IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Held in Johannesburg

Case no: CA 8/05

In the matter between

Astral Operations Ltd **Appellant**

And

Roger Parry **Respondent**

JUDGMENT

ZONDO JP

Introduction

[1] The respondent, a former employee of the appellant, brought an action in the Labour Court in which he sought an order that the appellant pay him various amounts of money arising out of his previous employment relationship with it and the termination thereof. The appellant brought a counter-claim against him for some payment as well but that counter-claim was later withdrawn. The appellant's claims fell under Claim A, Claim B, Claim C and Claim D.

[2] Claim A was based on an alleged breach by the appellant of the contract of employment between the parties in that, according to the appellant, the appellant had dismissed him for operational requirements without following certain contractual or internal procedures applicable in the case of such a dismissal. He relied on the provisions of sec 77(3) of the Basic Conditions of Employment Act, NO 75 of 1997 ("**the BCEA**") to contend that the Labour Court had jurisdiction to entertain such a claim. The claim was for the payment of an amount of R 530 131, 31.

[3] Under Claim B the respondent sought an order for the payment of his salary for certain periods between October 2002 and March 2003, notice pay, leave pay, relocation allowance and severance pay. Under Claim C the respondent sought an order for the payment of an amount equivalent to 12 months' remuneration being compensation for unfair dismissal under the Labour Relations Act, 1995 (Act 66 of 1995) ("**the Act**"). Claim D was an alternative claim based on an alleged breach of the respondent's right to fair labour practices in terms of sec 23(1) of the Constitution of the Republic of South Africa Act 108 of 1996.

[4] The appellant raised the point that the Labour Court did not have jurisdiction to entertain any of the respondent's claims because its jurisdiction to entertain them would have to be found either in the Labour Relations Act, 1995 (Act 66 of 1995) ("**the Act**") or in the BCEA and those Acts did not apply in Malawi where the respondent was based because that is a different country. The respondent maintained that those Acts did apply in his employment relationship with the appellant and that the Labour Court did have

jurisdiction. The appellant's contention was that the relevant Malawian Court had jurisdiction in the matter. The appellant also raised other matters in seeking to defend itself against the respondent's claims. It is necessary to set out the facts of this matter before considering the questions which need to be decided on appeal.

The facts

[5] In its Heads of Argument in this Court the appellant set out from paragraphs 14.1 to 14.11 facts which it said were not in dispute in this matter. The respondent did not challenge this in his heads of argument. In its judgment the Labour Court set out the factual background to the dispute in paragraphs 2 to 16. In his heads of argument in this Court the respondent accepted that factual background as correct. In the light of this I set out below a factual background that is derived from the factual background set out in the judgment of the Labour Court and the relevant part of the appellant's Heads of argument.

[6] The parties set out common cause facts in paragraphs 2.1 to 2.31 of the agreed pre-trial minute. It is convenient to quote paragraphs 2.1 to 2.31 of the pre-trial minute. They read thus:

> "2.1 **The identity of the parties.**
>
> **2.2 The applicant was employed as the respondent's General Manager: Africa Operations, at a monthly remuneration package of US$6 680,00 per month plus R 4 133,00 per month. (Applicant's car allowance was set in Rands and the balance of his package in US**

dollars). In this position as General Manager: Africa Operations, applicant was responsible for respondent's operations and subsidiaries in Malawi, Zimbabwe and Zambia.

2.3 Applicant was previously an employee of Tiger Brands Ltd. The Astral Group was unbundled from Tiger Brands and applicant was subsequently appointed as a director of Astral Foods Limited early in 2001. Astral Foods Ltd was the holding company of *inter alia* the respondent (Astral Operations Ltd) and County Fair Foods (Pty) Ltd.

2.4 Applicant's position with Astral Operations Ltd became redundant. A written agreement was entered into with respondent on 31 July 2001 which had the following salient features:

2.4.1 It was recorded that applicant's position had become redundant and that he had had 23 years of completed service. (This was a reference to his years of service with both Astral Operations Ltd and Tiger Brands).

2.4.2 Applicant would take up the newly created position of General Manager, Africa Operations with respondent with effect from 1 June 2001.

2.4.3 The contract was concluded in South Africa.

2.4.4 The contract made no reference to the employment relationship being

governed by a legal system other than South African law.

2.4.5 On the other hand clause 9.2 provided that sick leave would be "*subject to conditions prescribed by relevant legislation*". Clause 13.1 which dealt with hours of work provided similarly.

2.5 The written agreement was signed by applicant on 25 June 2001 and on behalf of respondent on 31 July 2001 (it is in dispute whether a letter dated 21 June 2001 in addition set out further terms and conditions of employment between the parties).

2.6 The company policies included a retrenchment procedure. Clause 2 thereof provided for prior notice of possible retrenchment which notice was inter alia obliged to disclose in writing the reasons for the proposed retrenchment; the proposed selection criteria; and the possible date of retrenchment.

2.7 Clause 3 of the retrenchment procedure provided that the company undertook to comply with the "*legally required consultation process*". In terms of the procedure the applicant had to be afforded the opportunity to make submissions on relevant issues. His submissions then had to be responded to. The Company also undertook to endeavour to find alternative employment for the applicant.

2.8 Paragraph 1.2 of the recordal in the agreement provided that if applicant had to be retrenched, then, because he had received severance pay for the 23

years' service he had already rendered "*the future payment of any severance pay by the company commences to run from the date mentioned in this paragraph as the date when the employee takes up the new position*." (The respondent contends that it was a term of the employment contract that the internal retrenchment proceedings would only apply to employees in relation to whom the Labour Relations Act was applicable. Respondent further alleges that the applicant was not such an employee claiming that he was employed outside South African and beyond the territorial application of the Labour Relations Act.)

2.9 After the conclusion of the employment agreement of 31 July 2001 the applicant moved to Malawi.

2.10 Respondent's Malawian business was held in a subsidiary Malawian-registered company called Meadow Feeds Limited (Malawi).

2.11 Meadow Feeds Limited (Malawi) was not profitable.

2.12 Applicant introduced respondent to a third party, Central Poultry 2000, which offered to buy the business of Meadow Feeds Limited (Malawi).

2.13 Respondent agreed to sell the business to Central Poultry 2000, and thereby to shut down its Malawian operations.

2.14 Applicant was instructed to oversee the sale of the business and its assets, and the collection of all

outstanding debts owing to Meadow Feeds Limited (Malawi).

2.15 When the announcement of the need for the applicant's return to South Africa was communicated to him in writing by Groenewald on 23 July 2002 the applicant was informed that the position in South Africa was being considered, but that this "*will take some time to finalise and you will be kept abreast of any developments*".

2.16 On 31 October 2002 respondent's Groenewald wrote to the applicant say the following:

> **"*Since the Malawi operations are coming to an end and in the absence of a suitable position elsewhere in the Group, we have no option other than to offer you a retrenchment package. The package will be based on the Astral Policy and will be finalised once you complete your work in Malawi.*"**

(The respondent averring that Groenewald made a bona fide error regarding the respondent's obligation to pay a retrenchment package to the applicant.).

2.17 Applicant was repatriated to South Africa by the respondent on 15 November 2002. He returned to his home in the Western Cape.

2.18 On 16 November 2002 applicant met with Groenewald in Johannesburg. A letter from Groenewald to Gustav De Wet ("*De Wet*") dated 22 November 2002, which was copied to applicant and concerned the meeting of 16 November 2002 stated that applicant would receive "*a written document*

***indicating his pay, the duration of his employment and the detail of his retrenchment package upon completing the outstanding issues*.”**

2.19 The respondent refused to pay a severance package to the applicant, respondent averring that it determined that it was not in law obliged to do so.

2.20 Groenewald was himself subsequently dismissed from his post as Director of Meadow Feeds, Northern Region. At the time the applicant was still in the respondent’s employ.

2.21 After his repatriation to South Africa the applicant remained in the employment of respondent and continued to perform certain functions relating to the respondent’s African operations.

2.22 Approximately a month after his return to South Africa, applicant was requested by respondent to conduct certain further work in Malawi on its behalf, which he did between 5 and 12 December 2002. On 13 December 2002 and in Johannesburg, applicant and de Wet had a meeting where applicant reported back on this trip, and where the following issues were, amongst others, discussed. De Wet and applicant discussed the work that remained to be done following the sale of respondent’s business in Malawi. Applicant and de Wet made plans to conduct a business trip to Malawi in January 2003.

2.23 Applicant had previously been the Managing Director of Meadow Feeds National Operations.

2.24 During or about December 2002 various investigations into misconduct on the part of senior employees were being undertaken.

2.25 De Wet was placed on a warning valid for twelve months.

2.26 Respondent's Human Resources Director Len Hansen, writing from Pretoria on 7 January 2003, wrote to the Applicant and stated the following.

2.26.1 That respondent confirms that his services "*have been terminated on 31 December 2002 as per your discussions with Gustav de Wet 13 December 2002*."

2.26.2 Respondent advised applicant that he would <u>not</u> be paid a retrenchment package apparently because "*the new owners of the operation in Malawi offered you another position*."

2.26.3 Respondent also advised applicant that it would "*not consider*" him for the position of Managing Director: Northern Region.

2.27 On 14 January 2003 De Wet wrote to the applicant setting out calculations for the payment of his final salary for the months of November and December 2002. His e-mail stated the respondent wished to transfer the monies as soon as possible. Neither of the amounts there reflected nor any part thereof had been to date paid to the applicant and nor has any tender subsequently been made to pay such amount.

2.28 De Wet's letter of 14 January 2003 also informed the applicant that De Wet believed that "*it will not be necessary for you to plan to still go to Malawi with me*." (It being in dispute as to whether applicant wished to accompany De Wet to Malawi or not.).

2.29 On 30 January 2003 the applicant referred a dispute to the CCMA in which he, inter alia, alleged that his retrenchment was unfair and that the respondent had failed to pay him severance pay.

Ad respondent's claim in reconvention

2.30 In late 2001 Applicant introduced a potential purchaser Central Poultry 2000 Limited ("Central Poultry") to Respondent. Negotiations thereafter commenced relating to the potential acquisition of Respondent's business and/or assets in Malawi by Central Poultry. In such negotiations Respondent was represented by Applicant, De Wet and Christo Groenewald. Applicant was therefore at the times fully aware of the progress of and developments in such negotiations.

2.31 Meadow Feeds Limited (Malawi) was a wholly owned subsidiary of the respondent at the time of his dismissal"

The Labour Court

[7] The Labour Court did not deal separately with the point taken by the appellant that it did not have jurisdiction. It dealt with the question of what the proper law was which was to be applied in adjudicating the respondent's claims, found that it was the South African law and, from this, concluded that, therefore, it, as a South African court, had jurisdiction. It went on to deal with the merits of the claims and made various orders the details of which will be dealt with later if this becomes necessary. However, it can be pointed out that the orders did include orders:

(a) for the payment of one month's salary as notice pay in leave of notice of termination of the contract of employment

(b) for the payment of the respondent's balance of salary for June, July, November, December 2002 and January 2003.

(c) for the payment of severance pay calculated at two weeks' pay for every year of service.

(d) for the payment of accrued leave pay for November 2002 to February 2003

(e) for the payment of an amount equal to twelve months' remuneration for unfair dismissal for operational requirements.

(f) interest and costs.

[8] Subsequently, the appellant made an application to the Labour Court for leave to appeal to this Court against some of the orders. The Labour Court granted leave to appeal against some of its orders and refused leave in respect of others. The respondent also sought leave to cross-appeal and such leave was granted. For

present purposes it is not necessary to go into orders in respect of which to leave to appeal was refused and orders in respect of which leave to appeal was refused.

The appeal

[9] The first question that needs to be decided is whether or not the Labour Court had jurisdiction to entertain the respondent's claims in the light of the fact that the Act and the BCEA have no extra-territorial application. Counsel for the appellant submitted that the Labour Court had no jurisdiction. In support hereof he referred to the presumption in our law that **"(i)n the absence of an intention clearly expressed or to be inferred either from its language or from the object, subject-matter or history of the enactment, …. Parliament does not design its statutes to operate on its subjects beyond the territorial limits**" of the country. In support hereof he referred to Maxwell: "**Interpretation of Statutes**", 8th ed at p 127 as approved in **Bishop and others v Contrath & Another 1947(2) SA 800 (T) at 804**. He also referred to the case of **Viljoen v Venter NO 1981(2) SA 152 (W) at 154 H.** Counsel for the appellants contended that, since the respondent's workplace was in Malawi, the Labour Court could not have jurisdiction. In support of the submission that, if an employee's workplace was outside the country, the laws of this country could not apply to such person, Counsel also relied upon **CIWU v Sopelog cc (1993) 14 ILJ 144 (LAC)** and the decision of the Appellate Division in **Genrec Mei (Pty)Ltd v Industrial Council for the Iron, Steel, Engineering, Metallurgical Industry and others (1995) 4 BLLR 1(A), Lamani & Another v CTC Bus Co Ltd & Another 1988**

(9) ILJ 583 (E), Tawusa v Bahwaduba Bus Service (Pty) Ltd 1989 (10) ILJ 1169 (IC), Wilson v Maynard Ship Building Consultants AB (1978) ICR 377, Todd v British Midlands Airways Ltd (1978) ICR 959 Janata Bank v Ahmed (1981) IRLR 457 and Weston v Vega Space Systems Engineering Ltd (1989) IRLR 429.

[10] In the Sopelog matter Scott J, sitting in the now defunct Labour Appeal Court created under the Labour Relations Act 1956 (Act 28 of 1956 as amended), had to decide the question whether the Industrial Court had jurisdiction to entertain an application in terms of sec 17(11)(a) of the old Act where the employees concerned worked on oil rigs outside the territorial waters of the Republic, the workers were residents of the Republic, their employer's principal place of business was in Cape Town and its registered office was in Johannesburg. Scott J concluded that in that case the industrial court had no jurisdiction because the workers' workplace fell outside the territorial boundaries of the Country and, therefore, of the industrial council.

[11] In the Genrec matter the question was whether or not the old Act, prior to certain amendments thereof in 1991, was applicable to the dismissal dispute between the workers concerned and their employer which, if answered in the affirmative, would mean that the respondent industrial council had jurisdiction to deal with such dispute but, if answered in the negative, would mean that the respondent industrial council had jurisdiction to deal with such dispute.

[12] In the Genrec matter the employer, that is Genrec Mei (Pty) Ltd, had its principal place of business in Durban and that area fell within the area of jurisdiction of the industrial council. The employees who, after dismissal referred their dismissal dispute to the respondent industrial council for conciliation, were recruited by Genrec to perform work on an oil rig situated above the continental shelf and outside South African territorial waters. The contracts of employment between the workers concerned and Genrec had been concluded in Durban and the workers themselves were resident in Durban.

[13] Sec 2(1) of the old Act provided, prior to its amendment in May 1991, that the old Act applied to "**every undertaking, industry, trade or occupation.**" The 1991 amendment extended the application of the old Act to undertakings performing work in, on or above the continental shelf. The Appellate Division held that the old Act did not, prior to its amendment in 1991, apply to the undertaking operated by the employer on the oil rig above the continental shelf outside South African territorial waters.

[14] Although it is not very easy to determine the actual basis for the Court's decision that the old Act did not apply to the case in Genrec, it seems that the Court made the decision on the basis of where the employer was carrying on its undertaking in which the employees concerned were working. (see Genrec at p. 5 H-I). At 6 B-C in Genrec Van Heerden JA, writing for the Appellate Division said:

> "**It seems clear therefore that, if one ignores the provisions of s 48(1)(c) of the Act, the jurisdiction of an industrial council is limited to matters relating to an undertaking carried on in an area in respect of which it is registered. Now, although the Council is one of the few industrial councils registered for the whole of South Africa, it was rightly common cause that prior to the 1991 amendment of s 2(1) the Act by itself did not have extra-territorial application, and that hence the council could not deal with disputes existing in an undertaking carried on outside the Republic. The main bone of contention between the parties was on the question where the appellant's undertaking in which the respondents were employed was being carried on."**

Sec 48(1)(c) of the old Act – to which the learned Judge of Appeal referred in the above passage - gave the Minister additional power to declare by notice in the Government Gazette that provisions thereof would be binding in an area additional to that in respect to which the industrial council concerned was registered. Sec 48(1)(c) was irrelevant to the issues in the Genrec matter.

[15] From the passage quoted above it seems to me that the Appellate Division was saying that the industrial council could not, in the absence of sec 48(1)(c) of the old Act, have jurisdiction in respect of a matter "**relating to an undertaking carried on in an area in respect of which**" it was not registered. The Court also stated that it was "**rightly common cause**" that, prior to the 1991 amendment of sec 2(1) of the old Act, the old Act did not by itself have extra - territorial application and "**hence the council could not deal with**

disputes existing in an undertaking carried on outside the Republic." The Court pointed out at 6 C-D that the issue between the parties in the Genrec matter was "**on the question where [Genrec's] undertaking in which the [employees] were employed was being carried on."**

[16] The Appellate Division said that Scott J may have gone too far by equating the location of the workplace with the location of the carrying on of an undertaking (see Genrec at 7 F-G). In Genrec the Court pointed out at 7 I- 8C that:

(a) the question where an undertaking is being carried on at any given time is ultimately one of fact;

(b) although Genrec did carry on an undertaking in Durban, it was also engaged in another undertaking conducted on the platform;

(c) the vast majority of Genrec's employees working on the platform were not part of Genrec's regular workforce;

(d) the respondent employees in the Genrec matter were recruited specially for employment to work on the platform.

(e) the respondent employees' contracts of employment in the Genrec matter were of limited duration and were to come to an end of the completion of "**the Hook-up contract**" and, thereafter, they would no longer be employees of Genrec. In other words, said the Court, they would at no stage be employed in the Durban undertaking unless, of course, new agreements were to be concluded with them at a later stage.

[17] In the light of the above factors and those that had been mentioned by Booysen J in the court of first instance in the Genrec matter, said Van Heerden JA, it appeared that the undertaking in which the employees in the Genrec matter were employed was completely divorced from the Durban undertaking. The Court then concluded: **"…. I am consequently of the view that in its main characteristics the former undertaking pertained solely to work to be executed on the platform and, hence outside our territorial waters**." (see Genrec at 8 B-C).

[18] Having considered the Genrec decision I am of the view that in that case the Appellate Division decided the application or non-application of the old Act to the dispute in the case according to the locality of the undertaking carried on by Genrec in which the respondent employees were employed (see what the Court a quo was reported to have said at 6D-E, 7C- 8B). I propose to use the same criterion to decide the issue in the present matter. I am mindful of the fact that in Genrec the Appellate Division was dealing with a case in which the locality of Genrec's undertaking where the respondent employees worked was of particular significance because in terms of the old Act the jurisdiction of the industrial council – which was in issue in that case - was linked to both the undertaking carried on as well as the area in respect of which the industrial council was registered. Nevertheless, I do not think that that factor should make a material difference because, even under the current Act, a similar issue could arise involving a bargaining council as under the current Act a bargaining council's jurisdiction in respect of an employer depends upon the type of

undertaking which the employer runs and whether the area in which the employer conducts such undertaking falls within the territorial scope of the bargaining council. In such a case the Supreme Court of Appeal would probably follow the same approach in deciding whether the Act applied or whether the bargaining council has jurisdiction in respect of a similar dispute.

[19] In a case where there was no bargaining council and the Commission for Conciliation, Mediation and Arbitration would have to be involved if the Act applied, the position would be that in terms of sec 115 of the Act the CCMA has jurisdiction in the whole Republic and, obviously, has no jurisdiction outside the Republic. It seems to me that in a case involving the CCMA the Court could also ask whether the employer's undertaking in which the employees work is carried on inside or outside the Republic. If it was carried on inside, the CCMA would then have jurisdiction and, if where it was carried on outside, the CCMA would not have jurisdiction.

[20] In this matter the respondent terminated his contract of employment with Astral by agreement and took a severance package amounting to R 600 000,00 even though he was being offered another job. He then concluded a completely new contract of employment for his new job. That is his Malawian job. That was the position of General Manager: Africa Operations. He then relocated to Malawi. He was working for a Malawian subsidiary of the appellant. He made monthly reports to the Head Office in South Africa. The operation in Malawi was separate from the South African operation of the appellant. That is why he was able

to sell that operation separately. Those of the respondent's duties that he performed outside Malawi were not performed inside South Africa. If he was to work in the South African undertaking of the appellant, he and the appellant would have needed to enter into a new contract of employment with the appellant. In my view when all the facts of this matter are considered and the question is asked as to where the undertaking was carried on in which the respondent worked, the answer would be an easy one, namely: Malawi! In fact when one has regard to the facts of the Genrec case and the facts of this case, one would realise that it would be very difficult to distinguish this case from the Genrec case. In both cases the employer had a business operated from the Republic. In both cases the employee was or employees was or were resident in the Republic. In both cases the employer had an operation outside South Africa. In both cases the employee or employees had entered into specific contracts of employment requiring them to work outside South Africa. In the light of all of this it was decided in Genrec that the Act did not apply prior to its amendment. In the light of all of this I am of the view that the Act did not apply to the appellant's operation in Malawi and that the Labour Court had no jurisdiction to entertain the respondent's claims.

[21] In concluding that the Labour Court did not have jurisdiction to entertain the respondent's claims, I am mindful of the fact that some of the respondent's claims were based on the contract of employment and not on the BCEA or the Act. This would give rise to the argument that, based on the provisions of sec 77(3) of the BCEA, the Labour Court has the same jurisdiction as the High Court in respect of any matter concerning a contract of

employment and that, even if the BCEA and the Act did not apply, the Labour Court would have jurisdiction to deal with such claims in the same way as the High Court would have had jurisdiction. In this regard it would be pointed out that both the plaintiff and the defendant in South Africa, the contract was concluded in South Africa and if the Court gave a monetary judgment in favour of the plaintiff, that money judgment would be executed in South Africa. While I do understand all of this, my difficulty is that the Labour Court can only derive jurisdiction to entertain such claims from sec 77(3) of the BCEA and, without that provision, it would not have such jurisdiction. If the BCEA did not apply to this case obviously sec 77(3) of the BCEA also did not apply.

[22] The Court below reached the conclusion that the BCEA and the Act applied to this case. I have taken a different view. I wish to make two observations which in my view are responsible for the different outcome in the court below. The first is that it seems to me that, as Counsel for the appellant submitted, the Court a quo dealt first with the question of the proper choice of law and once it had concluded that the parties had chosen the South African law as the law that would apply, it seemed to it that it followed that the Labour Court had jurisdiction. In my view this did not follow. Parties are able to choose whatever law as the law that must be applied in resolving a dispute between themselves arising out of some agreement between them. That law may be invoked by a court in a foreign jurisdiction to adjudicate a dispute. In this case a Malawian court could have applied South African law including the BCEA and the Act in adjudicating the respondent's claims against the appellant.

[23] The other observation is that it does not appear to me that the Court below sufficiently considered the question of what criterion was used in Genrec to determine whether the industrial council in that case had jurisdiction in that matter.

[24] In the light of the conclusion I have reached on the appeal, the cross-appeal falls away. In the premises it seems to me that the appeal must succeed. I am of the view that the requirements of the law and fairness dictate that there should be no order as to costs.

[25] In the result I make the following order:

1. The appeal is upheld,
2. The cross-appeal is dismissed.
3. There is to be no order as to costs on appeal and cross-appeal.
4. Those orders of the Labour Court in respect of which leave to appeal was granted are set aside and replaced with the following order:

"(a) **This Court has no jurisdiction to entertain the Applicant's claims.**

(b) There is to be no order of costs."

Zondo JP

I agree.

Jappie JA

I agree.

Patel JA

Appearances:

For the Appellant	:	Mr A C Oosthuizen SC
Instructed by	:	Cliffe Dekker Inc
For the Respondent:		Mr C S Kahanovitz
Instructed by	:	Dernardt Vukic Potash & Getz
Date of judgment	:	4 September 2008