

IN THE INDUSTRIAL COURT OF SWAZILAND**HELD AT MBABANE****CASE NO. 151/2007**

In the matter between:

PERCY LOKOTFWAKO**Applicant**

and

**SWAZILAND TELEVISION BROADCASTING
CORPORATION t/a SWAZI TV****Respondent****CORAM:****P. R. DUNSEITH : PRESIDENT****JOSIAH YENDE : MEMBER****NICHOLAS MANANA : MEMBER****FOR APPLICANT : M. MKHWANAZI****FOR RESPONDENT : S. MNGOMEZULU****J U D G E M E N T -**

1. The Applicant alleges that he was employed as a sales representative by the Respondent in August 1993, and on 21st December 1993 he received written confirmation of his employment. He alleges that he worked continuously for the Respondent thereafter until 28th March 2007, when he was locked out of the Respondent's premises.

2. The Applicant has applied to court for an order:
 - 2.1 That the Respondent is interdicted and restrained from unlawfully locking out the Applicant from Respondent's premises or from any conduct in furtherance of the lock out aforesaid.
 - 2.2 Declaring that the Applicant has a tacitly relocated indefinite or permanent contract of employment with the Respondent, terminable by reasonable notice given by either party for any period determined by the above Honourable Court in light of the particular circumstances of the case.
 - 2.3 Costs of application.
3. The Respondent opposes the application and has raised an objection to the jurisdiction, alleging that the Applicant is not, and never has been, an employee of the Respondent and the Industrial Court may only exercise jurisdiction in respect of matters arising between an employer and employee in the course of employment.
4. A second legal point in limine was not argued by the Respondent.
5. It is common cause that section 8 of the Industrial Relations Act 2000 confers jurisdiction on the Industrial Court to hear, determine and grant appropriate relief only in respect of disputes between an employer and employee in the course of employment, or between employer and employee organizations. If the Applicant has never

been an employee of the Respondent, then the court has no jurisdiction to adjudicate upon the application.

6. The Industrial Relations Act 2000 defines “employee” as “a person, whether or not the person is an employee at common law, who works for pay or other remuneration under a contract of service or under any other arrangement involving control by, or sustained dependence for the provision of work upon, another person.”
7. An employee for purposes of the Act is thus a person who works for pay or other remuneration
 - under a contract of serviceor
 - under some arrangement not amounting to a contract of service involving
 - control by another personor
 - sustained dependence upon another person for the provision of work.
8. A person who works for pay or other remuneration under a contract of service (*locatio conductio operarum*) is an employee at common law. A contract of services involves the right of the employer to supervise and control the employee, and the sustained dependence of the employee upon the employer for work. The Act extends the common law concept of an employee to include persons working for pay or other remuneration under other forms of contract, such as a contract for work (*locatio conductio operis*), agency, partnership and *mandatum*, provided that the element of

control or sustained dependence for work is present.

9. This extended definition means that the Industrial Court may even have jurisdiction over independent contractors and their principals, provided that the necessary degree of control or sustained dependence for work is shown to be present in the relationship.
10. The letter appointing the Applicant in 1993 states that *"this letter serves as confirmation of your employment as a commissioned sales person."* The Applicant's counsel argues that the use of the word 'employment' is decisive. The court does not however give much weight to the language used. As was held in **Goldberg v Durban City Council 1970 (3) SA 325 N at 331C**, *"it is the duty of the court to have regard to the realities of [the parties'] relationship, and not regard itself as bound by what they have chosen to call it."*

See also **Dempsey v Home Property (1995) 3 BLLR 10 (LAC) at 14 B.**

11. The letter of appointment provides that the Applicant is paid a commission on all sales generated by himself. He is expected to meet a monthly sales target. He is paid a petrol allowance, but he is responsible for his own business expenses and must provide his own transport. The letter provides for a 3 months trial period, and the agreement can be cancelled on 30 days written notice.
12. Prima facie the letter of appointment, the Applicant is a sales representative paid by results and not by time. Though not conclusive in itself, this tends to suggest that the contract is one of work, not service.

**Barcherds v CW Pierce & J. Sheward t/a Lubrite Distributors
(1993) 14 ILJ 1262 (LAC) at 1279 H-I.**

Dempsey v Home & Property (op. cit) at 15.

13. The responsibility of the Applicant for his own expenses and transport also suggests a relationship of principal and independent contractor rather than employer and employee. Furthermore there is no requirement that the Applicant must render his services personally, and his working hours appear to be left to his discretion.
14. On 8th June 2001 the parties entered into a new contract, in terms of which the Applicant is appointed as a Freelance Sales Advertising Executive for a fixed period, renewable. Oxford Concise English Dictionary defines the word "freelance" as "*a person, usually self-employed, offering services on a temporary basis, especially to several businesses etc. for particular assignments.*" The term "freelance" thus also connotes an independent contractor who is not required to exclusively to render his services to one principal.
15. The new contract describes the Respondent as "*the Principal*". It requires the Applicant to "*attend mainly to the sale of advertising time for use on Swazi TV.*" Commission is payable upon proof that an advertising contract has been concluded and the deposit paid. The Applicant is still responsible for his own expenses and transport, and the contract makes no provision for supervision or

control of the manner in which he is to carry out the work save to require that he dresses and conducts himself properly and upholds the policies of the company.

16. Having regard to the letter of first appointment and the subsequent contract, the court is satisfied that the relationship between the parties cannot be described as a contract of service. It is a contract of work, and the Applicant is an independent contractor.
17. The Act provides that an independent contractor under a contract of work may nevertheless be an “employee” if the contract involves control by, or sustained dependence for work upon, another person. This provision in the Act creates an anomaly: the right of control is an important indicium of a contract of service, and the greater the degree of supervision or control, the stronger the likelihood that the contract is one of service – see

Smit v Workmens Compensation Commissioner 1979 (1) SA 51 A.

Dempsey v Home Property (op. cit) at 13.

Likewise, sustained dependence for work is an element of a contract of service.

In our view, the definition of employee in the Act extends to include a category of quasi-employees: where the dominant impression (see Borchards’ case (supra)) in that a person is an independent contract or agent under some arrangement other than a contract of service, such person will nevertheless be regarded as an employee for purposes of the Act if the arrangement involves control or sustained dependence

for work.

18. The Applicant says that he carried out his duties subject to the control of the Respondent, not as he pleased. He does not give any examples of the control he was subjected to. He appears to have enjoyed a great deal of autonomy in the performance of his work. He had no fixed hours of work. He was not subject to discipline if he failed to meet his target. He did not work from the Respondent's premises. He was given free reign in the manner in which he secured advertising contracts. All these factors indicate an absence of control.
19. The court does not consider that the requirement that the Applicant conducts and dresses himself properly indicated any significant degree of control. These measures are provided to maintain adherence to the Respondent's standards so long as the Applicant operated as its representative in its name.
20. The fact that the Respondent deducted PAYE tax from the Applicant's remuneration also does not assist the Applicant, since such arrangements are frequently made between principals and independent contractors. Of more relevance is the fact that the Applicant's contract makes no reference to annual leave and sick leave, nor was the Respondent paying contributions on his behalf to the Swaziland National Provident Fund.
21. With regard to any sustained dependence for work, the Applicant makes no such allegation, nor does his contract preclude him from working for other persons. The court has no evidence before it as to the extent to which the Applicant depends upon the Respondent

for provision of work.

22. In the result, the Applicant has failed to prove that he is an employee in terms of the definition contained in the Act. It follows that he has failed to prove that the court has jurisdiction to adjudicate upon his claims.
23. The application is dismissed, with no order as to costs.

The members agree.

P. R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT