

SOUTH AFRICA / JUDGMENT

Hamper Sales (Pty) Ltd and Another v L.D. Mahlahangu (N. O.) and Others (JR 2982/19) [2023] ZALCJHB 22; (2023) 44 ILJ 1072 (LC) (20 February 2023) [2023] ZALCJHB 22

COURT

Labour Court Johannesburg

BEFORE

Lagrange

CASE / FILE NUMBER

JR 2982/19

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FLYNOTES:

EMPLOYEE OR INDEPENDENT CONTRACTOR

LABOUR

– Employee – Test – Whether employee or
independent contractor – Not registered by the firms
for

PAYE or UIF – Never given a formal job description –

Had registered as a micro business with SARS –

Paid for

results as sales consultant – Requirement to render a
satisfactory standard of service also applicable to
independent

operator – Substantive working relationship one of an
independent contractor, not an employee – Labour Relations
Act 66 of 1995, s 200A.

The

Labour Court of South Africa,

held

at Johannesburg

case

No: JR 2982/19

Of

interest to other judges

In

the matter between:

HAMPER
SALES (PTY) LTD First
Applicant
TYCOON'
S TEA AND COFFEE (PTY) LTD Second
Applicant
and
L.D.
MAHLAHANGU (N. O.)
First Respondent
THE
COMMISSION FOR CONCILIATION,
MEDIATION
AND ARBITRATION Second
Respondent
KIM
MILLER Third
Respondent
Date
of Set Down: 2 February 2023
Date
of Judgment: This judgment was handed
down electronically by circulation to the parties' legal
representatives by email, publication on
the Labour Court website and
release to SAFLII. The date and time for handing down judgment is
deemed to be 10h00 on 20 February
2023.

Summary:

(Review – Jurisdictional issue –
employment status – sales consultant and independent contractor
not an employee
– tests of employment considered)

JUDGMENT

LAGRANGE J

Introduction

- [1] This is an application to review and set aside an arbitration award in which the arbitrator decided that the third respondent, Ms K Miller (Miller) had been an employee of the two applicants (Hamper Sales and Tycoon's) and had been substantively and procedurally unfairly dismissed by them on 4 February 2019. She had been engaged by them as a sales 'consultant' in July 2016. The arbitrator awarded Miller 10 months' remuneration as compensation amounting to approximately R 877,000.

- [2] The review application was a few days late in that it was sent to Miller by registered post before the expiry of the six week period, but in terms of the provisions of the Labour Court rules was only deemed to have been delivered after the six week period had expired. It should be mentioned that it appears that it was served by email before the end of the six week period, but in 2019 service by email was not permissible without this court's express permission. Consequently, the applicants applied for condonation for the late filing of the review application. At the hearing, it was confirmed that Miller was not opposing the condonation application. The delay in question was minimal with reference to the time period for deemed service by registered post and no serious prejudice to Miller resulted from that delay. Miller claimed never to have received the registered post, but that has nothing to do with the timing of the deemed service in terms of the rules. In the circumstances, there is no reason not to grant the condonation application.
- [3] There were also a host of other preliminary points mostly raised by Miller, but these were also abandoned at the court hearing. Consequently, the court is only seized with determining the substantive merits of the review application. Briefly stated, the applicants contend that the arbitrator wrongly determined that Miller was an employee of either of them and, even if she was an employee, the arbitrator acted irregularly by determining the fairness of the termination of her services, because the proceedings had been conducted on the basis that the arbitrator would first determine her employment status, and accordingly it had not considered it necessary to deal with the fairness of her termination. The applicants also took issue with the reasonableness of the arbitrator's award of 10 months' remuneration as compensation.

The award

- [4] In determining Miller's employment status, the arbitrator adopted the test set out in section 200A of the Labour Relations Act, 66 of 1995 (the LRA)[1], though he expressly noted that the seven factors to be considered under that section were not dispositive of that question if the person whose employment status was under consideration earned more than the statutory earnings threshold.
- [5] The arbitrator found that the factors which pointed towards Miller being an employee were that she:
- 5.1 was subject to the direction and control of the firms in respect of the manner in which she worked because, she worked 40 hours a week, attended operational meetings of the firms and her leave was approved by the firms when she went on holiday;
- 5.2 formed part of the organisation of the firms because she attended functions of the firms including the year end function and was provided with a work uniform by them;
- 5.3 was economically dependent on the firms because they provided the only basis of her income as there was no tangible evidence she had another source of income;

5.4 was provided with a laptop with an email address of the firm to perform her work and there was no evidence to dispute her claim that she received a cell phone allowance and petrol card, and she

5.5 performed her duties in person.

- [6] The arbitrator also placed emphasis on the principle that the court will look at the substance of the relationship and not the form in which the parties have chosen to characterise their contractual relationship.
- [7] Having concluded Miller was an employee, the letter of termination she received on 4 February 2019 was a letter of summary dismissal, which was effected without any investigation of whether there were grounds for dismissing her contrary to the guidelines for a procedurally fair dismissal for misconduct set out in Schedule 8 of the LRA. He then decided that her dismissal was both procedurally and substantively unfair, without providing any reason why he found it substantively unfair.

The Grounds of review

- [8] The grounds of review can be grouped in three categories: The first concerns the correctness of the arbitrator's finding that Miller was an employee of the firms. Because her status as an employee is a jurisdictional requirement for considering if her termination was an unfair dismissal, the test on review is whether on the evidence before the arbitrator that finding was correct.[2] The second category of review grounds have to do with whether the arbitrator's finding that Miller's dismissal was unfair was one that no reasonable arbitrator could have arrived at based on the evidence properly before him. Only if Miller, objectively

speaking, was an employee do the second category of review grounds arise for consideration. Lastly, the applicants take issue with the amount of compensation awarded.

Evaluation

The test for determining whether or not a person is an employee or independent contractor

- [9] In deliberating on the employment status of the respondent in *Denel (Pty) Ltd v Gerber* [2005] 9 BLLR (LAC) the Labour Appeal Court took account of the same list of factors set out in section 200A of the LRA, which also appear in section 83A(1) of the Basic Conditions of Employment Act, 75 of 1997, but only as a guide[3]. In *State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*

(2008) 29 ILJ 2234 (LAC), the court identified three primary criteria to determine the realities of a relationship:

"[12] ... 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.”

[10] In considering the realities of the relationship the contractual relationship the parties actual enter into is one of the factors that must be considered, even though the reality of relationship is the deciding factor[4].

[11] There is a wide spectrum of a variety of ways in which services can be rendered to the party benefitting therefrom between the two extreme positions of an employee who is paid mainly according to the time they work, cannot work for another and can be directed how and when to work and what to do by a superior, and an independent contractor, who is contracted to deliver a specific product or render a particular service by a certain date, but can choose how they bring about the agreed result and may employ others to help. The challenge in difficult cases is to determine at which end of the spectrum a provider of services falls. Determining that is not akin to identifying a point on a calibrated continuum based on a numeric preponderance of factors pointing to one type of relationship rather than the other. Reason dictates that the test is qualitative rather than simply quantitative in nature. This is because some indicators necessarily tell us far more about the essential character of the

relationship than others. To cite a simple example, depending on the context, the fact that a putative employee is required to complete a particular task by a certain deadline and is paid only on completion of the task, would usually carry more weight than the fact that the person is engaged to perform the task under a contract entitled ‘temporary employment contract’.

[12] Although it is for the court to determine if Miller was an employee or not, it is useful to note some of the criticisms raised on the grounds of review concerning the arbitrator’s own failure to consider certain evidence and whether or not aspects of Miller’s version had been tested with their witness, Venske, under cross-examination. In going through some of the evidence specific examples of gaps and the arbitrators reasoning will be mentioned in passing.

[13] To begin with, it is pertinent to note that there was a remarkable congruity between Venske’s understanding of what it meant to be a consultant and that of Miller as well. Venske regarded a consultant as someone who performed a service for which they were paid on submission of an invoice and were not subject to working any fixed time and could come and go as they please and work from where ever they like.

[14] Venske testified under cross-examination that, when he took over the Hampers business from his parents, they could not employ more permanent staff. He stated:

“At the time that I took over, Kim came to me and said to me cool, we agreed that she would come on a consultant basis and paid for whatever she sells. It was an agreement that then worked for both of us. We could not, full-time employees and she was happy to go on agreement, whether it was a, how you see it, independent contractor or consultant, whatever the word you want to use.... If she sold five of those

then she got commission for five of those and that was it. That was the business in Snippets. A couple of months later Tycoon's came along. We bought the business we, we bought this business and Kim, we did not have permanent jobs, none of us. When I say permanent jobs, a full time 12 month job okay (inaudible). I said to her would you like an opportunity to consult for us in this business as a contractor like you have done, call it independent contractor or consultant, however you described it and I would pay you as part of the gross profits of the business. That was our arrangement, that is the whole, where this whole thing, and her and I both said at the point where it does not, where no, if it gets to a point where we do not want to

work with each other we can just part ways. The agreement is easy for both of us. That was the discussion we had 3 and a bit years back at (inaudible). That is how it was all done.”

Miller confirmed that at the time she was engaged, Venske said to her:

“I don't care what you do, how you do it, when you do it, just get in and sell.”

[15] All that mattered to Venske was Miller's sales performance. He alleged Miller also did not want to be an employee because she wanted to be able to do her own thing and structure it her own way. Likewise, Venske saw a consultant as:

...somebody that goes into a company that normally charges them a fee for what they do, however many hours they work there and they have their own set up, do their own thing and off they go in and when and how they like because it is their own business. That is the way I see a consultant”

Nonetheless, Miller's view and that of the arbitrator, was that she was an employee.

[16] Various factors relied on by Miller in support of her claim to have been an employee were canvassed in the evidence, which may be summarised as follows:

16.1 The firms provided her with a laptop. Venske testified that it was necessary to do this to maintain security of the business emails and the accounting systems. Applicants retain control over the security of the laptop and can switch it off remotely, but Miller could use it for other purposes.

16.2 Venske did monitor Miller's emails at some stage. He claimed he only did so because customers were saying they were not getting through to her on the phone. He also complained to her about not responding to requests to follow up on debtors who were more than 60 days in arrears, even though that was not her real responsibility.

16.3 Miller used the corporate identity as 'sales manager' with the Snippets logo at the bottom. Venske denied allocating her the title of 'Sales Manager', which she used in her email correspondence. In her testimony The address assigned to her had been "Sales 1@snippets hampers.co.za". Miller testified that she was never reprimanded for identifying herself as a sales manager or sales executive of Snippets. Venske was never questioned about this claim. Later, when all other staff were also given new email addresses she was assigned Kim@venske.com as her email address. Miller testified she had no separate email address for her own business.

16.4 Miller also testified to have been given everything that was needed for her work including even paper, pens pencils and the like. She further claimed she had been given a uniform too. None of these claims were tested with Venske.

16.5 Venske maintained that Miller had no fixed hours nor was she required to be at the firms' joint office at any particular times. When questioned about how many hours she spent at the office, Venske could not say because he did not keep track of her hours as it was immaterial to him. Miller testified she worked from 8 to 4 every day and when she tried to raise the question about her hours of work Venske said that she was a key team player and had to be in the office because she made people laugh and gave a "vibe" to the office. Apart from her claimed working hours none of the rest of this version was put to Venske.

16.6 Venske agreed that initially Miller had been provided with a petrol card, but that was in anticipation of her having to be on the road much more doing business for Tycoon's. As things turned out this proved unnecessary and the card was cancelled.

16.7 Miller claimed she attended monthly meetings to discuss sales results like all the other employees. Venske disputed her claim that sales meetings were regular monthly events. Rather, these were annual events held towards the year end in which he generally reported on how the company had performed. Notwithstanding the dispute about how often sales meetings occurred or if the regularly attended them, Miller did volunteer that her attendance at sales meeting was not compulsory. Miller claimed that she was expected to attend the year end functions and that she occasionally had to present 'shows'. This was not canvassed with Venske.

16.8 Venske agreed that he had accompanied Miller on appointments with the likes of large clients like Pick n Pay and Spar, where they went as a team because they were big clients and she had difficulties with some of the rebates which applied to them. In her own evidence, Miller claimed she never saw any clients without being accompanied by Venske, but he was not asked about this during his testimony.

16.9 In answer to a leading question Miller claimed that she was subject to the control and direction of Venske because she reported to him. When asked to elaborate what she meant she said: "well any discussions that had to happen I would take it up with Bradley, anything related to the business was always discussed with Bradley." She also claimed that she had to give him daily reports tell him what she was doing which she did verbally. Like other significant aspects of Miller's version, this too was not canvassed with Venske.

16.10 Miller argued she was wholly dependent on the firms for her income. During the course of her testimony it emerged that she did rent out a small flat and some rooms at her home on Airbnb, but she described these activities as a hobby.

[17] The evidence tending to suggest Miller was a contractor rather than an employee was that:

17.1 Miller's husband, Mr A Miller, rendered tax and secretarial services to the applicants, as an independent contractor. He also prepared his wife's invoices to the firms for her sales commissions, based on a schedule of sales and commission earned provided by Venske to Ms

Miller. Ms Miller strenuously sought to distance herself from the slightest involvement in the preparation of her invoices, but there was email evidence of her requesting her husband to prepare invoices. Once the invoices were prepared, Venske would approve payment of the invoices by Mr Miller. There was no evidence tendered by Miller that she was

ever remunerated for her services to the firms in any other manner since her employment as a consultant in July 2016.

17.2 Miller was not registered by either of the firms for PAYE, UIF or any other statutory employment levy and no employee deductions were made from her commission for that purpose. Most of the other persons working for the firms were taxed and paid according to the hours they worked. These persons were exclusively employed by one or other of applicants, even though both firms operated in the same open plan office. They also concluded pro former employment contracts. Amongst other things these contracts stipulated their normal working hours. Miller was remunerated solely on the basis of a profit based commission on the sales she generated and accordingly the payments she received from the firms varied from month to month.

17.3 Miller was never given a formal job description. She claimed that her designation as a “sales consultant” was decided on by Venske. Nonetheless, she confirmed that he said “come in as a sales consultant and do what you can improving the business. And basically that is what I was told to do.”

17.4 Miller registered as a micro business with SARS, which meant as long as the turnover of her business was less than R 1 million per annum she was liable for turnover tax rather than having to income tax as an employee. Formally her tax status was only confirmed by SARS more than a year after her employment, but she had applied some time before that. Her husband had prepared the SARS application and she had signed it. When Mr Miller testified he claimed that he and Venske had discussed his wife registering as a micro-business and once Venske agreed he discussed it with her spouse. How the decision to register as a micro business evolved was not canvassed with Venske under cross-examination.

17.5 While the tax advantage to the Miller was considerable because the micro business turnover tax was dramatically lower for the same amount of nett income than if it was taxed as a salary. Moreover, Ms Miller could make deductions for expenses and disbursements made in the course of running her business. Venske was not challenged when he claimed there was no tax advantage to the firms derived from Millers’ designation as a micro business. Her annual financial statement she described herself as a ‘sole proprietor’ and designated her income from the firms as ‘consultancy fees’. In the tax year ending February 2018 she deducted R 284,044.00 for ‘operating expenses’ from her consultancy fees showing a nett pre-tax profit of R 390,620.00

17.6 In 2018, Miller wanted to secure a bank loan to purchase property. In response to a request for a letter from Venske confirming she was employed by the firms, Venske sent a letter which stated:

“This serves to confirm that Ms KB Miller has been contracted as a consultant by Hamper sales And Tycoon’s since July 2016.”

Venske said Miller had come to him asking for him to issue her with a letter confirming her appointment as an employee, which he declined to do because she was not “physically employed” but was engaged as a consultant. The letter he issued was not acceptable to the bank in order to confirm that she was an employee. It was clear from Miller’s own correspondence with her husband about the bond requirements that she realised that she required an employment contract and asked him “Now what can I do?” Subsequently, with the assistance of her husband, she attempted to obtain the loan on the basis she was self-employed.

- [18] It is apparent that Miller was not engaged on the same basis as other employees employed by one of the two firms. It may be so she was provided with the use of a laptop and some assistance for transport and occasionally some airtime for her cell phone. The petrol card was withdrawn when it became apparent it was not needed. Miller did not complain that her remuneration in kind, as an employee, was being reduced when this happened. The cell phone airtime was provided on an irregular basis. In her dealings with the firms she presented invoices in order to obtain payment and her payments were authorised just like payments for any other creditors except that her husband prepared the invoices based on sales information supplied to him by his wife, which she had receive from the firm. She did meet with big clients together with Venske, but on the evidence this was not the case with other clients.
- [19] It was common cause that, at the commencement of her engagement by the firms, she would be paid by results and it was up to her how, when and where she made her sales. Although there were sales meetings at the office from time, and she did attend a number of them, but whether she attended or not was neither here nor there from the firms’ perspective. When Venske declined to say she was an employee for the purposes of the bank loan, Miller did not dispute his characterisation of the relationship, but sought to obtain the loan on the basis she was self-employed. Venske’s letter was consistent with his approach from the start of her engagement, namely that she should not be included in the monthly payroll but paid as a creditor on presentation of an invoice like any other creditor which was the way the parties handled the payment of her services in the form of fees.
- [20] What is telling is that Venske and Miller essentially agreed that the basis of the contractual arrangement between her and the firms was that she would be paid for results and the firms were not going to tell her how she should achieve the results or where she had to work. She did not challenge Venske’s evidence that she had told him she wanted to be free to conduct her work as she saw fit. Whether or not she derived almost all her income from her sales consultant work for the two firms, does not detract from the fact that she was able to choose how, when and where she obtained sales for the firms. She was free to come and go and did not need permission to do other work. Even if she was largely dependent on the income from her sales

commission there was no suggestion that was because the requirements of the work meant she had no freedom to do work for other third parties, or to take time off when she chose. The basis on which she was paid, the absence of an employment contract like other staff and her decision to characterise her work as the operation of a micro business were material and substantive features of the commercial arrangement she had with the firms. The SARS classification provided very material advantages to Miller. It was not an inconsequential choice to render her services to the firms using such a business model. To the extent that Venske and Miller had to characterise the nature of the working relationship, for the most part they acted consistently on the assumption that she was not an employee. The only time she sought to reframe the relationship was when it was expedient to do so in order to make it easier to get a housing loan.

- [21] The fact that she might have asked at times to enquire from customers why some sales to them remained unpaid or that Venske was able to verify if she was getting back to customers or not, when they complained about her service, did not amount to subordinating the use of her time to the firms' beck and call or to directing her principal activities. Venske was entitled to verify if she was performing her sales function satisfactorily if he had cause to be concerned she was not performing to the standard expected. A requirement to render a satisfactory standard of service is not only an obligation an employer can impose on an employee, but is equally applicable to a service rendered by an independent operator.
- [22] Considering the above, I am satisfied that the substantive working relationship the firms and Miller were engaged in was one in which she was an independent contractor, not an employee.

Conclusion

- [23] It follows that the award must be set aside for lack of jurisdiction on the part of the arbitrator, and that the other grounds of review are irrelevant.
- [24] There is no reason in law or fairness not to follow the normal practice of not making a cost award.

Order

- [1] The late filing of the review application is condoned.
- [2] The arbitration award dated 12 November 2019 issued under case number GAEK 2613-19 is reviewed and set aside and substituted with a finding that the Applicant in the award (the Third Respondent) was not an employee of the Respondents in the award (the Applicants) and accordingly the arbitrator (the First Respondent) lacked jurisdiction to determine the Applicant's unfair dismissal claim.
- [3] No order is made as to costs.

Lagrange J

Judge of the Labour Court of South Africa

Representatives

For the Applicant: A N Snider SC

Instructed by: LDA

Inc. Attorneys

For the Third Respondent: C N Gilpin of Gilpin Attorneys

for Third Respondent

[1] 200A Presumption as to who is employee (1) Until the contrary is proved, for the purposes of this Act, any employment law and section 98A of the Insolvency Act, 1936 (Act 24 of 1936), a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:

- (a) the manner in which the person works is subject to the control or direction of another person;
- (b) the person's hours of work are subject to the control or direction of another person;
- (c) in the case of a person who works for an organisation, the person forms part of that organisation;
- (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
- (e) the person is economically dependent on the other person for whom he or she works or renders services;
- (f) the person is provided with tools of trade or work equipment by the other person; or
- (g) the person only works for or renders services to one person. [Sub-s. (1) amended by s. 39 of Act 6 of 2014 (wef 1 January 2015).] (2) Subsection (1) does not apply to any person who earns in excess of the amount determined by the Minister in terms of section 6 (3) of the Basic Conditions of Employment Act.

[1] 200A Presumption as to who is employee

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- (e) the person is economically dependent on the other person for whom he or she works or renders services;
- (f) the person is provided with tools of trade or work equipment by the other person; or
- (g) the person only works for or renders services to one person.

[Sub-s. (1) amended by

s. 39 of Act 6 of 2014 (wef 1 January 2015).]

(2) Subsection (1) does not apply to any person who earns in excess of the amount determined by the Minister in terms of section 6 (3) of the Basic Conditions of Employment Act.

[2] Transnet t/a Transnet Freight Rail v National Union of Metalworkers of SA on behalf of Manku & others

(2021) 42 ILJ 1948 (LAC) at para [9]

[3] At para [99].

[4] Vermooten v Department of Public Enterprises & others (2017) 38 ILJ 607 (LAC) at para [18].

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