

SOUTH AFRICA / JUDGMENT

**Mokoena and Others v MEC Gauteng  
Department of Health (J352/16) [2016]  
ZALCJHB  
98; (2016) 37 ILJ 1445 (LC) (18 March 2016)  
[2016] ZALCJHB 98**

## COURT

Labour Court Johannesburg

## BEFORE

P Benjamin

## CASE / FILE NUMBER

J352/16

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

## JUDGMENT

Case no: J 352/16

DATE: 18 MARCH 2016

Reportable

In the matter between:

MOKOENA WILLIAM BUTIE.....First Applicant

KHUKHE BOIPELO JOY.....Second Applicant

MBOTSHELWA ZOLEKA.....Third Applicant

MAHLANGU ANNAH.....Fourth Applicant

TSHEMESE NOSICELO.....Fifth Applicant

And

MEC GAUTENG DEPARTMENT OF

HEALTH: MAHLANGU QEDANI DOROTHY N.O.....Respondent

Heard: 11 March 2016

Delivered: 18 March 2016

BENJAMIN, AJ

## Introduction

- [1] The five Applicants in this case are all engaged as community health workers (CHWs) by the Respondent, the Gauteng Department of Health. They currently provide services to the respondent in terms of fixed term contracts that expire on 31 March 2016. At the heart of this case is a dispute over whether these contracts are contracts of employment or contracts for the provision of services by independent contractors.
- [2] The Applicants contend that they are employees of the Respondent, as contemplated by the Labour Relations Act, 66 of 1995 (“the LRA”). The Respondent, on the other hand, disputes this characterisation of the relationship. It argues that they are independent service providers who provide services as volunteers whom, consequently, fall outside the statutory definition of an employee.
- [3] If the Department is correct in this regard, the Labour Court has no jurisdiction to entertain this claim and it must be dismissed. If they are employees, they are entitled to institute proceedings to protect their rights as employees in terms of the LRA. The extent to which the Labour Court has the jurisdiction to hear this matter, raises a further issue of whether this matter falls within the exclusive jurisdiction of the CCMA or a Bargaining Council.
- [4] The applicants sought in their notice of motion an additional declaration that they are employed as employees on an indefinite basis, as their employment on fixed term contracts could not be justified in terms of the provisions of section 198B(4) which specifies the circumstances allowing the employment of lower paid workers on fixed term contracts. That argument was not pursued in the hearing because it raised conflicts of fact on the papers and the applicants’ counsel indicated that this issue would, if necessary, be referred to another forum for determination.

## Background facts

- [5] The five Applicants have been employed in terms of fixed term contracts with the respondent since 2013. They were initially employed on a six -month contract followed by two one-year contracts. In other words, their contracts have been renewed on two previous occasions. All of the Applicants have received training on one or more occasion from the Respondent. Their current contracts expire on 31 March
2016. While there are slight differences in the circumstances of their employment, these do not affect the issue at stake in this case.

- [6] The Applicants are among 9181 CHWs engaged in Gauteng. CHWs were first employed in the late 1990s in response to the HIV-AIDS crisis. Until 2012, the CHWs were employed by non-profit organisations (NPOs) who received funding from the Department to remunerate them. This model became increasingly unworkable, occasioning extended work-stoppages. The factors contributing to this included widespread corruption. This included the funding of NPOs operated by Department officials and non-payment or underpayment of CHWs.
- [7] As a result of these very substantial problems, the CHWs approached the Department with a request that they be paid directly by it. This led to the Department reaching an agreement with the Finance Directorate at the Gauteng Provincial Government that the CHWs would be issued with vendor numbers in order to facilitate direct payments to them. This arrangement was implemented with effect from September 2013 and at this time CHWs, including the five applicants, concluded individual contracts with the respondent. Their current contracts expire on 31 March 2016.
- [8] When the Applicants returned to work on 4 January 2016, they were asked to provide the Respondent with their identity documents, qualifications and bank statements for the last three months. An advertisement in the press on Sunday, 10 January 2016, invited individuals to apply to be volunteers serving as health counsellors, CHWs and peer educators. In their founding papers, the applicants contend that the requirement that they reapply for their positions is unlawful and unfair.
- [9] The Respondent states that one of the reasons for issuing the request for re-applications was to ensure that all CHWs have the minimum

qualifications of a grade 9. In addition, the respondent states that a number of persons who have been employed as CHWs are convicted

criminals, including some who have been convicted of serious offences such as rape and robbery, who have used their status as CHWs to prey on vulnerable members of society such as the elderly and child headed households. The Department also states that there are nurses, in its employment, who are registered as CHWs. These individuals have been able to work as CHWs because there have been inadequate vetting procedures in the engagement of CHWs, particularly when compared to the employment of individuals within the public sector as employees.

#### Urgency

- [10] The applicants brought this application on 19 February 2016. The respondent contends that the applicants did not act with appropriate

haste in instituting these proceedings. It is, therefore, necessary to examine the steps that the applicants took between learning of the advertisement and instituting these proceedings.

- [11] One of the applicants saw the advertisement in the press on 10 January; the others state that they learnt of the advertisement by 16 January

2016. There was no uniform method of communication across the Department. However, officials did bring the requirement to re-apply to the attention of CHWs. The applicants attended a meeting of the Gauteng Community Health Forum ('Forum') on 23 and 24 January at which three of the applicants were deputed to meet with a representative of the respondent on 2 February to enquire about the implications of the advertisement for their continued employment.

[12] At this meeting, a representative of the respondent advised the three applicants present that the respondent had requested and accepted

applications from both current CHWs as well as members of the public and that a decision would be taken in due course as to which of the applicants were disqualified from continuing to be CHWs. Accordingly, none of the applicants, or any other CHW, was guaranteed a further contract.

[13] The Forum is an organisation representing CHWs, the establishment of which is currently being formalised, and which has some 700 members. According to the Respondent, it is one of two groupings that represent CHWs. At the meeting of 23 and 24 January 2016 the interim committee of the Forum also decided to seek legal assistance. They approached an NGO, Khanya College, to assist them. In the first week of February, senior counsel was contacted and on 12 February a leading firm of attorneys undertook to take the matter on a pro bono basis. This led to the sending of a letter of demand on 15 February 2016 and to the launching of an urgent application on 19 February.

[14] The five applicants all completed applications as required by the advertisement of 10 January 2016. They are not members of a registered trade union. The individual Applicants are low paid workers who are engaged on terms that are by no means clear. They sought clarity as to whether their contracts would be extended on a third occasion but received no assurances either as individuals or on behalf of the CHWs as a group. During the period after learning of the requirement to reapply, they met as a collective, contacted and

met with representatives of the Department both in their individual and collective capacities and sought and obtained legal representation. They did so while continuing to work as CHWs. In the circumstances, they responded with reasonable expedition in the period after they learnt of the requirement to re-apply application and the lapse of some 40 days between the notice of advertisement and the launching of the application is not a reason for non-suiting them on the basis of lack of urgency.

[15] The respondent further argued that the issue underlying this application is the question of whether the individual applicants are employees of the respondent. This, they contend, is not a new issue as they have already been engaged on this basis for almost 30 months. While this is correct, there is no doubt that the trigger for this application was the advertisement of 10 January 2016 and its implications for them. The respondent pointed out that it had only eight days to prepare its answering affidavit which was unreasonably short in the circumstances. However, the Department not only filed an answering affidavit but in addition a supplementary affidavit that was served on the morning of the hearing and which

provided additional background on the system of CHWs. In consequence, the respondent's averments were placed fully before the court. In the circumstances, the degree of urgency with which this application has been brought was justified and it is appropriate the Court should deal with the merits of this very significant issue. Had they not proceeded urgently, there is no prospect that the matter could have been heard before 31 March 2016.

Are the applicants employees?

[16] In terms of section 213 of the LRA, an employee is defined as –

‘(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

(b) any other person who in any manner assists in carrying on or conducting the business of an employer.’

[17] In evaluating whether the applicants in this case are employees, I will utilise the approach followed by the Labour Appeal Court in the well-known decision in *State Information Technology Agency (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others (SITA)*[1] and applied on numerous occasions subsequently.[2] In that case, the LAC held that there are three “primary criteria” for determining whether a person is an employee. These are:

1. an employer’s right to supervision and control;
2. whether the employee forms an integral part of the organization with the employer;
3. the extent to which the employee is economically dependent upon the employer.

[18] The presence of any one of these three factors will generally be sufficient to establish that the person is an employee.[3] The identification of these primary criteria does not preclude an employee relying on other factors associated with the “dominant

impression” test.

[19] The working arrangements of the CHWs are not subject of any significant contention between the parties. Where they differ is what inferences should be drawn from these facts. CHWs report at a clinic of the Department at 8 am on each working day and are required to sign an attendance register. After reporting for duty, they may be assigned specific tasks by the team leaders who are nurses based at a primary health care facility. In addition, the team leader provides them with some of the materials that they require to carry out their duties. They then proceed into the community in which they are working to perform their duties.

[20] The duties of the CHWs include:

1. household registrations – each CHW must target 270 households to visit and do follow up visits at which primary health care is provided;

2. follow-up visits after household registration;
3. anti-and post-natal care and supervision;
4. care for children under five;
5. adherence support for patients on strict medical resume such as for TB and HIV – AIDS;
6. birth bathing;
7. tracing of patients that have stopped coming to the clinic and taking their medication;
8. health talks;
9. sharing promotional and campaign material or messages issued by the respondent and other government departments;
10. referring people in need of assistance to the clinic, social services or home affairs.

[21] CHWs are required to complete household registration forms and household tickets sheets as part of their duties. The duties of CHWs end at 2 pm. At that time, they are required report back to the clinic where they are based and to complete file the forms recording the work that they have done for the day. These forms are kept by the team leaders at the clinics and are monitored and checked by the team leaders. These forms are submitted to the Respondent and it is on the basis of these that their stipends are calculated. The team leaders monitor and take steps to improve performance by CHWs. There is some disagreement between the parties as to the manner and extent to which the Respondent exercises discipline in respect of CHWs; I do not propose to resolve that on the papers as it is not decisive in the light of the extent to which the working arrangements are common cause.

[22] The CHWs are employed in terms of a contractual arrangement headed “contract to volunteer as a community health worker”. The contract consists of two parts: the contract itself and a service level agreement (SLA) between the respondent and the CHW which is incorporated into the contract. Both the contract and the SLA specify four deliverables that the CHWs are required to fulfil –

- i. targeting individuals and households;
- ii. submitting monthly plans and reports;
- iii. performing other duties at other places that may be reasonably required by the Department from time to time;
- iv. reporting to an NGO to which the CHW is assigned.

[23] The contract specifies that these services are provided to the Respondent. In return for performing these services, the CHWs receive

a stipend. This is currently R 2500 per month for CHWs classified as lay counsellors and R 2263 per month for care givers. This has remained unchanged since January 2013. CHWs are granted annual leave; they are required to take some of this leave over the December-January holiday season. While the purpose of the SLA is to specify matters pertaining to the “services” provided by CHWs, it repeats the deliverables specified in the contract, albeit it stipulating the requirement of the first deliverable (targeting households and individuals) in greater detail.

[24] The language of the contractual arrangements articulates two different grounds for excluding CHWs from the ambit of an “employee”.

On the one hand, it seeks to portray them as volunteers who are performing work that they would otherwise do without pay, but for

which they are receiving a stipend. The stipend it claims is paid in order to enable them to perform this service, which is rendered to the NPOs rather than the Department.

[25] There is no magic in describing payment as a stipend. At the broadest level, employees are workers who work for an employer for

remuneration other than as an independent contractor. The CHWs work for the Respondent and are, in return for doing so, paid. Irrespective of what that payment is called, it falls within the statutory definition of remuneration.[4]

[26] The contract further portrays them as service providers who fall outside the definition of an employee on the basis that they are independent suppliers of services. Again, this characterisation cannot alter the nature of the work performed. The notion of deliverable is presumably used to avoid an implication of employment. However, it is evident that they remain employees who have placed their capacity to work at the disposal of the respondent. The manner in which the deliverables are framed means that, like other employees, they are obliged to comply with reasonable and lawful instructions to do work required by the respondent.

[27] The respondent accepts that it does exercise control over the activities of CHWs. It justifies this control on a number of grounds.

These include the fact that this is required to implement a process of primary health care re-engineering as well as the fact that this is necessary to secure its investment in the project. It points out that this is necessary in order to ensure that they perform the functions and that CHWs who are not reporting for duty are not paid. The issue of whether they receive payment is determined on the basis of the registers that the CHWs complete at the start and end of their working day.

[28] The presence of control in a bureaucratic sense does not determine the issue of whether the CHWs are workers or independent contractors. The Labour Appeal Court has held that an employer may exercise a measure of control over independent contractors.[5]

[29] The key question, as framed by the LAC in the SITA case, is whether the working activities of the CHWs are subject to control and supervision by the employer or whether they perform these activities as independent contractors. I am in no doubt that CHWs are not independent contractors. While they may spend the majority of the working day away from the clinics and visiting the homes of individuals in the community, this does not amount to the performance of unsupervised work on an independent basis. They are directed in their activities by the team leaders who are based at the clinics.

[30] The respondent further points to the fact that the applicants voluntarily entered into the service provider contracts and that they are contractually bound to this characterisation of their employment relationship. The labour courts look beyond the description of the contractual status contained in contracts and examine the reality of the working relationship; this approach has led the court to holding that individuals who have accepted that they are employees falling outside of the LRA are, in fact, employees.[6] While the contract describes the CHWs as service providers, it does not have an express ouster of the jurisdiction of the LRA. The

respondent, in its argument, relied on the fact that there is a dispute resolution procedure in the contract. However, this merely

provides for mediation between the Department and a CHW hosted by the NGO in the event of disputes arising. It makes no mention of how disputes that cannot be resolved through mediation will be resolved.

[31] A further argument that the respondent raises is that the primary purpose of the CHW scheme is to provide training to community members to raise the standards of primary health care within a community and not job creation. It, therefore, distinguishes the CHW scheme from public work programmes. The fact that training may be the major goal of contracting CHWs does not have the consequence of removing them from the realm of employment, as the provision of training is usually an indicator of employment rather than independent service. It is noteworthy, in this regard, that workers that are employed in terms of learnership agreements under the Skills Development Act, 97 of 1998 are classified as employees employed on fixed term contracts and receive the protection of labour law for the duration of their

contracts. If the goal of employing CHWs is indeed to provide training, this would be a justification for employing CHWs on a fixed

term contract and for not renewing the contract of individuals after a certain period. However, it is not a justification for refusing to classify them as employees.

[32] The respondent also points out that it has to obtain funding on an annual basis to fund the employment of CHWs. These funds come from the Comprehensive HIV and AIDS Conditional Grant for which the respondent is required to submit an annual funding proposal in accordance with governmental budget cycle to the National Treasury. The

contracts of CHWs are synchronised with this funding cycle. The applicants, on the contrary, adopt the view that the funding comes from the approved budget of the Department.

- [33] The necessity for obtaining funding in terms of a budget cycle is not unique to this project and is applicable to many categories of workers, within both the public and private sectors. Again, the requirement to obtain funding in this manner may be a justification

for the employment of workers on fixed term contracts that coincide with the funding cycle; however, it does not justify classifying such workers as not being employees. Likewise, the fact that CHWs are not provided with PERSAL numbers does not assist the respondent to show that, objectively, they are not employees.

- [34] Underlying the respondent's submissions is an argument that the registration of CHWs as service providers with the Department was introduced under considerable pressure as a result of the problems associated with routing payments through NPOs, the resulting

dissatisfaction among CHW's and the negative impact that this had on the provision of primary health care services. While this may be an accurate reflection of what occurred historically, it is not a justification for their continued status as service providers when their work clearly falls within the scope of the definition of an employee.

- [35] The respondent argues that it never intended to contract with the CHWs as employees. However, I accept the counter-argument by the applicants that the issue of intention is not relevant in determining whether they are employees. Their status must be inferred from an objective evaluation of the work relationship. As the factors referred to above indicate decisively, the relationship between the CHWs and the Department is one of employment.

- [36] In the light of my conclusion in this regard, I do not propose to deal with the second and third aspects of the SITA test in any detail. I would indicate that the documentation provided by the Department does indicate very strongly that the

activities of the CHWs are central to the implementation of the Respondent's commitment to primary health care and that the

functions that they perform are integrated into its organisation. While, the applicants did all indicate that they were all

economically dependent on the earnings from their work as CHWs, the situation of other CHWs may differ according to whether, for

instance, they have other employment.

- [37] It can also be argued that there is a good public policy argument for the employer to impose the controls inherent in public sector

employment on CHWs for example. As indicated previously, the respondent states that there are criminals utilising the CHW system

for their benefit and attributes this to the fact that the vetting of persons to be engaged as CHWs is not as strict as that applicable to public service employees. It states that the need to exclude these persons from the schemes is an argument why the Court should not direct the CHWs are employed indefinitely. Although there is no indication of the extent to which this has occurred, the fact that this problem has arisen is an important motivation why CHWs should be exposed to a greater level of scrutiny in order to protect the public as their status as CHWs provides them with access to the homes of members of the public. Declaring them to employees would not detract from this.

Was the requirement that the applicants reapply for their positions unlawful?

- [38] The applicants contend that the advertisement of 10 January 2016 in which current CHWs required to apply for reappointment in their positions was both unlawful and unfair. They seek a declaration to this effect as well as a direction that the respondent withdraws this instruction. Clearly, this court has no jurisdiction in these proceedings to declare that the instruction was unfair; such a claim could only be made in unfair labour practice or unfair dismissal proceedings.
- [39] As stated, the primary reason for issuing the request for re-applications was to ensure that all CHWs have the minimum qualifications of a grade 9. In addition, the respondent was seeking to identify criminals using their status as CHWs to prey on vulnerable members of society such as the elderly and child headed households, and there are nurses in its employment who are “moonlighting” as CHWs.
- [40] As indicated, the applicants initially contended that this court should direct that they are employed on indefinite contracts. While the Applicants do not seek a ruling on this issue in these proceedings, they do persist with the argument that the requirement to re-apply for their positions was unlawful. At best for the applicants, they are employed on fixed term contracts. It was argued that the by issuing the requirement for the CHWs to re-apply for their posts, the Department was refusing to renew contracts on account of its operational requirements and, therefore, the employer should have followed the procedures for dismissals by reason of the employer’s operational requirements in section 189. The refusal or failure to renew a fixed term contract may amount to a dismissal in terms of section 186 (1)(b) of the LRA, if the employee had a reasonable expectation of a either renewal of the contract or indefinite employment, on the same or similar terms. However, this does not have consequence of bringing section 189 into play.
- [41] The respondent has not advised any of the applicants that their contracts will not be renewed. A failure by the employer to reappoint any of the current CHWs may well amount to an unfair dismissal. However, that case will depend on the individual circumstances of individual CHWs including their qualifications, other employment, relevant criminal records and whether they can demonstrate a reasonable expectation of renewal. At this

stage, none of the applicants have been dismissed. As no dismissal has occurred at this stage, I cannot rule on this issue. In addition, and any claim of fair dismissal would have to be referred for conciliation in terms of the LRA.

[42] The Applicants argue that because their contracts have been extended on two previous occasions, they have a reasonable expectation of a further renewal. That may well be true. It is highly probable that an applicant who has the requisite qualification and who does not suffer from the other barriers to re-employment (e.g. a criminal record or full-time employment within the Department) has reasonable expectation of employment in terms of a further contract. However, that does not prevent the employer from taking steps to ascertain that information nor does it compel the employer to commence a section 198 process before the contracts expire.

[43] If the request to re-apply were set aside, the respondent would not be able to rely on the information it had obtained through the

applications for renewal. The information in these applications should allow the respondent to ensure that those CHWs who are offered

further contracts have appropriate qualifications for the position and are otherwise appropriate for employments as CHWs. It would not be in the interests of either the Department, CHWs as a whole or the communities served by CHWs for the Department, to be prevented from so doing.

[44] The issuing of the notice contained in the advertisement of 10 January 2016 does not violate any legal provision binding on the respondent and, accordingly, there is no basis for setting it aside as being unlawful.

[45] Accordingly, this aspect of the application must fail.

[46] In the light of the foregoing, the applicants are declared to be employees of the respondent, as contemplated by the Labour Relations Act, 1995.

[47] The applicants were represented on a pro-bono basis and did not seek any costs in the event that the application succeeded. Likewise, the representatives for the respondent did not seek costs. Accordingly, no order as to costs is made.

#### Order

1. The applicants are declared to be employees of the respondent, as contemplated by the Labour Relations Act, 1995.
2. There is no order as to costs.

P Benjamin, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate T Bruinders SC and Advocate H Gray

Instructed by: Werksmans Attorneys

For the Respondent: Advocate B Metu

Instructed by: Mdlulwa Nkuhla Attorneys

- [1] (2008) 29 ILJ 2234 (LAC) at para 12.
  - [2] See, for instance, the decision of Van Niekerk, J in Pam Golding Properties v Erasmus and Others (2010) 31 ILJ 1460 (LC).
  - [3] SITA at para 12.
  - [4] Remuneration is defined in the LRA as "any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person, including the state"
  - [5] Phaka and Others v Bracks and Others [2015] 5 BLLR 514 (LAC); (2015) 36 ILJ 1541 (LAC) at paras 33-34, where the LAC held that the exercise of a measure of control over persons engaged as owner-drivers does not necessarily entail that they were employees.
  - [6] See, for instance, Denel (Pty) Ltd v Gerber [2005] 9 BLLR 849 (LAC).
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