REPORTABLE

CASE NO: SA 70/2013

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

JOHN FREDERICK SWART **Appellant**

and

TUBE-O-FLEX NAMIBIA (PTY) LTD **First Respondent**

B M SHINGUADJA N O **Second Respondent**

Coram: SHIVUTE CJ, DAMASEB DCJ and CHOMBA AJA

Heard: **31 March 2016**

Delivered: **25 July 2016**

APPEAL JUDGMENT

DAMASEB DCJ (SHIVUTE CJ and CHOMBA AJA concurring):

[1] The present appeal is concerned with the appellate jurisdiction of the Labour Court established under the Labour Act 11 of 2007 (the 2007 Labour Act). It raises the issue whether a finding by an arbitrator[1] (as trier of fact) that the appellant is not an employee as defined in s 1, read with s 128A of the 2007 Labour Act, is an

[1] Pursuant to the jurisdiction to conduct arbitration under the Labour Commissioner's auspices in terms of Part C, Chapter 8 of the Labour Act.

appealable 'question of law alone'; and if it is whether this court should interfere with the arbitrator's finding. Leave to appeal to the Supreme Court was granted by the Labour Court.

[2] The appeal was not opposed, but given its public importance and the fact that it involved an interpretation of the Labour Act, the Chief Justice invited the Minister of Labour (the minister) to intervene in terms s 89(11) of the 2007 Labour Act. The minister accepted the invitation and was represented in the appeal by the Government Attorney. The court wishes to express its appreciation to the minister for the helpful submissions made by the Government Attorney.

[3] Section 89 of the Labour Act states that:

> ‘(1) A party to a dispute may appeal to the Labour Court against an arbitrator’s award made in terms of section 86, except an award concerning a dispute of interest in essential services as contemplated in section 78 –
>
> (a) on any question of law alone; or
>
> (b) in the case of an award in a dispute initially referred to the Labour Commissioner in terms of section 7(1)(*a*), on a question of fact, law or mixed fact and law.' (My underlining).

[4] The arbitrator declined jurisdiction, holding that the appellant was not an employee of the first respondent. On appeal the Labour Court did not decide if the arbitrator was right or wrong. It concluded that it lacked jurisdiction to determine the correctness of the arbitrator's conclusion. It is against that conclusion that the present appeal lies.

[5] The appellant's case before this court is that in finding that he was not the first respondent's employee and therefore not subject to the jurisdiction of the Labour Commissioner in terms of the 2007 Labour Act, the arbitrator was wrong as a matter of law and that the Labour Court misdirected itself in holding that it lacked jurisdiction under s 89(1)(*a*) to entertain the appeal.

The arbitration proceedings

The appellant's statement of claim

[6] In his statement of claim accompanying the referral of a dispute to the Labour Commissioner, the appellant alleged that he was employed by the first respondent as 'sales director' since 2007. He relied on a resolution of the first respondent dated June 2012 setting out a formula for the payment of a commission to him by the first respondent. He alleged that on 1 June 2012 the majority shareholder in the first respondent unilaterally changed the formula for the payment of his remuneration in a manner that was less beneficial to him. He alleged that he did not consent to that unilateral change and that it was for that reason unlawful and contrary to s 50(1) of the Labour Act.[2] He prayed for payment of an amount calculated as the commission due, applying the old formula. He also prayed that the previous formula for computing the commission payable to him be restored and that the respondent be barred from unilaterally changing his terms and conditions of employment.

The first respondent's point in limine

[2] Under s 50(1)(*e*) it is an unfair labour practice for an employer 'to unilaterally alter any term or condition of employment'.

[7] After the appellant lodged a referral with the Labour Commissioner to trigger the latter's conciliation and arbitration jurisdiction, the first respondent raised a point in *limine* that the Labour Commissioner lacked jurisdiction on the ground that the appellant was not an 'employee'. The plea asserted that the appellant was a shareholder only in the first respondent and a member of its board of directors. In the latter capacity he had agreed with the board of directors to render services as sales director for a commission. The first respondent also pleaded that the appellant's employment with it terminated in 2007; that he was not bound to any specific 'times of employment' unlike other employees; that he was not subordinate to its managing director unlike other employees; that he was not registered for social security unlike its other employees; that he is not subject to a leave regime unlike the other employees; that he leaves its offices 'if and when he so desires', and that he has no salary advice unlike its other employees.

[8] Upon the point in *limine* being taken, the Labour Commissioner (the arbitrator) called for a conciliation/arbitration. After hearing evidence on oath and entertaining oral submissions, the arbitrator upheld the point in *limine* and declined jurisdiction, holding in effect that the appellant was not an employee of the first respondent.

The facts

[9] The material facts are either common cause or are undisputed. Mr Nathan Nekomba, a manager and employee of the first respondent, testified before the arbitrator followed by the appellant.

[10] The appellant was in the employ of the first respondent for a total of 22 years, and six of those as its managing director. He retired in 2007 when the respondent's ownership changed, but remained a 15% shareholder and 'sales director'. While other employees had contracts of employment, the appellant did not. For his services he was paid a commission which was characterised as 'director's fees' in the books of the first respondent instead of a 'salary'. Unlike other employees, his working hours were not regulated. When requested on behalf of first respondent to be at work during the respondent's usual business hours the appellant remonstrated that he was not a permanent employee and refused to comply with such a request. The appellant did not seek approval for leave and took same when it suited him. He attended to sales at own discretion. The commission payable to him was a percentage of the first respondent's gross profits from sales. The first respondent availed the appellant a motor car and a cellphone as tools of trade. As sales director the appellant did mentoring for the respondent's other employees. He did not work for another employer and devoted his time solely to the respondent and received his commission without rendering an invoice for services rendered. He received a dividend like first respondent's other shareholders. The appellant does not sit or work at the respondent's place of business on full time basis.

[11] In addition to the common cause facts set out above, the following evidence was summarised in the arbitrator's ruling. The appellant was assisting the first respondent 'here and there by contacting clients'. The first respondent had about 10 employees who all had written contracts but the appellant did not. In the six years that the appellant served as sales director, Mr Nekomba (as manager) had

not approved any leave for the appellant. Mr Nekomba also had no control over the appellant's working hours and the appellant was not answerable to him. In fact, Mr Nekomba reported to the appellant.

[12] On his part the appellant testified that he had never agreed on working hours with the first respondent as he was not its permanent employee. In his evidence in chief he stated that a certain Victor who he referred to as the managing director of the first respondent asked him to be in office from 8h00 to 17h00 and his response was ‘I don’t see the necessity because I am not permanently employed and I am not on their staff’. Unlike the other directors who also provided services to the first respondent, he stated that his services were integral to the business of the first respondent. He asserted that he was dependent on the first respondent for his income.

[13] The arbitrator recorded in his summary of the evidence that the appellant testified that as between him and first respondent 'there is a business agreement but there is no contract of employment'.

Statutory meaning of employer/employee

[14] Section 1 of the 2007 Labour Act contains the following definitions:

> '"employee" means an individual, other than an independent contractor, who –
>
> (a) works for another person and who receives, or is entitled to receive remuneration for that work; or

(b) in any manner assists in carrying on or conducting the business of the employer.'

and

'"employer" means any person, including the State who –

(a) employs or provides work for, an individual and who remunerates or expressly or tacitly undertakes to remunerate that individual and who remunerates or expressly or tacitly undertakes to remunerate that individual; or

(b) permits an individual to assist that person in any manner in the carrying or, conducting that person's business.'

[15] Section 128A (introduced by the Labour Amendment Act 2 of 2012 in the wake of the judgment of this court in *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia and others* 2009 (2) NR 596 (SC) (APS)), states as follows:

'For the purposes of this Act or any other employment law, until the contrary is proved, an individual who works for or renders services to any other person, is presumed to be an employee of that person, regardless of the form of the contract or the designation of the individual, if any one or more of the following factors is present:

(a) the manner in which the individual works is subject to the control or direction of that person;

(b) the individual's hours of work are subject to the control or direction of that other person;

(c) in the case of an individual who works for an organisation, the individual's work forms an integral part of the organisation;

(d) the individual has worked for that other person for an average of at least 20 hours per month over the past three months;

(e) the individual is economically dependent on that person for whom he/she works or renders services;

(f) the individual is provided with tools of trade or work equipment by that other person;

(g) the individual only works for or renders services to that other person; or

(h) any other prescribed factor.'

The arbitrator's ruling

[16] In his ruling on the point in *limine*, the arbitrator considered the import of the definition of employee in s 1, together with the presumptions contained in s 128A of the 2007 Labour Act against the backdrop of case law. He then applied the law as he understood it to the facts and concluded that the appellant was not an employee of the first respondent 'although he was assisting it in its business'.

The Labour Court's judgment

[17] The Labour Court concluded (at para 33) that:

> 'The finding reached by the arbitrator on what was a tricky factual question before him was not in my view one which no reasonable court could have reached in the circumstances.'

and that:

> 'It is thus not open to me to substitute a finding of fact (of employment) for that of the arbitrator (of no employment), even if I were inclined to reach a different conclusion.'

[18] The Labour Court sustained the objection raised by the first respondent that the arbitrator's finding was not 'a question of law alone' and thus not appealable to it. It therefore declined jurisdiction because it took the view that the arbitrator's conclusion that the appellant was not an employee was a secondary factual inference drawn from the proven or admitted primary facts as found by the arbitrator and therefore not appealable within the meaning of s 89(1)(*a*).

[19] The court *a quo* concluded as follows:

> '[31] After referring to the facts, the arbitrator found that, although the appellant assisted the respondent in its business, he was not an employee of the respondent and set aside his complaint which would need to be based upon an employment relationship. Although the arbitrator did not expressly find that the respondent discharged the onus upon it of establishing that there was not an employment relationship, his finding after a reference to this presumption and his treatment of the facts would indicate that he found that the respondent had rebutted the presumption.'

Ground of appeal

[20] The appellant's main ground of appeal is that the Labour Court erred in its conclusion that the arbitrator's finding was a secondary finding of fact which in turn was not appealable as a 'question of law alone' as contemplated by s 89(1)(*a*). The appeal ground is premised on the assertion that it was not open to the arbitrator, having found that the appellant 'assisted' the first respondent in the

conduct of its business for remuneration, to conclude that the appellant was not first respondent's employee.

The parties' main submissions

The appellant

[21] Mr Boltman on behalf of the appellant argued that once the arbitrator had found that the appellant (a) assisted the respondent in its business and (b) was financially dependent on the first respondent, the inexorable conclusion it should have reached was that of an employer/employee relationship. In failing to do so the arbitrator fell into error as a matter of law. Mr Boltman emphasised that nothing turned on the fact that the appellant was a director as a director of a company could in law also be an employee.

[22] Mr Boltman in his written argument makes no reference at all to s 128A of the 2007 Labour Act. He relies solely on s 1 which is the definitions section. He argued that if there is a dispute whether a particular worker is an 'employee' one has to determine the issue by reference to that Act's definition of 'employee'. According to counsel, the only worker excluded from the definition of 'employee' under the 2007 Labour Act is an independent contractor. He maintained that the position was different under the Labour Act 6 of 1992 (the 1992 Labour Act) in that an employment relationship had to be determined by examining (a) the terms of the contract, (b) the parties' perception of the relationship, and (c) the manner in which the contract was carried out.

[23] Under the 2007 Labour Act, according to counsel, the relevant inquiry if the employer denies the existence of an employment relationship, is whether the worker is an independent contractor and not whether he or she is an employee. Once it is shown that the worker is not an independent contractor and there is evidence that he or she assists in the carrying on or conducting of the employer's business, the worker is presumed by the definitions section to be an employee. That, Mr Boltman submitted, is the 'express' legislative intent whose purpose is, as he put it, 'to cast the net of protection wide, and to include employment that might not necessarily comply with the requirements of the common law and to exclude only the independent contractor from the protection'.

[24] According to Mr Boltman, the inclusion of the words 'other than an independent contractor' was intended to remove the 'ambiguity that could arise from the fact that an independent contractor might also assist and or be remunerated'. He added that the common law is no longer relevant in determining who is an employee under the 2007 Labour Act. Therefore, the appellant only had to assist in the conduct of or the carrying on of the first respondent's business for the arbitrator to have jurisdiction to entertain the dispute that was before him. On this reasoning, therefore, the intention of the parties is irrelevant.

The Minister

[25] We are indebted to Mr Ndlovu of the Government Attorney for preparing heads of argument and arguing the appeal on behalf of the minister. Counsel for the minister argued that by insisting that the satisfaction of one criterion in the definitions section is dispositive of the matter, the appellant's principal argument

fails to bring s 128A into the equation. He added that the definitions section must be read together with s 128A in determining whether or not an employer/employee relationship exists. The approach taken by the appellant, it is said, fails to balance the employer's interests against those of the provider of labour.

[26] According to Mr Ndlovu, the correct approach is to look at the substance of the relationship rather than its form, bearing in mind that the true purpose of s 128A, read with the definitions section, is to afford the protection of labour legislation to persons who otherwise might be denied it through disguised contractual arrangements aimed at avoiding the consequences of labour legislation.

[27] Counsel added that the three dominant criteria for determining if an employment relationship exists are (a) the employer's right to supervise and control the provider of labour, (b) whether the provider of labour forms an integral part of the organisation, and (c) the extent of his or her economic dependence on the employer: The greater the degree of control over the provider of labour, the more likely an employment relationship was intended.

[28] Mr Ndlovu argued in support of the Labour Court's conclusion that a finding of the absence of an employment relationship, although a secondary fact, was one of fact and therefore non-appealable under s 89(1) as it was one a reasonable arbitrator could have reached on the record. According to counsel, although the facts found by the arbitrator in some respects pointed to the existence of an employment relationship, the dominant impression of the parties' relationship

weighed in favour of the absence of an employment relationship and that, for that reason, the arbitrator's finding was a reasonable conclusion as it was one of two reasonably possible outcomes on the record.

[29] Mr Ndlovu concluded that even if the arbitrator 'committed an error of law' it cannot be said that the finding was one which no reasonable arbitrator could have reached. My understanding of the latter submission is that even if it were found that the Labour Court erred in not finding that the arbitrator's finding was an appealable 'question of law alone', the arbitrator's finding was not arbitrary or perverse on the record and should therefore be sustained.

What is a 'question of law alone'?: The test

[30] This court has recently revisited the test to be applied in determining whether or not a finding by an arbitrator is an appealable question of law under s 89(1)(*a*): *Van Rensburg v Wilderness Air Namibia (Pty) Ltd* Case No. SA 33/2013 delivered on 11 April 2016. O'Regan AJA held that s 89(1)(*a*) reserves determination of facts to the arbitration process and an appeal relating to decisions on fact will therefore only be entertained where the arbitrator has made a factual finding on the record that is arbitrary or perverse. An arbitrator's conclusion on disputed facts which a reasonable arbitrator could have reached on the record is not perverse and thus not subject to appeal to the Labour Court.[3] The corollary is that an interpretation of facts by an arbitrator that is perverse in the sense that no reasonable arbitrator could have done so is appealable as a question of law. When a decision of an arbitrator is impugned on the ground that it is perverse, the Labour Court 'should

[3] *Van Rensburg* at p 21, para 34.

be assiduous to avoid interfering with the decision for the reasons that on the facts it would have reached a different decision on the record'. It may only interfere if the decision reached by the arbitrator is 'one that no reasonable decision-maker could have reached'[4].

[31] In so far as it is relevant to the present appeal, O'Regan AJA added (at para 48) that:

> 'Finally, when the arbitrator makes a decision as to the proper formulation of a legal test or rule, and a party considers that decision to be wrong in law, then an appeal against that decision will constitute and appeal on a question of law, and the Labour Court must determine whether the decision of the arbitrator was correct or not.'[5]

[32] O'Regan AJA rejected the argument that the term 'question of law alone' should be given a restricted meaning[6]. She added that interpreting s 89(1)(*a*) in a way that makes the arbitrator's application of the law to the facts immune to appeal 'would have the result that a perverse error in the determination of the facts by an arbitrator would not be subject to an appeal, which would undermine the rule of law which abhors arbitrariness of that sort'.

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[4]Ibid at p 22, para 45.

[5]Compare *Platt v Commissioner for Inland Revenue* 1922 AD 42 at p 50: 'Where all the material facts are fully found, and the only question whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law.'

[6] Ibid, paras 50 and 55.

[33] The court concluded[7] that whether or not a ground of appeal raises a 'question of law alone' within the meaning of s 89(1)(*a*), should be determined by considering the ground(s) of appeal.

When does an employer/employee relationship exist?

[34] Under the common law, the rendering of a personal service is essential to the existence of an employer/employee relationship. A contract of employment (*locatio conductio operarum*) involves one person making over to another (the employer) his or her capacity to produce (*Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) at 61A-B[8]). Although not decisive as a determinant of an employment relationship, a measure of control by the employer of the employee is important. In fact, if no control whatsoever exists over the worker, either expressly or by implication, that is a strong indication that the relationship is not one of employment. (See *Smit* at p 62D-F).

[35] An independent contractor or a contract for letting and hiring services (*locatio conductio operis*), on the other hand, involves one person being engaged by another to produce a result rather than to render a personal service. An independent contractor's commitment to the one who pays for his or her labour, is the production of a given result (*Smith* at p 57C-E, and *Colonial Mutual Life Assurance Society Ltd v McDonald* 1931 AD 412 at 425). It is recognised under the common law that the term 'independent contractor' is wide enough to include all agents who are not servants in the widest sense of that term and includes an independent agent, a mandatory or a *locator operis*: the common denominator

[7] Id, para 57.

[8] Approved by this court in *APS* at p 610G para 10.

being that they are engaged in a 'contract of work' as opposed to a 'contract of service': *Borcherds v C W Pearce & J Sheward t/a Lubrite Distributors* (1993) 14 ILJ 1262 (LAC) at 1277 and the authorities there collected.

[36] Thus in *Paxton v Namib Desert Trails (Pty) Ltd* 1996 NR 109, the court was called upon to consider whether a lady who had been assisting her husband in his employment and being paid for certain services was an employee. Her services were rendered on an *ad hoc* basis and more to assist her husband than his employer. She was found not to be an employee.

[37] *Paxton* was decided under the 1992 Labour Act which contained the same definition of employee as in s 1 of the 2007 Labour Act, save that the former did not include the words 'other than one who is an independent contractor'. Nothing should in my view turn on that fact because the common law always excluded an independent contractor from the definition of employee. The inclusion of those words in the 2007 Labour Act therefore does not add anything to the meaning of employee as defined in that Act. As John Grogan correctly observes as regards the inclusion of similar language in the 1995 South African Labour Relations Act (LRA) in his book *Workplace Law* 8 ed Juta 2006 at 24 :

> 'The express exclusion of independent contractors from the definition of "employee" in the LRA appears unnecessary, as the courts have always drawn the line at extending the statutory definition to them.'

[38] If, as I suspect, it is Mr Boltman's suggestion that the rendering of a personal service is not an essential element of an employment relationship, that argument

cannot be accepted. Rendering of a personal service lies at the heart of the employment relationship. As was recognised in *Paxton* (at 112D), it is true that in seeking to define who is an employer and who is an employee, the legislature attempts to extend protections to working people but it also seeks to balance the interests of those who make use of the labour of others. It cannot be correct that just because the legislature included the words 'other than an independent contractor' that balancing of interests ceased. In fact, the recognition in s 128A that parties may regardless of the presumption contract out of an employment relationship strengthens the view that not every relationship in which a person through his or her labour assists in the business of another will result in an employer/employee relationship. The definitions section must not be read in a way that renders s 128A nugatory. Each case must be considered on its facts and the trier of fact must look at the substance of the relationship.

[39] Mr Ndlovu correctly pointed out that the legislative scheme adopted in the 2007 Labour Act is in harmony with the recommendations of the International Labour Organisation (ILO) in *ILO R 198* – 'Employment Relationship Recommendation', 2006 (No. 198).[9]

[40] The Preamble to the Recommendation in relevant part recognises that: (a) employment or labour law seeks, among other things, to address what can be an unequal bargaining position between the parties to an employment relationship; (b) there are difficulties of establishing whether or not an employment relationship exists in situations where the respective rights and obligations of the parties

[9] Adopted in Geneva at the 95th ILC session on 15 June 2006.

concerned are not clear, where there has been an attempt to disguise the employment relationship, or where inadequacies or limitations exist in the legal framework, or its interpretation or application; (c) contractual arrangements can have the effect of depriving workers of the protection they are due; and (d) there is a role for international guidance to ILO member states in achieving the protection of workers through national law and practice.

[41] The ILO then proceeds to recommend that member states should consider the possibility of defining in their laws and regulations, or by other means, specific indicators of the existence of an employment relationship; in particular 'allowing a broad range of means for determining the existence of an employment relationship' and 'providing for a legal presumption that an employment relationship exists where one or more relevant indicators is present'.

[42] It is no coincidence therefore that the 2007 Act contains a definition of 'employee' and 'employer' and in s 128A sets out a presumption of an employment relationship if certain indicators are present.

[43] The definitions section of the 2007 Labour Act is intended to assist the trier of fact in resolving disputes concerning who is an employee and who is not. In that process the s 128A presumption also comes into play and must be considered together with the definitions section, bearing in mind that an employer may place facts and circumstances before the arbitrator which show that the parties did not intend to create an employment relationship. As the learned author Brassey observes in his article 'Nature of Employment' *ILJ* (1990) 934 at 935-936:

> 'Since independent contractors have been held to fall outside the statutory definitions of employment, a statutory employee is likewise a person who delivers up the capacity to produce rather than a finished product.'

[44] In contending that the mere fact of 'assistance' for 'remuneration' should bring a relationship within the ambit of the statutory definition, Mr Boltman supported his submissions with South African cases interpreting that country's labour legislation. Counsel placed great store by the South African case of *City of Tshwane Metropolitan Municipality v South African Local Government Bargaining Council & others* (2011) 33 ILJ 191 (LC) where (para 65) express reference is made to the fact that the applicable labour legislation in South Africa 'must be read so as to implement s 23 of the Constitution' which guarantees a constitutional right to fair labour practices vesting in 'everyone' and includes not only parties to a contract of employment but those persons in any employment relationship.

[45] The South African case law cited by Mr Boltman must therefore be understood against the backdrop of the constitutionally guaranteed right to 'fair labour practices' for 'everyone' under s 23 of the South African Constitution.

[46] In my view, the dominant purpose discernible from the scheme adopted in ss 1 and 128A, is the protection of workers from contrivances aimed at circumventing the protection afforded by labour legislation. An arbitrator (and the Labour Court on appeal) considering whether or not an employment relationship exists should bear that in mind.

[47] There is a rebuttable presumption of employment if any of the factors set out in s 128A are present. It is rebuttable because the parties may choose that there be no employment relationship even when one or more of the factors giving rise to a particular presumption are present. The consequence of a rebuttable presumption is to cast the onus on the person who wants to avoid an employer/employee relationship to show that, irrespective of the presence of the factors giving rise to the presumption of employment, the parties did not intend same and none in fact arose.

The Van Rensburg test applied

[48] When one applies *Van Rensburg*, s 89(1)(*a*) has two legs. The first leg is whether or not the arbitrator's finding is a 'question of law alone'. If the answer is in in the affirmative, the Labour Court must proceed to consider if the finding of the arbitrator was correct. As for the former, if what the arbitrator did was to make a determination whether the proven facts fall within a legal test or a rule, the resulting finding or conclusion is an appealable question of law within the meaning of the section. If what he or she did was to decide whether or not a particular set of facts has been proved, in other words, which of the disputed factual versions must be accepted, that is a question of fact which falls foul of s 89(1)(*a*), unless it is absurd, irrational or perverse.

[49] On the *Van Rensburg* formula, the arbitrator's finding in the present case involved the application of a rule or legal tests embodied in the definitions section and s 128A and was therefore an appealable question of law. That is the

conclusion the Labour Court should have reached. It should then have proceeded to consider if the arbitrator's decision was the correct one on the record.

[50] I therefore proceed to consider if the arbitrator made the correct decision on the record. Both parties confirmed that there was no misdirection on the facts by the arbitrator and Mr Boltman quite properly submitted that the facts as found by the arbitrator must be accepted as correct for the purposes of the appeal.

Proper application of definitions section and s 128A

[51] In deciding whether a particular worker is an employee as defined in labour legislation, Grogan[10] observes that:

> 'The ultimate question, it is submitted, is whether the person concerned is deserving of the protection or right which he or she is claiming under the statute.
>
> . . .
>
> This suggests that the courts should strictly scrutinise any purported independent contractual relationship to ensure that it is not a ruse aimed at evading the provisions of the Act.'

[52] These remarks are an apt characterisation of the 2007 Labour Act. The Act widens the common law meaning of employee so as to cast the net of protection of labour legislation to categories of persons who would otherwise not be covered under the common law. The definitions section and the s 128A presumption are intended to assist the courts guard against ruses aimed at evading the protection afforded by a worker being an employee.

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[10] *Workplace Law* at 24 footnote 32.

[53] As was said by Joubert JA in *Smit* at p 62D-63B in a *dictum* approved by this Court in the *APS*[11] matter:

> 'In many cases it is comparatively easy to determine whether a contract is a contract of service and in others whether it is a contract of work but where these two extremes converge together it is more difficult to draw a borderline between them. It is in the marginal cases where the so-called dominant impression test merits consideration . . . (The) presence of a right of supervision and control . . . is not the sole determinative factor since regard must also be had to other important *indicia* in the light of the provisions of a particular contract as a whole.'[12]

Analysis: Did the arbitrator reach a correct conclusion?

[54] It is trite that where there is no misdirection on fact by the trier of fact the presumption is that his or her conclusion is correct. The appeal court will only interfere if it is convinced that the conclusion is wrong. If the court of appeal is in doubt as to the correctness of the conclusion of the arbitrator as trier of fact, it must uphold the conclusion reached by the trier of fact: *R v Dhlumayo* 1948 (2) SA 677 (A) at 705-706 and compare *JMYK Investments CC v 600 SA Holdings (Pty) Ltd* 2003 (3) SA 470 (W) at 472.

[55] I agree with the Labour Court that in the present case a more ambivalent set of facts is hardly imaginable: On the one hand it points to the existence of an employment relationship regard being had to the definition of employee and the s 128 *indicia* while, on the other hand, it lends support to the inference of absence of an employment relationship. The fact that the appellant rendered sales solely to

[11] *APS* at 611 footnote 40.

[12] *Smit* at 62D-63B.

the respondent supports the inference that he was an employee. Yet, the fact that he did not take leave and took off at his pleasure supports the contrary conclusion.

[56] The facts of the present case resonate with those in *Borcherds v C W Pearce & J Sheward t/a Lubrite Distributors* (1993) 14 ILJ 1262 (LAC) at 1281A-C - where the absence of day-to-day control over a worker, the fact that he was employed to produce a result and not personal services, and the fact that he was not registered as an employee with the Department of Manpower resulted in him not qualifying as an employee. The tools of trade offered to him by the employer were regarded as neutral factors as they could be required for the employer's purposes from either an employee or an independent contractor.

[57] In the present case, the appellant was paid on commission basis and only if he produced a result. He did not render a personal service in that what was required of him was the production of a result. He was not registered with the Social Security Commission. The first respondent exercised no control over him and he chose when to work and did not work fulltime at the first respondent's place of business. He was not subject to the direction of the manager of the first respondent who in fact saw him as his superior on account of his being director and shareholder. There was no day-to-day control over his activities by the first respondent. He did not apply for leave to be absent from work. His being availed a cellphone and a company car are neutral factors.

[58] It is an important consideration that the appellant considered himself not to be an employee of the first respondent and that his rendering sales services to the

appellant was in consequence of a 'business agreement'. Mr Boltman suggested that he appellant did not understand the significance of being an employee. I find that improbable. The appellant was the company managing director for 6 years, managing what appears by all accounts to be a thriving business consisting of other personnel who were under his managerial command.

[59] The inference is inescapable that the appellant knew the difference between being an employee and someone who is not when he entered into the 'business agreement' with the first respondent. The concession before the arbitrator that he was not an employee therefore strengthens the first respondent's version that he was not an employee within the meaning of the 2007 Labour Act.

[60] Overall, the record shows that the appellant enjoyed a considerable degree of freedom of action and autonomy which made it possible for him to rebuff the request that he report for work according to set hours and routine – a privilege not available to an employee on the test for determining an employment relationship. This fact also lends credence to the inference that what he was engaged in was a contract of work and not for service: he had not surrendered his labour or service to the first respondent and the latter neither controlled nor directed the manner in which he performed his service.

[61] On the facts found by the arbitrator, the appellant does not fit the profile of a person who deserves the protection of the 2007 Labour Act and I do not find any pressing public policy reason or concern which necessitates extending the protection afforded by that Act to a person in the circumstances of the appellant.

[62] Regardless of whether on the same facts we could have come to a different conclusion on the evidence found by the arbitrator, I am satisfied that a reasonable trier of fact could reasonably come to the conclusion that the appellant was not an employee.

Conclusion

[63] The conclusion I come to is that although the appellant's ground of appeal raised an appealable question of law within the meaning of s 89(1)(*a*), the first respondent had rebutted the presumption that the appellant was its employee. Both the arbitrator and the Labour Court were therefore correct in declining jurisdiction to entertain the appellant's complaint.

Costs

[64] Both parties agreed that this is a matter of immense public importance and that no costs order should be made regardless of the outcome of the appeal.

The Order

[65] I propose the following order:

1. The appeal succeeds in part but fails on the merits.

2. The finding by the arbitrator that the appellant is not an employee is a question of law as contemplated in s 89(1)(*a*) of the 2007 Labour Act.

3. The arbitrator's finding that the appellant is not an employee as contemplated in the 2007 Labour Act is upheld.

4. The appeal is dismissed.

5. There is no order as to costs.

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DAMASEB DCJ

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SHIVUTE CJ

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CHOMBA JA

APPEARANCES

APPELLANTS:	J Boltman
	Instructed by Köpplinger Boltman
SECOND RESPONDENT:	M Ndlovu
	Instructed by the Government Attorney