



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

CASE NO JR 2298/11

In the matter between:

TEBOGO BRIAN MONARE

APPLICANT

and

SOUTH AFRICAN TOURISM

1ST RESPONDENT

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

2ND RESPONDENT

COMMISSIONER MOOI NO

3RD RESPONDENT

Date heard: 30 April 2014

Ruling made: 30 April 2014

RULING: APPLICATION FOR LEAVE TO APPEAL

VAN NIEKERK J

- [1] This is an application for leave to appeal against a judgment delivered by this court on 31 March 2014. In its judgment, the court reviewed and set aside an arbitration award issued by the third respondent, on the basis that the CCMA had no jurisdiction to entertain the claim before it.
- [2] The test to be applied is well-established – the applicable threshold is whether another court (in this instance, the Labour Appeal Court) might reasonably come to a different conclusion.
- [3] The primary ground of appeal relates to certain factual issues. In particular, the applicant contends that the court erred by making certain factual assumptions relating to the circumstances of the applicant's employment. These are recorded in paragraph (i) of the application, and I do not intend to repeat them here. While it is correct that the issue of the application of the LRA was never raised in the proceedings under review, the parties were invited to make submissions on whether the Act had any application given that the applicant had been employed and dismissed in London. Both parties made submissions, dealing with the facts as they appeared from the record. What the applicant seeks now to do is to introduce new facts, and to contend that they are supportive of a finding that the CCMA had jurisdiction. Regardless of whether the applicant is entitled to raise new facts at this stage, is difficult to appreciate how those facts might possibly make any difference to the outcome.
- [4] The real issue for present purposes is whether another court might reasonably conclude, given the above, that the CCMA had jurisdiction to entertain the applicant's unfair dismissal claim. The answer to that question lies in the judgment of the LAC in *Astral Operations*, referred to and applied in the judgment that is the subject of these proceedings. In that case, the LAC held that the question to be asked where a referral was made to the CCMA was '*whether the employer's undertaking in which the employees work is carried on inside or outside the Republic.*' The facts of that case are illustrative of the definition to be

accorded to the term 'undertaking in which the employees work'. The employee had been appointed as the respondent employer's general manager: Africa Operations, in terms of a contract concluded in South Africa. In this capacity, he moved to and worked in Malawi to oversee the sale of the respondent's business and assets in that country. When the Malawian operations came to an end, the employee returned to South Africa and continued working for the respondent company in South Africa until his retrenchment some 6 weeks later. The LAC held that the undertaking in which the employee had worked was in Malawi and that the CCMA accordingly had no jurisdiction to entertain his claim

- [5] In the present instance, the claim to jurisdiction is significantly more tenuous. The applicant, as I have indicated, on the undisputed facts, was recruited in Amsterdam and engaged in terms of a fixed term contract to work in London. He worked there and was dismissed there. At no stage did he return to South Africa, nor did he have any right to return to South Africa to work for the respondent after the conclusion of his fixed term contract. The applicant was left to argue that the CCMA had jurisdiction because the respondent is a statutory body, and that its London office was a 'branch' of its South African base. On the principles established in *Astra Operations*, this is insufficient. In that case, as I have indicated, the employee was employed by a South African entity, deployed to Malawi to perform work, returned to South Africa and was dismissed here. On this basis, even if the applicant in the present instance had been employed by the respondent in South Africa in terms of a contract signed here and thereafter deployed to London with some residual right to return to South Africa, the CCMA would not have had the jurisdiction to entertain his claim. It is quite conceivable that even if the applicant had been brought to South Africa to face disciplinary proceedings and had been dismissed here, that the undertaking in which he worked (and the defining jurisdictional factor) would have remained the respondent's operation in London.
- [7] I am bound by the principles established in *Astral Operations*. I see no reason why the LAC would come to a different conclusion on any application of the

principles in that judgment to the facts of the present case, nor is there any reason why the LAC might wish to revisit the principles that it established in that case. The *Astral Operations* decision has injected a degree of certainty into the law where there was previously a degree of confusion, and little purpose would be served in reopening the debate closed by that judgment.

- [7] For the above reasons, the application for leave to appeal stands to be dismissed. There is no reason why costs should not follow the result.

I make the following order:

1. Leave to appeal is refused, with costs.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT