

SOUTH AFRICA / JUDGMENT

Kambule v Commission for Conciliation Mediation and Arbitration and Others (JR 721/10) [2013] ZALCJHB 11; [2013] 7 BLLR 682 (LC); (2013) 34 ILJ 2234 (LC) (31 January 2013) [2013] ZALCJHB 11

COURT

Labour Court Johannesburg

BEFORE

Lagrange

CASE / FILE NUMBER

JR 721/10

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

case no: JR 721/10

In the matter between:

MAJOTA KAMBULE Applicant and COMMISSION FOR CONCILIATION, MEDIATION AND
ARBITRATION First Respondent COMMISSIONER NADIA SITHOLE (N.O.) Second Respondent
KAYA FM 95.9 Third Respondent

Heard: 4 November 2011

Delivered: 31 January 2013

Summary: (Review – jurisdictional issue - existence of employment relationship – principles
applicable – application dismissed).

LAGRANGE, J

Introduction

The second respondent, the arbitrator, issued an in limine ruling in the unfair dismissal claim of the applicant Mr M Kambule, better known by his broadcasting personality name 'Phat Joe'. The in limine ruling concerned the question whether or not Khambule was an employee of, or an independent contractor to, the respondent radio station, Kaya FM95.9 ('the station').

The arbitrator found that he failed to discharge the onus of proving that he was an employee. In reaching the conclusion she appeared to emphasise the following findings. The fact that the station was allowed to veto the content of the morning show which Khambule presented did not amount to supervision and control of his work. She noted also that the program manager had not been attending meetings to discuss the content of the program. Khambule submitted invoices to the station in the name of his company, Njabulo Communitech CC, and was not paid for shows he did not present. No deductions were made from his salary and he earned additional money over and above his normal monthly fee for so-called 'shout outs'. The terms of the contract alluding to 'remuneration' and the like were not decisive factors. In his tax returns Khambule described himself as an independent contractor who received 80% of his income from the respondent. The fact that he did not do other work was a matter of choice and not because he was prevented from doing so. In fact he was entitled to do any other work which did not conflict with the work he performed for the station. He also employed staff in his firm. Even though Khambule had a business card bearing the station's name, wore branded clothing and attended functions and made public appearances outside the hours during which he presented his program on air, this was all merely part of the marketing of his show and himself.

The arbitrator was referred to a number of cases dealing with the vexing issue of how to identify the existence of an employment

relationship, some of which will be referred to below.

The law on the employment relationship

In *Denel (Pty) Ltd v Gerber* (2005) 26 ILJ 1256 (LAC), Zondo, JP, as he was, characterised the task of a forum deciding the jurisdictional question as follows:

"[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 I 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. That cannot, in my view, be

allowed in a case where the duty of the court or tribunal is to determine that which is objectively the position. Indeed, were a court or tribunal faced with such a question to decide it in accordance only with the contents of the agreement between them, then, in a case such as this one, where the decision whether a person was or was not another one's employee goes to the jurisdiction of the court, the parties would in effect be able by their agreement to confer jurisdiction on a court or tribunal which it otherwise does not have or to take away from a court or tribunal jurisdiction that it otherwise has over them. That would be completely untenable and can simply be not allowed because whether or not a court or other tribunal has jurisdiction in a particular matter is, generally speaking, a matter that must be determined objectively and not be based on the say-so of any party or, indeed, of all parties to a dispute.”¹

Because a ruling on a person's employment status is a jurisdictional question, if a party seeks to review such a ruling it can be set aside, on the evidence before the arbitrator, simply on the grounds that it was wrong and not because it was a ruling no reasonable arbitrator could make. The LAC made the distinction between reviews based on reasonableness clear in *Fidelity Cash Management Service v Commission For Conciliation, Mediation & Arbitration & Others* (2008) 29 ILJ 964 (LAC)

*“[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.”*²

(emphasis added)

The standard test for employment has evolved over the years. It finds its latest and most expansive expression in the decision of the LAC in *State Information Technology Agency (Pty) Ltd v Commission For Conciliation, Mediation & Arbitration & Others* (2008) 29 ILJ 2234 (LAC). In that matter the LAC expressed current thinking as follows:

“[10] ...In short, the court in Denel, approached the vexed question of the employment relationship on the basis of the substance of the arrangements between the parties as opposed to the legal form so adopted. That particular judgment has been the subject of legal analysis. See in particular André van Niekerk (2005) 26 ILJ 109, who in turn refers to a most comprehensive and thoughtful analysis by Paul Benjamin in (2004) 25 ILJ 787. Benjamin's contention is that the Denel judgment is congruent with s 213 of the Labour Relations Act which inter alia defines an employee as any other person who in any manner assists in carrying on or conducting the business of an employer. Benjamin (whose article was written before the decision in Denel), notes that the issue of the employment relationship has become crucial to labour law partly because of the concept of outsourcing and because, in many cases, a traditional employer-employee relationship no longer operates in the labour market. He refers in this connection to international standards developed by the ILO and, in particular, to recent conventions which 'show a conscious policy to extend their application to workers not employed in convention[al]

employment

relationships' (at 801).

[11] Benjamin then makes a further useful point in relation to the determination of this question (at 803):

'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.'

[12] For this reason, 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.

[13] These three tests are congruent with the principles in the Denel judgment.” 3

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".

Material factors bearing on the applicant's employment status

The contract between the parties

The parties entered into an 18 month contract entitled “INDEPENDENT CONTRACT AGREEMENT” between the station and Khambule, in which Khambule was referred to as ‘the radio personality’. The provision dealing with the services Khambule would provide read:

"5 SERVICES OF THE RADIO PERSONALITY

5.1 radio personality's services shall include and entail:

5.1.1 presenting and producing a radio program Monday to Friday from 05:00 hours to 09:00 hours excluding public holidays.

5.2 the radio personality undertakes to:

5.2.1 abide by broadcasting requirements laid down by the station management, which may contain authorised editions or adjustments as may be brought about from time to time;

5.2.2 perform services in accordance with the instructions which may be given to the radio personality from time to time by the program manager of the station;

5.2.3 ensure that performance of the services shall not contain anything defamatory or anything calculated to bring (sic) the station into disrepute;

5.2.4 ensure that the execution of services does not contain any unauthorised advertisements or promotions;

5.2.5 adhere to the station security rules and other station regulations;

5.2.6 ensure that the radio personality does not make any statements or give interviews to any form of media whether print or electronic, concerning the station without obtaining prior written approval of the station; and

5.2.7 attend all meetings deemed necessary by the program manager and/or station management;

5.2.8 present either in the station studio and/or from outside broadcast unit, at the sole discretion of the station;

5.2.9 attend all functions arranged by the station, upon reasonable notice and provided that the professional schedule of the radio personality permits it if it should be outside the hours hearing stipulated;

5.2.10 the radio personality shall take to read and respond to all communications from all stakeholders to ensure effective communication channels are maintained;

5.2.11 actively promote and sell the station to advertisers under the terms of a separate agreement whose basic terms are outlined in and it should be.

5.2.12 be responsible in conjunction with the digital content manager and show producer for content for the higher website, downloads, blog or other digital platform content the show may produce."

Other provisions in the contract reinforced his obligations regarding broadcasting regulations and publication of defamatory

material by requiring him to warrant that he would not knowingly air any material which might be in breach of such obligations.

On request the station was obliged to provide a written outline of human resource procedures that would apply to the radio personality

and it would provide all technical support necessary for him to fulfil his obligations, subject to the proviso that he would have to pay for lost or damaged equipment. The station further undertook to provide him with written notification as soon as possible of any meetings or functions requiring his presence outside of the hours during his broadcast and undertook to provide him with minutes of any meeting taking place during his broadcast to keep him informed of what transpired in the meeting. The station also undertook to try to provide an annual budget for promotion and production within the station budget and to budget separately for the breakfast show.

Under clause 7 headed "Remuneration and Conditions of Employment" his remuneration was described as a total cost to

company "salary" paid monthly "as a consideration" for the services referred to above. The clause also indicated an intention for the station to develop a relationship with Khambule for up to 5 years with annual "salary reviews". It further undertook to renegotiate an annual contract based on audience and show revenue increases. The station reserved the right to deduct employee taxes and other statutory deductions that might apply to him, save that if the station was exempted from making such deductions by SARS, the tax liability would fall on Khambule. It also undertook to reimburse him for all expenses disbursements and costs reasonably incurred with the approval of the station in the course of discharging his duties under the contract. Khambule was entitled, but not obliged, to join the station's medical aid scheme but the full cost of membership would be for his account.

If Khambule required time off from presenting the show he was obliged to give reasonable notice to the station and had to present

a "comprehensive" medical certificate if he was unable to present the show on account of illness. His failure to appear on the program would disqualify him from receiving fees vote for so long as he was absent for whatever reason.

Clause 9 of the contract read:

"9 RIGHTS OF BOTH PARTIES

9.1 In respect of the radio personality:

9.1.1 the radio personality is self-employed and is not an employee of the station. Neither party shall represent itself as an agent, representative, employee, partner of the other, another party shall incur any liability whatsoever for the other.

9.1.2 the radio personality may have other lawful business interests, which may be pursued out of our stipulated for the rendering of services in terms of this agreement. Notwithstanding this acknowledgement, the radio personality agrees that her services related to such business interests may not conflict with the station's image as projected in the program.

9.1.3 the radio personality shall be entitled to work for organisations which transmits signals via a public address system, provided that the station shall have first call on radio personalities time and services in the event of a conflict existing between such work and the radio personality services in terms of this agreement."

Apart from these limitations on the applicant's freedom to do other work, he was also subject to a restraint of not performing any work for other radio stations in southern Africa or for any other business competing with the station. He was entitled to retain copyright in any concept involving his name that was clearly identified with his independent work in media business outside of the station's business, and for recorded material made privately, outside of the scope of the agreement, which the station agreed to use or purchase from him.

In terms of one provision, each party was required to give three months notice to the other of termination of the agreement.

Confusingly, another provision of the contract permitted either party to terminate the agreement on one calendar months notice, save that it seems it was intended in terms of clause 14.5, a portion of which is missing, that any misconduct which would justify summary dismissal at common law. In terms of clause 13.1, the parties were entitled to call on each other to remedy any breach of the agreement within 10 days or such extended period that might be necessary to remedy the breach, where after a party could terminate the agreement on notice if the breach was not rectified. In the stations founding affidavit before the CCMA it was said that the one month notice provision was the operative one and the 90 day version was an earlier draft, though this was not apparent from the copy of the contract appearing in the record before the court. It must be said that the various termination and notice provisions appear partly incomplete and lack coherence and consistency, making the true intention of the parties difficult to discern.

Clause 15.4 of the contract provided that any dispute between the parties about the interpretation or effect of the parties rights and obligations under the agreement or any matter arising out of it would be decided by private arbitration in terms of the Arbitration Act 42 1965. It seems the effect of this provision was not something that was raised as an in limine point, and I will confine myself to the jurisdictional ruling which is the subject of the review.

Other material features of the relationship

The collapse of the relationship was precipitated by letter dated 19 January 2009 from Neil Johnson the content manager of the station. In the letter entitled "Morning Show Issues" he stated that the letter served two purposes: firstly to put Khambule on terms and to record that any further material breach like the ones described below would result in summary termination of service contract and secondly to gauge Khambule's responses to the issues which would affect

the stations decision whether to renew the contract or not. At the end of the letter the points out that: "...were you an employee, [this letter] would be tantamount to a final warning and given that you are a contractor, you are hereby placed in mora and if there is a further material breach of the same or similar nature to the issues raised herein above then you may expect the termination or at very least non renewal of contract." The letter listed the complaints, which might usefully be summarised under the phrase "gratuitous smut, sexual innuendo and partisan politicking", a term that the station used to describe Khambule is alleged breaches of broadcasting legislation. Certain complaints were particularised such as a promotion for a brandy in which finalists were made to eat cat food, much to the annoyance of the sponsoring client. In another promotion contestants were dared to drink the presenter's urine.

In station further complained that he failed to maintain a balanced outlook and criticised his frivolous new year 'prediction'

that the president would be raped, and his handling of the killing of the ex-Speaker of Nelspruit in which he suggested that the merger was a political killing which the ANC was responsible. The station also raised its concern that there was a perception that he was too 'pro-COPE'. This complaint was prefaced by a reminder to Khambule that government institutions spent between seven and ten million rands annually in advertising on the station.

While stressing its support for political debate on the program, management and wanted Khambule to be more even handed in his attacks on political personalities. The letter also mentioned a more minor gripe that Khambule would not play the so-called "business classic" at the end of the morning business report.

Khambule made a detailed, eloquent and voluminous reply to these complaints. He ended the letter querying why it was being

characterised as a final warning when he had been led to believe that three written warnings were the norm. The final paragraph of his response reads:

"Given that we disagree with regards to the concerns tabled in your letter, I hereby request that you formally withdraw the

concerns in your letter and we resolve the issue through dialogue, or we refer the concerns in your letter arbitration in terms of my service agreement and arbitration act 42 1965, to bring formal finality to these concerns."

At the arbitration hearing both parties presented extensive heads of arguments and the matter was argued on the allegations set out in the parties' respective affidavits. In the affidavits filed in the review application some of the factual claims were expanded on, or amended, but it is the factual material before the arbitrator which must be considered.

The applicant's case

The principal allegations marshalled by the applicant in support of its contention that Khambule was an independent contractor are set out below. Apart from being entitled to do other work, Khambule was the CEO of Phat Joe Holdings (Pty) Ltd and sole member of Njabulo Communittech CC ('the corporation'), and invoices were issued by the corporation for the program services provided by Khambule. VAT was added to the program fees in the invoice. Khambule had declared to SARS that the Closed Corporation did not receive more than 80% of its income from the station. The corporation also employed three other persons, which the station claimed did not work for it. Khambule did not dispute the last mentioned allegation in his answering affidavit before the CCMA, though he later maintained that the persons engaged by his firm had been used to develop material for the program he presented at the station. Other than attending pre- and post production meetings to discuss the show, Khambule was free to do as he wished outside the broadcasting hours of 05h00 to 09h00. For this he received a fixed monthly fee which was not specifically linked to the actual hours he worked. The station emphasised that it was the provision of the program which was the primary obligation of Khambule. He determined the content of his program subject to compliance with the broadcasting regulatory regime. Further, Khambule pursued other commercial interests of his own "such as a television licence and mining rights", a claim which Khambule did not dispute in his answering affidavit.

Khambule and the station had entered into a third-party agreement with a property leasing company in terms of which, in exchange for advertising by the station, Khambule was given rent-free accommodation in a furnished apartment, whereas no other employees

received a benefit of this nature. Khambule was also the beneficiary of a unique arrangement enjoyed by no other employee of the station in terms of which he was allowed the free use of a Cadillac as part of a branding exercise, which complemented his on air persona.

Lastly, the station due attention to features of the contract between the parties and pointed out that in his reply to the

stations letter of complaint, Khambule did not dispute the statement that he was an independent contractor.

Khambule's case

Khambule presented his evidence under the heading of various tests which had been used to determine the existence of an employment

relationship. Thus, he maintained that he worked under the control and direction of the respondent. In this regard he cited his fixed working hours, the control of material aired on the show, and that he was disciplined. He maintained that his contract confirmed this point because he had to report to the program manager, abide by broadcasting requirements and station regulations laid down by station management. He also cited the restraint which prevented him from rendering the same services to other radio stations or businesses competing with the station and clause 9.2.2 of the contract in terms of which the station retained its "prerogative" to change program content "in conjunction with the radio personality". He also cited the fact that

the required the station's permission to take time off his broadcasting schedule and the fixed program hours as indicative of the station's control over him.

Khambule interpreted the housing and vehicle benefits he received as company benefits which showed that he was part of the station's

organisation. He also saw the integration of his radio personality in the station's marketing campaigns as another indication of this. At work he was provided with a workstation and worked in conjunction with a team of employees of the respondent dissociated with the production of the program. The station pointed out that a number of the announcers he worked with were also contractors like himself. He also had an e-mail address at the station and was given Kaya FM business cards which described him as a presenter.

Although his broadcasting hours consisted of 20 hours a week he claimed that on average he would work between 35 and 50 hours a week on the program. In practice he worked exclusively for the station and was totally dependent on the income he received from it.

Khambule also pointed out that the station provided him with all the technical and broadcasting equipment required for him to present his program and that he was reimbursed for expenses incurred in discharging his programming duties. Moreover, in the budget for the program the station provided the necessary financial support to produce the show.

Khambule relied too on the reference in his contract to remuneration and conditions of employment as indicative of the fact that he was an employee who received remuneration and the station's reservation of its right to deduct employee tax was another factor supporting this contention.

Analysis

The employer's right to supervision and control

In his letter responding to the stations complaint, the applicant points out that the programming manager attended planning meetings

and contributed during the first three months of the contract but thereafter only attended approximately 20% of the meetings. It is also apparent from the retrospective nature of most of the stations complaints that it concerned how far Khambule had pushed the boundaries of his program content in exercising his discretion, rather than his failure to comply with direct instructions on the content of each broadcast. The fact that he was subject to broadcasting regulations and the common law of defamation is a factor that would affect employee and contractor alike engaged in public broadcasting activities. It is also noteworthy that clause 9.2.2 of the contract concerning changes in program content required such changes to be done 'in conjunction' with Khambule, which is not something one would expect in a relationship of subordination.

The fact that the station's contract had with Khambule as a radio personality was clearly because it wanted to harness his unique style of presentation and edgy program content to its station profile. It was only when it believed that Khambule had pushed the proverbial envelope to breaking point that it sought to reassert parameters of what was acceptable. 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.

Integration in the employer's organisation

In the context of making public broadcasts as a business, it is difficult to imagine how a program broadcast could be delivered with out a degree of cooperation between all the individuals whose efforts must be coordinated to make the program presentation

possible. In relation to the program itself, clearly Khambule was an integral part of that program team, but beyond his commitment to the program he was free to pursue his interests independently without reference to the organisational structure or hierarchy of authority within the station.

Khambule was a radio personality presenting his program as part of the station's offering. In that capacity, having an e-mail address of the station was a reasonable ancillary tool to facilitate communication with him on matters pertaining to his program. He never claimed it was his exclusive e-mail address and in my view this is a relatively trivial factor in determining the substance of his relationship with the station. The same goes for the business cards, which was also part of the way in which the station sought to benefit from his personal brand, and was part of a marketing strategy rather than a factor determining the absorption of all Khambule's remunerative activity in the business of the station. The fixed nature of the program hours is also an inescapable incident of regular live programming. How Khambule prepared for the program how much time he spent himself on preparation and how much he relied on the services of others for this was a matter of his choice.

Similarly, the fact that the station provided the technical infrastructure necessary for production of the program, is little

different in my view from an airline using freelance pilots providing the aircraft which they fly. It is true that if Khambule

had produced the program in his own studios, that would have been a clear indication of his organisational independence, but the absence of that does not mean that Khambule's economic activities were all an integral part of the station's business. It is noteworthy in this regard, that Khambule retained his own staff who were not under the supervision or direction of the station nor were they part of its organisation, or in its pay.

In this regard, it is also noteworthy that even though the applicant was entitled to claim disbursements and expenses incurred in performing his duties, his closed corporation was registered for VAT and VAT invoices were issued for his work. This would have entitled the corporation to claim VAT deductions for its business-related expenditure. The fact that Khambule's services to the station were linked to the sale of services by the corporation is also indicative that his work was part of the corporation's business activities.

Economic dependence

Khambule maintains that he was solely reliant on the remuneration received from the station, but on the other hand portrayed to SARS that it did not exceed 80% of the income to his Closed Corporation. Khambule also maintained his interest in the Closed Corporation and his company while engaged to produce the program. The point made by Benjamin alluded to above is pertinent in this regard. Khambule maintained a business profile as an entrepreneur in his own right and in terms of his contract only gave up his ability to work in competition with the station. What he brought to the station was his services as a radio personality, not all his creative and commercial capacity, which he remained free to use in other non-competitive pursuits outside of the broadcasting hours. The more efficiently he used his own time for preparing the program or the more he paid others to do so, the more time he could dedicate to other economic pursuits.

It may well be that the applicant did not pursue other remunerative opportunities with any enthusiasm and relied on his income from the contract with the station, but he never claimed he was prevented from doing so. I am satisfied that he retained sufficient

independence to do other work in the media field or elsewhere.

Conclusion

In the circumstances, I believe that Khambule exercised considerable discretion over the content and manner of presentation of his program subject only to broad parameters and the legal regulatory constraints of broadcasting. Moreover, any fundamental change in the content of his program was something to be done in conjunction with himself. He also retained sufficient freedom of contract and a discretion as to how he used his time outside of broadcasting hours to pursue other commercial activities and the restriction on competing with the station did not sterilise his capacity for engaging in other gainful activity. The extent to which he worked in the organisational context of the station was limited to what was strictly necessary for the purposes of producing and broadcasting his program. Any other economic activity he pursued he could do as an individual or under the auspices of his own corporate entities.

Consequently, I believe that a consideration of the relevant criteria, shows that Khambule was an independent contractor rather

than an employee of the station.

Order

Accordingly, the following order is made:

The application to review and set aside the ruling of the second respondent dated 1 February 2010, under CCMA case number GAJB

33319-09 is dismissed.

No order is made as to costs.

R LAGRANGE, J

Judge of the Labour Court of South Africa

Appearances:

For the applicant: B Marques of Fluxmans Attorneys

For the third respondent: J D Crawford of Crawford and Associates Attorneys

1At 1264-5

2At 996

3At 2238

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