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REPUBLIC OF SOUTH AFRICA

Case No. 450/96

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

IVOR NISELOW — APPELLANT

and

LIBERTY LIFE ASSOCIATION OF AFRICA LIMITED — RESPONDENT

BEFORE: MAHOMED CJ, VAN HEERDEN DCJ, HARMS, ZULMAN and STREICHER JJA

DATE HEARD: 19 MAY 1998

DATE DELIVERED: 27 MAY 1998

JUDGMENT

STREICHER, JA:

In terms of a written agreement respondent, an insurance

company, appointed appellant as its "agent". Pursuant to disciplinary inquiries respondent terminated the agreement. Appellant thereupon instituted proceedings in the Industrial Court in terms of which he claimed payment of certain losses allegedly suffered by him as a result of the termination of the agreement. He alleged that he was entitled to payment of these losses in that his "dismissal" constituted an unfair labour practice in terms of the since repealed Labour Relations Act, 1956 ("the Act").

Respondent *in limine* raised the defence that the Industrial Court had no jurisdiction in respect of appellant's claim in that appellant had not been an "employee" as defined in the Act. By agreement between the parties the Industrial Court first tried the point *in limine*. It found that appellant was an employee as envisaged by the Act and dismissed that point. An appeal to the Labour Appeal Court was, however, successful. The point was upheld, resulting in the dismissal of appellant's application with costs. With the leave

of the Labour Appeal Court appellant now appeals to this court.

The only issue raised by the appeal is whether appellant was an "employee" of respondent as defined in s 1(1) of the Act. If not, the Industrial Court had no jurisdiction in respect of the dispute between the parties.

It was common cause between the parties that an independent contractor was not an employee as envisaged by the Act. An independent contractor undertakes the performance of certain specified work or the production of a certain specified result. An employee at common law, on the other hand, undertakes to render personal services to an employer. In the former case it is the product or the result of the labour which is the object of the contract and in the latter case the labour as such is the object (see *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) at 61B). Put differently, "an employee is a person who makes over his or her capacity to produce to another; an independent contractor, by contrast, is a person whose

commitment is to the production of a given result by his or her labour" (per Brassey *'The Nature of Employment'*(1990) 11 ILJ 889 at 899).

An "employee" is by s 1(1) of the Act defined as -

> "any person who is employed by or working for an employer and receiving or entitled to receive any remuneration, and . . . any other person whomsoever who in any manner assists in the carrying on or conducting of the business of an employer".

The first part of the definition requires the rendering of personal services (see *South African Master Dental Technicians Association v Dental Association of South Africa* 1970 (3) SA 733 (A) at 740-741) as in the case of the employee at common law (*Smit* at 61A).

It was not contended that the written agreement between the parties contained a simulated transaction, that it had been amended or that it was vague or ambiguous. The legal relationship between the parties must therefore be gathered from the terms of the written agreement (see *Smit* at

64B).

In terms of the written agreement appellant was appointed "an agent" of respondent. Appellant undertook to canvass, on a full time basis and exclusively for respondent, for applications for contracts of insurance. Appellant's remuneration was to be in the form of commission on contracts effected through him. The commission rates were to be determined by respondent. If required, appellant was obliged to take out a guarantee bond as security for money coming into his hands and for any loss through any dishonest, negligent or fraudulent act by him and for non-compliance with the conditions of the agreement. Appellant was obliged to keep accurate accounts of all transactions with or for respondent. All documents connected with applications for contracts of insurance were to be the property of respondent, whether paid for by respondent or not. Appellant was obliged to become a member of any of the death or retirement funds provided by respondent as

soon as he satisfied the conditions for eligibility. The agreement could without cause be terminated summarily by respondent by written notice to appellant. Appellant was entitled to terminate the agreement without cause by giving not less than 15 days written notice to respondent. The agreement also specifically provided that it would terminate upon appellant's death and on appellant's attainment of the retirement age under respondent's Retirement Fund Benefit. Appellant's rights and obligations in terms of the agreement could not be sold, assigned or ceded. No advertisement or other matter relating to respondent and its products could be published by appellant without the written consent of respondent. Approval by respondent were not to be construed as an undertaking by respondent to bear the costs of any such publication. In the absence of written approval of respondent appellant was prohibited from commencing legal proceedings against a third person on any matter arising out of, or in connection with, his activities as a "consultant of

Liberty Life". On termination of the agreement respondent was entitled to allocate the servicing of holders of respondent's contracts to such other person or persons as respondent could in its sole discretion decide.

The Labour Appeal Court held that the provisions of the written agreement reflected the acquisition by respondent of the fruits of appellant's labour rather than the labour itself. Appellant's productive capacity, so the Labour Appeal Court found, "remained within his own power to use in the manner he saw fit to achieve the results which he had contracted to produce". For this reason appellant was found not to have been an employee as envisaged by the Act.

Appellant submitted that the Labour Appeal Court erred. He contended that he had placed his productive capacity at the disposal of respondent by reason of the fact that he was, in terms of the written agreement, obliged to render services personally to respondent because he

had to canvass for applications for contracts of insurance on a full time basis and exclusively for respondent. In my view the Labour Appeal Court correctly found against appellant. Appellant was not in terms of the written agreement prohibited from employing other people to assist him in achieving the required result. He did in fact employ a secretary and from time to time paid commission to people who assisted him.

The undertaking by appellant, on a full time basis and exclusively for respondent, to canvass for applications for contracts of insurance, may be more common in a contract of service than in a contract appointing an independent contractor but is not inconsistent with the concept of an independent contractor. The same applies to some of the other provisions of the written agreement such as the provisions that the written agreement was to continue until appellant's death or the attainment by him of retirement age (see *Smit* at 61H).

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

First, clause 2.2 of the written agreement specifically provided that, subject to the rights of the parties to terminate the agreement, the continuance of the agreement depended on appellant maintaining, in the opinion of respondent, his status as an agent of respondent. To do so, appellant was in terms of the clause required to maintain a satisfactory standard of knowledge and competence in the sale of respondent's products and to produce a volume of new business sufficient to meet the minimum production standards of associate membership of the respondent's Production Club or such equivalent standards as could be set by respondent from time to time. Appellant was therefore obliged to produce a certain result in order to

keep the contract alive.

Second, appellant's remuneration was to be a commission on contracts effected through him. He was therefore entitled to remuneration for the result of his labour and not for the time spent by him canvassing for contracts of insurance. If no contracts had been effected through appellant he would not have been entitled to any remuneration for canvassing that he may have done.

Third, when, how and where the required result was to be achieved was not prescribed. Moreover, in terms of the written agreement appellant was not subordinate to respondent and was not obliged to comply with any instructions by respondent as to how he should go about achieving the required result. Appellant was free to choose his working hours and to adopt the means he considered appropriate to produce the required volume of new business free of control and supervision by respondent.

In *Smit* at 62E Joubert JA said:

> "The presence of such a right of supervision and control is indeed one of the most important *indicia* that a particular contract is in all probability a contract of service. The greater the degree of supervision and control to be exercised by the employer over the employee the stronger the probability will be that it is a contract of service. On the other hand, the greater the degree of independence from such supervision and control the stronger the probability will be that it is a contract of work."

None of the terms of the written agreement is inconsistent with a contract of work.

A considerable amount of evidence was tendered in the Industrial Court as to what the relationship between the parties was in practice. From the evidence it appears that respondent required appellant to work from its premises and not from elsewhere and that, before the written agreement was terminated, appellant was subjected to respondent's disciplinary process. Furthermore, appellant was required to comply with a dress code and a code

of ethics, to attend training programmes and meetings and, at one stage, to prepare an activity action plan. Appellant could not, however, contend that he was contractually obliged to attend the disciplinary enquiry or to comply with respondent's other requirements. Respondent could, of course, have terminated the agreement summarily and for that reason appellant would naturally have been more compliant with respondent's demands. It does not, however, follow that the appellant would have been in breach of contract had he ignored respondent's requirements.

As I have already stated it was not contended that the written agreement had been amended. The relationship between the parties therefore remained one in terms of which the appellant undertook to produce a certain result and not to render personal services to respondent.

It follows that appellant was not working for respondent as required by the first part of the definition of employee in the Act. It was not

and could not be contended that appellant was an employee within the meaning of employee according to the second part of the definition. As an independent contractor appellant was carrying on and conducting his own business. He was not assisting in the carrying on or conducting of the business of respondent (see *South African Master Dental Technicians Association v Dental Association of South Africa* at 741).

In the result the Labour Appeal Court correctly held that the appellant was an independent contractor and not an employee as envisaged by the Act. There is no reason why costs should not follow the result and counsel for respondent did not contend otherwise. Appellant was awarded the costs of two counsel in the Labour Appeal Court and is entitled to a similar order in this court.

The appeal is therefore dismissed with costs including the costs

occasioned by the employment of two counsel.

P E STREICHER

MAHOMED, CJ)
VAN HEERDEN, DCJ)
HARMS, JA) CONCUR
ZULMAN, JA)