REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 1296/12

In the matter between:

SILVER FALCON TRADING 176 (PTY) LTD	**Applicant**
and	
M D MAHLAWULE N.O.	**First Respondent**
CCMA	**Second Respondent**
P G COETZEE	**Third Respondent**

Heard: **20 March 2014**
Delivered: **22 April 2014**

Summary: Review – whether employee or shareholder – finding that employment relationship existed not supported by evidence – reviewed and set aside.

JUDGMENT

STEENKAMP J

Introduction

[1] This case is another reminder of the wisdom to reduce agreements to writing. Too often, what begins as a "gentlemen's agreement" [1] ends up in a court spat such as this one where the gloves come off and the gentlemanly behaviour of the past is a distant memory.

[2] The dispute in this case is whether the third respondent, Mr P G Coetzee, was an employee of the applicant or whether he entered into a partnership agreement. Whatever agreement there was, was terminated by the applicant. Mr Coetzee says he was an employee; he was dismissed; and it was unfair. The applicant says it merely terminated the partnership agreement. The matter was referred to arbitration at the CCMA (the second respondent). The arbitrator (the first respondent) found in Coetzee's favour. The applicant asks this Court to review that decision and to set it aside.

Background facts

[3] The applicant conducts a general trading business. It employed Mrs Coetzee (the third respondent's wife). Mr Coetzee[2] had his own business, Delkor Electrical Contractors. He became interested in the applicant's business. In January 2010 he went to China with the applicant's MD, Duncan Mackie. They went to China again in May 2010. They decided to import solar geysers from China for distribution in South Africa. In October 2010 they entered into an agreement. The applicant says it was a profit sharing arrangement; Coetzee says he was employed. No agreement was put in writing.

[4] Coetzee distributed and sold geysers on behalf of the applicant in October and November 2011. The applicant paid him R25 000 for each of those months. He says he considered it a salary; the applicant says it was his profit share for sales made in those months. Those were the only payments the applicant ever made to Coetzee.

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[1] No sexism intended – only men were involved.

[2] I shall refer to the third respondent, Mr Coetzee, as "Coetzee". Where it is necessary to refer to his wife, I will refer to her as "Mrs Coetzee".

[5] In December 2011 Coetzee went on holiday. He did not apply for leave. He was not paid. In January 2012 he returned from holiday and demanded to be paid. Mackie told him that he had not made enough sales to generate a profit and was not entitled to any payment. Mackie told him that the "partnership" was no longer beneficial to the applicant and terminated it.

[6] Coetzee referred an unfair dismissal dispute to the CCMA. Conciliation was unsuccessful. The first respondent (the arbitrator) conducted the arbitration. He found that Coetzee was an employee; that he had been dismissed; and that the dismissal was unfair. He ordered the applicant to pay Coetzee R150 000, being the equivalent of six months' remuneration calculated at R25 000 per month.

<u>The arbitration award</u>

[7] The arbitrator based his decision on the definition of "employee" in s 213 and the presumption in s 200A of the Labour Relations Act.[3] That section reads as follows:

> "**200A. Presumption as to who is employee**
>
> (1) Until the contrary is proved, 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;

[3] Act 66 of 1995 (the LRA).

(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.

(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*."

[8] It is common cause that, based on the claimed "salary" of R25 000 per month, Coetzee earned more than the amount referred to in s 200A(2). Yet the arbitrator based his award on the presumption contained in s 200A(1).

[9] The arbitrator took the following factors into account:

9.1 "It was never disputed that a suggestion was made to [Coetzee] to stop his electrical construction work and focus on their business. This is a request which he complied with. Therefore, I find it hard to believe that a person can devote one's full time to the promotion of a business, without a promise of a reliable income. It is my finding that he is well covered by both subsections (a) and (b) of the definition [in s 213]."

9.2 Though his hours of work were not controlled, it was never disputed that they exceeded the average of forty per month.

9.3 Andrew Mackie admitted during cross-examination that Coetzee was provided with "tools of work" by the applicant. He referred to "cards, pamphlets, tanks, geysers and pumps".

9.4 He assisted customers with their technical problems.

9.5 "Despite the fact that he drew something from his maintenance work, the fact that he had to stop his electrical operations and focused on the [applicant], meant that he was economically also dependant on the business. Therefore, he was an integral part of the business."

9.6 "I agree with the [applicant's] version that he was not controlled. However, it is not sufficient enough to declare him not an employee, considering other factors."

Review grounds and the applicable test

[10] The question whether Coetzee was an employee goes to jurisdiction. The *Sidumo*[4] test does not apply. The question is whether the arbitrator was right or wrong.[5]

[11] The applicant raises the following review grounds:

11.1 The arbitrator did not consider the evidence before him and the probabilities when he found that an employment relationship existed.

11.2 The arbitrator incorrectly applied the provisions of the LRA and committed a material error of law.

Evaluation / Analysis

[12] In *State Information Technology Agency (Pty) Ltd v CCMA*[6] Davis JA set out the following criteria to determine whether someone is an employee:

12.1 The employer's right to supervision and control;

12.2 whether the employee forms an integral part of the organisation; and

12.3 the extent to which the 'employee' is economically dependent upon the employer.

[13] Coetzee testified that, following is visit to China with Duncan Mackie, he was offered a 30% profit sharing arrangement in the applicant's business. That much is common cause. And in August 2011 the Mackie brothers – the partners in the applicant – asked him to stop the construction side of his electrical business, but the maintenance side of his business carried on and he continued to derive an income from it. He was not paid a salary in September 2011 and the parties did not agree on a salary amount. The only payments he received were in October and November 2011. No terms of employment, such as leave or working hours, were agreed upon or even discussed.

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[4] *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 *ILJ* 2405 (CC).

[5] *Workforce Group (Pty) Ltd v CCMA* (2012) 33 *ILJ* 738 (LC); *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen* (2012) 33 *ILJ* 363 (LC); *Sanlam Life Assurance Ltd v CCMA* (2009) 30 *ILJ* 2903 (LAC).

[6] (2008) 29 *ILJ* 2234 (LAC) para [12].

[14] It is difficult to see how the pamphlets and geysers could be seen as "tools of the trade". The applicant gave Coetzee pamphlets to hand out at a trade show. The geysers were the stock in trade.

[15] Coetzee testified that the applicant did not control him. The arbitrator accepted that. Coetzee was not given instructions on what to do when, he could come and go as he pleased, for example when he went on holiday in December 2011.

[16] Given these factors, it is hard to fathom how the arbitrator could have found that Coetzee formed an integral part of the applicant's business. The finding that he "had to stop his electrical operations and focused on" the applicant, and "therefore, he was an integral part of the business" is a *non sequitur*. Even if it were correct; it would not follow; but the premise is also wrong. The applicant only asked Coetzee to stop the construction side of his business. The maintenance side carried on to generate an income for him. The evidence did not establish that Coetzee formed an integral part of the applicant's business. At best, he marketed and supplied solar geysers on the applicant's behalf. That is consistent with the initial profit sharing arrangement rather than an employment relationship. So is the fact that he only got paid twice. On the probabilities, those payments were made in accordance with the profit share arrangement flowing from sales, and not as a salary. And under cross-examination Coetzee conceded that he was "not part of Silver Falcon in any way".

[17] The arbitrator's findings are not supported by the evidence and the probabilities. It appears that the arbitrator was persuaded by the presumption contained in s 200A(1); but, as the legislature stipulates in s 200A(2), the presumption did not apply to Coetzee, given his earnings. In this regard, the arbitrator committed an error of law.

[18] On the probabilities and on the evidence at arbitration, Coetzee did not show that he was subject to the applicant's control. In that regard the arbitrator was correct. On the finding that Coetzee was economically dependent on the applicant, I cannot agree. He only ever received two payments from the applicant. His own business continued to generate an income. That does not go far enough to show economic dependency to

the extent that an employment relationship can be said to have come into being, given the absence of any clear agreement and the absence of the other factors outlined above. And, as I have discussed above, the finding that Coetzee formed an integral part of the applicant's business does not follow on the arbitrator's earlier findings or on the evidence before him.

Conclusion

[19] On a conspectus of all the facts and having regard to the probabilities, it has not been shown that the parties entered into an employment relationship. It is more probable than not that the parties continued with a profit sharing arrangement as initially discussed. Coetzee was not an employee. Therefore, he was not dismissed and the question of a fair dismissal does not arise.

[20] With regard to costs, I take into account that Coetzee is an individual who had to defend an arbitration award in his favour. I do not consider a costs award to be appropriate in law and fairness.

Order

The arbitration award of the first respondent under case number LP 859-12 is reviewed and set aside. It is replaced with an award that the third respondent, Mr P G Coetzee, was not an employee of the applicant.

Steenkamp J

APPEARANCES

APPLICANT:	Cobus Prinsloo Instructed by Pratt, Luyt & De Lange (Polokwane).
THIRD RESPONDENT:	M H Schnehage Instructed by Stemmett & Osman Inc. (Polokwane).