



**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD AT DURBAN**

**Reportable**

**CASE NO: D510/15**

In the matter between:

**SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD**

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION**

**AND ARBITRATION**

First Respondent

**LESTER SULLIVAN N.O.**

Second Respondent

**NASHENTHA PADAYACHI**

Third Respondent

**Head: 26 June 2017**

**Delivered: 31 October 2017**

Summary: Review application – Jurisdictional issue – whether third respondent was engaged as an employee or independent contractor – principles applicable discussed and applied – third respondent is an independent contractor who claims the existence of employment relationship because it is in her financial interest to do so – review granted.

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**JUDGMENT**

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## Cele J

### Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act,<sup>1</sup> in which the Applicant seeks to review and set aside an arbitration award issued by the Second Respondent under the auspices of the First Respondent, in case number GKNDB7029/14 dated 28 April 2015. The Second Respondent found that the Third Respondent was an employee of the Applicant and not an independent contractor and ruled that the Applicant was to reinstate her into its employment on the same terms and conditions that she was employed under prior to her dismissal. The Second Respondent awarded the Third Respondent back-pay in an amount of R496 348-36. The third respondent opposed the review application.

### Factual Background

[2] The Third Respondent was engaged as a Radio Sport Presenter. She was required to render services from Monday–Friday only, between 15h00 -18h00 during the afternoon drive show known as Desi Drive and broadcast on Lotus FM, one of Applicant's radio stations. She was required to gather and research sport news, to package and edit same and to read it on air every 30 minutes during her three-hour show. At the times material to this matter she had 12 years of experience with the Applicant during which she served various fixed term contracts that were renewed at the end of each. During her last experience with the Applicant she was serving a fixed term contract of three years with effect from 1 August 2013 to 31 July 2016. The contract is described as "Contract for Services (Locatio Conductio Operis)". The Third Respondent is described as the Independent Contractor", throw ought the contract. For the period April 2013 to March 2014 she earned R510 330.00, based on a contractual fee of R2090 per call for the sport presentation. Clause

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<sup>1</sup> Act Number 66 of 1995 hereafter referred to as the LRA.

4 of Annexure A of the contract contains obligations of the Independent Contractor. *Inter alia*, it states that:-

- “4.1 The SABC shall pay the SPORT INDEPENDENT CONTRACTOR a daily per diem for services rendered away from home base as per the Policy of Independent Contractors.
- 4.2 The SABC shall pay the SPORT INDEPENDENT CONTRACTOR 100% of the contract fee for rehearsal days on condition that the call sheet should be attached to the rehearsal day's claim.
- 4.3 The Sport Independent Contractor shall submit to the SABC a valid and acceptable tax invoice within 48 hours (2 working days) of contribution.
- 4.4 The SPORT INDEPENDENT CONTRACTOR shall complete the SABC with each contribution. If the register is not signed, a letter must be written and signed off by the Producer confirming that the independent contractor was on duty.
- 4.5 In the cases where the SABC Sport cancels production within 24 hours ahead of the broadcast no cancellation fee will be paid to the Independent contractor that was booked. The SABC will confirm cancellation ahead of this timeframe.
- 4.6 The SPORT INDEPENDENT CONTRACTOR shall comply with SABC SPORT'S directives and guidelines with regards to dress code for SPORT INDEPENDENT CONTRACTORS.
- 4.7 The INDEPENDENT CONTRACTOR shall familiarise himself/herself with the PRESENTER STYLE GUIDE as it pertains to the time slot that the INDEPENDENT CONTRACTOR is presenting.

- 4.8 The INDEPENDENT CONTRACTOR shall monitor competitor stations and familiarise himself/herself with the performance of these stations.
- 4.9 The INDEPENDENT CONTRACTOR is expected to perform according to accepted broadcast industry standards and as such does not fall under the day to day supervision of the PROGRAMME MANAGER or his/her nominee.
- 4.10 The INDEPENDENT CONTRACTOR agrees to be bound by standards or authorities governing the broadcasting Industry in SOUTH AFRICA, including the Broadcasting Complaint Commission of South Africa's Code of Conduct for Broadcasters, and the Advertising Standards Authority. The INDEPENDENT CONTRACTOR recognises that any fines imposed by the above bodies resulting from unsanctioned broadcast by the INDEPENDENT CONTRACTOR of material that contravenes such standards or code of conduct regulations shall be payable by the INDEPENDENT CONTRACTOR in accordance with acceptable processes stipulated in the contract.
- 4.11 The INDEPENDENT CONTRACTOR shall familiarise himself/herself with the target market of the STATION, and ensure that all content used in the PROGRAMME is in accordance with the requirements of the STATION for the desired target market, i.e. – if any feature has to be introduced it should be approved by the STATION MANAGEMENT.

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4.14

- [3] The Third Respondent did not participate in any of the Applicant's benefits such as housing, pension, medical aid or bonus scheme. Employees

automatically qualify for these benefits. Applicant's Personnel Regulations as well as the Disciplinary Procedure and Code of Conduct were not applicable to the Third Respondent. She never claimed that these benefits should be extended to her because she regarded herself as being an employee.

- [4] The Third Respondent was not expected to work the eight hours per day as her office hours like other employees. She had to report for duty at least 60 minutes before the start time of her duty and to be available for at least 30 minutes after her shift. She also did not participate in a paid leave system. The no work, no pay system applied to her. The same principle applied in respect of sick leave. She never approached anyone to grant her maternity leave when she was pregnant. She was also not paid during the period of her pregnancy. That distinguished her from the situation of employees who automatically qualified for this type of leave and payment during the said leave in terms of Applicant's rules and regulations.
- [5] She was provided with a telephone pin code, her Lotus FM email address and work station from which she could do her job. The Third Respondent was not paid through the normal QPAC system applicable to employees, but through the independent contractor's system and in terms of an invoice being submitted. The program manager signed the invoice submitted by the Third Respondent to confirm that the Third Respondent had actually rendered the services indicated in the invoice, in order for the Department of Sport to effect payment accordingly. The tax structure applicable to the Third Respondent was also different from the tax structure applicable to employees. The Third Respondent paid a 25% flat rate tax on the contract fee whereas employees are taxed in terms of a fixed tax sliding scale.
- [6] There is a dispute between the parties whether the Third Respondent was obliged to attend staff or employee meetings. According to the Applicant, the Third Respondent was not required to attend any staff or employee meetings. The Monday meeting that the Third Respondent was required to attend, was a

meeting scheduled by the Sport Division with independent contractors and program managers of the Radio Stations on a national basis, in order to inform them on the events to be covered during the coming week as well as other instructions specifically related to Sport Division issues. Other meetings that the Third Respondent was required to attend and scheduled by the Radio management were meetings relating to RAMS, audience interaction, radio strategy and goals and what was expected of the independent contractor as far as enhancing the image and flavor of the station. These were meetings scheduled as part of the contractual obligations of the Third Respondent. According to the Third Respondent she was required to attend employee meetings and station strategy sessions, other than sports meetings. Those meetings were scheduled on an ad hoc basis by the Station Manager and were compulsory to attend.

- [7] She claimed rebates from South African Revenue Services (SARS) and the IRP5 form issued by the Applicant also indicated that she was an independent contractor. She portrayed herself to SARS as an independent contractor and also received a refund from SARS. The Third Respondent never contested this fact during her tenure with the Respondent since 2002. According to her, she was simply provided with an IRP5 form issued by the Applicant to be sent to SARS. She had asked various questions about the issue and was shown the procedure to be followed. It was her first ever employment and so she followed the advice given to her by the Applicant when dealing with SARS as she did not know any other different procedure.
- [8] The Third Respondent conceded that there was a clear difference between the Remittance Advice that she received on a monthly basis as opposed to the salary advice being provided to employees. In the case of the Remittance Advice provided to independent contractors, only the monthly income and the applicable 25% tax deducted were reflected, as opposed to the salary advice applicable to employees where income, benefits and all deductions were reflected, which was substantially different from the information reflected in the Remittance Advice. The Third Respondent also never contested this fact

during her tenure with the Applicant since 2002. She said that she had not seen the remittance advice for an employee before the arbitration hearing and was shown the difference at that hearing. As such, she would not have had any need to contest the issue during her employment.

- [9] According to the Applicant and in relation to outside broadcast, all continuity presenters who were independent contractors, including the Third Respondent, were obliged to fit in with the station's program and activities, as long as the sport broadcast took place. The Applicant said that it was a national and worldwide trend that when such continuity presenters represented the Station at a special event, they participated in the event activities and also wore brand clothing. The Third Respondent said that she felt obliged to accompany the Station on these outside broadcast events and therefore, considered the request to be part of the supervision and control exercised by the station.
- [10] On 28 April 2014 the Applicant reported at the station at 15h12 for the Desai Drive program scheduled for three hours from 15h00 to 18h00. At about 16h13 she left the studio to only return at 17h54. In her absence no sport news stories were broadcast. The Applicant took this incident seriously as it felt that its name was brought into disrepute. The contract which the Applicant and the Third Respondent had, was then terminated. After Third Respondent's contract was terminated, Ms Riemer issued her a reference letter which clearly indicates that the Third Respondent was engaged on a "freelance basis" (independent contractor). The Third Respondent never challenged the fact that her status was referred to as an independent contractor in the letter. Having received the reference letter, Third Respondent prepared her Curriculum Vitae. On the first page of the Curriculum Vitae, the Third Respondent used an extract from the reference letter drafted by Ms Riemer and pasted same next to her picture. She said that the use of a reference letter from the Applicant was no indication that she was an independent contractor. She merely used a portion of the reference letter in an attempt to

obtain future employment, without accepting that she was an independent contractor.

[11] According to the Applicant the Third Respondent was permitted to do work for other external organisations or to have interest in other businesses and the Applicant said that Third Respondent conceded that she at least once did do outside work without permission. According to the Third Respondent it was the Applicant that once provided a voice-over in an advertisement. She said that she once attempted to work for an outside organisation, namely SuperSport but was prevented from doing so by the Applicant. After the termination of the contract between the parties, the Third Respondent referred an unfair dismissal dispute to the First Respondent for conciliation. When the dispute could not be resolved, she referred it to arbitration and the Second Respondent was appointed to arbitrate it. The Applicant took the position that the First Respondent lacked jurisdiction to be seized with such a dispute, contending that the Third Respondent was an independent contractor and not its employee. The Third Respondent bore the onus to prove that she was an employee, was dismissed by the Applicant and therefore that an unfair dismissal dispute was properly before the First Respondent.

#### Chief findings of the Second Respondent

[12] The Second Respondent's findings which the Applicant is attacking as the foundation for the review application are the following:

- Mr Pillay was an exceedingly poor witness and that his evidence was to be rejected where it contradicted that of the Third Respondent; did not recall saying or doing what the Third Respondent claimed he had done; and that Mr Pillay's evidence was illogical in many respects;
- Ms Riemer had contradicted Mr Pillay when she testified that the Third Respondent was not required to interact with the presenter when she

presented her sports report whereas Mr Pillay had testified that she was allowed to interact and did interact with the presenter; and therefore, such interaction weighs heavily against the Applicant's contention that the Third Respondent was an independent contractor;

- the second major issue in the hearing was whether the Third Respondent was managed by Mr Pillay or Ms Riemer;
- the Third Respondent did not know who Ms Riemer was and never received any communication from her;
- the Third Respondent was subordinate to the will of the Applicant as she was obliged to follow the commands of Mr Pillay;
- the Third Respondent did not have skills when she was first contracted by the Applicant;
- the Third Respondent was compelled by the Applicant to render returns to SARS;
- the rights of the Third Respondent would have been disregarded had she considered the Applicant's argument that merits needed to be decided separately; and
- an order for retrospective payment was made by the Second Respondent allegedly when no evidence was placed before her as to what the Third Respondent's earnings were.

#### Grounds for review

[13] The Applicant submitted that the award made by the Second Respondent was reviewable on the following grounds:-

13.1 the Second Respondent's findings are not supported by evidence presented during the arbitration hearing:

13.2 the Second Respondent failed to make credibility findings in circumstances calling for such finding to be made in favour of the Applicant;

13.3 the Second Respondent showed lack of understanding of legal principles in relation to whether or not a person is an employee;

13.4 the Second Respondent misunderstood the legal issue presented by the parties;

13.5 the Second Respondent was impartial, alternatively, committed misconduct during the proceedings.

[14] Further submissions were made by the Applicant in support of the outlined grounds for review, inter alia, that:-

14.1 In relation to a finding that Mr Pillay was an exceedingly poor witness and that his evidence was to be rejected where it contradicted that of the Third Respondent, the Second Respondent only gave one example that did not support his conclusion. The Applicant's submission was that these findings were not justified by the actual evidence presented during the arbitration hearing. Further, that there was nothing illogical in Mr Pillay's evidence as she testified that since 2002 independent contractors report to her, at SABC Sport, through email communications.

- 14.2 On whether Ms Riemer had contradicted Mr Pillay when she testified that the Third Respondent was not required to interact with the presenter when she presented her sports report, the submission was that an assertion that the two witnesses contradicted each other was incorrect. The Second Respondent's finding that such interaction weighs heavily against the Applicant's contention that the Third Respondent was an independent contractor was said to be simply without foundation and evidenced a misunderstanding of the applicable legal principles. It was submitted that both Mr Pillay and Ms Riemer testified that the Third Respondent was an independent contractor. A determination on whether the Third Respondent was an employee or an independent contractor could not be made by reference to her interaction with a presenter.
- 14.3 On the finding that the second major issue in the hearing was whether the Third Respondent was managed by Mr Pillay or Ms Riemer it was the Applicant's submission that this approach proved that the Second Respondent did not understand the law in relation to the meaning of an employee. The question was whether she was under the supervision and control of the Applicant. The evidence of Mr Pillay and Ms Riemer was that she was not under their supervision as she was not an employee but an independent contractor. As regards the finding that the Third Respondent was subordinate to the will of the Applicant as she was obliged to follow the commands of Mr Pillay, the Applicant said that this finding was not supported by evidence as Mr Pillay had testified that he did not give the Third Respondent instructions on how to do her work;
- 14.4 While the Second Respondent stated that the Third Respondent did not know who Ms Riemer was and never received any communication from her, it was a finding which contradicted the Second Respondent's own earlier finding that Pillay forwarded communication from Ms Riemer to the Third Respondent every week.

- 14.5 The Second Respondent found that the Third Respondent did not have skills when she was first contracted by the Applicant without elaborating on the relevance of such skills in relation to the determination of her status as an independent contractor. The Applicant's submission was that the Third Respondent was an independent contractor and the basis of an independent contract between the parties was in relation to a skill that she possessed for sport presentation;
- 14.6 For the Second Respondent's finding that the Third Respondent was compelled by the Applicant to render returns to SARS the submission was that such a finding was absurd as there was no evidence to support such compulsion. It was contended that the Third Respondent rendered returns to SARS as an independent contractor and kept the tax benefits.
- 14.7 The Second Respondent found that the rights of the Third Respondent would have been disregarded had he considered the Applicant's argument that merits needed to be decided separately. The Second Respondent misunderstood the legal issue which was that jurisdiction had to be determined before evidence could be led on the merits.
- 14.8 The Second Respondent made an order for retrospective payment when no evidence was placed before him as to what the Third Respondent's earnings were. It is the Applicant's submission that such finding amounted to a reviewable irregularity on the part of the Second Respondent.

#### Submissions by the Third Respondent

- [15] The Third Respondent opposed the review application issued in her favour and has made a number of submissions. She said that it was evident that during the course of the proceedings, a credibility finding was required to be

made by the Arbitrator in circumstances where on a number of occasions there were either mutually destructive versions, or alternatively, one version which the Third Respondent had presented and the opposite version of the Applicant party's witnesses being that they could not recall this issue. The submission was that it is trite in our law that the Arbitrator conducting the process, and who has actual sight of the witnesses providing evidence and their demeanour, is the party best placed to make any credibility findings. This Court should therefore be reluctant to enter the fray and impose upon the parties its own credibility findings in circumstances where it did not have the opportunity to consider the demeanour of the witnesses themselves during the course of the proceedings and only the written transcript which has been provided. This approach was said to carry extra weight in this matter given the findings by the Arbitrator that the main witness for the Applicant party, Pillay, was found to be:

“...an exceedingly poor witness. He was evasive, contradictory and generally made a poor impression. In his evidence in chief, that is while being questioned by the Respondent's representative, he stated he did not do what was suggested by the Applicant. However, when cross-examined by the Applicant and reminded of specific incidents and specific statements made by various parties, his response was that he did not recall saying or doing what the Applicant claimed he had done.”<sup>2</sup>

[16] She contended that a large portion of the credibility finding was that the Applicant's main witness was evasive and generally made a poor impression. It was submitted that the Court was not in a position to contradict these findings by the Arbitrator and as such, should be loath to enter an arena where no real evidence has been provided that the Arbitrator has made an unreasonable finding in this regard. An occasional comment by the Applicant party that the Arbitrator made illogical findings here or there, could not carry any weight with regards to the issue of credibility and did not support its ground of review that any credibility finding should be made in favour of the

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<sup>2</sup> Paragraph 30 of the award.

Applicant. In fact, no real justification had actually been provided in any of the papers presented that the Arbitrator's decision was wrong with regards to credibility, even in respect of the specific instances cited.

- [17] In the circumstances, it was submitted that the Arbitrator had made a reasonable finding with regards to the credibility of the witnesses, and same had not been adequately challenged by the Applicant party. Accordingly, any references to where evidence should be accepted from the Third Respondent should again be accepted in these circumstances. On dealing with the first issue raised by the Applicant that of the contradiction between Ms Riemer and Mr Pillay's evidence and furthermore the credibility finding by the Arbitrator against Pillay, the Applicant submitted that the finding by the Arbitrator was illogical, however the Applicant failed to consider the specific paragraph where the Arbitrator has dealt with this issue.
- [18] The Arbitrator stated that there were many events where Mr Pillay had changed his version from that of denying what had taken place to when, under cross-examination, when reminded of specific incidents and specific statements, to a response that he could not recall saying or doing what the Third Respondent had claimed. It was on this basis that the Arbitrator had found that Mr Pillay's evidence was lacking in credibility. The Arbitrator then when going on to discuss examples of the illogical evidence, specifically then set out that those issues were in addition to those previously mentioned. In a correct reading of paragraph 31 of the Arbitration Award, the Arbitrator specifically stated: "*Pillay's evidence was also illogical ...*" This gives one the indication that on top of what the Arbitrator had already found were issues with Mr Pillay's evidence, there were examples. The Applicant attempts to suggest that the finding by the Arbitrator that Ms Riemer and Mr Pillay contradicted each other was incorrect, however sets out no details regarding this issue. On the issue of whether it was an illogical finding by the Arbitrator when dealing with how Mr Pillay had communicated with the Third Respondent, Ms Riemer specifically in her evidence set out the fact that she would send communications at least 10 times a week to the Station Manager regarding

various issues and that the Station Manager would then deal with the people themselves. This much is recorded in the transcript to the arbitration proceedings.

[19] Further to the above, the Arbitrator then dealt with whether or not the two witnesses contradicted each other with regards to the interaction with the presenters during the course of the shows. In this regard, she said that it was common cause that she was required by Mr Pillay to interact with the host of the show during the course of the program. However, Ms Riemer's evidence was that she was unaware that the Third Respondent was a co-host on a compulsory basis and that she would have liked this information run past her so that she could understand the role and what she was going to do so that she could either agree or not to it. This she said was so clearly contradictory evidence that one could not understand why the Applicant took issue with it.

[20] Further, it was submitted that why such an issue would weigh heavily on whether the Third Respondent was an independent contractor, is that, it was clear evidence that Mr Pillay was supervising and controlling the activities of the Third Respondent outside of the scope of what was alleged to be the independent contracting agreement. The individual whom the Applicant would have one believe was the Third Respondent's superior, in fact said she had no knowledge of this taking place and would have appreciated it if it had been run past her. This is evidence of the control and supervision which Mr Pillay had over the Third Respondent and was correctly cited by the Arbitrator as an important consideration. The submission was that this was by no means any indication that the Second Respondent did not understand the principles applicable to the independent contracting situation and in fact shows quite the contrary.

[21] The second major issue which the Applicant then raised was the fact that the Arbitrator dealt with whether the Third Respondent was managed by Ms Pillay or Ms Riemer. The Applicant then suggested that this showed a clear

misunderstanding by the Arbitrator as he was supposed to consider the issue of supervision and control. It was submitted that this issue was merely semantics and wordplay and quite clearly what the Arbitrator was considering was whether the Third Respondent was being managed by the individuals concerned which would by implication require supervision and control. The fact that certain individuals had stated that the Third Respondent was an independent contractor and was not under their supervision or control was not borne out by the facts of the matter as have been correctly set out by the Arbitrator.

[22] The submission made was that the Applicant averred that the Arbitrator had ignored Ms Riemer's evidence with regards to weekly teleconferences however, in so doing, the Arbitrator had specifically found that he would prefer the evidence of the Third Respondent which said that the Third Respondent was not generally the individual involved in these teleconferences as it was mainly the morning sports presenter that would be involved in same. The Arbitrator elected to prefer the evidence of the Third Respondent over that of the Applicant's witnesses on a number of issues. Furthermore, the finding by the Arbitrator in no way contradicted any issue with regards to the forwarding of communication. The submission was that the Arbitrator was well aware of the process which was being followed and at no stage did Ms Riemer confirm that all Mr Pillay was required to do was to forward the emails on. In fact, she confirmed that he was to deal with the people concerned after having received the emails.

[23] In respect of whether the Third Respondent did not have any skills when joining the Applicant's organisation, the Third Respondent referred to the case of *SABC v CCMA and Others*<sup>3</sup>, where the court stated the following:

“The Applicant conducts business as a public broadcaster. It has a large number of its own employees, but also engages the services of a number of

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<sup>3</sup> [2017] ZALCJHB76 (8 March 2017).

individual persons as independent service providers. All these persons offer the kind of services that entails a particular skill attaching to such person, especially when it comes to technical personnel.”<sup>4</sup>

[24] With regards to independent contractors a certain skill is sought after and obtained. It is not the employing of an individual from “off the street” to come and perform the function of any normal employee. In these circumstances, it was submitted that the Third Respondent had no skills which would lead one to employ her as an independent contractor at the time. She was taught everything that she knew at the Applicant’s company and in essence was employed and trained up as an employee. The arbitrator was said to be quite correct in dealing with the issue of her lack of skills when entering the organisation. It was averred that the Arbitrator correctly applied his mind to the evidence which has been presented on this aspect and quite correctly focused on this issue in his determination.

[25] In respect of tax returns to SARS, the Third Respondent was said to have been open about the fact that this was her first real employment and simply did as she was told by the Applicant. She advised that she knew no better and was simply following their recommendations as to what needed to be done. In the circumstances, little should be taken from this submission by the Applicant. The Applicant then takes issue with regards to whether the Arbitrator knew what the Third Respondent was earning and says that this therefore is an indication of a reviewable irregularity because the Arbitrator has set out a figure. However, the Applicant was said to have neglected to take into consideration that evidence was presented to indicate what the Third Respondent earned. In this regard, the figure which was eventually utilised by the Arbitrator in his Arbitration Award, being R510,330.00 per annum, was specifically presented into evidence by the Applicant’s own representative. In the circumstances, the Arbitrator had specific evidence as to the earnings of the Third Respondent and has therefore made a finding accordingly.

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<sup>4</sup> At para 6.

[26] Finally, the Applicant said that the First Respondent had clearly committed serious misconduct and therefore the Third Respondent ought not to have been reinstated. The submission was that the Arbitrator was not called upon to determine this issue given the agreement which had been previously reached with the Applicant's representative and which is contained in the transcript. In the circumstances, the Arbitrator had no need to consider any allegations of misconduct against the Third Respondent and therefore has not committed any reviewable irregularity by reinstating the Third Respondent to her position.

### Analysis.

[27] I am in agreement with a submission by Mr Maserumule for the Applicant that it is now trite that where an award relates to the jurisdiction of the CCMA to arbitrate a dispute, the approach in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*<sup>5</sup> does not apply.<sup>6</sup>

“Nothing said in *Sidumo* means that the CCMA's arbitration award can no longer be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter or any of the other grounds specified in section 145 of the Act. If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise ....’ (emphasis added)

[28] This approach is indeed consistent with the decision in *Sanlam Life Insurance Ltd v Commission for Conciliation, Mediation and Arbitration and Others*<sup>7</sup> where it was held as follows:

“It was, therefore, incumbent upon the Labour Court to deal with the issue whether or not there had been an employment relationship between the

<sup>5</sup> *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC).

<sup>6</sup> *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 964 (LAC) at para 101.

<sup>7</sup> (2009) 30 ILJ 2903 (LAC) .

appellant and the third respondent and, therefore, whether the CCMA had the requisite jurisdiction to deal with the dispute... The Labour Court was called upon to decide *de novo* whether there was an employer-employee relationship between the parties. It was not called upon to decide whether the commissioner's findings were justifiable or rational.”<sup>8</sup>

[29] The same approach will be adopted in these proceedings, namely to decide *de novo* whether there was an employer-employee relationship between the parties, without deciding whether the commissioner's findings were justifiable or rational. Rather whether a correct approach to determining the jurisdictional issue was followed by the Arbitrator in this matter.

[30] According to the closing submissions of the Applicant's representative at arbitration the Third Respondent earned about R510 330.00 during the period April 2013 to March 2014. This equates to an annual earnings at the material time. The arbitrator correctly accepted that submission as there was no evidence to negate. These earnings put the Third Respondent beyond the applicability of an employee as defined in section 200A of the LRA. The approach to be adopted in assessing whether or not a person is an employee in circumstances where s 200A of the LRA does not apply was summarised as follows in *State Information Technology Agency v CCMA & Others*<sup>9</sup>:

“For this reason, when a court determines the question of an employment relationship, it must work with three primary criteria:

1. an employer's right to supervision and control;
  
2. whether the employee forms an integral part of the organization with the employer; and

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<sup>8</sup> At para 17.

<sup>9</sup> (2008) 29 ILJ 2234 (LAC) at para 12.

3. the extent to which the employee was economically dependent upon the employer”

[31] Yet another guidance on this issue comes from the case of *SA Broadcasting Corporation v Mckenzie*<sup>10</sup>, relied on by Mr Kirby-Hirst for the Third Respondent where the court said:

“The employee is subordinate to the will of the employer. He is obliged to obey the lawful commands, orders or instructions of the employer who has the right of supervising and controlling him by prescribing to him what work he has to do as well as the manner in which it has to be done. The independent contractor, however, is notionally on a footing of equality with the employer. He is bound to produce in terms of his contract of work, not by the orders of the employer. He is not under the supervision or control of the employer. Nor is he under any obligation to obey any orders of the employer in regard to the manner in which the work is to be performed. The independent contractor is his own master.”

[32] In conducting this enquiry it is imperative that the Court must give due weight to the contract concluded by the parties, and to consider the realities of the relationship between the parties, in so far as they are not those reflected in the written contract.<sup>11</sup> It stands as a well-known fact that there are standards or authorities governing the broadcasting Industry in South Africa. These include the Broadcasting Complaints Commission of South Africa and the Advertising Standards Authority. The Broadcasting Complaints Commission has a Code of Conduct for Broadcasters. The broadcasting industry is in the business of disseminating information to millions of listeners within a very short space of time. The room for correcting error when a broadcaster is already on air is almost non-existent. It is thus a highly sensitive industry. It must follow from the aforesaid that some measure of control and supervision to those whose business it is to disseminate such information is inevitable. Put differently, the

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<sup>10</sup> (1999) 20 ILJ 585 (LAC) at paragraph 9.

<sup>11</sup> *Denel (Pty) Ltd v Gerber* [2005] 26 ILJ 1256(LAC) at para 19

control and supervision of information in this industry is inherent in the business of the broadcasting world. Noticeable, the supervision in the broadcasting industry pertains more to the control of information than to the movement of the person doing the job. The determination of whether a person is the subject of an employer's right to supervision and control and therefore an employee is made more complex by this inevitable need for control in this industry.

- [33] The broadcasting industry is highly competitive. The contract has a provision to the effect that the one person it engages shall monitor competitor stations and familiarise him/herself with the performance of these stations while expected to perform according to accepted broadcasting industry standards.<sup>12</sup> While a broadcaster may include these provisions in a contract for service or services, such standards belong to the industry as a whole. The Applicant and SuperSport were in competition in the broadcast of sports. If she rendered services for SuperSport while doing the same for the Applicant there could be a conflict of interest. When she considered rendering services for SuperSport she was in reality confronted with a choice between staying with the Applicant and going to SuperSport. She chose to stay with the Applicant.
- [34] The contract provides that the Third Respondent would not fall under the day to day supervision of the Program Manager or his/her nominee.<sup>13</sup> This is at the heart of the Arbitrator's finding that there was a contradiction in evidence of Ms Riemer and that of Mr Pillay. Ms Riemer's evidence spoke to what the contract said. Mr Pillay was confronted by his regular dealings with the Third Respondent in the working field. The practice of co-hosting came more as an exception than a general occurrence. It was not the evidence of the Third Respondent that she co-hosted on a continuous basis. In the type of industry one can understand the Third Respondent coming on air while the host of the previous program is on or when she is about to finish her program and the next host comes in. This could conceptually involve the introduction of

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<sup>12</sup> See clauses 4.8 and 4.9.

<sup>13</sup> See clause 4.9.

one host by the other. As an exception, the Third Respondent might have to continue on air at the end of her program where the next host is sudden unavailable. I am referring to a similar scenario as on 28 April 2014 at 16h13 when she left the station. In the broadcasting industry there must always be a host on air, keeping the station running, even if just playing music. A request to step in in such exceptional circumstances would not amount to the control and supervision we are concerned with.

- [35] The Applicant left the contents used in the program to the discretion of the Third Respondent so long as its feature fell within the target market of the station agreed upon. In this regard it remained beyond dispute that the Third Respondent had skills in improving audience listenership figures. She rendered a particular result. This is a specialised field where only her could produce a particular kind of result distinct from another host. There never was any evidence of how and for how long such skills could be acquired. Listening with keen interest to a radio program such as a sports program while at home over a protracted period could conceptually equip an interested person with some skills.
- [36] The Third Respondent was required to gather and research sport news, to package and edit same and to read it on air every 30 minutes during her three-hour show. This was her co-function. It does not appear that there was any much interference by anyone on how she packaged, edited and read her sports news. Any subsidiary functions she might have rendered could therefore not be the basis for determining her status.
- [37] She was required, in terms of the contract to attend rams presentations, and/or other sport or station meetings with the Portfolio Research Manager or Sport/Station/Program Management to discuss the performance of the program.<sup>14</sup> Clearly this meeting was intended to review the particular result she had rendered. The Monday meeting that the Third Respondent was

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<sup>14</sup> See clause 4.14.

required to attend, was a meeting scheduled by the Sport Division with The Third Respondent and Program Managers of the Radio Stations in order to inform her of the events to be covered during the coming week as well as other instructions specifically related to Sport Division issues. This was not a general meeting with all staff members but was attended by those who rendered services on sports to the Applicant.

- [38] It remained common cause that the Third Respondent did not participate in any of the Applicant's benefits such as housing, pension, medical aid or bonus scheme. Employees automatically qualify for these benefits. Applicant's Personnel Regulations as well as the Disciplinary Procedure and Code of Conduct were not applicable to her. She also did not participate in a paid leave system. The no-work-no-pay system applied to her. The same principle applied in respect of sick leave. She never approached anyone to grant her maternity leave when she was pregnant. She was also not paid during the period of her pregnancy. These considerations distinguished her from the situation of employees who automatically qualified for those benefits. She clearly did not form an integral part of the organisation of the Applicant.
- [39] In general the service rendered by the Third Respondent to the Applicant was limited to about 4.5 hours per day. The Third Respondent was free to utilize the rest of her time as she might want to, so long as the issue of conflict of interest never arose. The time 08h00 to 13h00 daily was always available to the Third Respondent to use as she saw fit. This is a period of 5 hours which is longer than the time she gave to the Applicant. If she wanted to, she therefore could have been financially dependent on another service benefactor while rendering her services to the Applicant. The extent to which she was then economically dependent on the Applicant was much less than the regular 8 hours per day.

[40] In this matter I find myself in agreement with the finding made in the case of *SABC v CCMA & Others*<sup>15</sup> where this Court said:

“I must confess my concerns about what seems to be a growing trend of persons who had entered into independent service agreements with a third party contractor, but then claim the existence of an employment relationship, purely because it is considered to be opportune or in their financial interest to do so. This would often be the case where the relationship comes to an end, and the individual service provider then claims dismissal so as to extract relief from the other party flowing from a claim for unfair dismissal. Or, as is the case *in casu*, the independent service provider claims employment so as to procure employment benefits the employees of the third party contractor would be entitled to. These situations are often more a case of opportunism, rather than a genuine attempt to establish the true nature of a relationship where that is unclear.”<sup>16</sup>

[41] As I give due weight to the contract concluded by the parties and as I consider the realities of the relationship between the parties, in so far as they are not those reflected in the written contract, I find that the realities of the relationship between the parties were not materially disproportionate to the terms they agreed on. This is also not a case in which the parties deliberately entered into the contract intending to cover up the true nature of their relationship so as to avert any applicable legal bar that prohibited the employer and employee relationship between them as in *Denel v Gerber*.<sup>17</sup> In my consideration, the Third Respondent failed at arbitration to prove that she was an employee and not an independent contractor.

### Order

[42] Accordingly the following order shall issue:

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<sup>15</sup> [2017] ZALCJHB 76 (8 March 2017)

<sup>16</sup> At para 32.

<sup>17</sup> [2005] 26 ILJ 1256(LAC)

1. The arbitration award issued by the Second Respondent under the auspices of the First Respondent, in case number GKNDB7029/14 dated 28 April 2015 is reviewed and set aside.
2. It is found that the First Respondent had no jurisdiction to arbitrate this matter as the Third respondent was not an employee of the Applicant.
3. No costs order is made.

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Cele J

Judge of the Labour Court of South Africa.

APPEARANCES:

1. FOR THE APPLICANT: Mr P Maserumule of Maserumule Attorneys.
2. FOR THE THIRD RESPONDENT: Mr G Kirby-Hirst of MacGregor Erasmus Attorneys.