IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JR1210/08

In the matter between:

NATIONAL HEALTH AND ALLIED	
WORKERS UNION (NEHAWU)	APPLICANT
AND	
KGAUGELO RAMODISE	1ST RESPONDENT
THE COMMISSION FOR CONCILIATION,	
MEDIATION AND ARBITRATION	2ND RESPONDENT
SENIOR COMMISSIONER,	
TIMOTHY BOYCE	3RD RESPONDENT

JUDGMENT

Molahlehi J

Introduction

1] This is an application to review the ruling of the third respondent (the commissioner) under case number GAJB 28037-07 dated 28th March 2008 in terms of which he found the first respondent to be an employee of the applicant (Nehawu).

Background facts

2] The first respondent, Mr Ramodise was prior to his dismissal employed by the applicant, Nehawu, as deputy secretary and currently is employed as chief executive officer at Sekororo District Hospital, Limpopo Department of Health and Social Development. Although there seem to have been no written contract at the time Mr Ramodise was appointed deputy secretary of Nehawu on 1st July 2004, he received a monthly salary in the amount of R22 429.88, a monthly car allowance in the amount of R9 500.00, pension/provident fund benefits, housing allowance, cell phone allowance, credit card and petrol card. Several statutory deductions were also made from the salary of Mr Ramodise and these including PAYE, Unemployment Insurance the levy for Skills Development fund etc.

3] Nehawu suspended Mr Ramodise during October 2006, on the grounds that he together with other staff members had acted in a manner that amounted to misconduct. The relevant parts of the letter of suspension read:

> *"1. This serves as a notice to inform you that you are suspended as the Deputy Secretary and an employee of NEHAWU on full pay with immediate effect until the finalisation of the disciplinary process as decided by the Special CEC that took place on the 19 September 2006.*
>
> *2. Your suspension is a precautionary measure by your employer, National Education Health and Allied Workers Union, informed by reasons to: …"*

4] Thereafter, and following the recommendations of an independent investigation, a disciplinary inquiry was conducted against Mr Ramodise. The relevant parts of the charges brought against him are quoted in full in this judgment because of importance of the wording used therein particularly as concerning the issue at hand. The relevant parts of the notice of the disciplinary hearing reads as follows:

> *"5. You failed to disclose that you were a director and shareholder of Pheliso.*
>
> *6. You had the duty to disclose these facts to your employer because of the following:*
>
> *6.1 . . .*
>
> *6.2 . . .*
>
> *6.3 The failure to disclose your interest in Pheliso which is an alliance company of CCS constitutes material misconduct alternatively creates a perception that you were partial in your dealings towards CCS and further that you placed the interests of CCS over those of your employer.*
>
> *6.4 Your failure to disclose constitutes gross misconduct which destroys the relationship between your employer and yourself ..."*

5] Under the heading *"FAILURE TO PROMOTE YOUR EMPLOYER'S*

INTERRESTS OVER AND ABOVE INTERRESTS OF CCS, the charges read as follows:

> *"7. You had a common law duty to promote your employer's interest and to avoid a conflict of interest in your dealings with service providers of your employer.*
>
> *8. You materially failed in your duty by promoting the interests of CCS over and above your employer's interests. You did so by:*
>
> *8.1 . . . to 8.5 . . .*
>
> *8.6 Your aforesaid conduct destroys the relationship of trust between yourself and your employer."*

6] The disciplinary proceedings were chaired by Advocate Sibeko SC, assisted by two assessors who are employees of Nehawu. One of the issues that arose during the disciplinary proceedings concerned the question as to whether Mr Ramodise was an employee or an office bearer. This issue arose during the cross-examination of Mr Majola, the secretary general of Nehawu.

7] The chairperson of the disciplinary enquiry, after a thorough and detailed analysis of the facts observed as follows:

> *"It would appear that these proceedings contemplate a dispute which involves an employer -employee relationship."*

8] In arriving at this conclusion the chairperson of the disciplinary hearing relied on the letter of suspension and the charges as was formulated by Nehawu. In as

far as the substance of the charges were concerned the chairperson the disciplinary hearing found Mr Ramodise not guilty of misconduct. However, the two assessors who were employees of Nehawu, to the contrary found him guilty of serious misconduct and concluded that he should be dismissed. This view received support from the Central Executive Committee of Nehawu whose view and conclusion is recorded in a letter which reads as follows:

> *"The Central Executive Committee of Nehawu which convened and set on the 25 June 2007, took a decision in terms of section 63(5)(a) and (b) of the Nehawu constitution, to remove and dismiss you effective from 25 June 2007."*

9] Clause 63 (5) (a) and (b) of Nehawu's Constitution reads as follows:

> *"If, in its opinion, the charges have been satisfactorily proven, the BEC, REC, PEC, NEC or CEC may:*
>
> *(a) remove the shop steward or office bearer or official (as the case may be) from office in the union;*
>
> *(b) expel the shop steward office bearer from the union, or dismiss the official from employment by the union;"*

10] Following his dismissal Mr Ramodise referred his unfair dismissal dispute to the second respondent (the CCMA) and upon failure to reach an agreement during conciliation the matter was arbitrated by the commissioner.

The ruling

11] The commissioner in his ruling identified that the issue he was required to determine involved the question of whether or not Mr Ramodise was an employee. After considering the submissions of both parties the commissioner found Mr Ramodise to be an employee in terms of section 213 of the Labour Relations Act 65 of 1995. He reasoned as follows:

> *"5.1 It was common cause that pursuant to having been appointed as a respondent's Deputy Secretary, the applicant:*
>
> *5.1.1 was required to perform certain functions;*
>
> *5.1.2 was paid a set of salary;*
>
> *5.1.3 received a car allowance together with certain other benefits."*

12] The commissioner further correctly distinguished the case of Nehawu and Mr Ramodise from that of the *Church of the Province of Southern Africa (Diocese of Cape Town) v CCMA and others [2001] 11 BLLR 1213 (LC),* where the Court found that an employment relationship did not exist between the parties because the parties never intended to create a binding agreement and therefore there was no employment relationship between them. On the facts of the matter before him the commissioner found that Mr Ramodise's appointment was accompanied *"by a duty to perform certain duties, and a reciprocal entitlement to be paid for performing those duties. The parties must, accordingly, have intended to create a legally binding agreement."*

13] Nehawu contends that the commissioner committed a serious mistake of law which resulted in it being denied a fair hearing. It was for this reason that it contended that the commissioner committed gross misconduct justifying a review of that decision. For this reason Nehawu submitted in its founding affidavit that the commissioner ought to have found that the relationship between the parties was not that of employment. It is does not however define the nature of the relationship it had with Mr Ramodise.

14] Mr Malindi for Nehawu argued that despite everything pointing to the existence of the employment relationship the Court should on the evidence of Mr Majola find that there was no employment relationship. He in this respect argued further that the word *"employee"* was used loosely and not as envisaged in the Labour Relations Act. He further argued that the fact that there was no written contract between the parties was not an omission but an understanding that even though Mr Ramodise was paid remuneration as an employee he was not an employee.

The applicable legal principles

15] The word *"employee"* is defined in terms of section 213 of the Labour Relations Act 66 of 1995 (the Act) 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."*

16] In *Hydraulic Engineering Repair Services v Ntshona & Others (2008) 29 ILJ 163 (LC),* this Court considered the factors to take into account in determining the existence of an employment relationship between the parties. The Court held in this regard that the fact that the provisions of the contract categorize the relationship between the parties to be that of an independent contractor is not conclusive of the true nature of the relationship. While the Court in that matter was faced with a written contract, the principles enunciated therein would still apply even where the employment contract was concluded by way of a verbal agreement or otherwise. In this respect the Court found that the courts and other dispute resolution bodies have gone beyond what the parties regard as the nature of their relationship to uncover the underlying and the true nature of such a relationship.

17] The Court in *Hydraulic Engineering Repair* looked at the various tests that the courts and other dispute resolution bodies have over the years applied in determining the true nature of the relationship between the parties. In applying any one of the tests the courts have acknowledged and emphasized 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 parties.

18] At an earlier stage in the development of jurisprudence in this area the South African courts 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).

19] 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 Labour Relation Act and the Basic Conditions of Employment Act. The reality approach does not however mean that the contractual expression by the parties as contained in their agreement should be ignored. Thus the court in *Ackers (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 scrutinized.

20] The Labour Appeal Court in *State Information Technology Agent (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration (2008) 29 ILJ 2234,* confirmed the approach it had adopted in *Denel.* Davis JA in that case, after upholding the views expressed by Benjamin in *(2004) ILJ 25 787,* held that the decision in *Denel* is congruent with the provisions of section 213 of the Labour Relations Act, and that when determining the issue of employment relationship the Court must work with three primary criteria. The three criteria are set out (at paragraph 12) in the judgment as follows:

"1. an employer's right to supervision and control;

2. whether the employee forms an integral part of the organisation with the employer; and

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

21] Turning to the facts of this case, it is clear that Nehawu has failed to show on what basis the ruling of the commissioner should be reviewed and set aside. In other words it has failed to show that the relationship between it and Mr Ramodise was anything other than an employment relationship. It is clear from the facts of this case that Mr Ramodise was under the control of Nehawu as its employee and was in this respect expected to put out 40 (fourty) hours of work a week. In addition to the basic salary which he dependent on for his economic survival, the other factors which support the view that he was an employee is that Nehawu deducted and made contributions for the various statutory requirements from his salary like PAYE, UIF, Provident Fund and Skills Development Levy.

22] It is important to note that the Unemployment Insurance Act 63 of 2001 defines an employee as *"any natural person who receive remuneration or to whom remuneration accrues in respect of services rendered ... but excludes an independent contractor."* Also in respect of this Act Nehawu could not have made contribution as it did because a *"contributor"* is amongst others defined as a natural person who is or was employed. The Skills Development Levies Act 9

of 1999, imposes a duty on an employer like Nehawu to pay skills development levy. Also of importance in as far as this Act is concerned is that its definition of an *"employee"* is the same as that in the Labour Relations Act 66 of 1995.

23] Nehawu's contention that Mr Ramodise was not an employee is not supported by the written communication with him. Mr Ramodise is referred to as an employee consistently through out starting with the letter of suspension and ending with that of dismissal.

24] Reliance on the constitution by Nehawu does not assist its case. There is nothing in the constitution that prohibits an office bearer from becoming an employee. In fact the reading of clause 65 which Nehawu based its case on indicates that the constitution envisaged that a person could be both an office bearer and an employee as was the case with Mr Ramodise. Clause 65 (a) provides for the removal of a shop steward or office-bearer from office. And clause 65(b) provides for the expulsion of a shop steward or office bearer from the union or *the dismissal of an official from the employment by the union. (My emphasis).*

Conclusion

25] In conclusion and in summary, it is my view that the realities of this case point towards the fact that Mr Ramodise was an employee. The particular facts that support this view can be summarized as flows:

1. that even subsequent to the disciplinary hearing, Nehawu treated Mr

Ramodise as an employee in that he was dismissed and not voted out of his position in terms of clause 64 of the constitution.

2. the manner in which he worked was subject to the control and/or direction of the Nehawu and its officials.

3. he was part of the organization-Nehawu.

4. his hours of work was subject to the control of Nehawu and in this regard had to report for work on a daily basis and was entitled to take leave like any other employee.

5. he was economically dependent on the salary paid to him by Nehawu.

6. he reported for work at the Nehawu offices and was provided with, inter alia, office space, computer equipment, stationery, telephones and other work equipment to enable to render his services.

26] In the light of the above, the application to review the ruling of the commissioner stands to be dismissed. What then remains for consideration is the issue of costs which is governed by section 162 of the Labour Relations Act 66 of 1995. In terms of this section account should be taken of both law and fairness in the consideration of whether or not to grant costs. In my view the facts and circumstances of this case calls for costs to be awarded on a punitive scale.

27] In the premises the following order is made:

(i) The application to review the ruling of the third respondent

under case number GAJB 28037-07 dated 28th March 2008, is dismissed.

(ii) Mr Ramodise is the employee of the applicant and accordingly the second respondent (CCMA) has jurisdiction to entertain the alleged dismissal dispute.

(iii) The applicant is to pay costs on the scale of own attorney and client.

Molahlehi J

Date of Hearing : 22nd April 2009

Date of Judgment : 18th August 2009

Appearances

For the Applicant : Adv G Malindi

Instructed by : Thaanyane Attorneys

For the Respondent: Mr F van Rooi of Eversheds