THE LABOUR COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN)

CASE NO. C 455/07

In the matter between:

PAM GOLDING PROPERTIES (PTY) LTD	**Applicant**
And	
DENISE ERASMUS	**1ST Respondent**
ADV KOEN DE KOCK	**2ND Respondent**
THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**3rd Respondent**

JUDGMENT

VAN NIEKERK J

Introduction

[1] The first respondent (Erasmus) referred a constructive dismissal dispute to the third respondent (the CCMA) pursuant to which the applicant raised a point *in limine* to the effect that Erasmus was not an employee as defined by the Labour Relations Act no. 66 of 1995 (the LRA) and that the CCMA therefore lacked the jurisdiction to deal with the dispute.

[2] Evidence was tendered on behalf of the applicant and by Erasmus only on the point *in limine*, after which the second respondent (the commissioner) issued a ruling that Erasmus was an employee and not an independent

contractor for the purposes of the LRA. In these proceedings, the applicant seeks to review and set aside that ruling.

The commissioner's award

[3] I do not intend to canvass the commissioner's award in any detail. The commissioner reviewed the applicable legal principles, and appears to have concluded that the 'dominant impression' test prevails as the means to determine the existence or otherwise of a contract of employment. The commissioner then set out the evidence, under headings that indicate the substantive issues in dispute. The first is the 'estate agency agreement'. It was common cause in the arbitration proceedings that the applicant had introduced the agreement in an attempt to regulate the relationship between itself and it s agents, and that all new agents were required to agree to its terms. The agreement purports to create a relationship of independent contractor between the applicant and each agent party. Erasmus was not a new agent, and had refused to sign the agreement. Nevertheless, the commissioner concluded that the relationship between the applicant and the vast majority of its agents was governed by the terms of the agreement, and that it was therefore indicative of the nature of the relationship between the applicant and Erasmus. The commissioner then proceeded to analyse those clauses of the contract that he considered relevant, and conclude that on balance, those clauses that were indicative of an independent contractual relationship were completely outweighed by the clauses indicating that the true nature of the relationship is one of employment. The commissioner then applied the series of presumptions of employment contained in s 200 A of the LRA, not in any determinative sense, but as a guideline. After considering each of the factors listed in s 20A, the commissioner conclude that all of them were present in the relationship between the applicant and Erasmus, and that "the immediate impression that comes to mind is that the applicant must surely have been an employee". The commissioner then applied the 'dominant impression' test to the evidence (including documentary evidence

that had been submitted) and concluded that on a preponderance of probabilities, the true nature of the employment relationship between the parties was one of employment.

The test on review

[4] A decision made by a commissioner may be reviewed and set aside if it failed to meet the test laid down in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC), where the majority of the Constitutional Court held that the question to be asked is whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach. In other words, having regard to the material before the commissioner, provided that the commissioner's decision falls within a band of decisions that can be described as reasonable, the decision cannot be impugned.

[5] It might be inferred from the *Sidumo* line of reasoning that in an application for review brought under s 145, process-related conduct by a commissioner is not relevant, and that the reviewing court should concern itself only with the record of the arbitration proceeding under review and its result. I do not understand the *Sidumo* judgment to have this consequence. Section 145 of the Act also invites a scrutiny of the process by which the result of an arbitration proceeding was achieved, and a right to intervene if the commissioner's process-related conduct is found wanting. Of course, reasonableness is not irrelevant to this enquiry - the reasonableness requirement is relevant to both process and outcome. Prior to *Sidumo*, in *Minister of Health & another v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as* amici curiae) 2006 (2) SA 311 (CC), Ngcobo J (as he then was) made the point in the following way:

> *"There is obviously an overlap between the ground of review based on failure to take into consideration a relevant factor and one based on the unreasonableness of the decision. A consideration of the factors that a decision-maker is bound to take into account is essential to a reasonable decision. If a decision maker fails to take into account a factor that he or she is bound to take into consideration, the resulting decision can hardly be said to be that of a reasonable decision-maker"*

[6] In his judgment in *Sidumo*, Ngcobo J reaffirmed the role of reasonableness in relation to conduct (as opposed to result) in these terms:

> "*It follows therefore that where a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate. In so doing … the commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings as contemplated in section 145 (2) (a) (ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings*'.[1]

The LAC recently cited this passage with approval.[2] As Davis JA put it:

> "*When all of the evidence is taken into account, when there is no irregularity of a material kind in that evidence was ignored, or improperly rejected or where there was … a full opportunity for an examination of all aspects of the case, then there is no gross irregularity"* .[3]

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[1] At para 268.

[2] *Ellerine Holdings Ltd v CCMA & others* (2008) 29 *ILJ* 2899 (LAC).

[3] At p 13. In another recent judgment by the LAC post-*Sidumo*, *Maepe v CCMA & others* [2008] 8 BLLR 723 (LAC) at para 11, the court also confirmed that the failure to have regard to materially relevant factors constitutes a reviewable irregularity.

[7] Since *Sidumo*, the Constitutional Court has again had occasion to consider the role of commissioners and their process-related obligations when conducting arbitrations. In *CUSA v Tao Ying Metal Industries* & others (2008) 29 *ILJ* 2461 (CC), O'Regan J held:

> *"It is clear, as Ngcobo J holds, that a commissioner is obliged to apply his or her mind to the issues in a case. Commissioners who do not do so are not acting lawfully and/or reasonably and their decisions will constitute a breach of the right to administrative justice.*[4]

[8] In summary, s 145 requires that the outcome of CCMA arbitration proceedings (as represented by the commissioner's decision) must fall within a band of reasonableness. The court is also empowered to scrutinise the process in terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review including, for example, a material mistake of law and a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification.

Distinguishing employees and independent contractors.

[9] The definition of 'employee' in s 213 of the LRA reads as follows:

> "'employee' means-

[4] At para 134.

(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 assist in carrying on or conducting the business of an employer, and 'employed' and 'employment' have meanings corresponding to that of 'employee'."

[10] Mr. Rautenbach, who appeared for the applicant, submitted that the test to be applied to distinguish an employee from an independent contractor has its roots on the one hand in old cases in our law, but on hand in more recent and significant developments, and provided a useful restatement of the law in support of his submission. The purpose of the restatement was to establish a basis for his contention that before a commissioner should know what facts are relevant to the issue in dispute, the commissioner should know what the legal question is to which an answer is sought. The question that the commissioner had to answer was whether Erasmus was an employee or an independent contractor. The legal question raised is therefore the definition of an employee as opposed to an independent contractor.

[11] Mr. Rautenbach's review 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 written agreement on the other hand, does contain provisions which make it clear that the contract was intended to be a contract of work and not a contract of service i.e. that the result of the appellant's labour and not his labour as such was intended to be the object of the contract. "

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, an 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.

[12] On this basis, Mr. Rautenbach submitted that the true test is that formulated by *Niselow*. The question the commissioner was therefore obliged to have asked to determine whether Erasmus was an employee or independent contractor was whether it was Erasmus's labour or a particular

result that was the object of the contract. In making this assessment this legal question, where circumstances point in both directions, the 'dominant impression' must be sought by the Court, but this is merely a method to weigh the evidence rather than the legal test to be applied. On this basis, as I understood Mr. Rautenbach's submission, the commissioner erred in relation to the test that he adopted and further, that he in any event erred in applying the law to the facts.

[13] I deal first with the test to be applied in distinguishing an independent contractual relationship from a relationship of employment. 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.

[14] To the extent that the applicant contends that the commissioner's ruling should be reviewed and set aside because he applied the incorrect legal test, it does not seem to me that the commissioner committed a material error of law in adopting the approach that he did. The commissioner had regard to the factors listed in s 200A as guidelines, as did the LAC in *Denel*. The commissioner's evaluation of the evidence and the application of a multi-factoral approach (which he labelled the 'dominant impression' test) are consistent with the existing jurisprudence. If any criticism is to be levelled against the commissioner's approach, it is that he failed to acknowledge the importance of the recent judgment by the Labour Appeal Court, *State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 ILJ 2234 (LAC). This judgment is indicative of what seems to me to be a new approach to the determination of the nature of the contract, one that accounts for recent legislative development (in the form of s 200A) and developments in international labour standards. This approach adopts a test that is markedly different from the test based on any making over of productive capacity to another person, and can certainly be said to have confined that test to the status of historical curiosity. The test established in *State Information Technology* is more closely aligned with the 'dominant impression' test, though not identical to it, and more in tune with developments internationally and on the domestic legislative front. Davis JA held that when a court determines the question of an employment relationship, based on the legislative presumption of employment in s 200A and the judgment in *Denel*, three primary criteria apply. These are:

(a) an employers right to supervision and control;
(b) whether the employee forms an integral part of the organisation with the employer;

(c) the extent to which the employee was economically dependent upon the employee (at paragraph [12] of the judgment).

[15] The latter criterion, not relevant in the traditional formulation of the 'dominate impression' test, has assumed a degree of importance. In the course of its judgment, the LAC cited Benjamin's article, *"An Accident of History: Who is (and Who Should Be) an Employee under South African Law"* (2004) 25 ILJ 787, where Benjamin argues:

> "A starting point is to distinguish personal dependence from economic dependence. A genuinely self-employed person is not economically dependent on their employer because he or she retains the capacity to contract with others. Economic dependence therefore relates to the entrepreneurial position of the person in the marketplace. An important indicator that a person is not dependent economically is that he or she is entitled to offer skills or services to persons other than his or her employer. The fact that a person is required by contract to only provide services for a single "client" is a very strong indication of economic dependence. Likewise, depending upon an employer for the supply of work is a significant indicator of economic dependence. [5]

Benjamin suggests further that the presence of any one of the factors of the employer's right of supervision and control; the employee forming an integrated part of the organisation of the employer; and the employee's economic dependent on the employer would be sufficient to indicate that the person is an employee.

[16] In summary: while the commissioner might have adopted the approach established in *State Information Services* with its emphasis on control and direction, being an integral part of the organization and economic dependency as a relevant criteria, he did not commit a material error of law in applying the test that he did, and thus did not commit a reviewable irregularity.

[5] At 803.

[17] In so far as the commissioner's application of the law to the facts is concerned, I do not intend to engage in a lengthy analysis of the arbitrator's findings. Much was made in the papers of commissioner's regard for the contract presented to Erasmus but never signed, the terms of which the commissioner regarded as indicative of the nature of the relationship between the applicant and its agents, including Erasmus. Mr. Rautenbach contended that only contractually binding terms can be relied on to determine the relationship between the parties, and that the commissioner's reliance on the terms of the agreement, which was not binding on Erasmus, were irrelevant. For this reason alone, he submitted, the commissioner's ruling should be reviewed and set aside. Further, the commissioner failed to have regard to factors that would indicate whether the object of the contract was Erasmus's capacity to produce, rather than the product of her work. In other words, the commissioner selectively looked at evidence that favoured Erasmus.

[18] In my view, it is clear from the commissioner's reasons that he did not seek effectively to enforce a non-existent agreement - the commissioner was at pains to make the point that the terms of the agreement, in so far as they may have embodied the nature of the relationship between the applicant and its agents (those who had signed the agreement and those who like Erasmus had not) was relevant only to a determination of the true nature of that relationship. In doing so, it seems to me that by having regard to the terms of the contract, the commissioner was endeavouring to ascertain the reality of the relationship between the applicant and those persons it regarded by virtue of the contract as being independent contractors, and to determine the extent to which this reality was reflected by the nature of the relationship between the applicant and Erasmus. In my view, this was not grossly irregular. Further, the commissioner's award does not disclose a partisan approach to an evaluation of the facts. The commissioner had before him evidence to the following effect. Erasmus only worked for the applicant, on the basis that she would retain for her own account 50% of all commission earned. During the

course of her engagement by the applicant, she was not entitled to work for her own account, or for any other agent. Erasmus worked from the applicant's offices, and was provided with the infrastructure for her to provide the services that she did. She was entitled to employ other persons to assist her to discharge her obligations to the applicant, and to enter into partnership with other persons with whom she was entitled to share commission. Erasmus was provided with forms and documentation bearing the applicant's logo, which she was required to use. She was required to conduct business in accordance with the applicant's policy on commissions, and was nor free to negotiate her own reduced rate of commission without penalty. Erasmus was entitled generally to come and go as she wished, but was required to attend meetings at least twice a week, in addition to a monthly meeting. There was a dispute as to whether Erasmus was required to complete leave forms or present medical certificates for any period of absence on account of illness, or how those forms were processed and for what purpose.

[19] It may be correct, as Mr. Rautenbach contended, that there were a number of *indiciae* present that bear out the conclusion that Erasmus contracted to produce a specific result (namely sales) rather than make over her productive capacity to the applicant. These include the limited restriction on her daily hours (if they were restricted at all), the number of weeks that she was required to work in any year, the fact she was not compelled to apply for leave or that any leave applications she signed were not processed in any way, the fact that no disciplinary action was taken against agents who did not attend meetings, the fact that Erasmus was paid commission only and that she was required to provide her own vehicle to carry out her work. In short, when, how and how much effort Erasmus put into selling property was up to her. It may even be reasonable to conclude based on this evidence that in the result, Erasmus did not make over her capacity to work to the applicant, and that she was engaged to ensure the production of a result.

[20] However, the existence of these *induciae* does not render the commissioner's ruling reviewable, nor is it apparent to me from the ruling or the record that they were ignored by the commissioner. There was more than sufficient evidence before the commissioner to render his finding that the scales tipped in the direction of the existence of an employment contract a reasonable one. In any event, and to the extent that this Court is entitled in review proceedings to have regard to evidence in the record that may not have played any significant role in the commissioner's decision but which is supportive of that decision (see *Fidelity Cash Management Service v Commission for Conciliation Mediation and Arbitration & Others* (2008) 29 *ILJ* 964 (LC)), there can be little doubt that Erasmus was subject to the applicant's supervision and control, that she was an integral part of the organization and that she was economically dependent on the applicant. Based on the *State Information Technology* test, she was an employee and not an independent contractor.

[21] For these reasons, the application stands to be dismissed. There is no reason why costs should not follow the result.

I accordingly make the following order:

1. The application is dismissed, with costs.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Date of hearing: 28 October 2009
Date of judgment: 4 December 2009

Appearances:

For the applicant: Adv F Rautenbach

Instructed by: Justine Del Monte Attorneys

For the respondent: Mr. Leon Bell from C & A Friedlander Attorneys