IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

Case Number: JR 1022/05

In the matter between:

HYDRAULIC ENGINEERING REPAIR SERVICES **APPLICANT**

and

VUYO NTSHONA **1ST RESPONDENT**

COMMISSIONER E PATELIA **2ND RESPONDENT**

METAL & ENGINEERING INDUSTRIES BARGAINING COUNCIL **3RD RESPONDENT**

JUDGMENT

MOLAHLEHI AJ

Introduction

[1] This is application to review and set aside the ruling issued by the first respondent under case number MEGA 2779, dated 31 March 2005, in terms of which the first respondent Commissioner Patelia (the commissioner) dismissed the jurisdictional point which was raised by the applicant. The point raised concerned the contention by the applicant that the first

respondent, Mr Ntshona was not an employee in terms of the Labour Relations Act 66 of 1995 (the LRA). The commissioner found and ruled that Mr Ntshona was an employee in terms of the LRA.

[2] The applicant also sought condonation for the late filing of its supplementary affidavit which was granted.

[3] The relevant background facts which appears from the papers are largely common cause and the dispute relates mainly to their interpretation.

Background Facts

[4] During early 2003, Mr Page who was a sole shareholder of the applicant, entered into a purchase and sale of shares agreement (the sale agreement) with Mr Ntshona who purchased 50% of the shares from the applicant. The sale agreement was never signed by the parties.

[5] In terms of the sale agreement, Mr Ntshona undertook to pay for the shares which at that stage were valued at R9 000 00-00 on a monthly instalments of R150, 000.00 over a period of five years or R75 000-00 per month for a period of ten years from the date of signature of the sale agreement.

[6] According to the applicant it was also a condition precedent that Mr Ntshona and Mr Page would enter into a shareholders' agreement (the shareholders agreement), which would regulate the relationship between the two of them

and the applicant. It is common cause that the parties accepted the unsigned copy of the shareholders agreement as binding on them.

[7] In terms of the shareholders agreement both Mr Ntshona and Mr Page were respectively designated first and second shareholders. The second shareholder being Mr Ntshona was further, in terms of clause 3.2.2 of the shareholders agreement designated as the marketing director who was responsible for holding regular marketing meetings with the sales representatives, setting targets for the sales representatives and monitoring sales.

[8] Clause 3.2.3 of the shareholders agreement provided:

> *"The second shareholder shall be entitled on a gross remuneration package of R40 000-00 (forty thousand rand) per month as marketing director."*

[9] Clause 3.2.3 of the shareholders agreement provided:

> *"It is specifically recorded that the second Shareholders is required as Director to keep proper office hours and spend his time and energy in the advancing the company, (sic) failing which he can immediately be removed as Director by the first Shareholder. Should the second shareholder keep to the benchmark as stipulated in clause 3.2.5 below, the 40 (forty hours) per week from will be reduced from the 1st (first) anniversary of this agreement to allow the second shareholder to spent time on the setting up and structuring of a holding company to be formed."*

[10] Clause 3.2.5 of the shareholders agreement provided:

> *"Accordingly should the second shareholder not comply with clause 13 of the last mentioned agreement, the second Shareholder may be removed as Director as well as any Director appointed by him."*

[11] Failure to achieve the performance benchmark entitled Mr Page to buy back the shares from Mr Ntshona.

[12] The dispute which was referred to the third respondent arose from the letter dated 25 November 2003, in which Mr Page required Mr Ntshoana to resign from the applicant as the director. On receipt of the said letter Mr Ntshona immediately left the applicant premises and stopped performing any of his responsibility as the director. The letter read as follows:

> *"RE: <u>YOUR APPOINTMENT AS DIRECTOR AND SHAREHOLDER OF HYDRAULIC ENGENEERING REPAIRS SERVICES (PTY) LIMITED</u>*
> *As shareholder agreement was pared for signature by yourself and myself which agreement, due to various reasons, was never signed.*
> *However, your appointment as Director of the company was based on clause 3.2 of the shareholders agreement, which was also never signed but forms the basis of your appointment as a 50% shareholder of the company.*
> *You have been receiving a Director's fee of R40 000.00 per month plus medical aid and fuel as Sales and Marketing Director based on clause 3.2.3 of the draft shareholder's agreement. The understanding was that you will fulfil the obligations as set out in clause 3.2.1 (sic).3.2.3 (he first 3.2.3) and clause 3.2.4 of the said shareholders (sic) agreement.*
> *You have not complied with your duties in that you did not spend your time and energy in advancing the company. No proper feed back on the projections and on high level negotiations to expand the company nor on your progress (sic) relation to adhering to the benchmark as per clause13 of the sale of shares agreement.*
> *Accordingly as per clause 3.2.4 of the draft shareholders (sic) agreement, which forms the basis of your relationship between ourselves and the company, I hereby notify you that you are requested to resign as Director, failing which you will be removed as Director of the company.*
> *A letter will be sent to all our current and prospective clients, explaining the failure this proposed partnership.*
> *Despite this failure, this company is totally committed t establishing a black empowerment partnership that is dedicated and shares our vision for the future (sic) this company.*

Yours faithfully

Eric W Page."

Applicant's contention

[13] The applicant contended that both Mr Page and Mr Ntshona entered into a partnership agreement and used it as a vehicle to secure their 50%/50% of the shareholding from the applicant. It was through this partnership that the affairs of the applicant were conduct according to the applicant. In the light of this, the applicant argued that it was impossible for a person to be an employer and an employee at the same time.

[14] The applicant further argued that each party was entitled to share in the management of the partnership business which also entailed being jointly and severally liable for the obligations of the partnership. In this regard, the applicant, submitted, that unless a partner has signed away his rights, in a 50% partnership a lawful dismissal would have to take place with the consent of both partners. The "dismissed" partner, who complained about such a dismissal, would then be suing his own partnership for a dismissal according to the applicant.

[15] It was also contended that there is nothing which suggested that Mr Ntshona "signed away his rights" as a partner, or otherwise consented that the management of the partnership business should reside entirely within the control of Mr Page.

The Legal Principles

[16] The word "Employee" is defined in terms of s213 of the LRA to mean:

> *"(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and*
>
> *(b) Any other person who in any manner assists in carrying on or conducting the business of an employer."*

[17] The commissioner in arriving at his decision as he did correctly relied on the case of *PG Group (Pty) Ltd v Mbambo NO others* (2005) 11 BLLR (LC), in which the court had to decide whether a director of a company could be regarded to be an employee for the purposes of the Labour Relations Act 66 of 1995 (The LRA). It is worthwhile to record the following important points from the judgement:

> *"[26] A director may act in. certain capacities and perform the kind of work which appears to disqualify him or her from having the status of an employee. On the other hand, a director may also perform duties as an employee of the company. The office and duties of a director are separate. The type of work done by a director is not e dependable criterion as the nature of a director's actual day-to day work may vary greatly."*
>
> *[27] Directors are the holders of an office within the company. Rights and duties attach to that office and flow from statutory and common law of companies. A contractual relationship between a company and a director may not be necessary. Yet more often then not contracts of employment are concluded between directors and companies ..."*

[28]The argument that the Labour Relations Act does not apply to directors is largely premised on the argument that employment is characterised by an imbalance in bargaining power or in subordination. Therefore the argument is that financial, managing and ordinary directors have no claim to the status of an employee. This imbalance is not capable of being described in such precise terms so as to particularly exclude a director from the definition. It has been held that a director's position is a dual one - a holder of office on the one hand and an employee on the other.'

[29]Neither the labour Relations Act, nor the companies Act nor, in this case, the applicant's articles specifically preclude a director from enjoying the protection of the Labour Relations Act..."

[18] The commissioner further relied on the decision of *Rumbles v Kwa Bat Marketing (PTY) Ltd* (2003) 8 BLLR 811 (LC) wherein the court held that:

"[9]An appropriate point of departure in inquiries of this nature is the terms of any agreement between the parties. It is well established that a construction of any contract that the parties concluded is the primary source from which the legal relationship between them must be gathered (see SA Broadcasting Corporation v McKenzie (1999) 20 ILJ 585 (LAC) at 591E and Liberty Life Association of Africa Ltd v Niselow (1996) 17 ILJ 673 (LAC)

However, contractual terms are not definitive of the nature of any legal relationships that might exist. The courts will have regard to the realities of the relationship between the parties to determine the true nature of the relationship between them. This is particularly so when a party is induced into entering into a contract that deprives that party of the protections granted by the status of employment (see Building Bargaining Council (Southern & Eastern Cape) v Melmons Cabinets CC & another [2001] 3 BLLR 329 (LC). The parties' own perception of their relationship and the

> *manner in which the contract is carried out in practice are also relevant factors in a determination of the nature of that relationship, particularly in those areas not covered by the strict terms of the contract (see Borcherds v CW Pearce & J Sheward t/a Lubrite Distributors (1993) 14 ILJ 1262 (LAC).”*

The Court further held on the facts of the case that:

> *“The applicant was paid a salary each month irrespective of the fortunes of the business and irrespective of the value of his contribution to the business in any month.”*

[19] It is now well established that the fact that the parties either in writing or otherwise categorises their relationship as being anything other than that of an employment, is not in itself conclusive of the true nature of that relationship. The courts and other dispute resolution bodies have gone beyond the description given by the parties, of the nature of their relationship to uncover the underlying and the true nature of the relationship.

[20] The difficulty and the complexity of determining the true nature of the relationship has resulted with the courts and other dispute resolution bodies having to apply a number of tests to uncover whether or not the relationship is that of employment. In applying any one of the tests the courts have acknowledged and emphasised that the question of whether a person is an employee of another person depends largely on the facts of each case in the light of the features of the relationship between such two persons.

[21] The South African courts, at an earlier stage in the development of

jurisprudence in this area, favoured the use of the control test in determining the nature of the relationship between master and servant. Control and supervision was held to be one of the indicia to determine whether the relationship was that of a contract of service (employment contract) or a contract for service (independent contract).

[22] In *Mandla v Lad Brokers (Pty) Ltd* (2000) 21 ILJ 1807(LC) at 1809 para 8, Basson in dealing with the control test had this to say:

> *"The greater the degree of supervision and control to be exercised by the employer over the employee the stronger the probability will be that it is a contract of service."*

[23] The dominant impression test has since *Ongevallekommissaris v Onderlinge Verskerinsgenoodskap AVBOB* 1976 (4) SA 446(A) and *Medical Association of SA & others v Minister of Health & others* (1997) 18 ILJ 528, gained more support from the courts and the various dispute resolution bodies. The dominant impression test was embraced by the courts after acknowledging that the control test was still an important factor to take into account in evaluating the nature of the relationship between the parties. Thus in *Stein Rising Tide Productions CC* (2002) 23 ILJ 2017 (C) at 2024 Van Heerden J said:

> *"Problems experienced by the South African courts in the application of this control test for determining a master-servant relationship ultimately resulted in the courts acknowledging that, although the control test is an important factor in the enquiry, the crucial test, particularly in marginal cases, is whether or not the 'dominant impression' of the relationship is*

that of a contract of employment.."

The court went further to say:

".... Notwithstanding its importance the fact remains that the presence of such a right of supervision and control is not the sole indicium but merely one of the indicia, albeit an important one, and that there may also be other important indicia"

[24] In *SA Broadcasting Corporation v Mckenzie* (1999) 20 ILJ 585 (LAC) at 590-591D, the court in distinguishing the features of the contract of employment and the contract of work, said:

"1 The object of the contract of service is the rendering of personal services by the employee to the employer. The services are the object of the contract.

The object of the contract of work is the performance of a certain specified work or the production of a certain specified result.

2 According to a contract of service the employee will typically be at the beck and call of the employer to render his personal services at the behest of the employer.

The independent contractor, by way of contrast, is not obliged to perform the work himself or to produce the result himself, unless otherwise agreed upon. He may avail himself of the labour of others as assistants or employees to perform the work or to assist him in the performance of the work.

Services to be rendered in terms of a contract of service are at the disposal of the employer who may in his own discretion subject, of course, to questions of repudiation decide whether or not he wants to have them rendered."

[25] In using the dominant impression test to evaluate whether an employment relationship exists, the relationship should be looked at in its totality and

those aspects that indicate an employment and those indicating some other forms of relationship be identified. All relevant factors are to be weighed and then a determination should be made as to whether or not from those factors a dominant impression prevails that the nature of the relationship is that of employment. See *Dumpsay v Thorne Property* (1995) 3 BLLR 10 (LAC).

[26] When confronted with having to determine whether a person is an employee the courts or other dispute resolution bodies are enjoined to determine the true and real position between the parties. In this regard, the issue is not exclusively decided on what the parties have decided to call their relationship. In other words the designation of the position is not conclusive of the nature of the relationship.

[27] In *CMS Support Services Ltd v Briggs* (1998) 19 ILJ 271 (LAC) the court focused and emphasised upon the election made by the employee, in the contract. This approach was criticised in the *Denel (Pty) LTD v Geber* (2005) 26 ILJ 1256 (LAC) for disregarding the realities of the relationship between the parties. It was held, in Denel's case that ignoring the realities of the relationship between the parties, makes it possible to avoid the scope of the protective legislation such as the LRA and the BCEA. This approach does not however mean that the contractual expression by the parties as contained in their agreement should be ignored. Thus the court in *Lad*

Beukers (Pty) Ltd v Mandla (2001) 22 ILJ 1813 (LAC), held that in determining whether a relationship exists between the parties, the terms of the relevant contract should be scrutinised.

[28] Turning to the facts of this case, the applicant contended that because he was dealing with an unknown person and therefore had to put in place measures to protect his interest. The applicant further contended that Mr Ntshona jointly, managed the applicant with Mr Page through the shareholder's agreement. The purpose of the shareholders agreement according to the applicant was to create a Black Economic Empowerment company.

[29] It is evidently clear, however, that Mr Page had all the powers and control on the running of the applicant. As stated somewhere else in this judgment, the reason for not affording Mr Ntshona equal power and control was to protect the interest of Mr Page.

[30] In my view, ownership rights in the business did not necessarily mean that Mr Ntshona could not be regarded as an employee. The question of whether or not he was an employee turns around the determination of the true and real position that existed between him and the applicant.

[31] It is clear that in terms of the provisions of the shareholders agreement, Mr Ntshona was entitled to a gross remuneration of R40 000-00 per moth as a marketing director. This amount was reduced by Mr Page despite the objection from Mr Ntshona. The

issue of classifying the R40 000-00 as a director's fee was introduced only in the letter of dismissal.

[32] The applicant does not dispute that it paid in full for the medical aid of Mr Ntshona. And more importantly the applicant does not dispute that the pay slip which was issued to Mr Ntshona at the end of each month reflected deductions for UIF, SITE and PAYE.

[33] The applicant conceded that Mr Ntshona was obliged to manage the sales team and was expected to get involved in the day-to-day activities of the business in as far as marketing and sales were concerned.

[34] The above evidence point to nothing but the existence of an employment relationship between the applicant and Mr Ntshona.

Conclusion

[35] In the result the following order is made:

1. The *point in limine* is dismissed with costs.

The first respondent, Mr Ntshona, was an employee of the applicant in terms of the Labour Relations Act 66 of 1995.
The matter is remitted to the third respondent for arbitration.

MOLAHLEHI AJ

DATE OF HEARING : **16 FEBRUARY 2007**

Date of Judgment : **17 August 2007**

APPEARANCES

For the Applicant: Advocate A Redding SC

Instructed by : LDF Attorneys

For the Respondent: Advocate J Woodcraft

Instructed by : Engelbrect Khumalo van der Bergh