REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Case no: PR 40/2013

In the matter between:

PETER COOPER ESTATES **APPLICANT**

and

KATHLEEN MURIEL VAN EEDEN **FIRST RESPONDENT**

PATRICK FLOOD **SECOND RESPONDENT**

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **THIRD RESPONDENT**

Heard: **23 April 2015**

Delivered: **24 April 2015**

JUDGMENT

VAN NIEKERK J

[1] This is an application to review and set aside an arbitration award handed down by the second respondent, to whom I shall refer as 'the commissioner'. In his award, the commissioner held that the first respondent, the applicant in the arbitration proceedings, had been unfairly dismissed. She was awarded the equivalent of three months' remuneration, some R37 000, in compensation.

[2] The facts giving rise to the dispute between the parties are recorded in the commissioner's award, and I do not intend to repeat them for present purposes. In essence, the applicant contended that the relationship between it and the first respondent fell to be regulated by the terms of what is referred to as an 'independent contract' signed on 29 May 2009. In terms of that contract, the first respondent was appointed to act as an estate agent in return for commissions paid on the sale of immovable property. The contract was terminated on 18 December 2012, on 48 hours' notice, after the applicant formed the view that the first respondent was not meeting the required performance standards.

[3] The first respondent subsequently referred a dispute to the third respondent, the CCMA, in which she contended that the relationship between her and the applicant was one of employment, and that she had been unfairly dismissed.

[4] Arbitration proceedings were conducted on 24 April 2013 and culminated in the award under review. In the award, after an evaluation of the evidence, the commissioner came to the conclusion that the contract that existed between the applicant and the first respondent was one of employment, and determined further that the applicant had been both procedurally and substantively unfairly dismissed. He awarded the first respondent compensation, as indicated above.

[5] The primary ground for review is that the commissioner erroneously found that the first respondent was an employee, where in truth, she was an independent contractor. In particular, it is submitted that the commissioner misdirected himself by failing to attach any or sufficient weight to the wording of the contract between the applicant and the first respondent and by failing to apply relevant legal principles, and in particular, those which attach material weight to the terms of the contract. Further, the applicant contends that the commissioner's finding in relation to the unfairness of the first respondent's dismissal was made in circumstances where the commissioner exceeded his powers since his function was limited to the decision of the preliminary point as to the first respondent status. Finally, it is contended that the award of compensation was unreasonable.

[6] It is now well-established that in respect of the first ground for review raised by the applicant, this court does not undertake a reasonableness review (which ordinarily applies to awards made under section 145 of the LRA); rather, the correctness or otherwise of the commissioner's award is at issue. The court is required to conduct what amounts to an enquiry *de novo* of the existence or otherwise of an employment relationship. Insofar as the remaining grounds for review are concerned, the reasonableness test is to be applied, i.e. the court must determine whether the decision made by the commissioner falls outside of the band of decisions to which reasonable decision-makers could come on the available material.

[7] Turning first to the relationship between the applicant and the first respondent, the legal principles to be applied are well established. The court is required to determine whether or not the first respondent was an employee by reference to the definition of 'employee' in section 1 of the LRA rather than the terms of any agreement between the parties. In other words, while the terms of any contract between the parties are not irrelevant, they are not determinative of the nature of the relationship.

[8] I did not understand Mr. Bouwer, who appeared for the applicant, to dispute this proposition; rather, he emphasised the judgment of the Supreme Court of Appeal in *Niselow v Liberty Life Association of Africa Ltd* (1998) 19 *ILJ* 752 (SCA), where the court dealt with a matter that concerned the contract of an insurance sales agent who was contracted to canvass full-time and exclusively for the respondent for applications for contracts of insurance. The court held:

> It was common cause between the parties that an independent contractor was not an employee as envisaged by the Act. An independent contractor undertakes the performance of certain specified work or the production of a certain specified result. An employee at common law, on the other hand, undertakes to render personal services to an employer. In the former case it is the product of the result of the labour which is the object of the contract and in the latter case the labour as such is the object (see *Smit v Workman's Compensation Commissioner* 1979 (1) SA 51 (A) at 61B). Put differently, 'an employee is a person who makes over his or her productive capacity to produce to another; an independent contractor, by contrast, is a person whose commitment is to the production of a given result by his or her labour (per Brassey '*The Nature of Employment'*) (1990) 11 ILJ 889 at 899."

In applying this principle to the facts of the case and finding that the appellant was not an employee but an independent contractor conducting his own business, the SCA held that:

> The undertaking by the appellant, on a full time basis and exclusively for respondent, to canvass for applications for contracts of insurance, may be more common in a contract of service than in a contract appointing an independent contractor but is not inconsistent with the concept of an independent contractor. The same applies to some of the other provisions of the written agreement such as the provisions that the written agreement was to continue until appellant's death or the attainment by him of retirement age (see Smit at 61H).

The SCA considered the following factors decisive - the fact that the appellant was obliged to produce a certain result in order to keep the contract alive, the fact that his remuneration was commission based, and the fact that the respondent could not direct the appellant as to the manner in which to achieve the result, and in particular, how to spend his time. On this basis, Mr. Bouwer submitted that the question the commissioner was therefore obliged to have asked to determine whether the first respondent was an employee or independent contractor was whether it was the first respondent labour or a particular result that was the object of the contract.

[9] In *Pam Golding Properties (Pty) Ltd v Erasmus & others* (2010) 31 *ILJ* 1460 (LC), this court said the following:

> I do not understand the *Niselow formulation* to have abolished the continuation of a multi- factoral approach established by *Smit*. *Niselow* regarded the object of the contract as a key factor to be taken into account in determining the nature of the contract, but it does not so far as to suggest that this is the only relevant factor, or that it is determinative. Post- *Niselow*, the courts have continued to apply the 'dominant impression' test (see, for example, *Stein v Rising Tide Productions cc* (2002) 23 ILJ 2017 (C)). In any event, *Niselow* has been overtaken by a number of subsequent events and rulings. In 2002, s 200A was introduced into the LRA to establish a rebuttable presumption of employment to be applied in certain circumstances. The factors listed in s 200A, which include whether the manner in which the person works is subject to control or direction, whether the person forms part of an organization, whether she is economically dependent on the person to whom services are provided and whether she renders services only to one person. The value of these factors as a guideline in circumstances where they do not apply (the section does not apply to persons who earn is excess of a prescribed amount) was recognised and applied by the Labour Appeal Court *Denel (Pty) Ltd v Gerber* (2005) 26 *ILJ* 1256 (LAC). This approach resonates with the International Labour Organisation's Employment Relationship Recommendation, 2006, which provides that member states should consider defining, in their laws and regulations, specific indicators of an

employment relationship. The specific indicators listed in clause 13 of the Recommendation are closely aligned with the provisions of s 200A.

[10] This approach was affirmed in *State Information Technology Agency (Pty) Ltd v commission for Conciliation Mediation & Arbitration & others* (2008) 29 *ILJ* 2234 (LAC), where the Labour Appeal Court held that when a court determines the question of an employment relationship, it must work with three primary criteria. These are the employer's right to supervision and control, whether the employee formed an integral part of the organisation with the employer and the extent to which the employee was economically dependent on the employer. It was also followed in *Linda Erasmus Properties Enterprise (Pty) ltd v Mholongo & others* (2007) 28 ILJ 1100 (LC), where the court considered the respondent in those proceedings, also an estate agent, to be an employee based on the requirement in the relevant contract to the effect that the respondent was not entitled to compete with the agency, the agency maintained control and supervision over her activities, she was not entitled to decide how to split to commission except with the consent of the agency, she was required to comply with office rules, keep the roster and correspondence, she was subject to a restraint of trade and was paid only commission.

[11] I see no reason to depart from these decisions (which deal specifically with the engagement of estate agents), and indeed, I am bound by the *SITA* judgment. In the present instance, the terms of the agreement between the parties (which give some indication of what precisely was required of the first respondent) provides, amongst other things, that the first respondent was to devote her attention to the business of the applicant as may be necessary to properly discharge of duty, to carry out all reasonable directions given to her by the applicant and to promote and extend the business of the applicant to the best of your ability. The commission payable to her on each sale amounted to 50% of the commission paid to the applicant. The first respondent was liable for the costs of expenses including travelling, parking, the use of a cell phone and entertainment. The first

respondent was furnished with a so-called 'start-up kit' which included business cards, training course, registration with the appropriate regulatory authority, a name badge and photograph. Paragraph 17 of the agreement contained a restraint of trade which prohibited the first respondent, on termination of the agreement, from selling immovable property within the Jeffreys Bay area for a period of three months. Paragraph 20 of the agreement contained what is referred to as a 'waiver of rights' in the form of a declaration by the first respondent that she waves any presumption contained in section 200 A of the LRA.

[12] Section 200 A creates a rebuttable presumption of employment provided that any one or more of the factors listed in this section are present. These include the degree to which the person works subject to the control of direction of another person, whether the person forms part of the organisation by which you she is engaged, whether the business economically dependent on the person for whom he or she works will render services, whether the person is provided with tools of trade work equipment and whether the person only works of render services to one person. Given that the right to fair labour practices is a fundamental right in terms of section 23 of the Constitution and that the LRA, which seeks to give legislative expression to that right is similarly a fundamental right accruing to all persons who fall within the ambit of the definition of 'employee', the waiver signed by the first respondent is of no force and effect. Employees may contract out of the statutory protections conferred by labour legislation only when that legislation permits them to do so. I do not understand the applicant's representative to contend to the contrary; rather, as I have indicated, his submissions were directed at the failure by the commissioner to give proper weight to the terms of the contract.

[13] It is clear to me from the terms of that contract, to the extent that it is determinative of the facts that characterised the relationship between the parties, that the first respondent was obliged to carry out and comply with all reasonable instructions given by the applicant, that she was provided with a tool of the trade

(at least in the form of a cell phone) that she was required to attend training courses as and when required by the applicant (who carried the costs) and that she was required to keep detailed and comprehensive written records which remain the property of the applicant. It cannot seriously be disputed that the first respondent was economically dependent on the applicant; she was permitted to do 'other' work, but not to engage in the selling of property for any other agent. While this provision may have been necessary to protect the applicant's proprietary interests, it inevitably created a degree of economic dependency by the first respondent on the applicant. All of these factors meet one or more of the criteria set out in section 200 A, and it must be presumed therefore that the first respondent was an employee of the applicant, and that the applicant was her employer.

[14] In short, there is nothing in the material before me which serves to rebut the presumption of employment. On the contrary, the contract between the parties is similar to that examined by the court in the *Linda Erasmus* and *Pam Golding* judgments, and the facts of those cases are similar, as the commissioner observed, to the facts that exist in the present instance. In my view, the applicant therefore falls within the definition of 'employee' for the purposes of the LRA and the termination of the contract between the applicant and the first respondent constituted a dismissal.

[15] Turning next to the submission made on behalf of the applicant that the proceedings under review were concerned only with the jurisdictional point, that is not apparent from the record before me. The dispute referred to conciliation is characterised as an unfair dismissal dispute and that is the nature of the dispute referred to arbitration. In the absence of any indication to the effect that there was any express agreement or directive to the effect that the proceedings would concern only the jurisdictional point raised by the applicant, I am unable to find that the commissioner committed a gross irregularity or otherwise misconducted himself to the extent that intervention by this court is warranted. Similarly, to the extent that the applicant submitted in these proceedings that there was no

evidential basis on which the commissioner was entitled to make an order for compensation, that is not disclosed by the material before the commissioner. On the contrary, the first respondent gave evidence as to her earnings and the computation of her average monthly salary. While this was disputed by the witness who testified on behalf of the applicant, the version proffered amounted to nothing more than a bare denial. In my view, given the evidence by the first respondent and the exchange between the parties after the proceedings have been concluded, there is nothing unreasonable about either the quantum of the compensation awarded or its computation. The application for review accordingly stands to be dismissed.

[16] There is no reason why costs ought not to follow the result.

I make the following order:

1. The application is dismissed, with costs.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Mr PW Bouwer, P.W. Bouwer Attorneys

For the respondent: TD Potgieter, T.D. Potgieter Attorneys