

SOUTH AFRICA / JUDGMENT

Protect A Partner (Pty) Ltd v Machaba-Abiodun and Others (JR2062/2010) [2012] ZALCJHB 56; (2013) 34 ILJ 392 (LC) (22 June 2012)

[2012] ZALCJHB 56

COURT

Labour Court Johannesburg

BEFORE

Gaibie

CASE / FILE NUMBER

JR2062/2010

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no.: JR2062/2010

PROTECT A PARTNER (PTY) LTDApplicant

and

LAURA MACHABA-ABIODUNFirst Respondent

COMMISSION FOR CONCILIATION

MEDIATION & ARBITRATIONSecond Respondent

SMIT, MARGARET NOThird Respondent

Heard: 24 May 2012

Delivered: 22 June 2012

Summary: Employee – Director and significant shareholder - Determination – Section 213 of LRA 1995 – Reality test adopted – Three criteria applied to determine existence of employment relationship – Focus on nature of control element for the purposes of director

GAIBIE, AJ

Introduction

The applicant seeks to review and set aside the ruling made by the second respondent ('the commissioner') under the auspices of the third respondent ('the CCMA') on 20 July 2010 under case number GAJB 42640/09 in terms of section 158(1)(g) of the Labour Relations Act 66 of 1995 ('the LRA'). The commissioner ruled that the first respondent, Ms Laura Machaba Abiodun ('Abiodun'), was an employee in terms of section 213 of the LRA, and that the CCMA, accordingly, had jurisdiction to entertain an unfair dismissal dispute referred by her.

Both parties had filed heads of argument in the present proceedings on the erroneous assumption that the review test in respect of this jurisdictional matter was that established by the judgment in *Sidumo and Another v Rustenburg Platinum Mines and Others*.¹ During the course of argument, it became apparent to the parties that the Sidumo test was inapplicable, and that the test established by the Labour Appeal Court in *SA Rugby Players Association and Others v SA Rugby (Pty) Limited and Others*² was the applicable test. In respect of jurisdictional matters, the question is not whether the finding was reasonable, rational or justifiable but whether on the facts, the applicant was an employee.

In SARPA, the LAC dealt with the provisions of section 186(1)(e), and in the context of determining whether a dismissal had occurred, Tlaetsi AJA held, on behalf of the Labour Appeal Court, that:

'[39] The issue that was before the commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal then the CCMA had no jurisdiction to entertain the dispute in terms of section 191 of the Act.

[40] The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court.'

Van Niekerk J in *Workforce Group (Pty) Limited v CCMA and Others*³ had regard to the SARPA judgment and held that in regard to a commissioner's finding on jurisdiction, the question is not whether the commissioner's finding was reasonable but whether on the facts the individual was an employee:

'In other words, the issue before the court is whether, objectively speaking, there existed facts which would give the CCMA the jurisdiction to entertain the dispute, ie that established that the...respondent...was an employee as defined by section 213 of the LRA.'⁴

In further amplification of the test, Steenkamp J in *ASARA Wine Estate and Hotel (Pty) Limited v Van Rooyen and Others*⁵ also had regard to the SARPA matter and stated the applicable test in respect of jurisdictional matters in the following terms, albeit that it was in relation to an issue of constructive dismissal:

‘The test I have to apply, therefore, is not whether the conclusion reached by the commissioner was so unreasonable that no commissioner could have come to the same conclusion, as set out in Sidumo, but whether the commissioner correctly found that Van Rooyen had been dismissed.’

I proceed therefore to enquire whether the commissioner correctly found that the applicant was an employee in terms of section 213 of the LRA.

Background facts

The applicant was represented, in its review pleadings, by its Chief Executive Officer (‘CEO’), Ms Marthie Claasens (‘Claasens’). In addition to her role as the CEO, she described herself as a 55% shareholder, employee and director of the applicant. The only other director and 45% shareholder was Abiodun. The CEO contends that whilst she is an employee of the applicant, Abiodun is not.

Arbitration proceedings

On 1 December 2009, pursuant to a disciplinary process, Claasens dismissed Abiodun summarily from her employment. On 10 December 2009, Abiodun referred an unfair dismissal dispute to the CCMA. A conciliation meeting was held on 3 February 2010, and on the same day Abiodun referred the dispute to arbitration.

Claasens launched an application in terms of rule 31 of the CCMA Rules (‘the Rule 31 Application’ or ‘the Rule 31 Affidavit’) in which she disputed Abiodun’s status as an employee, after she had received legal advice to do so.

Abiodun chose to lead viva voce evidence at the CCMA proceedings and whilst the applicant cross-examined Abiodun, it did not lead any evidence on behalf of the applicant. Accordingly, what is before this court for the purposes of determining the jurisdictional point is the applicant’s rule 31 application, the transcript of the arbitration proceedings and the review application in this matter.

Further supplementary affidavit

The applicant also submitted a second supplementary affidavit in which it purported to rely on evidence that was not before the CCMA for the purposes of the jurisdictional point. The applicant argued that in light of the dictum in *Workforce Group*, the Labour Court was enjoined to determine the matter afresh and that it was accordingly appropriate for it to take into account evidence that was not before the CCMA. I will deal with this issue later in this judgment.

The contractual relationship between the applicant and Abiodun

The applicant commenced its business as a close corporation in 2004. Its main business was the provision of technical assistance, training and assurances to auditors in respect of commercial audits.

During early 2007, Claasens met Abiodun and invited her to join the company because she would make a material contribution to the business of the applicant as a BEE partner. According to Claasens, in February 2007, she entered into a verbal agreement with Abiodun in terms of which the latter would: act as a non executive director; acquire the 'title' of chairperson of the Board of Directors ('the Board'); and acquire shares in the applicant as soon as it was converted into a private company. In return, Abiodun was required to spend one day a week 'to further the applicant's business' and

she received a monthly gross salary of R30 000 subject to the usual statutory deductions, including PAYE and UIF.

In October 2007, the applicant's status changed from a close corporation to a private company with limited liability. Claasens contends that, at that stage, the applicant had entered into a further verbal agreement with Abiodun in terms of which she acquired a 26% share in the applicant, and the remaining 19% was acquired by a close corporation known as AMC International (the 'CC') in which Abiodun and her husband were members. This evidence is contradicted by the shareholder's agreement which records that the shares in the applicant's business are held only by Claasens and Abiodun respectively in the ratio of 55% : 45%.

Claasens assisted Abiodun to obtain a loan so that she could acquire the 45% shareholding at a cost of some R2.8million.

From October 2007, Abiodun continued to receive the monthly salary of R30 000, and in addition thereto received an amount of R90 000 for consultancy services. In return, Abiodun was required to spend at least 3 days a week in the office and according to her she was required to 'facilitate various meetings and to enhance the business opportunities of the applicant'. Claasens expected Abiodun to 'promote the applicant's business, source work and market the applicant's services to her connections'. She also anticipated that Abiodun might 'expand the applicant's business via strategic business diversification and training initiatives'.

According to Claasens, Abiodun did not contribute to the applicant's business materially, nor did she secure business opportunities for the applicant. In any event, Claasens did not suggest that either she or the applicant took any action against Abiodun in consequence thereof.

On 2 October 2009, the relationship between Claasens and Abiodun had 'crossed a certain Rubicon'. According to Claasens, Abiodun accused her of fraud and corruption, and Abiodun enlisted the services of a forensic audit company to audit the books of the applicant. Claasens stated that it was during this debacle that certain irregularities pertaining to Abiodun came to her attention, and in consequence thereof Abiodun was suspended, charged and ultimately dismissed.

Abiodun did not participate in the disciplinary hearing because she was of the view that the decision to terminate her employment was a *fait accompli*.

16 charges of misconduct were levelled against Abiodun, which included allegations of dishonesty, fraud, disposition of company monies without authority, loss of business, passing off, acts in contravention of statutes, insubordination, insolence and incompatibility. It is necessary, to quote relevant parts of the charges, to capture the terminology and tenor of speech used therein in light of the issues raised in this matter. The relevant parts thereof read as follows:

‘Insubordination

Charge 13

On 16 October 2009 you were given a direct instruction from Marthie Claasens, the CEO of the company... to give feedback on the following:

Work sourced since 2007 clearly indicating on a schedule:

Date of meeting

Contact person....

Further work being sourced:

On which date

Negotiated with whom...

You failed and/or neglected to make the requested information available.

You then undertook to make it available on 23 October 2009.

The abovementioned incidents of insubordination has resulted in the employment relationship being strained and intolerable which has resulted in business suffering potential loss.

Insolence

Charge 14

On 22 October 2009 it is alleged by your co-employees and senior professional staff that you made yourself guilty of gross misconduct by being rude, abusive, and insulting and treated them with disrespect.

In March/April 2009 you attended to a tender in Mmbatho with Accountant General of the North West Province and gave undertakings and made promises without communicating this to the staff resulting in this tender being abandoned.

....

The abovementioned incidents of insolence has resulted in the employment relationship being strained and intolerable which has resulted in business suffering potential loss.

Incompatibility

Charge 15

Failure to maintain cordial and harmonious relationships with employees and co-directors, resulting in business unit being dysfunctional.

Failure to engage constructively or refusal to engage with CEO and other directors.

You in your capacity as chairperson, shareholder and director of the company failed and/or neglected to advance the interest of the company and its reputation by making false statements on 2 October 2009 in that your co-directors made questionable transactions without proper consultation with co-directors.

...

The abovementioned incidents of incompatibility have resulted in the employment relationship being strained and intolerable which has resulted in business suffering potential loss.'

Abiodun was found guilty of all the charges proffered against her and the chairperson concluded that she should be summarily dismissed.

On 1 December 2009, the CEO informed Abiodun about the termination of her employment in the following terms:

'You are hereby informed that you have been summarily dismissed on 1 December 2009 after a proper disciplinary hearing was convened and chaired by an independent chairperson. Therefore your last day of employment is today, being 1 December 2009.

You will receive your normal remuneration for the period up to and including 1 December 2009.'

As indicated above, the applicant for the first time contested Abiodun's status as an employee in terms of a rule 31 application at the CCMA arbitration proceedings. On the basis of the dicta in *State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*,⁶ and *Workforce Group*, the applicant contended that Abiodun was not an employee. In that regard, the applicant contended that Abiodun: was not subject to the supervision or control of the applicant; was not part of the organisation of the applicant; nor economically dependent on the applicant.

It is, in my view, necessary to examine the relevant aspects of the relationship between the applicant (represented by Claasens) and Abiodun in order to determine the jurisdictional issue.

Payments to Abiodun

Prior to the applicant's conversion into a private company, Abiodun received a monthly salary of R30 000.

From October 2007, Abiodun received an additional R90 000 which was paid to her CC, and which brought her total earnings to R120 000 per month. Claasens stated in the review application that the amount of R120 000 was made up of: R30 000 (a director's fee); R65 000 (to assist with the repayment of the loan used to purchase her 45% shareholding); and R25 000 (for consultancy services).

In contrast, Abiodun testified that the R30 000 was paid to her directly and the R90 000 was paid into the CC's account for the purposes of discharging the loan. She also testified that Nick Claasens, the Chief Financial Officer ('CFO') of the applicant, was responsible for structuring packages and that her package was structured in the same way as Claasens' package with a view to securing the most beneficial tax structure available.

The following additional factors indicated that the applicant considered the monthly payment to Abiodun as a composite figure of her entitlement to remuneration. For instance:

In reference to the amount of R90 000, Claasens indicated in paragraph 18 of her founding affidavit that this amount 'constituted 75% of her total remuneration from the applicant'.

On 24 November 2009, Abiodun was suspended from her employment with immediate effect and on 'on full pay'.

The chairperson of the disciplinary hearing recorded the following in relation to Abiodun's earnings:

'The accused had been in employment for almost 3 years. She is in a very senior position at the company and earning R156 000 per month. No previous disciplinary action has been taken against the accused. The financial position of the accused is unknown to the complainant, but she is married and her husband owns a successful company. She also serves on the board of other companies.'

In the circumstances, and on a balance of probabilities, it is clear that Abiodun received an amount of R120 000 which was later increased to R156 000 as remuneration per month. It is perhaps more than coincidental that paragraph 9 of the unsigned draft employment agreement reflected the amount of R30 000 as "remuneration". I return to the relevance of the unsigned employment agreement later in this

judgement.

There is one additional factor that requires a brief mention. It was Abiodun's uncontested evidence that she was reimbursed for any travel expenses for work purposes from the beginning of 2009. The only relevance of this reimbursement to the jurisdictional issue is that it is referred to as an entitlement in paragraph 10 of the unsigned employment agreement.

Control and supervision

The applicant averred that the commissioner erred when she found that Abiodun was under its control, and that the commissioner was only able to find one incident, being the disciplinary process, as an example of her submission to Claasens's authority. Claasens contended both in the Rule 31 application and in the review application that Abiodun performed her tasks in circumstances that were not subject to her control, direction or supervision. I deal with each of the issues raised by her in her affidavit that have a bearing on the issues of control or supervision below.

Hours of work and leave

It was common cause that Abiodun's hours of work were not regulated, controlled or monitored, and that she was not required to submit timesheets like the rest of the staff. According to Claasens, Abiodun was initially required to spend one day a week to 'further the applicant's business' and from October 2007 she was required to spend three days a week to 'facilitate various meetings and to enhance the business opportunities of the applicant', amongst other things. Claasens did not specify whether there was any agreement between them as to how this time would be computed, and it is accordingly not clear on what basis Claasens was able to contend in the rule 31 affidavit, that Abiodun 'did not spend in excess of an average of 40 hours per month in furthering the [applicant's] business'.

Whilst there was a dispute as to whether Abiodun was entitled to annual leave, it was clear that Abiodun was entitled to her monthly remuneration whether or not she rendered services to the applicant. In the circumstances, she continued to receive her monthly remuneration despite her absence, at some stage, when she travelled to the USA.

Services to be rendered or work to be performed

According to Claasens, Abiodun was required, in the main, to 'further the applicant's business', to promote and market it, and to source work for the applicant. Claasens did not provide any particularity as to how these tasks should have been achieved except for a broad and bold expectation that Abiodun was required to 'promote the applicant's business, source the work and market the applicant's services to her connections'.

It is arguably more than coincidental that para 3.5 of the unsigned employment agreement echoed Claasens' understanding of Abiodun's tasks in the following terms:

'The duties, functions and tasks of the EMPLOYEE shall be to strategic marketing of the firm's business.'

It was Abiodun's uncontested evidence that she did more than just the strategic marketing of the applicant's business. According to her she:

dealt with recruitment of staff - for instance, she together with Claasens interviewed a potential candidate for the post of CFO;

attended various meetings with Claasens, including meetings with customers;

cached payments at the Auditor General; she negotiated with SARS in respect of taxes that were owing by the applicant but were outstanding for years and months;

had to evaluate employees on their performance; and she was required to assess the applicant's operating model and determine whether it was effective; and

was responsible for ‘firming up’ existing contracts, such as the contract with the Auditor General where the applicant got 90% of its income, and for heading a project aimed at obtaining contracts with the Department of Labour.

It is also apparent from the provisions of the shareholders agreement that both Claasens and Abiodun were responsible for the day to day management of the applicant. In this regard, paragraph 13 of the shareholders agreement is significant. The relevant parts thereof provide as follows:

‘13 MANAGEMENT OF THE COMPANY

13.1 Control and management of the Company will vest in the Board.

13.2 The Board will be responsible for and have the following powers and authority –

13.2.1 the management of the Company;

13.2.2 determining the strategic policy of the Company and preparing the Annual Budget from time to time; and

13.2.3 ensuring compliance with any approvals framework agreed to by a Special Majority of the Shareholders from time to time.

13.3 The day to day management of the Company will be –

13.3.1 subject to the policies and principles determined from time to time by the Board; and

13.3.2 the governance and oversight responsibility of the Executive Chairman who will be appointed from among the Directors, who will initially be Machaba-Abiodun;

13.3.3 the responsibility of a Chief Executive Officer who will be appointed from among the Directors, who will initially be Claasens.’

In the context of this evidence, it is necessary to ask whether Abiodun had performed her tasks under any supervision or control. Under cross-examination, Abiodun conceded that she was not under the supervision or control of Claasens but that she was answerable to the Board, even if the Board was made up of Claasens and herself. According to her, the Board ‘had to agree on the strategic direction ... and once that was agreed, I execute that. I will not execute anything outside of the Board, that was not agreed’. Abiodun’s evidence in this regard is in sync with the provisions of paragraph 13 of the shareholders agreement quoted above. It is in this context that Abiodun testified that she was under Claasens’s command in so far as she executed the Board’s instructions, and that in all other circumstances they were peers who worked in collaboration with each other.

It was, in any event, not disputed that Abiodun was reflected as an employee in the ‘top management’ of the applicant in a document which was submitted by the applicant to the Department of Labour in respect of its BEE status.

Despite this evidence, Claasens persisted with her view, in the Rule 31 application and the review application, that Abiodun was no more than a non-executive director. This view is not only underscored by Abiodun's uncontested testimony (captured above, in particular, at para 36) but also by clause 13 of the shareholders agreement.

Tools of trade

It was common cause that the applicant had provided Abiodun with an office and office equipment which she used for the performance of her tasks and function and for matters that related to her status as a non-executive director of external entities. Abiodun testified that Claasens also used her computer for other business activities. This evidence was not contested.

Part of the organisation

Claasens contended that Abiodun did not form part of the organisation of the applicant. This contention rested on two propositions: first, that Abiodun was not a qualified auditor and that she was therefore unable to partake in the core business of the applicant; and second, that Abiodun was not obliged to devote her time and energy to the applicant's business on a full time basis.

Abiodun on the other hand contended that she was completely part of the organisation, that when she started with the applicant she engaged with the employees and once she had made a financial contribution to the shareholding of the applicant, she explained her commitment to the business of the applicant in the following resounding terms:

'Imagine that at time I as working ... it was positioning outside, at this time we wanted to get into the skin of the company, how the operatives run, how the finances run, because the operative model was not sustainable that is what we were concerned about, like any equity shareholder, we want to make sure that it is a sustainable model.

Three days in the office, what we have agreed on and continuing to do the strategy of marketing and the position in the company'.

Economic dependence

It was common cause that Abiodun sat on numerous other boards as a non-executive director and that she received substantial income in consequence thereof. Abiodun however maintained that the 'lion share' of her income came from her employment with the applicant. The applicant argued that her income from the other entities, albeit in the form of a non-executive director's fee, was indicative of the fact that she was not economically dependent on the applicant.

The various agreements

It was common cause that an employment agreement and a consultancy agreement were drafted by the applicant but that these were not concluded or signed by the parties. The parties did however conclude a shareholders agreement and apart from the relevance of clause 13 referred to above, clause 3.1.2 indicated as a 'condition precedent' that Claasens and Abiodun should conclude employment agreements with the applicant by 17h00 on 31 October 2007'. Claasens

maintained that she was an employee of the applicant and that Abiodun was not, in the absence of any allegation that she had concluded an employment agreement with the applicant.

The main issue

The central question in this case is the following: Are directors employees? More specifically, are permanent part-time directors and significant shareholders employees for the purposes of the LRA? The traditional answer to this question is that some are and some are not. However, since directors are legal persons separate from the entity, the possibility arises that they may be its employees. Our courts have on several occasions held that directors should be regarded as employees in appropriate circumstances.⁷

It is a general and well established principle of law that a company is a separate legal person, and there is a fundamental difference between its rights, duties and acts to those of others, including its directors and shareholders.

In general, there are essentially two types of directors, more commonly known as non-executive and executive directors. The directors of an organisation are the persons who are the members of its board. An executive director, sometimes also referred to as an “inside director” is a director who is often an employee, officer, significant shareholder, or someone similarly connected to the organisation. Inside directors or executive directors represent the interest of the entity’s stakeholders, and often have special knowledge of its inner workings, its financial or market position, its vision and its mission. Typical executive directors would include: a chief executive officer who may also be the chairman or chairperson of the board, other executives of the organisation, such as its chief financial officer or any other director tasked with the management of the entity’s operations. A non-executive director is usually referred to as a member of the Board who is not otherwise employed by or engaged with the entity or the organisation, and does not generally represent any of its stakeholders. A typical example would be a director who is president of a firm or entity in a different industry.

The question as to whether a director, albeit a permanent part-time director, is an employee will always be coloured by the context in which the question of the director’s work status has arisen and the answers will highlight conflicting factors that may operate in any given situation. The Court has to consider the relevance of all of these factors, decide what weight should be given to each of them and then balance one against the other to arrive at an appropriate

conclusion.

Against that brief background it is also necessary to take judicial recognition of the overall employment background and the nature of employment relationships in modern day. In his article⁸ Professor Paul Benjamin (“Benjamin”) indicates that the statutory definition of an employee draws the line between employment and self-employment. Benjamin recognises that in recent years –

‘...this line has become an increasingly contested terrain. Factors such as globalisation, deregulation and technological change have combined greatly to increase the variety of forms of employment. An increasing number of workers are now located in a grey area between employment and self employment. In addition, many employers have adopted strategies to disguise employment as self employment so as to avoid the requirement of labour law.

This shift has been described as the rise of “atypical” or “non-standard” forms of employment. These terms are generally taken to encapsulate employment other than full time employment for a single employer who controls the workplace. As Clive Thompson has commented: “The standard model of employment is now one of inherent variability. Work has changed and is changing for both better and for worse”.

Benjamin also indicates that the negative implications of these developments have been recognised in government policy documents and he records the following excerpt from the green paper⁹ which preceded the promulgation of the Basic Conditions of Employment Act 75 of 1997 (‘the BCEA’):

‘The current labour market has many forms of employment relationships that differ from full-time employment. These include part-time employees, temporary employees, employees supplied by employment agencies, casual employees, home workers and workers engaged under a range of contracting relationships ...’

In her article,¹⁰ Professor Rochelle Le Roux also comments on the diverse forms in which labour presents itself:

‘Until recently there has been very little difficulty in using the contract of employment to draw that line. However, work continuously presents itself in new and diverse forms, and the reality must have dawned on even the most conservative labour lawyer that the continued reliance and the contract of employment will render labour law less and less relevant. So where and how should the line be drawn now?’

Applicable legal principles

The scope of the definition of ‘employee’ in section 213 of the LRA was recently discussed in Workforce Group.¹¹ In that decision, the Court referred to the Sita judgment, where the LAC, without indicating the relative weight that should be accorded to each factor, identified the primary criteria for the purposes of determining an employment relationship as:

The employer’s right of supervision and control;

Whether the employee forms an integral part of the organisation with the employer; and

The extent to which the employee was economically dependent upon the employer.

The LAC, in developing the reality test, cited with approval, Benjamin's article. Benjamin clearly indicates that it is not necessary to establish the existence of all three criteria for the purposes of deciding whether an employment relationship exists. In this regard, he makes the following proposal:

'It is suggested that the presence of any of these should, in normal circumstances, indicate that the person is an employee. The presence of a right of control should point to an employment relationship covered by labour legislation, unless the employer can show aspects of the relationship that make this inappropriate. It will be for the courts to delineate those factors that indicate that an employment relationship does not exist despite the presence of control. Where this is not the case, the courts could utilise the presence of economic dependence or the person's integration into the employer's organization to determine whether they should receive the protection of labour law.'¹²

According to Benjamin, therefore, no one factor is decisive and it is possible in certain circumstances to declare that an employment relationship exists if only one of the three factors is satisfied.

Depending on the context, the three criteria must be applied in circumstances where there is a recognition that there may be many factors to be taken into account in relation to each of those criteria with different priority being given to those factors depending on the facts of each individual case.

Element of control

First, the element of control will be important. Traditionally, this element is determined by enquiring who makes the decision about what is to be done, the way in which it is to be done, the manner or the means by which it is to be done and/or the time when it is to be done? In addition, questions must be asked about who hires and fires the persons who must perform what is to be done, and who provides the material, the equipment or the tools to be used in performing what is to be done? These questions are, in the context of the control element, easy to answer in respect of employees who are either unskilled or semi skilled precisely because such employees fit neatly into the typical master-servant relationship. From time to time, our courts have, depending on the nature of the employment relationship, attempted to define the control element in narrower terms, requiring in its basic form some element of hierarchical authority or subordinate relationship.¹³

In the context of skilled or expert employees, the element of control may not be decisive precisely because the employer may be less skilled or less experienced than the skilled

employee and may not have the appropriate skill or discretion to decide how the work should be done. This was recognised in *Medical Association of S.A. and Others v Minister of Health and Another*.¹⁴ Whilst it is settled law that some form of control is necessary for an employment relationship to exist, the exact nature, form or extent of control required in any particular case is less clear. Much will depend on the nature of the work to be performed and the relationship between the parties.

In such cases, the control element must be broadened to ask questions that are context appropriate. In the case of skilled employees, the appropriate question was posed by the Court of Appeal in *Lane v Shire Roofing Company (Oxford) Limited* [1995] EWCA Civ 37; [1995] IR LR 493 (CA), where Henry LJ stated that:

‘In such cases the question is broadened to ask whose business was it? Was the workman carrying on his own business or was he carrying on that of his employers? The American Supreme Court, in *United States of America v Silk*

[1947] USSC 104; (1946) 331 US 704, asks the question whether the men were employees “as a matter of economic reality”. The answer to this question may cover much of the same ground as the control test (such as whether he provides his own equipment and hires his own helpers) but may involve looking to see where the financial risk lies, and whether and how far he has an opportunity of profiting from sound

management in the performance of his task.’

A similar approach was adopted by Cooke J in *Market Investigations v Minister of Social Security* [1969] 2 QB 173 (HC), where he indicated that:

‘The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors, which may be of importance, are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, and what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.’

The above approaches to the element of control are also congruent with section 213 of the LRA which inter alia defines an employee as any other person who in any manner assists in carrying on or conducting the business of the employer.

The Employment Appeal Tribunal in the UK in *Buchan v Secretary of State for Employment; Ivey v Secretary of State for Employment*¹⁵ suggested that in its most reduced form the element of control would be reflected in the employer’s power to terminate the employment relationship.

In the context of this case, it is apparent that:

the authority for hiring Abiodun lay within the domain of the applicant and so did her firing. To the extent that the applicant was of the view that Abiodun did not comply with any mandate or instruction, she was subject to the disciplinary control of the applicant and was ultimately dismissed in terms of thereof;

the applicant provided Abiodun with office space and equipment in order to ‘further the applicant’s business’;

Abiodun invested a huge amount of money in the purchase of her shareholding in the applicant and was responsible for governance matters in relation to the Board and for the management of the entity subject to the Board’s direction.

In all of these respects she was subject to the control of the applicant.

Organisation test

The applicant contended that Abiodun did not form part of the organisation as she was not a qualified auditor, and was therefore unable to partake in the core business of the applicant. In addition, the applicant contended that she was not obliged to devote her time and energy to the applicant’s business on a full time basis. This contention misses the point. An employee does not form part of the organisation simply because he or she performs the same services or tasks as other employees in the organisation or because she does not do so on a fulltime basis. On the contrary, both the BCEA and LRA acknowledge part time employment relationships and extend protection against the unfair deprivation of work security to them.

According to Benjamin, ‘...integration into the employer’s organization is now a factor that may be taken into account in cases in which the conventional aspect of control and supervision are not present. The criticism of the organisation test in Smit must now be tempered by the fact that the statutory definition of an employee requires a court to consider whether the employee is assisting the employer conduct its business, an issue to which the “organisation” test addresses itself.’¹⁶

Abiodun’s evidence that she was part of the organisation was not seriously challenged. On Claasen’s version, Abiodun effectively assisted the applicant in conducting and furthering its business. In addition, she was provided with an office and a computer to do so. The nature of the tasks and services that she rendered and in respect of which she gave testimony indicates a significant degree of integration into the applicant’s organisation which is indicative of the existence of an employment relationship.

The applicant contended that because Abiodun had alternative means of earnings independently of her employment with the applicant, she was not economically dependent. However, and despite her alternative means of earnings, Abiodun’s evidence that the lion share of her income emanated from the applicant was uncontested.

In any event, and on the basis of the reality test, Abiodun has satisfied both the control and the organisation tests, and she has established that her income from the applicant was the dominant form of her earnings. To that extent she has satisfied that criteria too. However, and in so far as a contrary view exists in relation to determining the notion of ‘economic dependence’,¹⁷ it is clear that Abiodun has discharged the onus, at the very least, in relation to the first two criteria.

Conclusion

As it will appear from my assessment of the evidence in this matter, I intermittently referred to the unsigned employment agreement and the signed shareholders agreement. I did so to indicate, at appropriate stages, the relevance of those agreements to the reality of the relationship between the parties.

During the course of argument, the applicant’s counsel suggested that I should disregard the shareholders agreement in so far as it may have any relevance to the jurisdictional issue, notwithstanding the fact that the agreement was valid and enforceable. In this regard, she referred to the following excerpt of Van Niekerk J, in *Workforce Group*,¹⁸ in support of her argument that any agreements relevant to this matter should not be relied upon for the purposes of determining the jurisdictional issue:

‘When the existence or otherwise of an employment relationship is determined, the court has regard to substance rather than form. The terms of any agreement between the parties, the labels that they use to define their relationship and the use of any vehicle through which services are rendered by one to the other are of no consequence – what matters is the reality of the relationship between them...’

I do not understand this dictum to suggest that any documents, including the terms of an agreement between the parties will always be irrelevant in these circumstances, but rather that a holistic approach should be adopted in these circumstances to arrive at a reasonable and equitable

conclusion

about the reality of the relationship between the parties.¹⁹ The suggestion was, I believe, opportunistic especially because on a closer examination of the facts in this matter the reality of an employment relationship was echoed by the relevant provisions of the shareholders agreement and was indicative of an employment relationship envisaged in the unsigned employment agreement.

In the circumstances of this matter, I am of the view that Abiodun has discharged the onus of establishing that she was an ‘employee’ as defined in the LRA. It follows that the matter should be remitted to the CCMA for the arbitration hearing to continue.

There is one final issue that needs to be dealt with before I deal with the issue of costs. The applicant served and filed a second supplementary affidavit in which it purported to attach evidence of Abiodun's income from alternative sources. Such evidence was not placed before the commissioner and I was requested to admit the affidavit on the basis that this Court was required, for the purposes of the jurisdictional issue, to determine the matter afresh. Whilst this Court is enjoined to consider the matter afresh, it does so under the review provisions provided in section 158 of the LRA and to that extent it does so on the basis of the evidence that was presented to the CCMA. In the circumstances I am of the view that the second supplementary affidavit cannot be admitted. However, and for the reasons alluded to above, even if I was of the contrary view, the information contained in that affidavit, does not change the outcome of the jurisdictional issue.

In terms of section 162 of the LRA, this Court has a wide discretion to make orders of costs according to the requirements of law and fairness. Ordinarily, on the basis that costs follow the result, the applicant would be liable for the first respondent's costs. In this regard, I must take cognisance of the fact that the applicant wished to test its case in terms of an approach which is not entirely incompatible with sentiments expressed before in respect of the status of a director in terms of the LRA.

The application is accordingly dismissed with costs.

Acting Judge of the Labour Court

For the Applicant: AC Soldatos from Fluxmans Incorporated

For the Respondent: Adv JM Bezuidenhout – Instructed by Spector Attorneys

1 2008

(2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC).

2(2008) 29 ILJ 2218 (LAC).

3(2012) 33 ILJ 738 (LC)

4Id at para 2.

5(2012) 33 ILJ 363 (LC) at para 23.

6(2008) 29 ILJ 2234 (LAC).

7See Boumat Ltd v Vaughan

(1992) 13 ILJ 934 (LAC); PG Group (Pty) Ltd v Mbambo NO and others (2004) 25 ILJ 2366 (LC); South African Post Office Ltd v Mampeule (2010) 10 BLLR 1052 (LAC); and Chillibush Communications (Pty) Ltd v Johnston NO and Others (2010) 31 ILJ 1358 (LC)

8Benjamin, P. 'An Accident of History: Who is (and Who should be) an employee under South African Labour Law,' (2004) 25 ILJ 787 at 789-790.

9Id at 790.

10Le Roux, R. 'The Meaning of 'Worker' and the Road Towards Diversification: Reflecting on Discovery, SITA and Kylie', 2009 (30) ILJ 49.

11Workforce Group (supra) at para 5.

12Above n 8 at 804.

13Mhlongo and Another N.O. v Minister of Police 1978 (2) SA 551 (A); Roffey v Catterall, Edwards and Goudré (Pty) Ltd 1977

(4) SA 494 (N).

14(1997) 18 ILJ 528 (LC).

15 [1997] IRLR 80.

16At pages 803-804.

17See in this regard Paul Benjamin's article at 803.

18Workforce Group (supra) at para 6.

19The LAC in the SITA matter took cognisance of the relevant documents and agreements to determine the jurisdictional issue.

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Prepared on 12 October 2026 · Esheria