REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A641/2008

DATE: 13/11/2014

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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SIGNATURE **DATE**

In the matter between:

COMPENSATION COMMISSIONER Appellant

and

MADELINE LOUISA VAN VUUREN Respondent

JUDGMENT

BASSON, J

[1] This is an appeal in terms of section 91 of the Compensation for Occupational

Injuries and Diseases Act[1] ("the Act") on the basis that the presiding officer of a Tribunal established in terms of section 91 of the Act erred in law[2] in finding, firstly, that the deceased was an employee in terms of the Act; secondly, that the deceased's wife is an employee[3] in terms of the Act and, thirdly, by dismissing the appellant's submission that there was not employer-employee relationship between the deceased and Red Ribbon Services.

[2] Mr Van Vuuren ("the deceased") was involved in a fatal accident whilst he was busy dismantling a tower crane. From the papers it appears that the deceased was the sole owner of "Red Robin Services". On the letterhead used by the deceased in conducting his business the following appears: "*WL Van Vuuren Trading as Red Robin Services*".

[3] The deceased's wife Mrs Van Vuuren ("the claimant") lodged a claim against the Compensation Commissioner for compensation resulting from the fatal injury. On 14 March 2007 the Compensation Commissioner repudiated the claim arising from the fatal injury of the deceased on the basis that the deceased cannot be regarded as an employee in terms of the Act by virtue of the fact that "the deceased did not declare his earnings":

> *"On the available information we consider that the Compensation and Medical Aid expenses are not payable in terms of the Act, as your husband's employer did not declare his earnings and he can therefore, not be regarded as an "employee" in terms of the Act."*

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[1] Act 130 of 1993.

[2] "91. Objections and appeal against decisions of Director-General - (5) (*a*) Any person affected by a decision referred to in subsection (3) (*a*), may appeal to any provincial or local division of the Supreme Court having jurisdiction against a decision regarding—

(i) the interpretation of this Act or any other law;
(ii) the question whether an accident or occupational disease causing the disablement or death of an employee was attributable to his or her serious and wilful misconduct;
(iii) the question whether the amount of any compensation awarded is so excessive or so inadequate that the award thereof could not reasonably have been made;
(iv) the right to increased compensation in terms of section 56.

(*b*) Subject to the provisions of this subsection, such an appeal shall be noted and prosecuted as if it were an appeal against a judgment of a magistrate's court in a civil case, and all rules applicable to such an appeal shall *mutatis mutandis* apply to an appeal in terms of this subsection."

[3] In terms of section 1 of the Act, a *"dependant of an employee" means [inter alia]— (a) a widow or widower who at the time of the employee's death was married to the employee according to civil law;"*

[4] The claimant filed an objection against the decision of the Compensation Commissioner and confined the objection to the fact that the claim was rejected on the basis that the deceased's "employer" (Red Robin Services) did not declare his earnings. In her objection, the claimant states that the deceased was an "*employee*" of Red Robin Services and in support thereof she attached a letter from "Wolmarans Finansiële Dienste" confirming that Red Robin Services have been in business since 2003. More in particular, the claimant states in her objection that the mere fact that the deceased's employer had failed to register him as an "employee" in terms of section 80 of the Act should not be used to *"victimise the dependents of Mr Van Vuuren*".

[5] A Tribunal Hearing was convened on 12 November 2007. At the commencement of the hearing the presiding officer stated as follows:

> "*So, to sum it up is that the issue is whether the employee falls within the category of an employee in terms of the Act, as described by the Act?"*

Both Mr Badenhorst on behalf of the claimant and Mr Molefe on behalf of the Compensation Commission confirmed that this was indeed the issue for determination by the Tribunal.

[6] Despite the fact that it was acknowledged that the issue before the Tribunal Hearing was whether the deceased was an "employee" in terms of the Act, the presiding officer upheld the objection on the basis that *"there is nowhere in the Act where it says failure to declare renders the employee no longer an employee as defined in the Act*".

[7] The Compensation Commissioner lodged an appeal in terms of section 91(5) of the Act against the decision upholding the objection.

[8] The respondent submitted that the hearing correctly concerned itself only with the provisions of the rejection letter and submitted that the presiding officer cannot stray beyond that which is contained in the objection. In other words, the only issue before

the hearing was whether the deceased was an employee for the purposes of the Act *due to the non-declaration of his earnings*. Consequently, it was submitted that the Appeal Court similarly cannot *mero motu* extend the ambit and scope of the Tribunal Hearing and by extension go beyond the ruling of the Commissioner. On behalf of the appellant it was, however, submitted that the issue of whether the deceased was an employee was central to the objection and was in fact pertinently raised during the deliberations at the Tribunal Hearing.

The law

[9] It is trite that only an "employee" as contemplated in the Act is entitled to lodge a claim for compensation caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment or for death resulting from such injuries or diseases**.** Who is an "employee" is defined as follows in terms of section 1 of the Act:

> *"[E]mployee" means a person who has entered into or works under a contract of service*[4] *or of apprenticeship or learnership, with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or in kind, and includes—*
>
> *(a) a casual employee employed for the purpose of the employer's business;*
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> *(b) a director or member of a body corporate who has entered into a contract of service or of apprenticeship or learnership with the body corporate, in so far as he acts within the scope of his employment in terms of such contract;*
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> *(c) a person provided by a labour broker against payment to a client for the rendering of a service or the performance of work, and for which service or work such person is paid by the labour broker;*
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> *(d) in the case of a deceased employee, his dependants, and in the case of an employee who is a person under disability, a curator acting on behalf of that employee;…."*

[4] Court's emphasis.

[10] The Appeal Court (as it then was) in *Smit v Workmen's Compensation Commissioner*[5] confirmed that in order to determine whether the appellant may have a claim in terms of the Workmen's Compensation Act[6] it is important to determine whether the appellant is a "workman"[7] as contemplated by the Act. Fundamental to this enquiry is to establish what the nature of the agreement is in terms of which an individual was required to render a service:

> *"This appeal raises the question whether the appellant was at the time of the accident a "workman" as contemplated by s 3 (1) of the Act. The relevant portion of s 3 (1) provides as follows:*
>
> > *"Subject to the provisions of ss (2) and unless inconsistent with the context, 'workman' in this Act means any person who has entered into or works under a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, is oral or in writing, and whether remuneration is calculated by time or by work done, or is in cash or in kind, and includes..."*
>
> *In the Afrikaans version of the section "'n dienskontrak" is used as equivalent to "a contract of service". The Act itself does not define a "contract of service" and accordingly this Court held in Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB1976 (4) SA 446 (A) at 450C that the reference in s 3 (1) to a "contract of service" (dienskontrak) should be construed as one relating to a common law contract of service. Hence it is necessary to consider the legal nature and characteristics of a contract of service (dienskontrak) at common law."*[8]

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[5] 1979 (1) SA 51 (A).
[6] Act 30 of 1941. This act was the predecessor of the present Act.
[7] An "employee" in terms of the present Act.
[8] Smit *supra*: *"Three main tests have been expounded to identify a contract of employment and to distinguish such a contract from that of an independent contractor or self-employed person, that is one who works under a "contract for services". These tests are (A) the control test; (B) the organisation test; (C) the multiple or mixed test (the dominant impression test, referred to in the judgment of this Court in the Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB case supra). As to (A): The traditional test is control. See Performing Rights Society Ltd v Mitchell & Booker Ltd (1924) 1 KB 762; Colonial Mutual v Mc Donald (supra). In*

[11] Where a person is an independent contractor (*locatio conduction operis*) or a sole-proprietor or self-employed such a person will not be entitled to claim compensation in terms of the Act because they are not regarded as an "employee" for purposes of the Act simply because of the absence of an employer-employee relationship. In terms of the Act it is specifically required that a person must have entered into or work under a "contract of services" for an employer. Such a contract may be implied, oral or in writing. The relationship between an employer and an employee is consequently inherently reciprocal: An employer places his or her labour potential "or capacity to produce" at the disposal of the employer and the employer remunerates the employee for services rendered.[9] Where a person is self-employed or where a person is a sole proprietor or where a person renders a service as an independent contract such a person is not regarded an employee as contemplated by the Act.

[12] It is accepted that a Tribunal constituted in terms of section 91 of the Act is a "*creature of statute*" and that the Tribunal derives its powers, obligations and jurisdiction from the four corners of the statute and more in particular from section 91(2) and (3) of the Act. In this regard the Court is in full agreement with what the Court held in *Venter v Compensation Commissioner*:[10]

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accordance with this test an employee works under the control of another, not only as to what he must do but also the "how" and "when" he must do it. The control test is no longer considered to be conclusive in determining the question and the absence of such control is not conclusive against the existence of a "contract of service". (Quoted from the headnote.) These test have subsequently been expanded and refined. See: *SABC v McKenzie* [1999] 1 BLLR 1 (LAC) and *Liberty Life Association of Africa Ltd v Niselow* (1996) 17 *ILJ* 673 (LAC) at 683.

[9] Zondo, JP (as he then was) held as follows in *Denel (Pty) Ltd v Gerber* (2005) 26 *ILJ* 1256 (LAC) regarding the difference between an employee and an independent contractor: "*[97] In McKenzie's case, referred to above, this court began to move in the right direction when it held that the realities of the relationship should be considered as opposed to the approach adopted in Briggs which was to the effect that whether or not a person was an employee of another was effectively determined by the election made by the parties at the relevant time. The approach adopted by this court in McKenzie is in line with the approach I have adopted in this matter. [98] In Niselow v Liberty Life Association of Africa Ltd (1998) 19 ILJ 752 (SCA) it was said at 753H:*

> *'An independent contractor undertakes the performance of certain specified work or the production of a certain 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 or the result of the labour which is the object of contract and in the latter case the labour as such is the object (see Smit v Workmen's Compensation Commissioner 1979 (1) SA 51 (A) at 61B). Put differently, an employee is a person who makes over his or her 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).*'

[10] (2001) 22 *ILJ* 2425 (T) at 2428 – 2429.

“A tribunal as constituted in terms of s 91 is, without any shadow of a doubt, a 'creature of statute'. It derives its powers, obligations and jurisdiction from the four corners of the statute; ie from s 91(2) and (3), and from no other source. In this respect it is comparable to a Magistrate's Court which is –

> *'. . . a creature of statute and has no jurisdiction beyond that granted by the statute creating it. It has no inherent jurisdiction such as is possessed by the superior Courts and can claim no authority which cannot be found within the four corners of its constituent Act'.*
> *See Jones & Buckle The Civil Practice of the Magistrates' Courts in South Africa (9th ed vol I (The Act)) at 34. This statement is derived from long-standing authority; see, in particular, Connolly v Ferguson 1909 TS 195 at 198 and also, inter alia, Hydromar (Pty) Ltd v Pearl Oyster Shell Industries (Pty) Ltd 1976 (2) SA 384 (C) at 386H-387A and Mason Motors (Edms) Bpk v Van Niekerk 1983 (4) SA 406 (T) at 409E-F.*

Applying these principles in casu, the tribunal's only power, duty and jurisdiction was to consider 'the objection lodged in terms of this section', ie whether the appellant's back condition was caused by his original injury. This the tribunal did not do - and, in coming to the conclusion it did, it acted ultra vires its jurisdiction. That is the crux of the appellant's case on appeal.”

[13] The respondent referred this Court to the decision in *Venter* (*supra*) as authority for the submission that the Tribunal and also this Court may not stray beyond that what is contained in the objection: Firstly, it is accepted that the Tribunal Hearing is a “creature of statute”. Secondly, the facts in the *Venter* case are distinguishable from the present case. There the Tribunal decided *mero moto* that the claimant was not an “employee” as contemplated by the Act in circumstances where the employment status of the claimant as an employee was not in contention. In fact, in that matter it was common cause that the claimant was an employee. For this reason the Court,

correctly held that the decision by the Tribunal Hearing to revisit *mero moto* whether the claimant was an employee resulted in the Tribunal usurping the powers of the Director-General and that that was *ultra vires*. Thirdly, the pertinent issue before the Tribunal Hearing in the present case was the status of the deceased as an "employee" as contemplated by the Act: This was the issue before the Compensation Commissioner in the first place and this was the issue to be determined by the Tribunal Hearing. The fact that the *reason* for arriving at the decision that the deceased was not an "employee" may be wrong in law, does not detract from the fact that the employment status of the deceased was the pertinent issue before the Tribunal. Fourthly, it is accepted that it is wrong to hold that a person is not an employee merely by virtue of the fact that an employer failed to furnish the Director-General with the particulars required in terms of section 80 of the Act. At best such an omission would attract a fine or some other penalty. It certainly would not follow that a person who was initially regarded as an "employee" in terms of the Act is no longer regarded as such as a result of such an omission. Accordingly, the fact that the reason for rejecting the deceased's claim is premised on a wrong interpretation of the Act does not, in our view, detract from the fact that the issue before the Tribunal was the question whether the deceased was an employee since only an "employee" is entitled to compensation in terms of the Act. It was the decision of the Compensation Commissioner that the deceased was not an employee. This decision regarding the status of the deceased as an employee was competently made in terms of section 4 of the Act that specifically confers the function upon the Director General to decide whether a person is an employee, an employer, a mandatory or a contractor for the purposes of the Act.[11]

[11] See in this regard: *Howick District Landowners Association v Umngeni Municipality and Others* 2007 (1) SA 206 (SCA) where the Court held that the mere fact that reference has been made to a wrong provision does not invalidate the administrative act: *"[18] But the landowners' argument faces a second obstacle. Even if, technically, the reference to the wrong provision stood unamended, the authority the council intended to invoke was plain. The minutes record that the council's chief financial officer informed the meeting that, in terms of the judgment of Swain J, 'the Municipality is entitled to levy and recover rates in the [newly rated] areas in terms of the Ordinance [or] the LGTA on condition that the right process and procedures are followed'. This reflected the judgment. There was no mention of the Systems Act, since by then it was clear that it had no application.*
[19] Under the doctrine in Latib's case, where an empowering statute does not require that the provision in terms of which a power is exercised be expressly specified, the decision-maker need not mention it. Provided moreover that the enabling statute grants the power sought to be exercised, the fact that the decision-maker mentions the wrong provision does not invalidate the legislative or administrative act."

[14] The deceased was not “employed” by an “employer”: He was not employed by another person[12] nor was he employed by a legal entity such as a closed corporation or a company. Even though it is accepted that one’s own closed corporation or company can in law employ the owner of the closed corporation or company as an employee,[13] this *scenario* is not present in this case: The appeal should therefore succeed.

[15] In respect of costs we are of the view that, although a successful appellant should normally be entitled to the costs of an appeal, costs should not be awarded in this case. In arriving at this decision we have taken into account the specific circumstances of this case and the fact that the presiding officer materially misconceived the issue in dispute before the Tribunal and that this error necessitated the appellant to lodge an appeal.

[16] In the event the following order is made:

1. The appeal is upheld.
2. No order as to costs.

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[12] *“'employer' means any person, including the State, who employs an employee, and includes-*
(a) any person controlling the business of an employer;
(b) if the services of an employee are lent or let or temporarily made available to some other person by his employer, such employer for such period as the employee works for that other person;
(c) a labour broker who against payment provides a person to a client for the rendering of a service or the performance of work, and for which service or work such person is paid by the labour broker;”

[13] Zondo, JP (as he then was) in *Denel (Pty) Ltd v Gerber* (2005) 26 *ILJ* 1256 (LAC) accepted that one can be employed by a company or closed corporation although such person is effectively the owner of the company: *“[93] In the light of the above authorities I am of the view that, even where, as in this case, there is an agreement between one legal entity such as a company or a close corporation and the alleged employer for the provision of certain services, it is in law possible that it can be found that a person who is effectively the owner of such company or close corporation is an employee of the other company (ie the alleged employer) with which his or her company has such an agreement. In other words, the mere fact that use has been made of a legal entity such as a company or close corporation to provide services is no bar to a conclusion that someone who is part of the company or close corporation or who owns the company or close corporation contractually obligated to provide such services to the alleged employer is an employee of the company contractually entitled to receive such services. In such a case it seems to me that the court must have regard, not to labels but to the realities of the relationship between the three parties. In other words substance rather than form must determine the relationship. This approach accords with the approach adopted in Catamaran's case referred to above as well as the approach adopted in Young & Wood v West referred to above.”*

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AC BASSON

JUDGE OF THE HIGH COURT

I agree

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M ISMAIL

JUDGE OF THE HIGH COURT

I agree

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A LEPHOKO

ACTING JUDGE OF THE HIGH COURT