



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

CASE NO JR 2298/11

In the matter between:

SOUTH AFRICAN TOURISM

APPLICANT

and

TEBOGO BRIAN MONARE

1ST RESPONDENT

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

2ND RESPONDENT

COMMISSIONER MOOI NO

3RD RESPONDENT

Date heard: 7 March 2014

Supplementary heads filed: 28 March 2014

Judgment delivered: 31 March 2014

JUDGMENT

VAN NIEKERK J

- [1] This is an application to review and set aside an arbitration award issued by the third respondent (the commissioner). In her award, the commissioner found that the first respondent had been unfairly dismissed. The essence of the commissioner's finding is that at most, the first respondent had been guilty of a failure to follow proper procedures, but that he was not guilty of any dishonesty or fraud, certainly not to the extent that they continued employment relationship would be intolerable. To the extent that the first respondent had been guilty only of breaching company procedures, the commissioner ordered that the first respondent be reinstated, but without retrospective effect.
- [2] The grounds for review reflected in the founding and supplementary affidavits largely reflect process-related conduct on the part of the commissioner. The primary ground for review articulated at the hearing of the application is that by concluding that the first respondent had not been guilty of any dishonest conduct and that at most, he had failed to comply with applicable policies and procedures, the commissioner made a decision to which no reasonable decision-maker could come on the available material. The applicant also attacks the commissioner's decision to reinstate the first respondent, on the basis that the breakdown of trust and confidence in the first respondent rendered that decision unreasonable.
- [3] At the hearing, the court directed that the parties submit supplementary heads of argument, addressing the issue of the territorial application of the LRA, given the undisputed facts relating to first respondent's employment. It is common cause that on 10 November 2009, the applicant and the first respondent entered into a contract of employment for a fixed term, to commence on 1 February 2010. That contract was concluded outside of the Republic of South Africa. In terms of the contract, the first respondent was appointed as the applicant's finance and administration manager in the United Kingdom, with effect from 1 February 2010. The first respondent had previously been employed in the applicant's Amsterdam office. It is not disputed that the first respondent commenced work at the applicant's office in Wimbledon, London, and that he rendered services there

until his dismissal on 30 September 2010. The first respondent's dismissal was preceded by a disciplinary hearing conducted in London on 27 and 28 September 2010. The chair of the enquiry found the first respondent guilty of various offences with which he had been charged. These charges related to subsistence and travel claims made by the first respondent during March 2010, and the unauthorised use of an access code on the applicant's IT system. Prior to his dismissal, the first respondent had been suspended on full pay on 26 August 2010 by his direct superior, Ms Lebo Mokhesi, the country manager: UK. It is not disputed that in the capacity of country manager, Mokhesi had overall managerial control of the applicant's London operation, where first respondent performed his work.

- [4] The starting point in the determination of any extra-territorial application of the LRA in relation to the CCMA must be s 114(1) of the Labour Relations Act. That section provides that the CCMA has jurisdiction in all the provinces of the Republic. Section 213 defines Republic to mean, when used in a territorial sense, the national territory of the Republic.
- [5] Since the CCMA is a statutory body with a statutorily defined jurisdiction, it is not open to parties to agree to confer jurisdiction on the CCMA merely because they wish the CCMA to arbitrate their dispute. Further, contrary to what the third respondent submits in the present proceedings, it is of no consequence that the issue of extra-territorial application has not previously been raised in these proceedings – the issue of jurisdiction can be raised at any time.
- [6] In *Serfontein v Balmoral Central Contracts SA (Pty) Ltd* (2000) 21 ILJ 1019 (CCMA), the commissioner Lagrange (as he then was) held that in a dispute such as the present, the CCMA was required to determine, as far as possible, if the substance of the employment relationship in question is reflected in obligations which are due and enforceable within the boundaries of the Republic of South Africa. The commissioner considered that the substance of that relationship might ordinarily be determined by having regard to the place where the employee must render his or her services, the place where payment is made,

the location of the parties, the method of calculating remuneration and the currency remuneration, and the place at which the relationship was entered into. None of these factors is individually decisive (at p1025).

- [7] In *In Kleinbans v Parmalat SA (Pty) Ltd* [2002] 9 BLLR 879 (LC), this court held that it had jurisdiction in a claim for breach of contract in circumstances where the claimant employee of an employer based on South Africa had been seconded to a foreign country on a fixed term contract. In that case, the court approached the issue of jurisdiction from the perspective of private international law and after weighing up as features of the contract which fell outside the jurisdiction as against those which link the contractual relationship to South African territory, the court concluded that it had jurisdiction.
- [8] In *Astral Operations Ltd v Parry* (2008) 29 ILJ 2668 (LAC), the Labour Appeal Court held that in this court did not have jurisdiction to entertain a claim for contractual damages, unfair retrenchment and the non-payment of various statutory amounts in circumstances where the respondent employee's workplace was in Malawi. In coming to that conclusion, the LAC had regard to a number of prior decisions that concerned the territorial application of the 1956 LRA, in particular, *CWIU v Sopellog CC* (1993) 14 ILJ 144 (LAC) and *Genrec Mei (Pty) Ltd v Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry & others* (1995) 16 ILJ 51 (A). The court came to the conclusion that the territorial application of the LRA is to be determined ultimately by the locality of the undertaking carried on by the employer. At paragraph 19 of the judgment, the court said the following:

'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, when it was carried on outside, the CCMA would not have jurisdiction.'

- [8] The court had regard to the facts of the case and those of *Genrec*, and said the following (at 2678H):

'In both cases the employer had a business operated from the Republic. In both cases the employer had an operation outside South Africa. In both cases the employee or employees had entered into specific contract of employment requiring them to work outside South Africa. In the light of all of this it was decided in *Genrec* that of 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.

- [9] In a recent judgment, *MECS Africa (Pty) Ltd v CCMA 7 others* (unreported JR 455/12, 16 August 2013) this court had to consider whether the CCMA had jurisdiction to entertain a dispute lodged by an employee who was employed by a temporary employment service in South Africa and whose services were made available to one of his employer's clients operating in the Democratic Republic of Congo. In that case, the employee had returned to South Africa from the DRC when the notice of termination of employment was issued. In the CCMA it had been argued, on the basis of *Astral Operations*, that the location of the employer's undertaking was the DRC. On the facts, the court found that that the primary purpose of the employer's business was to assign persons to provide services to its clients, a business that was located in South Africa. The court was clearly swayed by the nature of the employer's business, i.e. the recruitment and procurement of labour. That function was performed within the boundaries of the Republic of South Africa and not in the geographic locations at which the employer's clients conducted their operations. Of some further significance was the fact that the employer, as a distinct legal entity, had no presence in the DRC – the employee did not work at the employer's operations in the DRC; rather, he worked at the operation of one of his employer's clients. On this basis, the court concluded that the locality of the employer's undertaking in which the employee performed in terms of his contract was in South Africa and that the CCMA the consequently had jurisdiction to entertain the dispute.

- [10] The choice of law principles referred to and applied in the *Parmalat* should be approached with a degree of caution – the claim in that instance was one brought in contract - it was not a dispute, such as the present, in which an employee relied on a statutory right not to be unfairly dismissed and sought to enforce that right in an arbitration conducted under the auspices of a statutory body. In any case, as the LAC observed in *Astral Operations*, to the extent that a contractual claim may only be brought in this court under the provisions of s 77(3) of the Basic Conditions of Employment Act, the extraterritorial application of that statute is a relevant consideration, one that does not appear to have enjoyed the attention of the court in *Kleinhans*.
- [11] The authority binding upon me is to the effect that the primary but not sole consideration in determining the territorial application of the LRA is the location of the undertaking carried on by the employer. Of course, this begs the question of the meaning of an ‘undertaking.’ In my view, the presumption against extraterritorial application assumes some significance here – the court ought to exercise a degree of conservatism and caution in the determination of an undertaking in these circumstances. Given the amorphous meaning of the word ‘undertaking’ there will always be practical difficulties in determining the location of an employer’s undertaking, especially in the case of an employer that conducts operations on a global basis. Ultimately, this is a question of fact, to be determined by reference to all of the available evidence.
- [12] In the present instance, it is common cause that the applicant is a juristic person, established in terms of s 2 of the Tourism Act, 72 of 1993, registered in terms of South African law, with its head office situated in Sandton, South Africa. That is largely the basis on which the applicant contends that its London office does not constitute a separate entity or undertaking, but is merely an extension of its undertaking in South Africa, presumably in terms of s13 of the Tourism Act, which empowers the board to open and conduct offices in the Republic and elsewhere.

- [13] On the other hand, it is not disputed, as I have indicated, that the first respondent was appointed to work as finance and administration manager in the United Kingdom. It does not appear from the papers that the first respondent ever worked for the applicant in South Africa. The offer of employment relevant for present purposes was made to him when he worked in Amsterdam. On his version, it was an appointment in the applicant's London office, for a fixed term of five years. To use the language of *Astral Operations*, this is a case in which the employer operates a business from within the Republic of South Africa and in which it has entered into a specific contract of employment requiring the employee to work outside of South Africa. The location in which the first respondent was appointed to work, the applicant's office in London, had its own information technology systems, its own controls, time management, its own staff, and its own premises and was subject to a separate audit. In my view, all of these facts point to an undertaking carried on outside of the Republic of South Africa.
- [14] I do not understand the *Astral Operations* decision to exclude the consideration of any other relevant factors and in particular, those that were the subject of specific mention in the *Serfontein* award mentioned above. In this regard, it is not in dispute that the first respondent was paid in pounds sterling in the United Kingdom in terms of a contract concluded outside of the Republic of South Africa. All of these factors militate against a conclusion that the LRA has territorial application in the present instance.
- [15] To the extent that the first respondent has relied on the recent judgment in *MECS Africa*, this is not a case in which the first respondent was employed by a labour broker and then assigned to render services to client on an operation outside of the borders of the Republic of South Africa. Nor is this a case in which the first respondent was recruited in South Africa and thereafter seconded to the applicant's London office. Secondment arrangements envisage the continuity of employment at a home 'base' during a temporary deployment on agreed terms to a different location. Ordinarily, a secondment agreement would contemplate a

return to the home base on termination of the assignment. Conceptually, such arrangements are not dissimilar to those that existed in *MECS Africa*, and I venture to suggest that most would result in a similar outcome. But in the present instance, there is no such residual nexus with the applicant's South African office. The first respondent may be South African and he may have worked for an entity whose head office is located in South Africa but he was recruited overseas, his employment contract was concluded overseas, he was obliged to work overseas for an agreed fixed term with no right to return to South Africa and continue employment there on conclusion of that fixed term, and he performed services only in the United Kingdom. He committed the acts of misconduct that resulted in his dismissal in the United Kingdom, his disciplinary hearing was held there, and he was given notice of dismissal there. In my view, in these circumstances, the LRA has no territorial application. It follows that the first respondent had no right to refer his dispute to the CCMA, and the CCMA had no right to entertain it.

- [16] Finally, in relation to costs, given the broad discretion conferred on the court by s 162 of the Act, it seems to me that the requirements of the law and fairness are best served by making no order as to costs. The issue of territorial application ought to have been raised at a much earlier stage and it would not be fair to prejudice the first respondent with a costs order given the circumstances in which the point was raised and decided.

For the above reasons, make the following order:

1. The arbitration award issued by the third respondent on 1 September 2011 under case number GATW 13517/10 is reviewed and set aside

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Adv. A Snider, instructed by DLA Cliffe Dekker Hofmeyr Inc

For the respondent: Bester & Rhodie Attorneys

Labour Court