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THE JUDICIARY · REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case Number: JR1159/18

In the matter between:

HEEPKO VAN KAAM	**First Applicant**
WALLACE OOSTHUIZEN	**Second Applicant**
MOSES HERRENDOERFER	**Third Applicant**

and

ACTION MOTOR GROUP	**First Respondent**
MOTOR INDUSTRY BARGAINING COUNCIL	**Second Respondent**
ADV RAYNOLD BRACKS N.O.	**Third Respondent**

Date Heard: 10 January 2020

Delivered: This judgement was handed down electronically by circulation to the parties' legal representatives on the 12 May 2020

Summary:

Review of Arbitration Award – Finding that Applicants were not Employees – No application of the reasonableness test of review to jurisdictional ruling – Court considering issue of jurisdiction *de novo* - Finding that the Applicants

were not employees of the First Respondent – Application dismissed with attorney and client costs

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JUDGMENT

RAMDAW. AJ

Introduction

[1] This is an application in terms of section 158(1)(g) of the Labour Relations Act[1] (LRA) application to review and set aside a jurisdictional ruling issued by the Third Respondent acting under the auspices of the Second Respondent. The Third Respondent found that the Applicants were not employees of the First Respondent and dismissed their unfair dismissal referral.

Background

[2] The three Applicants were previously employed by Mobitech Close Corporation who rendered services to the Respondent as an Independent Contractor from 1998 to 2011. Sometime in September 2011 the First Applicant, his wife Mariaan Van Kaam and the Third Applicant formed a new company called Tshireletso Auto Installations (Pty) Ltd (TAI) which they termed as an empowerment company. TAI then moved into the Applicants premises and were given office space free of rental and came over with *inter alia* their own equipment and tools, continuing to render their services as an Independent Contractor servicing both the First Respondent and their own clients.

[3] During January 2014 TAI ceased serving clients for its own account but serviced clients through the First Respondent at its two dealerships. They agreed on a set fee which they termed a "*retainer*". TAI invoiced the First

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[1] No 66 of 1995, as amended.

Respondent on a monthly basis for initially R50,000.00 per month and thereafter R44,200.00 per month up and until 31 July 2017.

[4] The Applicants were introduced to the First Respondent's staff as the "*fitment team*". They had access to the company branded letter heads and communicated with the First Respondents customers using the aforesaid letterhead if necessary. The Applicants state that in January 2014 TAI closed operating as a discernible going concern and the business of TAI was assimilated into the First Respondent. Furthermore, that this was a temporary arrangement until they were fully integrated into the First Respondent's company as its employees which never happened. The First Respondent denies this and alleges that the Applicants were employees of TAI an independent contractor.

[5] The Applicants testified that they utilised their own tools as was customary in the industry save for air-conditioning tools and fixed equipment which belonged to the First Respondent. They were further offered an office desk with space, a direct telephone line, e-mail facilities, stationery, diagnostic tools, internet access, parking, vehicle lifts, access to a copier and job cards all belonging to the First Respondent. They also wore the First Respondent's branded uniform.

[6] On or about 3 July 2017 the First Respondent underwent a restructuring process in terms of section 198 of the LRA and sent out a circular to all its affected employees who signed receipt for same. It is during this process that the Applicants allege that they were employees of the First Respondent and not independent contractors as the First Applicant states that he also received a copy of this circular. The First Respondent maintained that the applicants were not their employees but were employees of TAI, an independent contractor engaged as a party to a service agreement and who were paid a monthly retainer. The First Applicant stated that no consultation meetings were held with him nor were the other 2 applicants given a copy of the aforesaid circular.

[7] The First Respondent stated that it terminated this arrangement with TAI represented by the First Applicant against payment of a 3 months' notice "retainer" of R132,600.00 in settlement. The First Applicant on 4 August 2017 signed acceptance of this offer of R132,600.00 which amount was then paid over to TAI on 11 August 2017. The First Applicant stated that on 6 August 2017 after he had the opportunity to consider the aforesaid letter properly and after seeking legal advice he withdrew his signature to the aforesaid letter which he stated he signed under duress. He disputed that they were employed by TAI independent contractors and insisted that they were employees of the First Respondent who had taken over TAI as a going concern in 2014.

[8] There was a flurry of correspondence exchanged between the First Applicant and the First Respondent who maintained their position that the Applicants were employed by TAI and were not their employees whilst the applicants insisted that they were their employees. The First Respondent maintained that TAI was an independent contractor to whom they outsourced their fitment service work per a service arrangement which was not reduced to writing. They were invoiced a retainer of R42,200.00 per month for attending to the labour aspect of the fitment service work as they supplied all parts and accessories to TAI who engaged the services of the applicants as its employees. They stated that First Applicant represented TAI in all its dealings. Furthermore, that they dealt with him only and not with the other 2 applicants whom he supervised.

[9] The Applicants referred an unfair dismissal dispute to the Second Respondent and that they are not aware of the reasons for their dismissal. At conciliation the First Respondent raised a jurisdictional point that the Applicants were not their employees. They raised the point *in limine* formally by way of filing an affidavit to which the Applicants responded and filed an answering affidavit

[10] The *Point in Limine* raised was arbitrated by the Third Respondent and oral evidence was led by both parties. The Third Respondent on 25 April 2018

issued an arbitration award. He found that the Applicants were not employees of the First Respondent and dismissed the matter.

[11] The Applicants seeks the following relief per an amended notice of motion which is cited *verbatim* for ease of reference:

> "1. The arbitration award issued under the auspices of the Second Respondent dated 25 April 2018 (and delivered on 30 April 2018), under case numbers MINT58093d, MINT58091N, MINT58090N, is reviewed and set aside.
>
> 2. The arbitration award referred to above in prayer 1 is substituted with the following order:
>
> a. The Applicants are declared to be employees of the First Respondent.
>
> b. The Applicants are reinstated as employees of the First Respondent on the same or similar terms prior to their unlawful termination of employment.
>
> c. The First Respondent is to pay the first Applicant back-pay, at a rate of R23,585.30 per month, for each and every month, for the period commencing 31 July 2017 to the date of reinstatement.
>
> d. The First Respondent is to pay the second Applicant back-pay, at a rate of R11,543.00 per month, for each and every month, for the period commencing 31 July 2017 to the date of reinstatement.
>
> e. The First Respondent is to pay the third Applicant back-pay, at a rate of R8,071.70 per month, for each and every month, for the period commencing 31 July to the date of reinstatement.
>
> f. The First Respondent is to pay each Applicant the equivalent of 12 months' salary as compensation for the unlawful termination of their employment.
>
> 3. The respondents are to pay the costs of this application, in the event of opposition.
>
> 4. Further and/or alternative relief."

[12] The Applicants have abandoned prayer 2f.

The relevant facts

[13] The Applicants contends that the reality of the relationship between themselves and the First Respondent is an employment relationship. Specifically, the First Respondent had the right to, and did, exercise supervision and control over them; they formed an integral part of the First Respondent's organisation and they were economically dependent on the First Respondent.

[14] They further contend that this is evidence by the fact that they were required to wear uniforms issued by the First Respondent; they were required to wear name tags issued by the First Respondent; they were assigned official titles; they were issued with telephone extension lines and e-mail addresses and were required to use these modes of communication when dealing with the First Respondent's other employees and clients; they used the First Respondents' tools to fulfil their duties; they worked 5 days a week from 07:30 – 17:00 exclusively for the First Respondent at two of its dealerships; the First Respondent reprimanded them for not complying with its policies;

[15] The First Respondent was only accredited to do air-conditioning warranty related services because of the Applicants' expertise; the First Respondent paid R44,200.00 per month to Tshiriletso Auto Installations (Pty) Ltd ("TAI"), which amount was equal to the Applicants' salaries; TAI paid the Applicants their salaries from this monthly payment; TAI did not service any other clients and made no profit from any dealings with the First Respondent. Further, TAI continued to invoice the First Respondent for the work done by the Applicants.

[16] The First Respondent contends that TAI was the Applicants' true employer and that it entered into a service agreement with TAI, under which it would pay a retainer fee of R44,200.00 per month to TAI for vehicle fitment services. Further, the First Respondent contends that the Applicants are not their employees and were employees of TAI who paid them their salaries. There

was no agreement in place to integrate the Applicants into becoming their employees nor did they take over TAI as a going concern.

[17] The First Respondent argued that the Applicants were never on their payroll, no taxes were deducted, no IRP5 were issued to them, they never used their clock card biometric system, they never signed leave forms, they never contributed to their pension fund or had medical aid, were not subject to their discipline or control. They explained their usage of uniform and certain facilities for both convenience and uniformity like other independent contractors which did not make them employees.

[18] The contractual relationship with TAI was mutually terminated against payment of 3 months retainer and the Applicants are not entitled to any relief as they are not their employees. Furthermore, that the Applicants have become opportunistic and was attempting to extort money out of them.

Test for review on a jurisdictional issue

[19] The test for a review of a jurisdictional point is set out in detail in *SABC v CCMA and Others*[2] and is applicable herein. The issue as to whether an employment relationship exists is a jurisdictional fact. If there is no employment relationship between the parties to the dispute the Motor Industry Bargaining Council, the Second Respondent, would have no jurisdiction to determine the matter and consequently there can be no unfair dismissal.

[20] In cases such as these, where it is about whether the Second Respondent had jurisdiction, the Labour Court is entitled to, if not obliged, to determine the issue of jurisdiction of its own accord, by deciding *de novo* whether the determination by the arbitrator on jurisdiction is right or wrong.[3] In *Trio Glass t/a The Glass Group v Molapo NO and Others*[4] the Court said:

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[2] Unreported decision. Case number: JR745/16. Delivered on 8 March 2017.
[3] See: *Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen and Others* (2012) 33 ILJ 363 (LC) at para 23; *Hickman v Tsatsimpe NO and Others* (2012) 33 ILJ 1179 (LC) at para 10; *Protect a Partner (Pty) Ltd v Machaba-Abiodun and Others* (2013) 34 ILJ 392 (LC) at paras 5–6; *Gubevu Security*

'The Labour Court thus, in what can be labelled a 'jurisdictional' review of CCMA proceedings, is in fact entitled, if not obliged, to determine the issue of jurisdiction of its own accord. In doing so, the Labour Court is not limited only to the accepted test of review but can in fact determine the issue de novo in order to decide whether the determination by the commissioner is right or wrong.'

[21] In the case of a wrong decision by a CCMA arbitrator where it comes to the issue of jurisdiction, the decision of the arbitrator would be reviewable on objectively justiciable grounds.[5] It does not matter what the reasoning of the arbitrator may have been, it is up to the Court to, from an objective perspective, decide whether the requisite jurisdictional facts exist. In *Universal Church of the Kingdom of God v Myeni and Others*[6] the Court said:

> '... the value judgment of the commissioner in a jurisdictional ruling has no legal consequence and that it is only a ruling for convenience. Therefore, the applicable test is simply whether, at the time of termination of his relationship with the church, there existed facts which objectively established that Mr Myeni was indeed the employee of the church. If, from an objective perspective, such jurisdictional facts did not exist, the CCMA did not possess the requisite jurisdiction to entertain the dispute, regardless of what the commissioner may have determined.'

[22] In the end, and as held in *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others*[7]:

Group (Pty) Ltd v Ruggiero NO and Others (2012) 33 ILJ 1171 (LC) at para 14; *Workforce Group (Pty) Ltd v CCMA and Others* (2012) 33 ILJ 738 (LC) at para 2; *Stars Away International Airlines (Pty) Ltd t/a Stars Away Aviation v Thee NO and Others* (2013) 34 ILJ 1272 (LC) at para 21.

[4] (2013) 34 ILJ 2662 (LC) at para 22. See also: *Kukard v GKD Delkor (Pty) Ltd* (2015) 36 ILJ 640 (LAC) at para 12; *Phaka and Others v Bracks NO and Others* (2015) 36 ILJ 1541 (LAC) at para 31.

[5] See: *SA Commercial Catering and Allied Workers Union v Speciality Stores Ltd* (1998) 19 ILJ 557 (LAC) at para 24; *Zeuna-Starker Bop (Pty) Ltd v National Union of Metalworkers of SA* (1999) 20 ILJ 108 (LAC) at para 6.

[6] (2015) 36 ILJ 2832 (LAC) at para 27.

[7] (2008) 29 ILJ 2218 (LAC) at para 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..."

[23] Turning to the specific instance of the existence or not of an employment relationship as an issue of a jurisdictional fact needed to clothe the CCMA with jurisdiction, the Court in *Sanlam Life Insurance Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[8] held:

> 'It was, therefore, incumbent upon the Labour Court to deal with the issue whether or not there had been an employment relationship between the appellant and the third respondent and, therefore, whether the CCMA had the requisite jurisdiction to deal with the dispute... The Labour Court was called upon to decide de novo whether there was an employer-employee relationship between the parties. It was not called upon to decide whether the commissioner's findings were justifiable or rational.'

[24] *"In casu*, this is simply a matter of deciding whether the individual Applicants are independent contractors to, or employees of, the First Respondent. I must confess my concerns about what seems to be a growing trend of persons who had entered into independent service agreements with a third party contractor, but then claim the existence of an employment relationship, purely because it is considered to be opportune or in their financial interest to do so. This would often be the case where the relationship comes to an end, and the individual service provider then claims dismissal to extract relief from the other party flowing from a claim for unfair dismissal[9]. Or, as is the case *in casu*, the independent service provider claims employment so as to procure employment benefits the employees of the third party contractor would be entitled to. These situations are often more a case of opportunism,

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[8] (2009) 30 ILJ 2903 (LAC) at para 17. See also: *Melomed Hospital Holdings Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 920 (LC) at para 44; *Beya and Others v General Public Service Sectoral Bargaining Council and Others* (2015) 36 ILJ 1553 (LC) at para 20.

[9] This would be reinstatement, re-employment or compensation- see Sections 193 and 194 of the LRA.

rather than a genuine attempt to establish the true nature of a relationship where that is unclear."

[25] It is trite law that the Labour Court and the CCMA are entitled to go beyond what is contained in a contract so as to establish the true nature of the relationship between the parties. In *Denel (Pty) Ltd v Gerber*[10] the Court held:

> 'When a court or other tribunal is called upon to decide whether a person is another's employee or not, it is enjoined to determine the true and real position. Accordingly, it ought not to decide such a matter exclusively on the basis of what the parties have chosen to say in their agreement for it might be convenient to both parties to leave out of the agreement some important and material matter or not to reflect the true position.'

Therefore, and despite a contract being labelled and styled as an independent contract, the Court can still extract an employment relationship from it, applying a number of tests and considerations with due regard to all objective facts.[11]

[26] The concern I have is that in the haste to apply the available tests in establishing the existence of an employment relationship, adjudicators often loses sight of the contract itself, how it came about, and the services provided in terms thereof. There are two parties to the contract, and the basis upon the third party contractor sought to enter into the relationship with the service provider must be an important consideration. Where parties to a service providing relationship have, with the necessary circumspection and on the basis of an informed decision, decided to structure their relationship in a particular way, an adjudicator should not readily interfere with this relationship as enshrined in the contract, after the fact. After all, the principle of *pacta servanda sunt* equally applies in employment law."

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[10] (2005) 26 ILJ 1256 (LAC) at para 19. See also para 22 of the judgment.
[11] See: *LAD Brokers (Pty) Ltd v Mandla* (2001) 22 ILJ 1813 (LAC) at para 18; *SABC v McKenzie* (1999) 20 ILJ 585 (LAC) at para 10.

Employee or Independent contractor?

[27] 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 the carrying on or conducting the business of an employer.

[28] Section 198 (1) of the LRA reads:

> "In this section temporary employment services means any person who for reward procures for, or provides to a client other persons-
> (a) who performs work for the client; and
> (b) who are remunerated by the temporary employment services ";

[29] Section 198 (2) of the LRA reads:

> "For the purposes of this Act, a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service and the temporary employment service is that person's employer."

[30] Section 198 (3) of the LRA reads:

> "Despite subsections (1) and (2) a person who is an independent contractor is not an employer of a temporary employment service, nor is the temporary employment service the employer of that person".

[31] Section 200A of the LRA sets out the presumption as to who is an employee. It is common cause that the Second and Third Applicant fall within the provision of Sec 200A given the earnings threshold and the First Respondent has to rebut this presumption that they are their employees.

Parts 2 and 3 of the Code of Good Practice to the LRA deals with "*Who is an employee and interpreting the definition of an employee*".

[32] The First Respondent maintained that a proper service providing agreement was entered into with TAI who made an informed decision continuing to act as an independent contractor and being paid a monthly retainer. This arrangement was in place from 2011 up to date of termination on 31 July 2017 with TAI and previously with MOBITEC from 1998 to 2011. All 3 Applicants were employees of TAI an independent service provider and were never their employees.

[33] The LRA was never intended to banish the genuine independent service agreement concluded with individual service providers to the scrap heap of history, in favour of a default employment relationship. What the LRA was intended to do was to provide protection to unsophisticated and disenfranchised persons, in an environment where jobs are scarce and unemployment is rife, which persons would do and sign anything just to get a job.

[34] Further, the LRA was intended to protect employees against unscrupulous employers seeking to abuse the common law of contract to escape employment law obligations. In these kind of circumstances, it can hardly be contradicted that the CCMA, Bargaining Councils and the Labour Court would be entitled to intervene and classify the relationship between the parties for what it really was – an employment relationship.[12]

[35] The adoption of Section 200A[13] makes sense, and in particular, that its application is limited to instances where the so-called employee earns less than the threshold prescribed by the Basic Conditions of Employment Act[14]

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[12] Ibid fn 2.

[13] Section 200A reads: '*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…*', with this Section then setting out all these factors.

[14] No. 75 of 1997. The threshold is determined in terms of Section 6(3) of the BCEA and currently stands at R205 433.00.

(BCEA) which is R205,433.00 per annum. This lesser level of earnings is normally associated with that part of the employment corps that would be more unsophisticated and more likely to be unduly influenced into signing something they never intended to, so that the envisaged employer can avoid employment obligations.[15] Section 200A, in order to compensate for such a situation, creates a presumption of employment, as a default position, with the onus on the so-called employer party to rebut that presumption if employment is truthfully not the case. Both the Second and Third Applicants fall within this category given their monthly earnings.

[36] In cases where Section 200A does not apply and the parties have concluded a written agreement establishing the nature of their relationship, it is this agreement that must be the default position in establishing the nature of the relationship. The onus would, in such case, be on the party seeking to contradict this agreement to show that the agreement does not reflect the true relationship between the parties, which is in reality not one of an independent contractor, but one of employment.

[37] In this matter the Second and Third Applicants are subject to the provisions of section 200A and the First Applicant falls outside these provisions given his earnings. This provision is a rebuttable presumption and of importance is the existing contract in place with TAI.

[38] In *LAD Brokers (Pty) Ltd v Mandla*[16] the Court said:

> '... The legal relationship between the parties is to be determined primarily from a construction of the contract between them. ...'

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[15] Id fn 13 at para 99.

[16] (2001) 22 ILJ 1813 (LAC) at para 15. See also: *Niselow v Liberty Life Association of Africa Ltd* (1998) 19 ILJ 752 (SCA) at 754C-D; *Linda Erasmus Properties Enterprise (Pty) Ltd v Mhlongo and Others* (2007) 28 ILJ 1100 (LC).

Although there is no formal written contract between the First Respondent and TAI, TAI invoiced the First Respondent on a monthly basis for a retainer of R42,200.00. An example is the July 2017 invoice which reads:

> 'Retainer fee for work done in workshop according to agreement July 2017 – Retainer Fee R44200.00. This invoice is addressed to Action Ford Constantia by TAI giving the tax numbers of both concerns.
> Date 27/7/17 - Due Date 31/7/17 "

[39] Considering this invoice on its face value and interpreting the word retainer it is clear that some sort of consultancy or service agreement is in place between the parties as the tell all phrase remains "*Retainer fee for work done in workshop according to agreement for July 2017*"

[40] This confirms that up to 31 July 2017 there was some agreement in place between the First Respondent and TAI represented by the First Applicant. The First and Third Applicants are both directors of TAI. The relationship between the parties is to be ascertained as per the agreement or arrangements in place and the monthly tax invoice from TAI is of paramount importance read in conjunction with the final termination agreement dated 4 August 2017.

[41] In *Phaka and Others v Bracks NO and Others*[17] the Court said:

> 'The repetitive references in the contract to the nature of the relationship, and the painstaking effort to define it, leave no doubt that the intention of the parties was to establish relationships overtly on a different footing to the previously existing employment relationships. This is confirmed ... by the express wording of the contract and the purport of its terms ...'

[42] The above being said, and specifically considering the authorities analysed above, the enquiry however does not end just with a consideration of the

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[17] (2015) 36 ILJ 1541 (LAC) at para 32.

contracts and what they contain, even though it may be an important consideration.

[43] In *State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[18], Davis JA postulated the following test to consider whether an employment relationship exists, despite what is contained in a contract:

> 'For this reason, when a court determines the question of an employment relationship, it must work with three primary criteria:
> 1 an employer's right to supervision and control;
> 2 whether the employee forms an integral part of the organization with the employer; and
> 3 the extent to which the employee was economically dependent upon the employer.'

[44] All these requirements are adequately met with TAI who via the First Applicant supervised and controlled the other two applicants who formed an integral part of TAI, an independent contractor from 2011. All three Applicants were economically dependent on TAI who paid them their salaries after deducting all statutory dues and this arrangement was in place up until 31 July 2017.

[45] The Labour Appeal Court in *Dr Joachin Vermooten v Department of Public Enterprises and Others*[19] held that the Applicant was not an employee as he entered into a consultancy agreement which was not a sham. The court stated that:

> "In the absence of any overriding policy considerations neither a tribunal nor a court may ignore its terms."

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[18] (2008) 29 ILJ 2234 (LAC) at para 12.
[19] (2017) 38 ILJ 607 (LAC)

> "Finally there can be no doubt that the Applicant and the Department consciously and deliberately elected to structure their relationship as one other than an employment relationship and it I permissible to do so"

[46] And in *Denel*[20] Zondo JP (as he then was) said:

> "... whether or not a person is or was an employee of another is a question that must be decided on the basis of the realities - on the basis of substance and not form or labels - at least not form or labels alone. In this regard it is important to bear in mind that an agreement between any two persons may represent form and not substance or may not reflect the realities of a relationship..."

[47] It is quite clear that the First Applicant acting on behalf of TAI and the First Respondent had some agreement in place as to how they will operate. The realities of the arrangement need to be ascertained in *toto* and not in a piece meal fashion as the Applicants attempt to do. It is quite clear that no employment relationship existed between the First Respondents and the Applicants as will be confirmed by the relevant facts listed hereinafter.

The Relevant facts

[48] An important party to this matter is TAI which company was formed in 2011. The First and Third Applicants are Directors of this company. There is some controversy as to who had the duty to join TAI as a party to this dispute. The Applicant did not do so and passed the blame to the First Respondent who in turn stated that the Applicant should have done so. TAI is a separate trading entity who contracted with the First Respondent from its inception in 2011 as an independent contractor. They were perfectly entitled to do so and they supplied the labour aspect of the fitment centre work invoicing the First Respondent a monthly retainer as a consultant or service provider. The wording of the invoices submitted monthly by TAI confirms this more than adequately.

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[20] Ibid at para 16.

[49] It was not in the interest of the Applicants to join TAI as two of the Applicants are Directors of TAI and as such will in effect be litigating against themselves. The First Respondent raised a *point in limine* at the outset that the Applicants were not their employees and that the Second Respondent lacks jurisdiction to arbitrate this dispute. The non-joinder of TAI which is now a deregistered entity can no longer be an issue save if there is a finding made of TAI being a temporary employment service. No case has been made out for such a finding save the presumptions per the LRA which are rebuttable presumptions. The Applicants made the concession that this matter be disposed on the basis that the TES application after 3 months employment post 2015 will make the First Respondent the employer of the Second and Third Applicant only. Furthermore, that TAI no longer exists as an entity.

[50] It is common cause that TAI was an independent contractor from 2011 to 2014 whilst trading from the First Respondent's premises. All 3 applicants were employed by TAI and the First Applicant contends that in January 2014 there were certain changes made in their working relationship, *inter alia*, the following:

51.1 TAI will not purchase parts from the First Respondent and will only do fitment centre work for the First Respondent. All other clients they were servicing will go through the First Respondent who will invoice them directly. In other words, TAI will provide labour only to the First Respondent in respect of its fitment work.

51.2 TAI will invoice the First Respondent on a monthly basis, initially R50,000.00 per month and then changing to R44,200.00 per month for vehicle fitment services, labour only. It is noted that 4 employees were initially posted by TAI in 2014 and this changed to 3 hence the differences in the billing 3 months into the arrangement.

51.3 The status quo which prevailed before January 2011 continued up till 2014 and beyond 2014. The Applicants never became employees of the First Respondent despite them stating that this was a temporary arrangement. The Applicants testified about a takeover by the Third Respondent of TAI assets, clients, goodwill and its 3 employees. This was never reduced to writing, nor were the applicants absorbed into the First Respondent's employment for over 3 years which is rather absurd. It can only be an afterthought in this quest to prove that they are employees of the First Respondent. The reality of the situation is that there is an agreement in place between TAI and the First Respondent which needs to be given a label. It cannot be labelled a sham nor was there any circumvention of any law nor a scheme but a genuine business relationship of outsourcing to minimize overheads which was in existence from 1998.

51.4 TAI continued to exist at least till its final deregistration in February 2018. In fact it was actively trading and on a monthly basis invoiced the First Respondent for R44,200.00 up and until 31 July 2017. They produced Bank Statements up and until 31 December 2017. The invoices issued monthly displayed a tax number and was in respect of a "*retainer fee for work done in the workshop according to agreement*" from February 2014 to July 2017. Doing work irrespective of the nature or basis and having a retainer deposited in a banking account is no doubt active trading by any standards. I accordingly find that the Applicant's version that TAI stopped trading in January 2014 and was taken over by the First Respondent a multi – million rand motor vehicle dealership group without any formal documentation being signed is nothing but a fabrication. It is clear that this is merely an attempt to find excuses as to why a proper employment contract was not entered into for over 3 years if the Applicants were indeed employees of the First Respondent. The First Respondent is a member of the Motor Industry Bargaining Council (MIBCO) and is audited on a regular basis and would have definitely absorbed

3 employees into their group if indeed this was the case as made out by the Applicants that all that was awaited were formal employment contracts. The balance of probabilities favours the Third Respondent's version that the Applicants were never their employees.

51.5 The Third Respondent applied all the different applicable tests relating to whether a person is an employee or not and made the right ruling in his arbitration award that the Applicants were not employees of the First Respondent. This review is in essence a correctness review coupled with a *de novo* determination on jurisdiction.

51.6 Since February 2014 TAI did work for the First Respondent and its customers only and did not invoice any other concern. The amount of R44,200.00 represent the Applicants' salaries and for almost three years never changed. As per the evidence before this Court TAI was not a labour broker nor a temporary employment service and was never registered as one. TAI was for all intent and purposes the *bona fide* employer of the Applicants who were placed at the First Respondent business per an agreement in place duly recorded in its monthly billing.

21.6 Up to 30 June 2017 before any dispute arose, this was a perfect scenario. All three Applicants were paid by TAI who invoiced the First Respondent on a monthly basis. TAI paid the statutory dues namely the Employee's Tax and UIF on behalf of the applicants. The bank statements furnished by the Applicants in respect of TAI confirms these payments made on a monthly basis to the South African Revenue Service. Between 2011 and January 2014 VAT was also paid but stopped as no purchases of accessories or parts were being made and the only income for TAI was the R44,200.00 per month from the First Respondent . For all intents and purposes TAI continued to trade as an entity and if it was being deregistered it will be for a failure to file their statutory annual returns. They maintained

an active bank account at Standard Bank and the bank would have closed this account if they were a deregistered entity in terms of relevant legal regulations.

[51] The parties were entitled in law to contract as such and there is no circumvention of any law nor of the fiscal as employee taxes were deducted and paid by TAI as evidenced by the bank statements on record. The First Applicant withdrew monies from the current account TAI held at Standard Bank being his drawings as he paid his personal living expenses, deposited shortfalls and paid the Second and Third Applicant their salaries from this account. Interestingly it is noticed from the bank statements on record that the Third Applicant was paid initially the sum of R20000.00 and then received the sum of R18000.00 per month presumably as a director's fee in addition to his usual salary. PAYE was deducted and for all intents and purposes the Applicants were employees of TAI as they were never paid directly by the First Respondent. To be part of the First Respondent's team they dressed in the Group's uniform and did everything like an employee will do but were controlled as well as supervised by the First Applicant who for all intent and purposes was the face of TAI. The First Respondent testified that other independent contractors like the two finance groups on the floor as well as a marketing team were also treated similarly to the Applicants but are independent contractors and not employees.

[52] What changed on 3 July 2011 is that the First Respondent embarked upon a retrenchment program and sent out circulars to each employee of the group. The First Applicant states that he received one but the First Respondent denied that it was meant for him as he did not sign receipt for same like other employees did. However, the First Respondent stated that it had to be transparent with the First Applicant and advised him, acting on behalf of TAI, that its fitment services will also be affected by this restructuring. Two dates for consultations were set out in this letter but the First Respondent stated that the First Applicant did not attend same. No notice was given to the Second and Third Applicants, nor were they engaged in any negotiations in

line with their version that they were not their employees but were employees of TAI. The First Respondent on 27 July 2017 called at the First Respondent's offices and was advised that TAI services will be terminated on one months' notice. This set the "*cat amongst the pigeons*" and a flurry of correspondence followed as contained in the indexed bundles as annexures to the pleadings filed.

[53] The First Respondent gave TAI notice that it wanted to terminate its arrangement with them. The First Applicant was taken aback and approached the First Respondent and on 31 July 2017, addressed a letter to them being his first retrenchment submission letter. On 4 August 2017 the First Respondent's two Directors met with the First Applicant, Mr Heepko Van Kaam representing TAI and they agreed to the three months' notice period presumably as requested even on a without prejudice basis as the words used in this letter addressed to TAI were "*we therefore agree to a 3 months notification period*". It is quite clear that Mr Heepko Van Kaam signed an acceptance of the offer made and not a receipt of the letter for further consideration as he put it, as he signed under "*'Acceptance: Hereby accept the proposal for a 3 months notification period.*" There is a big difference between acknowledging receipt of a letter for considering and accepting a proposed offer.

[54] It is quite clear that this letter dated 4 August 2017 was a formal settlement agreement signed by the parties. The same becomes binding upon the parties as they were both in a relatively equal bargaining position. These were all done in the name of TAI and not addressed to the First Applicant personally as he puts it in his evidence.

[55] Mrs Mariaan Van Kaam is a Director of TAI and obviously being the First Applicant's wife raised her concerns or dissatisfaction on learning of the settlement agreement of 4 August 2017. This may have started this "*campaign*" as she alluded to under cross examination to allege that the Applicants were employees of the First Respondent and as such needed to

be consulted with. Furthermore, that there was no company resolution relating to a mandate to Mr Van Kaam to sign the said settlement agreement and as such it was not valid. In any event the Turquand Rule[21] and provisions of the Companies Act[22] confirms that it was indeed a binding and legal agreement. No application to Court has been made to set aside the said agreement nor were prompt steps taken to refund the sum of R132,600.00 received on 11 August 2017. On a perusal of the bank statements furnished this amount remains in TAI's bank account as at 31 December 2017.

[56] The acceptance by the First Respondent of the settlement amount confirms that an agreement did exist and 3 months' notice to cancel this agreement calculated on the monthly retainer of R44,200.00 totals R132,600.00 which was reflected in the Third Respondent records as "*Termination Agreement from TAI*" as paid. The First Applicant's evidence of being placed under duress and being forced to sign the said agreement, signing an acknowledgement of the letter and not an acceptance of the 3 months proposal is nothing but an attempt to justify his actions to Mrs M Van Kaam or is a desperate attempt to get out of the agreement. This lends credibility to the First Respondent's initial averment in its founding affidavit that this entire matter was launched merely as an attempt to "*extort*" monies out of them by bringing a frivolous and vexatious referral.

[57] The contents of the correspondence exchanged and the averments made by the First Applicant, is in line with the pleadings before Court and no doubt emanates from inputs made by the Applicants attorneys of record as it contains legal challenges.

[58] In September 2017 the First Applicant received emails at the following email heepko@hwmfitment.co.za and cited as "*Managing Director of HWM Fitment Centre*".

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[21] The Turquand Rule was formulated in the matter of *Royal British Bank v Turquand* 1786 (6) ETB 327.
[22] No. 71 of 2008.

[59] During the cross examination of the Applicants it transpired that they are all working in a new fitment centre. It is clear that they became gainfully employed a month following their dismissal which they contend took place on 18 August 2017. In support of the *point in limine* by the First Respondent, it is stated:

> "In fact as we speak, TAI and the three individual Applicants operate as a fitment centre in Witpoortjie Roodepoort."[23]

[60] The Applicants denied this allegation in their answering affidavit deposed to by the First Applicant on 28 October 2017, who appears to have forgot that he attached annexure "HVK6", dated 28 September 2017, confirming his new position as Managing Director of H W M Fitment Centre (Pty) Ltd . The First Respondent's directors, in their letter dated 4 August 2017 stated that "*we wish to continue using your company's service in the future*" and agreed to give him some air conditioning equipment which they no longer required which the First Applicant accepted. This all confirms the amicable termination of the relationship with TAI represented by the First Applicant and certainly not a tense atmosphere wherein the First Applicant was forced to sign the agreement or acted under duress to sign same.

[61] There is no evidence that TAI was in fact a temporary employment service and supplied temporary staff to the First Respondent and that the Second and Third Applicants were indeed temporary employees who, after three months, became permanent employees of the First Respondent. The presumption created by Section 200A of the LRA is a rebuttable presumption and the First Respondent gave sufficient evidence to rebut this presumption as will be noted from the evidence led at the arbitration and pleadings filed.

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[23] See para 18 of the founding affidavit.

[62] The provisions of section 198 (3) of the LRA is applied in light of the finding that TAI was an independent contractor who entered into a service agreement with the First Respondent.

[63] The First Respondent outsourced its fitment centre work to TAI which company was operated mainly by the First Applicant who appears to be well-experienced and well-known in the fitment industry. This is demonstrated by the ease of him starting a new business once he left the First Respondent. His "*fitment team*" joined him as per the evidence led by the First Respondent and this carried on since 1998 via different concerns.

Conclusion

[64] The initial referral of a dispute to the Second Respondent is nothing but an opportunistic and misguided, well-orchestrated campaign by the First Applicant to overreach the First Respondent in nothing but a frivolous and vexatious, as well as a hopeless action. The First Applicant knew what his arrangements were with the First Respondent as he continued with a 1998 arrangement. He appears to be a fitment service expert and in his own words formed TAI, an empowerment company who supplied labour to the First Respondent to do all its fitment services work. TAI acted as an entity to which the First Respondent outsourced the labour aspect of its fitment service work, instead of employing its own staff to do so which is in line with sub-contracting and is perfectly legal as well as acceptable in a business environment where services are outsourced. The speed and manner in which the First Applicant set up his new fitment centre business and became the Managing Director confirms his role in the industry to be more an employer than an employee.

[65] The amendments to the LRA with regards to temporary employment services and/or labour brokers is to protect vulnerable employees who are being exploited by their employers and not to afford opportunistic persons the gap to litigate when it suits them. The Applicants could have brought this

issue even as a declaratory application to MIBCO and/or this Court some time ago to give their relationship a name and not to sign a settlement agreement settling a contractual, not an employment relationship, benefitting by same and then "*throwing both the law and the book*" at the First Respondent as it did in the hope of a favourable finding that they were its employees who were unfairly dismissed.

[66] The First Applicant represented TAI in all its dealings with the First Respondent till the end of the relationship. The Turquand Rule as expanded in section 20(7) of the Company's Act No 71 of 2008 confirms that despite the First Applicant representing TAI alone all transactions are perfectly legal and binds the company TAI and all its directors, two of whom are Applicants herein.

[67] It is quite clear that a service agreement was entered into by the First Respondent with TAI, who was an independent contractor, and who employed all three Applicants. TAI was paid the sum of R132,600.00 as a negotiated settlement figure to terminate this relationship and invoiced the First Respondent per its own words for "*work done in workshop according to agreement*" on a monthly basis.

[68] I have considered the issue of jurisdiction *de novo* as I have all the facts before me to do so. I have also considered all the relevant case law cited by both parties and those contained in the arbitration award issued by the Third Respondent. I accept that the dominant impression of the relationship between the Applicants and the First Respondent is that there was no employment relationship and that they were not employees.

[69] Accordingly, the application to review and set aside the arbitration award of the Third Respondent must fail as I have determined that the Applicants are not employees of the First Respondent.

Costs

[70] The First Respondent had no option but to defend these proceedings in the Bargaining Council and in this Court at great costs, given the volume of the pleadings, exhibits, records and transcripts in this matter. They maintained their position from the outset that the Applicants were not their employees. Both parties in their pleadings argued for a punitive cost order against each other

[71] This is one of those matters where parties must be discouraged to come to Court on nothing but a "*fishing expedition*" and a hopeless case to get maximum relief at great costs to the opposing party, let alone to clog this Court's roll with a matter which should not have been before this Court. A mutual separation agreement was entered into by the parties which had nothing to do with "*an employment relationship per the LRA*" as a service agreement was in place which was brought to W an end.

[72] I have, in terms of Section 162 of the LRA, a wide discretion when it comes to awarding costs which normally follows the result. I am inclined to afford the First Respondent its costs on the Attorney and Client Scale to show the court's disapproval.[24]

[73] The Labour Court reiterated the importance of costs orders as a tool to discourage frivolous and vexatious disputes that clog this Court's roll. A punitive cost order is warranted in this matter

[74] In *Sepheka v Du Point Pioneer (Pty) Ltd (unreported)*[25], the Labour Court reiterated that legal practitioners are part of a profession that demands complete professionalism, honesty, reliability and integrity from its members and the Court awarded costs *de bonis propriis* to convey the Court's displeasure when these objectives were not adhered to. The Court found

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[24] See: *Mashishi v Mdlala and Others* (2018) 37 ILJ 1607 LC and *Kabe v Nedbank Ltd* (2018) 39 ILJ 1760 (LC)

[25] *Sepheka v Du Point Pioneer (Pty) Ltd (unreported)* (2019) 40 ILJ 613 (LC).

that these objectives inherently demand that legal practitioners comply with their ethical duties towards the Court by refraining from prosecuting and defending hopeless cases in the pursuit of presumably pure financial gain. The Applicants instructed two counsels in this matter who would have advised them with regards to the merits of their case yet they came to Court to argue a hopeless case lacking merit.

[75] Therefore, in exercising my discretion in accordance with law and fairness an appropriate cost order to make would be on an attorney and client scale

[76] In the premises the following order is made:

Order

1. The review application is dismissed.
2. The Applicants are ordered to pay the First Respondent's costs, on an attorney and client scale, jointly and severally, the one paying the others to be absolved.

A. Ramdaw

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate V.S. Bruinders with Advocate Motlhasedi
Instructed by:	Marais Attorneys
For the First Respondent:	A.J. Posthumus of Snyman Attorneys