Hannah v Government of the Republic of Namibia 2000 (4) SA 940 (Namibia Labour Court)

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The case deals with the question of whether a High Court judge is an employee of the state or not, in light of the constitutional principle of independence of the judiciary. The question arose as a point *in lamine* in an application by a judge of the High Court of Namibia against the government of Namibia. The judge sought an order directing the respondent to desist from unilaterally altering the applicant's conditions of employment by depriving him of his entitlement to the provision of water, electricity and refuse disposal free of charge and at the cost of the respondent.

The respondent raised a preliminary point that the Labour Court had no jurisdiction to hear the matter as the relationship between a judge of the High Court and the state was not one of employer and employee. The Labour Act of 1992 empowered the Labour Court to make the order sought by the applicant only upon application by certain specified individuals or organisations such as an employer or employee.

Ngoepe AJ considered a number of factors relating to the position of a judge: a judge is appointed by the President on recommendation by the Judicial Service Commission; the appointment is for life; a judge may only be removed on grounds of mental incapacity or for gross misconduct, and the removal procedure is stringent. In addition, the salary of a judge is governed by legislation and may not be reduced, and the independence of the judiciary is guaranteed by the Constitution.

The definition in the Labour Act is not very helpful as it only states an 'employee' to be "any natural person

(a) who is employed by or working for, any employer and who is receiving or entitled to receive any remuneration or

(b) who in any manner assists in the carrying on or the conducting of the business of an employer and 'employer' and 'employment' shall have corresponding meanings."

Although the Court pointed out that various criteria were relevant in determining whether or not a particular relationship is that of employee and employer, it dwelt on the factor of control and supervision. Following a previous decision of the same court, the Labour Court observed that, although the exercise of control has been watered down from being

decisive, "it remains a very important yardstick and perhaps even an indispensable one". The court continued "if the presence of supervision and control is indicative, even if to a limited extent, of an employee/-employer relationship, then surely the absence thereof must, conversely, go some distance towards negating the existence of such relationship". The judgment goes on to observe that, given the provision for judicial independence in section 78(2) of the Constitution and the prohibition against interference with the judiciary by the other branches of government (section 78(3)), it could not be said that a judge was subject to the supervision and control of the state in the execution of his/her functions. The court found that the true nature of a judge's function was the exercise of judicial functions. It continues "when, for example, issues such as control, supervision, accountability and so forth are considered, it must be with reference to judicial functions and not to peripheral activities. The judge cannot be held accountable to the state in respect of his/her judgment". The court quotes from the Indian case of *Union of India v Pratibha Bonnerjea* [1996] AIR SC 690 in which the Supreme Court of India states that "[A judge] would not be able to discharge his duty without fear of favour, affection or ill will, unless he is totally independent of the Executive, which he would not be if he is regarded as a government servant. He is clearly a holder of a constitutional office and is able to function independently and impartially because he is not a government servant and does not take orders from anyone".

Judge Ngoepe also found it interesting to note that if a state official disobeyed the order of a judge such judge could send him to jail for contempt, which would mean a "servant" sending his/her "master" to jail. The court rejected the contention of the applicant that a judge can still be regarded as an employee of the state even though he/she gets no orders or instructions from the state. Unfortunately, Ngoepe does not go into details of why this contention is untenable except by reiterating the argument on absence and prohibition of control and supervision. It would have been helpful if other theories of conceptualising the employment relationship had been exhaustively canvassed and discarded.

The case leaves unanswered the question of whether judges have no protection with regard to "peripheral" matters such as pension, fringe benefits etc. Is there no remedy if the state varies them? The answer is probably that such benefits should be regulated by statute and a judicial service commission should be able to intercede on behalf of the judges if the need arises.

Having found that a judge is not an employee of the state but that his/her position is *sui generis*, the application was dismissed.

The case should be interesting for many other jurisdictions, especially those in the Commonwealth which have similar constitutions and similar conditions for judges.