

SOUTH AFRICA / JUDGMENT

## Smith v Mouille Grange Body Corporate and Others (C606/2022) [2024] ZALCCT 55 (18 November 2024) [2024] ZALCCT 55

COURT

Labour Court Cape Town

BEFORE

T Gandidze

CASE / FILE NUMBER

C606/2022

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### Source record

THE LABOUR COURT OF  
SOUTH AFRICA, CAPE TOWN

Not Reportable

Case

No: C606/2022

In

the matter between:

ANTHONY SPENCER  
SMITH  
Applicant  
and  
MOUILLE  
GRANGE BODY CORPORATE  
First Respondent  
COMMISSIONER  
CM BENNETT  
Second Respondent  
COMMISSION FOR  
CONCILIATION, MEDIATION  
AND  
ARBITRATION  
Third Respondent

Heard:

5 September 2024

Delivered: 18 November 2024  
Summary: Application to review and set aside an award which found that the applicant was an independent contractor, not an employee.  
The conclusion is correct, and therefore, the award is not reviewable.

## JUDGMENT

GANDIDZE, AJ

### Introduction

[1] Since 2010, the applicant, Anthony Smith, worked as a Building Manager for the first respondent, Mouille Grange Body Corporate (Mouille Grange). This was in terms of an Independent Contractor Agreement (the Agreement) concluded between the parties, which Mouille Grange terminated on 1 February 2022 on two months' notice. He referred an unfair dismissal dispute to the third respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA) alleging an unfair dismissal. In an award dated 1 November 2022, the second respondent commissioner found that the applicant was an independent contractor and, therefore, the CCMA lacked jurisdiction

to determine the dispute. The current review application in terms of section 145 of the Labour Relations Act[1] (LRA), is aimed at setting aside that award and substituting it with an order that the applicant was an employee.

[2] If the review succeeds, the applicant requests the Court to pronounce on the 'fairness of his dismissal' and find that the dismissal was both procedurally and substantively unfair. In that event, he seeks compensation.

[3] Mouille Grange opposed the application.

### Arbitration proceedings

[4] At arbitration, specific facts were agreed to be either common cause or were not disputed, as recorded below.

[5] The initial Agreement between the parties was signed in 2010 and renewed in 2013. Mouille Grange alleged that the applicant had repudiated the Agreement, which repudiation it accepted. The applicant challenged the termination of the Agreement, contending that notwithstanding the wording of the Agreement, he was, in fact, an employee and was treated as an employee from the beginning.

[6] The Agreement required the applicant to submit invoices. While the applicant submits that he was never requested and never submitted invoices, Mouille Grange contends that the applicant refused to submit invoices.

[7] The Agreement provided a total cost to the company remuneration for the applicant, including telephone and internet costs. The applicant was issued with monthly payslips reflecting a fixed salary, from

which Pay As You Earn (PAYE), Skills Development Levy (SDL), and the Unemployment Insurance Fund (UIF) contributions were deducted.

[8] The applicant also received a Private Retirement Annuity Benefit from 2017 until the contract was terminated.

[9] He permanently resided on the premises and received a fringe tax benefit for using a flat in the building.

[10] He also received an annual bonus, but the parties are in dispute whether the bonus was paid since 2012 or 2016.

[11] The Agreement also made provision for 15 days annual leave for the applicant.

[12] The applicant was required to work a minimum of 20 hours per week, which was later increased to 25 hours per week. These hours were as per the applicant's request.

[13] The applicant was required to attend all Trustee meetings regarding building and maintenance matters. He reported to Michael Kahn (Kahn), the Chairperson of Mouille Grange, regarding work that needed to be performed. How the applicant performed those tasks was not dictated to him, and he decided when to perform the work.

[14] Two employees of Mouille Grange reported to the applicant, who also managed their leave and disciplined them as necessary.

[15] In at least two e-mails issued on behalf of Mouille Grange, the applicant was referred to as an employee.

[16] The applicant managed two other residential blocks, Thermopylae and Heron Water, and also assisted the Mouille Grange residents for a fee. In rendering services to Mouille Grange, the applicant provided his tools of trade. He also used his private Gmail e-mail address to conduct Mouille Grange business.

#### Grounds for review

[17] The applicant's primary ground for review is that the finding by the commissioner that he was not an employee but an independent contractor is one that no reasonable commissioner would arrive at.

[18] In the alternative, it is the applicant's case that the commissioner committed a gross irregularity in the conduct of the proceedings and/or exceeded his powers in failing to take into account the following:

18.1 The contents of the Agreement signed by the parties and its annexures;

18.2 That it was common cause that he never submitted and was never requested to submit an invoice for his services;

18.3 That he was issued with a monthly payslip reflecting a fixed salary;

18.4 Mouille Grange deducted PAYE from his remuneration, and that PAYE is specific and peculiar to an employee, and that SARS did not require the PAYE deduction to be made;

18.5 Mouille Grange deducted the SDL and UIF contributions from the applicant's salary, which would be unlawful deductions if the applicant was not an employee;

18.6 Mouille Grange's witness, Van Schalkwyk, conceded that annexure B to the Agreement dealing with his remuneration, read together with the payslip, was indicative of an employment relationship;

18.7 The same witness also testified that in 2019, Kahn concluded that the applicant was an employee;

18.8 Kahn also wrote e-mails in which he referred to the applicant as an employee; and

18.9 The applicant received a Private Retirement Annuity Benefit and an annual bonus.

[19] The commissioner is also said to have failed to take into account the concessions by Kahn that:

19.1 The applicant reported to him;

19.2 Two employees of Mouille Grange reported to the applicant, who managed their leave and disciplined them as necessary;

19.3 The applicant received a fringe tax benefit for using a flat in the building; and

19.4 He described the contract as a 'quasi' contract, meaning it contains elements of an employment relationship.

[20] It is also the applicant's case that Kahn's version about the applicant's status was inconsistent in that he testified that he was 100% convinced that the applicant was an independent contractor, and yet in at least two e-mails dated 22 February 2021 and 6 December 2021 Kahn referred to the applicant as an employee.

[21] The applicant submits that the evidence does not bear out the commissioner's finding that the applicant considered himself a part-time employee.

[22] On the application of the dominant impression test, the commissioner came to the wrong conclusion that the applicant was an independent contractor, so the applicant submitted.

The legal principles

[23] Whether a person was an employee or an independent contractor goes to the CCMA's and the Court's jurisdiction. Unless one is an employee, neither the CCMA nor this Court has jurisdiction to determine an alleged unfair dismissal dispute lodged by that person.

[24] The person alleging the existence of the dismissal bears the burden to prove same.

[25] On review, the test is whether the decision reached by the commissioner on jurisdiction was correct. The Court decides whether the

## facts

objectively support the conclusion that one was an employee and decides the matter de novo as the commissioner's finding was made merely for convenience.[2]

[26] Section 213 of the LRA defines an employee as “(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer”.

[27] Where a person is an independent contractor, that is the end of the inquiry, given the specific exclusion in the definition of an employee.

[28] Section 200A of the LRA, read with section 83A of the Basic Conditions of Employment Act[3] (the Employment Act), provides that until the contrary is proved, a person who works for or renders services to another is presumed to be an employee, regardless of the form of the contract, if any one or more of the following factors are present—

28.1 The manner in which the person works is subject to the control or direction of another person;

28.2 The person's hours of work are subject to the control or direction of another person;

28.3 In the case of a person who works for an organization, the person forms part of the organization;

28.4 The person worked for that person for an average of at least 40 hours per month over the last three months;

28.5 The person is economically dependent on the other person for whom he or she works or renders services;

28.6 The person is provided with the tools of trade or work equipment by another person;

28.7 The person only works for or renders services to one person.

[29] In terms of section 200A (2) of the LRA, the above presumption applies to employees who earn less than the threshold determined by the Minister of Labour in terms of the Employment Act. In this case, the applicant earned above the threshold, with the consequence that the presumption does not apply.

[30] Where an employee earns above the threshold, as is the case here, the Code of Good Practice: Who is an Employee,[4] as contemplated in terms of subsection (4) of section 200A of the LRA, sets out the guidelines for determining whether that person is, in any event, an employee. The Code of Good Practice sets out six distinguishing factors[5] between an employee and an independent contractor as follows:

30.1 An employee renders personal service, whereas an independent contractor performs specified work and produces a specified result;

30.2 While an employee performs the service personally, an independent contractor may perform the service through others;

30.3 The employer chooses when to make use of the services of an employee, whereas an independent contractor performs work or produces a result within the period fixed by the contract;

30.4 An employee must obey the lawful instructions from the employer, whereas an independent contractor is subservient to the contract but is not under the supervision or control of the employer;

30.5 The contract with an employee terminates on such employee's death whereas the death of an independent contractor does not necessarily terminate the contract; and

30.6 An employee's contract terminates on the expiry of the period of service, whereas an independent contractor's contract terminates upon completion of work or production of the specified result.

[31] Various tests have been formulated to determine whether a person is an employee, and even though it has received heavy criticism, the dominant impression test has generally been followed. In terms of this test, the realities of the relationship are ascertained

irrespective of how parties have described or termed their relationship. Substance prevails over form.[6]

[32] In *State Information Technology Agency (SITA) (Pty) Ltd v CCMA & others*[7], (SITA) the LAC adapted the dominant-impression test by listing the three primary criteria for an employment relationship as (a) the employer's right of supervision and control, (b) whether an employee forms an integral part of the organization, and (c) the employee's economic dependency upon the employer.

## Analysis

[33] Although the applicant initially sought to have the award reviewed because it is one that no reasonable decision-maker could make, when the matter was argued, Mr Cronje, for the applicant, conceded that the test was one of correctness, viz, whether the commissioner's conclusion that the applicant was an independent contractor was correct or not.

[34] Section 213(a) of the LRA clearly states that an independent contractor is excluded from the definition of an employee. In other words, once it has been established that one is an independent contractor, that is the end of the inquiry.

[35] The Agreement between the parties is titled 'Independent Contractor Agreement' and provides as follows:

‘4. RELATIONSHIP BETWEEN THE PARTIES.

4.1. For the avoidance of doubt, the parties record and agree that pursuant to the implementation of this Agreement, the Contractor shall at all times act as an independent Contractor.

4.2. Nothing in this Agreement shall constitute an employer/employee relationship...’

[36] In the applicant’s pleadings and heads of argument, the submission was made that the ‘Independent Contractor Agreement’ signed by the parties was, in fact, a contract of employment given the factors that pointed to an employment relationship. At the hearing of the matter, Mr Cronje submitted that the applicant started as an independent contractor but that, at some point, the relationship evolved to be that of employer and employee.

[37] The applicant’s case evolved during oral submissions. During the arbitration proceedings, in the review pleadings and the heads of argument filed on behalf of the applicant, the case made is that he was an employee since the first day he commenced rendering services to Mouille Grange. This case was abandoned in oral argument as recorded above. The evidence was that on or about 2019, a proposal was presented to the applicant to transition from being an independent contractor to becoming a part-time employee. The applicant did not accept the offer. The change of tactic and strategy during oral argument has to be fatal to the applicant’s case on review, given that the arbitration award sought to be reviewed is based on the case presented during those proceedings.

[38] Returning then to the case before the commissioner, and as pleaded by the applicant in the review, the commissioner found that there were factors that could be relied upon to conclude that the applicant was an employee, and there were also factors that arguably pointed to the applicant being an independent contractor. The commissioner listed the factors for and those against those contentions. The commissioner expressly referred to the terms of the Agreement, the non-submission of invoices, the deductions made from the applicant’s remuneration, that the applicant reported to a trustee as part of monitoring performance, that the Agreement did not specify start and end work times, that the applicant managed employees of Mouille Grange and the Private Retirement Annuity

benefit that the applicant received. The commissioner found that bonus payments are based on performance. He also found that Mouille

Grange was required to deduct tax from the remuneration payable to the applicant. Therefore, contrary to the applicant’s

submission, the commissioner considered the factors the applicant alleges he failed to consider.

- [39] Some of the factors that the applicant submits point exclusively to an employment relationship were also present in *Vermooten v Department of Public Enterprises and Others*[8], but the Labour Appeal Court (LAC) found that the applicant in that matter was an independent contractor. Those factors include that the applicant reported to the Director General, he had staff reporting to him, he was entitled to annual leave, and PAYE of 25% was deducted from his remuneration,
- [40] Similarly, in *Universal Church of the Kingdom of God v Myeni and others*[9], a pastor was issued a monthly payslip, provided with accommodation, had UIF and PAYE deductions made, reported to the Bishop, and had an IRP5 form that reflected the Church as the employer. Still, the Court found that there was no employer/employee relationship.
- [41] Therefore, the presence of some of the factors relied upon by the applicant does not mean the exclusion of an independent contractor relationship.
- [42] The commissioner also took into account that the applicant, who was not uneducated, had signed the Independent Contractor Agreement on two separate occasions. Therefore, the applicant was an independent contractor because the Agreement said so, after he made an informed decision to be an independent contractor, which suited him best based on his situation. He was not in a weak bargaining position, and the law does not forbid such an arrangement, which is enforceable.[10]
- [43] In addition, in 2019, the applicant rejected the proposal to become a part-time employee preferring to remain an independent contractor. That arrangement suited him best, and the Agreement binds him.
- [44] Having considered those factors and applying the dominant impression test, the commissioner concluded that the applicant was an independent contractor. The applicant accepts that the commissioner applied the dominant impression test but states that the application of the test to the facts was wrong. The Court disagrees. Taking all the relevant factors into account, the applicant was an independent contractor.
- [45] It was also submitted for the applicant that the commissioner's finding that the applicant referred to himself as a part-time employee is not borne out by the evidence. Under cross-examination, it was put to the applicant that Mouille Grange remunerated him and that he also worked for another building, to which he responded that "I was employed at Mouille Grange on a part-time basis with five hours a day and 25 hours per week, and it was known to the trustees that I worked at Thermopylae". There is no merit in the submission that the commissioner made a finding unsupported by evidence.
- [46] The arrangement referred to above allowed the applicant to continue running his own business, manage two other buildings, and assist the residence of Mouille Grange for a fee that he pocketed. The employee/employer relationship was not ideal for that reason.

- [47] The fact that the applicant had several sources of income and was not economically dependent on Mouille Grange indicates an independent contractor relationship.
- [48] He did not submit invoices, but the Agreement required him to submit invoices, and therefore, the non-submission of invoices was not in accordance with what the parties agreed.
- [49] He provided his tools of trade and used his personal Gmail e-mail address to conduct the business of Mouille Grange.
- [50] He attended trustee meetings in his capacity as the person best placed to respond to building and maintenance issues, but this fact did not prove the existence of an employment relationship. The exact nature of the relationship is established by having regard to all the facts of the matter and the realities of the relationship.
- [51] Referring to someone as an employee is not conclusive on whether that person is an employee, in the same way, that calling a person an independent contractor without more does not lead to the conclusion that the person concerned is indeed an independent contractor.
- [52] Kahn's referring to the relationship as a quasi-contract does not take the matter further, given the meaning of the phrase, a contract created by law for reasons of justice without any expression of assent.
- [53] The Agreement required the applicant, and not Mouille Grange, to comply with the Employment Act.
- [54] If the SDL and UIF deductions were unlawful, the applicant had remedies. The deductions did not change the nature of the relationship with Mouille Grange.
- [55] The conclusion that the applicant was an independent contractor is correct on the facts of this matter. The independent contractor arrangement suited the applicant until Mouille Grange resolved to terminate the relationship on two months' notice, as provided in the Agreement. The termination was not that of an employment relationship.
- [56] Having correctly found that the applicant was not an employee, the commissioner was also correct in not deciding the issue of dismissal, which did not arise.

## Relief

- [57] In terms of section 162 of the LRA, cost orders are made taking into account the requirements of law and fairness. In this case, an order for each party to pay its own costs will be in accordance with the requirements of law and fairness.
- [58] In the premise, I make the following order:

## Order

1. The review application is dismissed.
2. There is no order as to costs.

T Gandidze

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr F. Cronje

Instructed by:

Cronjes Inc. Attorneys

For the Respondent: Advocate C. de Kock

Instructed by:

Carelse Kahn Inc.

1] Act 66 of 1995, as amended.

[2] SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others (2008) 29 ILJ 2218 (LAC) [2008] ZALAC 3; ; [2008] 9 BLLR 845 (LAC) at paras 40 and 41 and Benicon Earthworks & Mining Services (Edms) Bpk v Jacobs NO & others (1994) 15 ILJ 801 (LAC) at 804C-D.

[3] Act 75 of 1997.

[4] GN 1774 in Government Gazette 29445 of 1 December 2006.

[5] See also SABC v McKenzie [1999] 1 BLLR 1 (LAC); (1999) 20 ILJ 585 (LAC), Smit v Workmen's Compensation Commissioner [1979] 1 All SA 152 (A), Liberty Life Association of Africa Ltd v Niselow [1996] 7 BLLR 825 (LAC); (1996) 17 ILJ 673 (LAC) and Denel (Pty) Ltd v Gerber [2005] 9 BLLR 849 (LAC); (2005) 26 ILJ 1256 (LAC).

[6] Vermooten v Department of Public Enterprises and others [2017] 6 BLLR 606 (LAC); [2016] ZALAC 63 (LAC) at para 15.

[7] [ 2008] BLLR 611 (LAC).

[8] [2016] ZALAC 63; [2017] 6 BLLR 606 (LAC).

[9] [2015] 9 BLLR 918 (LAC); (2015) 36 ILJ 2832 (LAC).

[10] Automotive Tooling Systems (Pty) Ltd v Wilkens and Others 2007

(2) SA 271 (SCA); (2007) 28 ILJ 145 (SCA) at para 6 and Universal Church of the Kingdom of God v Myeni and others [2015] 9 BLLR 918 (LAC); (2015) 36 ILJ 2832 (LAC).

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