



Of interest to other judges/reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case: C581/2019

In the matter between:

GM GOLIATH

First Applicant

and

**SA BROADCASTING CORPORATION
SOC LTD**

First Respondent

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

MADELEIN LOYSON N.O

Third Respondent

Date of Hearing: 20 May 2021 (on the papers)

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 20 September 2022

Summary: (Unfair dismissal - Jurisdictional issue – status as an employee or independent contractor – Objective test – Presenter of music show – Contract renewed year after year – consideration of factors – Presenter an independent contractor)

JUDGMENT

LAGRANGE J

Introduction

- [1] This is an opposed review application of an award handed down on 23 August 2019 in which the applicant, Mr Gavin Goliath ('Goliath'), was found to have failed to discharge the onus that he entered into an employment relationship with the first respondent, the SABC. As a result, the arbitrator concluded that the CCMA had no jurisdiction to entertain the applicant's alleged unfair dismissal dispute.
- [2] Details of hearing. Both parties agreed the matter could be determined on the papers.

Factual background

- [3] The applicant, better known by his radio DJ name 'Nigel Pierce', worked for SABC as an on-air presenter of 'The Nigel Pierce show' on Radio Good Hope FM ('the station'). presented the programme which ran for three hours per day over a five-day week. He was paid an hourly rate for the time his programme was on air.
- [4] He had entered into many successive fixed term contracts with SABC since 1 July 2004. In March 2019 his contract was terminated before it expired at the end of that month. He alleged that he had been unfairly dismissed on 31 March 2019. He referred the matter to the CCMA on 4 April 2019. After the matter could not be resolved through conciliation, Goliath applied for the matter to be arbitrated.
- [5] The arbitrator first had to decide whether Goliath was an employee of SABC. If he was not an employee of SABC, the CCMA had no jurisdiction to determine

whether he was unfairly dismissed. The respondent argued that Goliath was not an employee, but rather an independent contractor.

The award

- [6] The arbitrator found that Goliath failed to discharge the onus that he was an employee of SABC. In reaching this conclusion she emphasised the findings set out below.
- [7] The arbitrator first looked at the contract. The applicant entered into contracts with SABC from 2004 until 2018. These contracts clearly emphasised that he was an independent contractor and not an employee. As Goliath has an LLM in Labour Law, she concluded that he would have been keenly aware of his status as an independent contractor. She also noted that he took no steps to change the situation. This led her to conclude that he made a conscious and informed choice to be an independent contractor, and therefore must be held to the contract. She also rejected any suggestion he was forced by economic duress into signing the contract due to the fear of unemployment, as such a well-qualified individual would not struggle to find alternative work.
- [8] The arbitrator then looked at the actual relationship between the parties. She found that Goliath was bound to perform a certain specified work or produce a certain specified result within a time fixed by the contract of work and did not perform work under the orders of the station. He was not under the supervision or control of the station for the presentation and production of his work. He was not obliged to obey any orders of SABC, as represented by the management of the station, in regard to the manner in which the work was to be performed, except under exceptional circumstances for quality assurance and adherence to applicable broadcasting regulations and standards. He earned a fee for each programme instead of earning a salary, he was not paid if he did not work, income tax was deducted on the basis that he was an independent contractor and he did not contribute to the pension fund, medical aid or life insurance policy of SABC. He was also not subject to the SABC's disciplinary code, nor entitled to leave. He was permitted to engage in other paid work as long as it was not in competition with the station.

- [9] In conclusion, the arbitrator decided that Goliath failed to discharge the onus and accordingly he was not an employee of SABC.

The applicant's case

- [10] The applicant wishes to review and set aside the award on the basis that:

- 10.1 The clauses which described the applicant as an independent contractor were a sham and invalid as the relationship between Goliath and the SABC was one of 'disguised employment'.
- 10.2 The arbitrator incorrectly applied the dominant impression test. The arbitrator should have concluded that the programmes Goliath presented fell under the SABC's direct control or supervision, that Goliath was an integral part of the SABC's organisation and that he was economically dependent on the SABC. This is because Goliath claims that:
- 10.3 The first respondent had sufficient control over the content, performance and manner in which Goliath did his work.
- 10.4 Despite the possibility of Goliath offering his services to other work-providers, there was no practical possibility of doing so, and as a result he was economically dependent on the first respondent.
- 10.5 He was an integral part of the SABC's organisation as he was involved in discussing the SABC's internal affairs and was involved in the SABC's core business.
- 10.6 The arbitrator misconstrued the purposes of the Labour Relations Act (LRA), and consequently failed to interpret and apply the LRA correctly.
- 10.7 The arbitrator elevated form over substance by focusing on the form of the contract, as opposed to the realities of the relationship.
- 10.8 The arbitrator erred in concluding that Goliath made a conscious choice to be an independent contractor. Due to an inequality of bargaining power and the contract being presented on a 'take it or leave it basis', the terms were dictated to him as opposed to being chosen by him.
- 10.9 The arbitrator misconstrued the definition of 'employee' by failing to correctly interpret or apply the constitutional right to fair labour practices.

Contract renewals and the cancellation of his contract in March 2019

- [11] Goliath said he had an expectation that his contract would be renewed as it had been previously happened each year since 2004. He identified with the station and viewed his life and tenure at the station with the SABC as a career. He saw himself as part of the future of the station. His expectation of renewal was based on the previous fifteen renewals and the fact that the program manager spoke of his career and his identification with the future of the station. In addition, both the program and station managers had spoken highly of his work ethic and contribution to the brand. Apart from one statement by the program manager that he saw him as part of the future of Good Hope FM, his expectation was largely based on the repeated renewals. Mr G Muller ('Muller'), the programme manager, insisted that the station would never make a promise of a long-term contract because it was not in a position to offer that and the renewal depended on budgets and the strategic objectives of the station which influenced the line-up.
- [12] Goliath was advised that his contract would not be renewed in early March 2019 and after he kept mentioning the fact of his departure despite request not to do so he was taken off the air for the remainder of the contract period. His conduct was characterised as insubordination which he took to be another indication of his employment status. He was prevented from entering the station on 8 March and was given a letter confirming the termination of his contract in the foyer by Muller.
- [13] Muller testified that the contract was not renewed because the SABC had reduced the station's budget due to its own constraints and the performance of the station itself. Accordingly, management had to look at the lineup and how many people they could afford to run the programs. One of the steps they took was to automate the 1am to 6 am slot so that it did not require presenters. What led the station to terminate Goliath's contract before it expired was Goliath talking on air about his contract ending at the time when they were still in discussion with other presenters about their contracts. They would have allowed him time at the end of the month to say farewell to his listeners.
- [14] On the conclusion of the written contract, Goliath denied there was any real negotiation about its terms. It was presented on a take it or leave it basis. Muller

largely confirmed that the contract was a standard one that was issued by the SABC and if there was no budget for increased rates the station had no control over that. Muller said he was unaware of any discussion which had taken place during his employment with the station about Goliath's employment status. He was aware that previously there were station managers who had discussed Goliath's contract with his lawyer.

- [15] It must be mentioned that Goliath has a BA, LLB degrees and an LLM degree majoring in labour law. Despite this legal academic background, he claimed that his knowledge of labour law was rudimentary as he obtained his degree in the 1990s, remembered nothing from his studies, and could not be reasonably expected to understand the distinction between an independent contractor and the employment contract. However, it was clear from the tenor of his evidence in chief that he understood full well many of the tenets of the law concerning defining characteristics of the employment relationship.

The applicable review test

- [16] In the context of an unfair dismissal dispute, a ruling on a person's employment status is a jurisdictional question. If there is no employment relationship between the two parties to the dispute, then the CCMA has no jurisdiction to determine the alleged unfair dismissal dispute.

- [17] In *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration & others* (2008) 29 ILJ 954 (LAC), the court said:

"[101] Nothing said in *Sidumo* means that the grounds of review in s 145 of the Act are obliterated. The Constitutional Court said that they are suffused by reasonableness. 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 s 145 of the Act. *If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise.* Also, if the CCMA made a decision that exceeds its powers in the sense that it is ultra vires its powers, the reasonableness or otherwise of its decision cannot arise." (emphasis added)

- [18] When deciding a review on the basis of jurisdiction, the proper test is whether the decision of the arbitrator was right or wrong. In *Trio Glass t/a The Glass*

Group v Molapo NO & others (2013) 34 ILJ 2662 (LC) the court expressed it thus:

“[22] The Labour Court thus, in what can be labelled a “jurisdictional” review of CCMA proceedings, is in fact entitled, if not obliged to determine the issue of jurisdiction of its own accord. In doing so, the Labour Court is not limited only to the accepted test of review, *but can in fact determine the issue de novo in order to decide whether the determination by the commissioner is right or wrong.*”

(emphasis added)

[19] Accordingly, the court must decide on the evidence before the arbitrator whether the arbitrator’s jurisdictional finding that no employment relationship existed was correct.

The law on the employment relationship

[20] The starting point for determining an individual’s employment status is the statutory definition of an employee, which explicitly excludes an independent contractor from the definition. This can be open to abuse, as some workers will be excluded from the protection of labour laws when they are falsely labelled as independent contractors even though they are employees. As a result, when determining if there is an employment relationship, the court must go beyond what is contained in the contract to establish the true nature of the relationship between the parties. In *Denel (Pty) Ltd v Gerber* (2005) 26 ILH 1256 (LAC), the court highlighted that:

“[19] When a court or other tribunal is called upon to decide whether a person is another’s employee or not, it is enjoined to determine *the true and real position*. Accordingly, it ought not to decide such a matter exclusively on the basis of what the parties have chosen to say in their agreement for it might be convenient to both parties to leave out of the agreement some important and material matter or not to reflect the true position.

[20] If a court or other tribunal were to be precluded from looking at matters outside of the parties’ agreement, there would be a serious danger that it could be precluded from determining the true position or the true relationship between the parties and end up making a finding that the parties wish it to make as to the position when in fact the true position is different.” (emphasis added)¹

¹ See also *Universal Church of the Kingdom of God v Myeni and Others* (2015) 36 ILJ 2832 (LAC) at para [27]

[21] However, this does not mean that the terms of the contract between the parties can simply be disregarded. In *South African Broadcasting Corporation (Soc) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (JR745/16) (2017) ZALCJHB 76 (LC), the court said

“[34] ...Where parties to a service providing relationship have, with the necessary circumspection and on the basis of an informed decision, decided to structure their relationship in a particular way, an adjudicator *should not readily interfere with this relationship as enshrined in the contract*, after the fact. After all, *pacta servanda sunt* in principle equally applies in employment law.”

(emphasis added)

[22] The contract will obviously be accorded weight depending on the extent to which its provisions describe in concrete terms rights and obligations of the parties which are more or less characteristic of an independent contractor relationship. If the contract does little more than deem the individual an independent contractor without substantive provisions according with that status, it is likely to carry little weight in determining the individual is indeed an independent contractor rather than an employee. When an applicant proves on a balance of probabilities that an employment relationship exists in reality despite an agreement worded to the contrary:

“[35] ... the CCMA and Labour Court would be entitled to intervene and classify the relationship between the parties for what it really was - an employment relationship.”²

[23] In *State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 ILJ 2234 (LAC), the court identified three primary criteria to determine the realities of a relationship:

“[12] ... 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
- 3 the extent to which the employee was economically dependent upon the employer.”

² *South African Broadcasting Corporation (SOC) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (JR745/16) (2017) ZALCJHB 76 (LC).

[24] In *Kambule v Commission for Conciliation, Mediation & Arbitration & others* (2013) 34 ILJ 2234 (LC), this court observe that:

“[7] Reason dictates that the test is *qualitative rather than quantitative*. Even if it is useful to list factual indicators by category, the nature of the relationship cannot be determined simply by comparing the number of indicators for and against the existence of an employment relationship. This is because some indicators necessarily tell us far more about the substance of the relationship than others. For example, a term of a contract setting out an obligation to deliver a finished product by a particular time, will usually carry more weight in determining employment status than the fact that the contract also bears the title ‘contract of employment’.”

(emphasis added)

Analysis

The right to supervision and control

[25] The court in *SA Broadcasting Corporation v McKenzie* (1999) 20 ILJ 585 (LAC) elaborated on the employer’s right to supervision and control over an employee:

“[9] 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.”

[26] The applicant claimed that the SABC exercised sufficient supervision and control over him to indicate an employment relationship. The applicant contended that the station had control over the content of his show, as well as over the manner in which the radio programmes were to be performed. Examples used by Goliath to show control were; that he was instructed not to conduct an interview with Dr Eve (a sexologist), it was recommended that he

remove certain 'inappropriate' content from his social media, he was advised to watch his language on air and was prevented from saying certain things.

[27] A number of cases have dealt with the question of whether someone is an employee in the context of radio broadcasting. In *McKenzie* (1999) 20 ILJ 585 (LAC), the court held that it does not follow from the fact that the programme manager had the right to give a radio broadcaster (McKenzie) instructions:

"[35]...as to the content of the programmes and that McKenzie had to

perform his duties in accordance with certain editorial standards that the

SABC exercised control over him of an employer. The SABC, as a public

broadcaster, has the right to exercise editorial control over the

programmes it broadcasts."

[28] In *Kambole*, it was held that:

"[31]...Setting broad content parameters, particularly when these also reflect concerns of possible breaches of the regulatory regime governing public broadcasting, is not comparable in my view with the supervision and direction of an employee's work."

[29] When dealing with the broadcasting industry it is important to consider the regulatory framework governing it. In *South African Broadcasting Corporation SOC Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (D510/15) (2017) ZALCD 22 (LC), this court found:

"[32]...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 to disseminate such information is inevitable. Put differently, the control and supervision of information in the 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."

(emphasis added)

[30] Goliath asserted that there was a lot of control exercised by the program manager and station manager about whom he could interview and what was said. In support of this he cited a couple of examples. Thus, on one occasion, he was told not to interview a sexologist, 'Doctor Eve'. He was also told not to say certain things about politics or situations in the Western Cape. More particularly, he was not allowed to interview politicians. He was also asked not to talk about his departure in March 2019. The message which was conveyed to him in an email, from Muller, telling him not to proceed with the interview with Dr Eve read:

"Brendan and I have concerns about sexual innuendos creeping onto the show, and this is been raised many times with you. We do not want to hear about our listeners' love life, how many times you make love, the infidelities and so on. We want a family show that we can sell with conviction to oral business within our target market, male and female and also to our existing and new clients.

Do not interview Doctor Eve, do not ask questions that lead to sexual innuendo. Just stay away from content of this nature that will lead you in this direction. You do not need it and we do not want it on air."

A few of your feature names leading to the sexual innuendo and this does not help your cause. It is an underlying theme form that allows for sexual innuendo to creep in when you engage on the air. It's there every day!"

(sic)

[31] Goliath was asked if he remembered engaging with Muller and Brendan Ficks ('Ficks'), the station manager, about the reason why they did not want him to interview Doctor Eve but he could not recall this. It was put to him that the reason was that they considered it was not an appropriate feature for that time of the day and it should have been broadcast after 21:00. Goliath's response was to say that he had more experience than they did and that radio stations overseas did not steer away from that kind of content, which did not have to be crass. It was also put to him that the station had to be wary of contravening broadcasting regulations in that regard, but he was clearly of the view that this was an unwarranted concern.

[32] Goliath testified that, on occasion, he was told to ask specific questions of a person being interviewed. Muller explained that some interviews were 'sold' to

a promoter of an event, who would require that there would be a certain line of questioning about the event. That would be the only instance where the presenter was expected to ask a particular set of questions. Apart from that, the presenter obviously had to comply with the code of conduct of the Broadcasting Complaints Commission of South Africa ('the broadcasting code') and Icasa regulations governing the use of local content in music. Muller testified that the regulations governing broadcasting required that content of an adult nature should be aired outside the so-called 'watershed period' from 5 a.m. to 9 p.m. He pointed out that the station was a light-hearted radio station in which music was played approximately 65% of the time. Even though the station might touch on social issues, it did not cover political content. Authority from the SABC news room was required for political interviews in any event.

[33] In terms of the content of each program, Goliath said sometimes he identified the topics to be dealt with. At other times topics were identified by the program manager. Generally, he would be responsible for the sourcing of the material and inputs into the program. He said that: "The general pattern is that I go and that topic then gets discussed with Gerard and he either pulls it or decides that we go ahead with it and this is done via the producer, and that is the general." (sic)

[34] Goliath alleged he did not lodge a grievance about being criticized over what he had said on air because he was not familiar with the employee grievance procedure. He said he had referred many things to HR department staff, who had given him advice. When Muller was asked how many times Goliath had been taken off air as a sanction during his years of engagement, he acknowledged it had happened more than three times. It was not something imposed after a disciplinary type of procedure, even though the presenter was given an opportunity to make representations before the decision was taken. Under cross-examination, Goliath was asked more than once whether or not an independent contractor could be subjected to disciplinary processes which applied to the station's employees. He was reluctant to be drawn on this issue and, despite having expressed his views quite forthrightly and strongly in his evidence in chief, he claimed not to understand it. Ultimately, he was pressed

to concede that disciplinary codes and procedures would only apply to employees.

[35] Goliath further alleged that, on occasion, the station manager would arrive during the show and stop him from doing certain segments of the show. He understood this to be an act of control going far beyond the right of the station to exercise quality control, which the contract did permit. He agreed that neither Brendan nor Gerard were in the studio whilst he was on air. However, at times they would send him emails and messages during his show telling him to refrain from certain things. He said there was more than one instance when they were in the studio controlling what he was saying, which flouted clause 5.2 of the contract, which stated that there would be no supervision or control by the client during the course of delivery of the services by the independent contractor.

[36] Muller testified that there might have been an instance when he had intervened but could not recall any specifics. He claimed he did not listen to the program on a daily basis. According to him, the type of thing he might intervene on would be, for example, if he got wind of a sponsor getting free advertising. Similarly, he would act if an advertisement was not run during the time slot which had been booked, leading to a loss of revenue. Such actions could result in a presenter being taken off air as a sanction for breaching the contract. On one occasion, Muller had emailed Goliath to ask him to watch his tone because it seemed 'aggressive'. Muller claimed that was a rare occasion and the station recognised that presenters needed to focus on their show. However, there were times when it was necessary to address an issue because it might affect the station on account of the broadcasting code, which could result in the station being fined.

[37] Goliath argued further that clause 5.4.2 of his contract in terms of which he agreed to consult with the station before in engaging in any media or publicity activity and which obliged him to take all necessary steps to ensure that those other business activities did not conflict with his engagement with the SABCO, was another of the controls exercised over him that demonstrated his employee status.

[38] Another instance he cited in support of this contention was the fact that management complained that he had lost the station an opportunity to stage a quarterly music event because he had quoted a presentation fee three times what the potential client was offering. Goliath would have participated in that capacity under his pseudonym and the event would have been branded jointly under his name and that of the station.

[39] Goliath believed further that having to attend strategy sessions from time to time was also indicative that he was subject to the station's control and supervision because it would be decided in such meetings whether or not certain ideas were implemented on his show.

[40] It must be noted that a considerable amount of Goliath's evidence was expressed in a rather generalised summary form, such as when he stated that "there were so many duties and obligations that we had to go ahead and even if I want to do certain things outside of the station I would still have to refer to Gerard or Brendan and get their approval."

[41] I accept that there were times when the station intervened directly, though this seems to have been infrequent. The interventions essentially concerned whether Goliath was acting in breach of certain constraints the station was under owing to the regulatory framework it operated under and its obligations to sponsors, or whether it conformed to the type of show he was contracted to present. In my view, the kind of supervision and control that the station exercised over Goliath was to ensure he delivered the type of show he was contracted for and to fulfill its commercial obligations to third parties also stipulated in the contract, as well as to prevent potential breaches of broadcasting regulations. The interview with 'Dr Eve' was refused to prevent sexual content from being broadcast during hours when children might be listening. The supervision of what Goliath said on air related mostly to the use of inappropriate language such as swearing.

[42] Imposing these standards, is not materially different from a client instructing a building contractor on the type of insulation or finishes a building should have, or that the building must conform to building environmental regulations. In the broadcasting context, because of the immediate impact of non-compliant presentations, which are difficult to rectify after the fact, it is understandable

that there might have been times when Goliath was contacted whilst on air, but that was not equivalent to being constantly monitored and directed. It was evident that he was the one responsible for creating the original content in each presentation, even though the original idea for the subject matter did not always come from him.

[43] Within the parameters of the type of program he was required to present, Goliath clearly exercised a significant degree of discretion over the content of each broadcast and the manner in which he presented the programme.

Integration in the employer's organisation

[44] Goliath had contended that he was an integral part of the station's organisation. He said he had been at the station for a lengthy 15 years and had become synonymous with the Good Hope FM brand. He had a Good Hope FM email address and Good Hope FM branded clothing. He used SABC's technical infrastructure to conduct the radio programme, he had to attend strategic planning meetings and signed off his intellectual property rights to SABC. He contended that he was involved in the station's core business and was subject to SABC's disciplinary procedures.

[45] In *Kambule* the character of this type of relationship was described in the following terms:

"[32] In the context of making public broadcasts as a business, it is difficult to imagine how a programme broadcast could be delivered without a degree of cooperation between all the individuals whose efforts must be coordinated to make the programme presentation possible. In relation to the programme itself, clearly Kambule was an integral part of that programme team, but beyond his commitment to the programme he was free to pursue his interests independently without reference to the organisational structure or hierarchy of authority within the station."

[46] The same applies in this instance. It is hard to imagine how the show Goliath presented could be delivered without a degree of cooperation from all parties involved. To that extent he was an integral part of the programme he presented, but beyond this he was free to pursue other non-competitive commercial interests independently without reference to the organisational

structure or hierarchy of authority within the station, unless it might compromise the station or the 'Nigel Pierce' show.

- [47] The station email address and branded clothing were reasonable ancillary tools for him to host the radio programme and are not evidence that he was an integral part of the organisation.³ The fact that the station:

"[34] provided the technical infrastructure necessary for the production of the programme, is little different in my view from an airline using freelance pilots providing the aircraft which they fly. It is true that if Kambule had produced the programme in his own studios, that would have been a clear indication of his organizational independence, but the absence of that does not mean that Kambule's economic activities were all an integral part of the station's business."⁴

- [48] It must also be remembered that his DJ persona, associated with him as a presenter was part of the very identity of the programme he was presenting, so his own distinct role was not simply submerged under the generic branding of the station. Furthermore, Goliath did not receive the benefits given to employees of SABC such as medical aid, pension fund and paid leave.

Economic dependence

- [49] Goliath presented his show from Monday to Friday for three hours per day. He argues he was economically dependent on SABC because even though he was legally permitted to render services elsewhere, it was practically impossible to take on other work due to the preparation required for the radio show.
- [50] Apart from the three hours presenting the programme, Goliath had to be present half an hour before and had to be available for up to half an hour after the program aired if the station management required it. He also had to monitor competing radio stations offerings and attend certain Radio Good Hope

³ *Kambule v Commission for Conciliation, Mediation & Arbitration & others* (2013) 34 ILJ 2234 (LC) at para 33.

⁴ *Ibid* at 34.

meetings. Muller pointed out that there was nothing specifying how much time he had to devote to listening to other radio stations.

[51] Goliath claimed that he would start working at 09:00 in the morning and would work again for another two or three hours after returning from the show in the afternoon. All in all, he claimed he worked from 09:00 until 20:00. He also said he worked on weekends. He contended that all of this made it impossible for him to pursue other interests.

[52] Muller accepted that Goliath would have to spend some time preparing for his show, but the decision on how much time he spent doing so was up to him. That applied to his monitoring of other stations too. He agreed that Goliath could not appear on another public radio station, but that did not for example prevent him from doing retail radio. As far as Muller was concerned, the contract restricted Goliath from offering his services to other radio stations, only related to the role he performed for the station, as a presenter of a music programme.

[53] In regard to the preparation time taken by Goliath, it noteworthy that Muller's evidence to the effect that about 65% of the content of the three-hour program consisted of music, as might be expected on a music station. Accordingly, just over one third of the program (approximately an hour) would have been made up with other content which Goliath had to provide over and above his input on the choice of music. Even allowing for the fact that there were occasions when he would have to prepare to conduct an interview during that time, it is difficult to accept that this necessarily required him to work an additional five to six hours every day (excluding the time spent at the studio) as well as weekends to prepare his daily offering.

[54] The fact that he apparently spent this amount of time on preparation might speak to his dedication and enthusiasm for his work. It might also speak to his disinterest in actively pursuing other lucrative opportunities. However, as a matter of probability, it is difficult to believe the time he claimed to have spent on preparation was indispensable for him to deliver a satisfactory presentation and that he could never have performed satisfactorily with less preparation time. The issue of economic dependence, as alluded to above, is whether the freedom to do other work is, in practice, illusory because the time that has to

be devoted, directly or indirectly, to render a satisfactory service, leaves no time to feasibly engage in any additional financially rewarding work. Goliath was not in the position of a someone performing low-skilled work for little remuneration, whose ability earn a basic living depends on them devoting a very significant part of their waking hours to providing the contracted service in question.

[55] In relation to other time he had to commit to the station, Goliath testified that he attended staff or employee related meetings, but he only said that it was 'more than once' or on a few occasions that they were all present together in the same meeting. Muller testified that there were quarterly meetings to review the station's performance or to look at the future direction of the station. These were information sharing sessions about programs ideas etc. that the station could possibly get involved in, when Goliath would be present.

[56] Goliath agreed that if he wanted to be excused from doing a show he applied for 'non-provision' of a show rather than filling in an employee leave form. Muller testified that the importance of filling in the form was so the station could make arrangements for a stand-in.

[57] Goliath maintained he was completely financially dependent on the work he did for the station and this was known by Muller, who had mentioned in an email that the SABC was responsible for Goliath's career and 'putting bread on his table'. Muller conceded that all Goliath's income derived from Good Hope FM, but insisted he was still free to enter into other contracts. Although Goliath had renewed his contract for fifteen years, which was a long time, Muller knew of another contractor who had similarly renewed his contract for a period of twenty years. Muller testified that the number of renewals entered into depended on the type of program nature of the show delivered. One reason for continuing to renew a contract might be the specialist nature of the show.

[58] In *State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 ILJ 2234 (LAC), the court cited the distinction made by Paul Benjamin between personal dependence and economic dependence:

“[11] ‘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.’”

(emphasis added)

[59] Obviously, a person who is required to be available to render a service for the length of a working day is one who has given over their capacity to produce to another, as reaffirmed by the LAC in *Member of the Executive Council for Transport: KwaZulu-Natal & others v Jele* (2004) 25 ILJ 2179 (LAC):

“[28] ... A person who makes his capacity to produce over to another is an employee of the other person (see Brassey 'The Nature of Employment' (1990) 11 ILJ 889 at 899 and 935-6 as approved in *Niselow v Liberty Life Association of Africa Ltd* (1998) 19 ILJ 752 (SCA) at A 753J-754A)”

Goliath only gave up his ability to work in competition with the station, or in a way that was inimical to it or his show. He was allowed to pursue other non-competitive pursuits outside of his broadcasting hours. Consequently, he retained a significant degree of economic independence to pursue other work, even if he devoted considerable time to preparation for his slot.

The contract

[60] As mentioned, when determining if there is an employment relationship, the court must go beyond what is contained in the contract, and look at the realities of the relationship. However, this does not mean the contract must be ignored altogether. In this instance great care was taken to ensure that the document would reflect an agreement between the station and the presenter as an independent contractor. This was not simply a matter of form, as discussed below.

[61] In relation to the contract itself Goliath claimed it was his intention to enter into an employment relationship, but the contract was presented as a 'take it or leave it' proposal. Because he was reliant on the remuneration, he asserted he accepted it without alteration. When he was asked under cross-examination why he kept signing contracts clearly designating him as an independent contractor when he believed that he was an employee, he alleged he had raised it many times with Ficks and Muller. However, he could not remember any details of what they had supposedly said in response to him, except that they probably said 'no'. While conceding that the station itself had little discretion over the form of the contract which was issued by the SABC, Muller agreed that that Goliath might have raised the issue of his status as an independent contractor, but maintained he could never have made a commitment to engage with him over employment-like benefits because the appointment of presenters was a completely different recruitment process from that of employees. If there had been such engagements with Goliath, it had not been on many occasions.

[62] Apart from describing Goliath as an independent contractor in detailed and unequivocal terms the contract provided, amongst other things, that:

62.1 the contractor was engaged by the SABC "to render specific services or to perform a particular task/specific program et cetera in return for an agreed contract fee" and the definition of the contractor expressly excluded a person placing his labour potential at the disposal of the SABC (clause 1.1.5);

62.2 the period of the agreement did not relate to permanent employment and if the parties agreed to a further agreement for an additional period the contractor agreed that his status would not change to that of an employee (clause 4.4);

62.3 the services performed by the contractor would be done in consultation, coordination and under the direction of the principal client on the understanding there would be "no supervision and control by the principal client during the course of delivery of the services by the independent contractor". (clause 5.2);

62.4 acknowledging the contractor's media profile might affect the media and engage in advertising and independent promotional activities, subject to consulting with the client before doing so and taking necessary steps to ensure that any other business activities do not conflict with his radio engagement (clause 5.4.2);

62.5 the contractor indemnified the SABC against any damages or loss sustained by it arising from claims by third parties against the contractor connected with his contract with the SABC (clause 10.1);

62.6 the parties agreed that the relationship between them should not be construed as a partnership, employment relationship or joint venture (clause 17.1), and

62.7 the SABC's remedies for a breach of the agreement by the contractor, committed it to refuse him access to the premises and any program pending an investigation into irregularities allegedly committed by him or the determination of a dispute about a breach of contract (clause 13).

[63] The specification of the contractor's work set out in an annexure to the agreement provided that Goliath had to: "present a radio program for the duration of the contract"; "present stand-in programs at the reasonable request of the program manager"; "write and voice a minimum of one show promo a week"; use and promote the stations SMS line, website, Facebook and Twitter sites and initiate blogging activities on the website. The annexure also required him to perform according to accepted broadcasting industry standards and standards or authorities governing the broadcasting industry. For the time spent presenting programs he would receive an hourly fee of R 1696-00. He was required to present stand-in shifts only when available to do so and on the reasonable request of the station.

[64] Apart from the time he had to be at the studio for the program (including 30 minutes prior to its commencement and being available for up to half an hour afterwards) he was also expected to attend certain meetings. In this regard he

was required to "dedicate some time" with various other management staff to discuss promotional material and his role in any promotional activities. He also had to be available for at least one monthly meeting with the program manager to discuss the program and its strengths and weaknesses and to meet with the sales and marketing team of the station or clients on the reasonable request of the station. Lastly, he was committed to make a minimum of 12 "station appearances" on behalf of the station during the contract. If any of those appearances required him to travel and book accommodation, he would be paid for his reasonable expenses incurred as a result. He could not use the media platforms provided by the station to promote his "personal brands". Goliath was permitted to accept tickets, gifts or other items from third parties provided that no promise of promotion was made for accepting them.

[65] It cannot be said that the concrete provisions above were merely an attempt to artificially clothe a typical employment relationship in a different guise. Amongst other things, they described the limits of his commitments to the station and the degree to which his role as a presenter might restrict the extent of other remunerative activities he could engage in. However, those limitations did not bar him from such engagements, nor (outside of the regular times he had to be at the station each weekday, which would not amount to more than twenty hours in a week) was he required to confine such activities only to certain hours or days. The agreement also recognised his right to market himself independently of the station. Goliath's performance of any additional paid presentation work for other programmes of the station was entirely subject to his own availability. Further, in respect of meetings there were limits set to the frequency of his participation. The station could not use normal disciplinary procedures and sanctions available to an employer to rectify any unacceptable conduct or poor performance on his part, and he could not invoke the employee grievance procedure.

[66] Furthermore, throughout the fifteen years Goliath presented the programme, the parties annually re-affirmed that the relationship was one between SABCO and an independent contractor. Despite his extensive legal and knowledge of labour law in particular, he never once attempted to expressly reserve his rights to dispute his contractual status. At best he orally expressed his belief on a few occasions that he was an employee, but never took it further and

acquiesced to the terms of the contract each time it was renewed during the fifteen years he worked for the station.

- [67] In conclusion, it is fair to say that the terms of the contract delineating the parties' respective rights and obligations did set out a substantive legal relationship that is difficult to equate with the typical features of an employment relationship. This is not a case where the terminology of independent contracting terms were artificially grafted onto an employment contract.

Conclusions

- [68] Based on the evaluation above I am satisfied that Goliath was not an employee, but was engaged to deliver a daily show bearing the stamp of his radio personality and within the ambit of the type of programme the station required, subject also to the unavoidable constraints of public broadcasting regulation and commitments to sponsors. The choice of themes or topics for each show was the result of a collaborative process between himself and the station. Goliath was chiefly responsible for the preparation of material for each slot and how it would run. It was expressly acknowledged he could engage in other work and the limitations on the type of other work he could perform were only constrained by the requirement he did not do similar public broadcasting for another station and that his other work did not comprise the image of Nigel Pierce show or the station. Even if he did dedicate most of his time to Nigel Pierce show, there was no evidence he wanted to do other work, and the time he spent on preparation was more likely to have been because he was particularly dedicated and diligent and did not wish to pursue other activities, than because it was a *sine qua non* for a successful presentation. In short, it is more likely the arrangement suited him and he was not itching to do additional independent work. What he had perhaps not reckoned on, despite the regularity of the contract being renewed, was that its renewal was not guaranteed. It is understandable when it was terminated that he sought to assert that his legal status was that of an employee. However, the fact that he never tried to obtain additional work and had got used to a work relationship having the regularity of employment, does not mean it changed its true legal

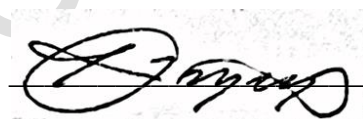
character from that of an independent contractor relationship to one of employment.

[69] Consequently, the arbitrator was correct in finding she had no jurisdiction to entertain his unfair dismissal claim, which was premised on him being an employee.

[70] Accordingly, the following order is made:

Order

1. The application to review and set aside the ruling of the Third Respondent dated 23 August 2019, under CCMA case no WECT 6471-19 is dismissed.
2. No order is made as to costs.



Lagrange J
Judge of the Labour Court of South Africa
(In chambers)