THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR2442/23

In the matter between:

MICHAEL COUTO **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

BONGE THEODORE MASOTE N.O. **Second Respondent**

NASA ENGINEERING (PTY) LTD **Third Respondent**

Heard: **5 November 2024**

Delivered: **9 January 2025 (This judgment was handed down electronically by emailing a copy to the parties. The 10 January 2025 is deemed to be the date of delivery of this judgment).**

Summary:

JUDGMENT

RAMJI, AJ

Introduction

[1] On 5 November 2024, I issued orders: (a) dismissing a postponement application brought by the third respondent (the company) from the bar with costs in the postponement, and (b) reviewing and setting aside the arbitration award handed down by the second respondent (the Commissioner) under the auspices of the first respondent (the CCMA).

[2] I reserved judgment on the applicant's (Mr Couto) second prayer for substitution of the ruling with a finding that the CCMA has jurisdiction to arbitrate this dispute. This was to consider whether there was sufficient evidence on the record to determine whether Mr Couto was, on balance, an employee of the company, or whether the question needed to be remitted to the CCMA.

[3] While addressing this, a potential jurisdictional issue appeared to me, and I requested further submissions.

[4] This judgment addresses the following:

4.1. The postponement application.

4.2. The order reviewing and setting aside the award.

4.3. My question on jurisdiction.

4.4. Whether Mr Couto was an employee of the company.

Reasons for dismissing the postponement application

[5] I dismissed the postponement application because after appointing attorneys, the company took no steps to ensure that its attorneys were representing it in the review – all that was required was an answering affidavit after the record was filed, but nothing was done.

[6] The company also did not file a postponement application in advance setting out the reasoning for failing to oppose the review application. Ms Berry who was following instructions from the company, advanced reasons for the failure

from the bar, but this is impermissible. There were no facts before me on which an indulgence could be sought, and by all indications, the company had failed to act with the necessary diligence.

[7] The matter proceeded on an unopposed basis.

Reasons for reviewing and setting aside the arbitration award

[8] Mr Couto's status as an employee is a jurisdictional requirement. The test on review is whether the evidence before the Commissioner was correct. I reviewed and set aside the arbitration award because the Commissioner applied the incorrect legal test, resulting in him ignoring relevant evidence and relying on irrelevant evidence. The Commissioner also made incorrect factual findings. Finally, the Commissioner incorrectly determined how a contract of employment comes into being:

8.1 When faced with the question of whether someone is an employee or independent contractor, the decision-maker must look at the substance of the relationship and not the form in which the parties characterised their contractual relationship.[1] The contract is one factor in the inquiry, and it may be outweighed by the realities of the relationship.[2] Although the Commissioner proceeded to consider a few factors relevant to whether a person is an employee, he considered only the factors against Mr Couto instead of weighing up factors for and against Mr Couto – incorrectly ignoring many relevant factors in the process.

8.2 The Commissioner found that Mr Couto did not return the signed contract of employment to the company. By all accounts, the document was never signed. From this the Commissioner drew the "*only reasonable*" inference that Mr Couto "*opted that to derive better financial benefit, he should go the independent contractor route".* This was largely speculative, but more importantly, this consideration is not the test for whether someone is an employee or an independent contractor. It is therefore incorrect.

[1] *Denel (Pty) Ltd v Gerber* (2005) 26 *ILJ* 1256 (LAC) at paras 19 – 20.
[2] *Vermooten v Department of Public Enterprises & others* (2017) 38 *ILJ* 607 (LAC) at para 18.

8.3 Finally, the company director's primary argument or testimony was that he never signed the contract of employment. The Commissioner was incorrect to be swayed by this and incorrect to conclude that *"to create a legally binding employment relationship, the parties had to sign the contract of employment".* The existence of an employment relationship is not contingent on the signing of a contract.[3]

[9] On 30 September 2022, the company gave Mr Couto a letter terminating his services (the termination letter). The letter stated:

> 'This letter serves to confirm that in accordance with paragraph 7 of the contract agreement the services of Mr M Couto Consulting with NASA Engineering SA (PTY) Ltd have been terminated effective from 31 October 2022.'

The Court's additional jurisdictional question

<u>Possible premature referral</u>

[10] Mr Couto referred an unfair dismissal dispute to the CCMA on 4 October 2022. The dispute was conciliated apparently without any jurisdictional points being raised at that stage. Mr Couto referred the dispute to arbitration on 4 November 2022. On 30 November 2022, the company filed a preliminary point: "*The Applicant was not an employee of the Respondent, accordingly could not have been dismissed".* It did not raise that Mr Couto's date of dismissal was in fact after he made his referral to the CCMA.

[11] Upon closer inspection of the record, it appeared that Mr Couto issued the company with an invoice for work in the month of October 2022, near the end of October 2022, suggesting that he worked during that entire period.

[12] In *National Union of Metalworkers of SA v Intervalve (Pty) Ltd and others*, the Constitutional Court noted while determining the issue of non-joinder, that the

[3] *Wyeth SA (Pty) Ltd v Manqele and others* (2005) 26 *ILJ* 749 (LAC) at para 13.

"*fact that a dismissal has occurred is required before it can be said that a dispute exists or has arisen about the fairness of a dismissal".*[4]

[13] Section 190(1) of the Labour Relations Act[5] (LRA) provides that the date of dismissal is the earlier of "*(a) the date on which the contract of employment terminated; or (b) the date on which the employee left the service of the employer".* Section 190(2)(d) of the LRA then states:

> 'Despite subsection (1) –
>
> …
>
> (d) <u>if an employer terminates an employee's employment on notice, the date of dismissal is the date on which the notice expires</u> or, if it is an earlier date, the date on which the employee is paid all outstanding salary' (own emphasis).

[14] Therefore, on 21 November 2024, I issued the following directive for further submissions from Mr Couto's representatives:

> '2.1. This Court is obliged to raise jurisdictional questions *mero motu*, and hereby issues a directive for written submissions on the following question: Is this dispute properly before this Court, and was it properly before the CCMA?
>
> 2.2. The Applicant is requested to make its written submissions in response to the question with regard to the following:
>
> 2.2.1. Mr Couto referred his dispute to the CCMA for conciliation on 4 October 2022 (Record, volume 10, pp 905 - 909).
>
> 2.2.2. The documents in the record suggest that no dismissal had in fact been effected when the matter was referred for conciliation on 4 October 2022 because:
>
> a. Mr Couto received his letter of termination on 30 September 2022, which provided for the termination of

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[4] (2015) 36 ILJ 363 (CC) at para 89. See also: *Sambo and others v Steytler Boerdery* (2014) 35 *ILJ* 3235 (LC) paras 17 – 21.
[5] Act 66 of 1995, as amended.

his services only on 31 October 2022 (Pleadings bundle section 1, pp 19 to 20, para 8 (founding affidavit of Michael Couto; Record, volume 1, p 64, lines 8 - 24).

b. On 24 October 2022, Mr Couto further issued the third respondent with an invoice for a full month of work for October 2022 (Record, volume 10, p 962).

2.3. The Applicant is required to confine itself to the law, and, in respect of any facts, to the review record. Any factual statements made in the written submissions must cross-reference the relevant page/s and (if applicable) line/s in the review record.'

[15] I received the applicant's submissions on 17 December 2024, and though I am not sure at what point the delay arose, I am grateful to counsel for the detailed submissions.

<u>Application of section 190(a) and 190(2)(d) to the facts</u>

[16] Mr Couto's case is that, despite the wording of the termination notice and the invoice, the date of his dismissal was 30 September 2022. The further submissions advanced several reasons based on the record of proceedings.

[17] First, the director stated in his founding affidavit made in support of the jurisdictional point raised before the CCMA that "*<u>the relationship</u>* [between the company and Mr Couto] *was terminated <u>on 30 September</u> 2022 via notice in writing*". (own emphasis)

[18] Second, Mr Couto's attorney stated under oath in an interlocutory application before the CCMA that Mr Couto "*was informed that it was not required that he worked his notice period and left the premises of the respondent on 30 September 2022"*. Mr Couto confirmed this. The company's denied that Mr Couto was told that he should not work out his notice period. Its version was that Mr Couto *"merely got up and walked out of the meeting"*. It had to replace him immediately (a point I return to later) and did so.

<u>Finding on date of dismissal</u>

[19] Mr Couto's counsel submitted that the company repudiated the contract. The company disputes this. I will accept the company's version that it was in fact Mr Couto who repudiated the contract by "*walking out*". The company states that it paid Mr Couto in full *"even though he did not work the remainder of the month*" and found a replacement to continue Mr Couto's work from the following day. Therefore, the company accepted Mr Couto's repudiation and terminated the contract. They paid him, whether in lieu of notice or not, but not for rendering any services. In short, even on the company's version, Mr Couto left its services on 30 September 2024.

[20] I therefore accept that Mr Couto's date of dismissal was 30 September 2024, in terms of section 190(1)(b) of the LRA.[6] As a result, his referral was not premature and, even on the strictest test, did not deprive the CCMA, and by extension, this Court, of the jurisdiction to determine his dispute.

[21] I turn now to the prayer for relief in the form of substitution.

Was Mr Couto an employee?

[22] This question was fully ventilated in the CCMA, and I have a detailed record of relevant evidence before me. A portion of the evidence of the director was not recorded, however, it was typed up based on the Commissioner's notes when the Commissioner realised the issue. It was then reviewed and amended by the parties and ultimately agreed to before continuing with the arbitration.

[23] Also, Mr Couto's services or employment ended in September 2022. If this matter is remitted to the CCMA for a fresh hearing on whether he is an employee, two-and-a-half years will have passed.

[24] Finally, if I find in Mr Couto's favour or the CCMA decides the point in his favour, the matter will still need to proceed to an arbitration on the merits. For these reasons, I find that I am able, and that it is expedient, to decide the question of whether Mr Couto was a company employee.

[6] Section 190(1)(b) of the LRA.

The test

[25] The test for employment involves the consideration of several factors. In addition to the form of the relationship, in *State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others (SITA)*,[7] the Labour Appeal court (LAC) set out the following substantive aspects of a relationship:

> '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.'

The form of the relationship

The employment contract

[26] The only written document purporting to govern the relationship between Mr Couto and the company is an "*Offer letter of contract of employment"*. It is addressed by the company to Mr Couto and begins, "*Further to our discussions, we would like to extend to you a formal offer of contractual employment. Your attention is drawn to the following conditions, which will be applicable to you".* The terms which follow are typical of an employment contract,[8] save for a suspensive condition, which fell away when parties began performing in terms of the contract. The director admitted that these were the same terms on which employees were engaged. This document therefore does not favour the company's case. It was relied on by Mr Couto as proof that this was an employment relationship, which he claimed commenced on 1 February 2021.

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[7] (2008) 29 ILJ 2234 (LAC) at para 12.
[8] *Niselow v Liberty Life Association of Africa Ltd* (1998) 19 ILJ 752 (SCA) at para 9; *SA Broadcasting Corporation v Mckenzie* (1999) 20 ILJ 585 (LAC) at paras 9 – 10 *(SABC).*

[27] An unsigned document is a binding and enforceable contract if the parties have performed in terms of it: the most significant considerations in this case are these:

27.1. The company itself regarded the contract as valid because it explicitly referenced the termination clause in the contract in its termination letter. The director was evasive and failed to explain why the employment contract was referenced when terminating Mr Couto's services, if it did not govern the parties' relationship. Eventually, the director could only state that he "*misplace[d]*" his words and that he "*should be better than that*".

27.2 Mr Couto was asked to provide his "*employment contract*" for the personnel files. The director could not dispute this and the company did not call the only witness who could dispute it.

[28] The employment contract was clearly close at hand and not a forgotten or destroyed document. I will not canvas everything in the record, but other significant aspects of the employment contract which parties performed are set out below under the headings of the three-part *SITA* test.

[29] The company argued and testified relentlessly that the Commissioner should not rely on this document, and that the clauses are irrelevant, because the director did not sign it. It alleged that this was because Mr Couto took a decision to abandon employment in favour of independent contracting to exploit the tax benefits. Agreeing with the company, the Commissioner inferred that the written agreement was abandoned because Mr Couto decided that it would be more beneficial to him from a tax perspective to work as an independent contractor and that he should be held to this.

[30] What we know from the evidence is that the offer letter was in substance an employment contract and that it was not signed. The Commissioner's inference is, however, unreasonable as there is no basis for the inference on the record. First, the independent contracting arrangement has benefits for both parties – a contractor can claim more tax deductions than an employee, but the company is exempt from providing employment benefits and various

tax and labour obligations. Second, there was no evidence that Mr Couto was avoiding or even evading paying taxes. He testified that he handled his own taxes with an accountant assisting him. Mr Couto's attorney made both arguments to the Commissioner.

Invoices

[31] The company's other evidence was that Mr Couto had always issued it with invoices, instead of being on the company payroll. The company alleges that this was based on Mr Couto's decision to not be an employee. However, the contract of employment contains an unconventional payment clause:

> 'You will be on a contractual basis as Technical Sales & Product Support Representative from 1st February 2021 at an average gross payment of R41,182 per month. Medical aid membership will remain your own responsibility. [sic]
>
> <u>You will be required to register your incomes with the necessary authorities for PAYE and/or SITE, for all legally prescribed deductions, where applicable.</u> Monthly payments will be paid on the last Friday of every month unless this is not a working day.
>
> For a period of three months you will be provided with an allowance of R9,000 per month <u>(payable with your monthly contractual fee)</u> to cover your travel expenses.' (own emphasis)

[32] A further clause required Mr Couto to submit "*a monthly expense schedule".*

[33] While an employee is responsible for registering as a taxpayer, it is the employer who registers for PAYE and SITE payments (among other things). The company's line of questioning on Mr Couto's failure to seek clarity on the clause does not assist it – this clause requiring the impossible was drafted by the company. The word "salary" is also not used in the contract. Instead, the company uses the term "*monthly contractual fee*".

[34] Therefore, when Mr Couto issued the company with invoices after being told to, he was not acting against the contract or in terms of his own decision. The payment provisions in the contract were sufficiently unclear to allow for an employee to issue invoices. This is a problem from a tax perspective for a party or parties seeking to exploit the tax system, but issuing invoices alone does not make Mr Couto an independent contractor. There is more to be considered.

[35] Beyond form, the content of the invoices is significant: Mr Couto "charged" the company the same "fee" every month, the same travel allowance and only the additional expenses, such as accommodation, varied. The line items and amounts were in line with those envisioned in the contract. The director even testified that this payment "*is part of our agreement*". Mr Couto also testified that he was informed by an employee described at one point as "*the financial manager*" in the company that he needed to invoice the company before he could be paid at the end of his first month of work. This was not challenged in cross-examination and the director testified that he "*did not know about that".*

[36] The financial manager also instructed Mr Couto to "*adjust*" his invoices, increasing his service fee by 6%. This accorded with a new bargaining council collective agreement which binds the company. It is implausible for the director to explain this increase related to an increase in Mr Couto's expenses. If it did, then it would have been Mr Couto who changed his rates and informed the company or negotiated with it.

[37] The financial manager, the person who could dispute the evidence on the invoices was not called as a witness, despite the company's attorney stating to the Commissioner that the financial manager would testify.

[38] Lastly, the invoices could not have been one of a true independent contractor if the company paid out an invoice during its shutdown period – i.e. a time when it was common cause that Mr Couto did not render any services to the company. The manager agreed when it was put to him that "*in terms of the agreement, [Mr Couto] will be paid a monthly fixed amount".*

[39] Mr Couto was also paid according to the company's sick leave policy when he did not work because he was sick. The only time when it was established that Mr Couto was not paid his leave pay was for October 2022, after the termination of his contract. One can only infer that this abrupt change occurred because, on termination of Mr Couto's contract, the company had decided to frame this as a client and independent contractor relationship. Its past practice of paying Mr Couto's leave pay is more significant.

<u>The company's right to supervision of and control over Mr Couto</u>

[40] The director correctly stated that even an independent contractor does not have "*carte blanche*". The issue is what freedoms Mr Couto enjoyed and the nature of those freedoms. Was he obliged to obey lawful commands, orders or instructions from the company? Did the company prescribe the work he had to do, how he had to do it, and when and where? Or could he perform the work on his own terms provided he delivered the required product at the end of the day?[9]

[41] The contract states that Mr Couto would be subject "*to any and all Company policies and procedures applicable from time to time".* The contract provides for annual leave, sick leave and family responsibility leave. The director conceded to granting Mr Couto leave on at least one occasion and claimed to have no knowledge of other leave that was granted. There were occasions when Mr Couto notified his manager that he would not be on the premises or attending to his work. In these cases, (including the case that arose shortly before Mr Couto received a termination letter), management responded in a displeased fashion (including complaining about Mr Couto submitting sick notes late). This response shows that Mr Couto was not his own master and that he required permission to be away from the company premises or from work. It is also uncontested that Mr Couto submitted weekly reports detailing his whereabouts – an independent contractor may be required to report, but would more likely be required to show a product or progress with a project, and not mere presence.

[9] Above at para 8.

[42] Another factor that prevented Mr Couto from being his own master was the common cause fact that when he was engaged, the company knew that he was not a specialist in the work and would be trained and supervised. It is implausible that an independent contractor would be engaged in order to be trained to do the work required of him.

[43] The contract also states that Mr Couto was subject "*to any and all Company policies and procedures applicable from time to time*". The company's real complaint appears to relate to Mr Couto's approach to taking time off, failing to make targets and client relationships. The director ended his explanation for why Mr Couto was being terminated by referring vaguely to "*a combination of not setting the targets that he was tasked to do by our management and things like that".* This is highly suggestive of control and supervision, and Mr Couto's alleged failures in these respects do not render him an independent contractor, though it may make him a difficult employee. In respect of supervision and control, Mr Couto was expected to behave like the company's recognised employees.

[44] The contract states that the contract could be terminated for, among other things, poor performance. The director also stated that he had an issue with Mr Couto's performance and that "*[i]f it improved, he would not be <u>dismissed</u>*" (own emphasis).

[45] The contract states that Mr Couto would "*[b]e responsible for all duties associated with [a] Technical Sales & Product Support Representative and any related duty that may be assigned to you from time to time"*. The company could not deny that Mr Couto was prescribed other work, specifically citing an incident where he was told not to waste *his time* with a certain task, and was directed to turn his attention to something else. His manager also testified that during a delivery he asked Mr Couto why he was not assisting company employees with unloading a truck. The manager claimed that he understood retrospectively that this was because Mr Couto was independent. This is implausible in the light of many similar instances, already cited, of the manager reprimanding Mr Couto's manner of working.

Whether Mr Couto formed an integral part of the company

[46] A third fact which the company put forward is that Mr Couto did not use a company e-mail account and used his private account instead. Mr Couto offered a plausible explanation for this (so that he could be reached after hours) and it is significant that the director testified that Mr Couto sought permission ("*asked to use*") this e-mail address.

[47] Turning to substance, Mr Couto was clearly not an accessory at the company. When he was away without permission, this was always an issue. He had an office at the company and worked full-time. Mr Couto's manager testified on the extent of his integration into the business, saying that "*if he is not going to be there, from an operational requirement's view, the company needs to know so that we can make other plans".* This is how employees operate in a business. His manager also testified that from a working perspective "*whether it was as an employment contract or as a service contract with M Couto Consulting, the needs for me myself in a marketing perspective in terms of the provision of information and data would have been one and the same".*

[48] Also, when Mr Couto was either asked to leave the premises or walked out on 30 September 2024, he was immediately replaced, showing that his work was integral to company operations. His replacement was formally recognised as an employee.

The extent of Mr Couto's economic dependence on the company

[49] In *SITA,*[10] the LAC adopted the following guide on economic dependence, which includes consideration of personal freedom:

> 'A genuinely self-employed person is not economically dependent on their employer because he or she retains the capacity to contract with others… The fact that a person is required by contract to only provide services for a single "client" is a very strong indication of economic dependence.'

[50] The contract states that Mr Couto "*shall not be engaged or take part, directly or indirectly, whether as a contract employee, or in any other capacity, in any*

[10] Above at para 11.

other business without the Company's prior written consent". It appears a common cause that Mr Couto did not work elsewhere while working for the company. The director testified that he would have investigated if Mr Couto started working for another company and then was evasive as to the further steps that he would take. His manager also expressed similar concerns.

[51] In *Goliath v SA Broadcasting Corporation SOC Ltd and others*,[11] La Grange J held:

> 'Obviously, a person who is required to be available to render a service for the length of a working day is one who has given over their capacity to produce to another.'

[52] The contract states that contract, Mr Couto was subject to prescribed (full-time) working hours, and that Mr Couto "*may be required to work such outside normal hours of employment, as the Company considers necessary to meet the needs of the Company's business".* His manager also contradicted himself, first testifying that Mr Couto could not work for anyone else because he failed to develop the skills to perform his work for the company efficiently, then stating, *"I think it was clear by virtue of the requirements from [the company] that [Mr Couto] would not be in a position to hold a second opportunity"*. This was the reality. Mr Couto also testified that with travelling to the client sites his work week was between 50 and 60 hours' long.

<u>Conclusion</u>

[53] Mr Couto was clearly engaged on terms (in writing and in practice) typical of an employment relationship.

[54] There are certainly unusual payment terms in the employment contract and the use of an invoicing system is equally strange. It may be that Mr Couto and/or the company sought to formally classify the relationship as one of a client and an independent contractor for financial advantages. I do not express a view on this. This is a matter for the South African Revenue Service, (SARS) which has mechanisms in place to test for employment

[11] (2023) 44 ILJ 185 (LC) at para 59.

status and to recover unpaid taxes from employers, who may in turn recover any payments to SARS from employees. This may be the financial fate of Mr Couto, but for purposes of this case and the jurisdiction of the CCMA, the evidence shows that he and the company generally acted and related as though Mr Couto was a company employee.

[55] In the result, the following order is made:

<u>Order</u>

1. The third respondent's postponement application is dismissed with costs.

2. The review application is granted.

3. The arbitration award is reviewed and set aside and substituted with a finding that the applicant was an employee of the third respondent, and that the first respondent has jurisdiction to determine the unfair dismissal dispute.

4. The applicant's unfair dismissal dispute is remitted to the first respondent for a hearing on the merits before an arbitrator other than the second respondent.

B Ramji

Acting Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the Applicant:	Adv Lindi Steyn
Instructed by:	Andre Schmidt Inc.
For the Respondent:	Ms Johane Berry
Instructed by:	Berry Law