



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

REPORTABLE

Case No: JR1346/22

In the matter between:

REENA NAIDOO

Applicant

and

COMMISSIONER D KHOSA NO

First Respondent

**GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL (GPSSBC)**

Second Respondent

**DEPARTMENT OF INTERNATIONAL
RELATIONS AND COOPERATION (DIRCO)**

Third Respondent

Heard: 11 February 2025

Delivered: 18 March 2025

Summary: Application to review and set aside the jurisdictional ruling of the first respondent. Application granted, dispute referred back to the second respondent.

JUDGMENT

DANIELS J

Introduction

[1] This is an application brought to review and set aside the jurisdictional ruling of the first respondent (hereafter the “commissioner”).

[2] In her ruling, the commissioner found that second respondent (hereafter the “GPSSBC” or the “Bargaining Council”) did not have jurisdiction to hear and determine the dispute concerning the alleged unfair dismissal of the applicant.

[3] As a result of the jurisdictional ruling, the applicant’s condonation application, for the late referral of the dispute to the Bargaining Council, was not considered.

Material facts

[4] The facts of the matter are largely common cause:

4.1 During 1995, the applicant, employed by the State, was posted to the South African Permanent Mission to the United Nations (hereafter “the Mission”) based in New York City, United States of America (hereafter “USA”).

4.2 At the time of her appointment, the applicant was required to sign an official affidavit stating, among other things, the following: “*I understand that I am guilty of an offence if I divulge to any person any information to which I have access by virtue of my employment with the South African Government ...*” That affidavit further stated: “*I have not participated in any strike against the South African Government and will not participate in any such strike whilst employed by the South African Government.*” (own emphasis)

4.3 The court was not provided with a signed employment contract (at least there is none in the arbitration record) or letter of appointment. One of the official forms (issued by the Head of the Administration) set out the applicant's position and remuneration, and states: "*The undermentioned LRP has been appointed in terms of the Delegation of Authority of the Head of Department and in accordance with the Administrative Code for the Foreign Service, Part III C*".

4.4 Though a South African citizen, at the time of her recruitment, the applicant was domiciled in the USA. Accordingly, as a result of her domicile, the applicant was considered to be "locally recruited personnel" (hereafter "LRP"). The third respondent contended that LRP are not recruited in terms of the Public Service Act, 1994 but are engaged through the Foreign Service Administrative Code.

4.5 A short extract (2 pages from a 13-page document) from the Foreign Service Administrative Code (Version No: 3) dated 5 August 2016 (hereafter the "Administrative Code") formed part of the record. Presumably the parties included only those portions of the Administrative Code which might be of assistance to the court.

4.6 In sections 3.3.3, 3.3.4, 3.4.1 and 9.4 of the Administrative Code "local laws"¹ are referred to, but none of those sections suggest that the employment contract of the applicant (or indeed all employees to whom the Administrative Code is applicable) is governed by the local law, nor do these sections indicate that the applicant chose local law as the applicable law relating to her employment. Aside from sections 3.4.1 and 9.4 of the Administrative Code, the other sections² relate to casual or occasional workers. Sections 3.4.1 and 9.4 deal with an offer of employment after the expiry of a fixed term contract.

¹ In private international law, in the present context, the reference to "local laws" refers to the law of the receiving state where the embassy, consulate, or mission is located.

² Sections 3.3.3 and 3.3.4 of the Administrative Code

4.7 The applicant rendered her contractual duties, at all material times, within New York City, New York State, USA. During her employment, the applicant was not a member of the Government Employee Pension Fund, which is mandatory for all public servants.

4.8 On 1 September 2021, the applicant was given notice of the termination of her employment when she received a letter from the Permanent Representative of the Mission informing her as follows: *"Your employment with the Permanent Mission of South Africa to the United Nations (hereafter referred to as the Mission) will terminate on 30 September 2021, which will be your last day that there will be any employment relationship between you and the Permanent Mission of South Africa to the United Nations, which date shall be referred to as the Separation Date."* The subject of this letter was: *"Termination of employment due to abolishment of Post No: NVNP1001"*

4.9 On 11 September, the applicant addressed a letter to the Permanent Representative. The applicant requested an urgent meeting to discuss her impending dismissal, set out detail of her 26-year career in the foreign service, and submitted that she remained an asset to the Mission. She also contended that there were alternatives to dismissal.

4.10 On 17 September, the applicant received a letter from the Mission in which she was advised that she was not being dismissed, because her employment would terminate by operation of law, resulting from the abolition of her post. In the letter, the Mission advised that it had been "instructed" to abolish her post. The letter made no mention of the fact that the applicant had passed the age of 65, the normal retirement age for female public servants.

4.11 On 18 October, the applicant's attorneys addressed a letter to the Mission in which they stated that the services of the applicant had been terminated for operational reasons, but there had been no compliance with section 189 of the Labour Relations Act 66 of 1995 as amended

(hereafter “the LRA”). Accordingly, the applicant’s dismissal was procedurally and substantively unfair. The applicant’s attorneys demanded an undertaking, within 7 days, that the applicant would be reinstated in due course failing which a dispute would be referred to the CCMA seeking retrospective reinstatement. No response was received within 7 days.

4.12 Accordingly, on 3 November, the applicant referred a dispute about the fairness of her dismissal to the Bargaining Council. The dispute was referred two days outside of the 30-day period in section 191 of the LRA.

4.13 On 4 November, the Department of International Relations and Cooperation (hereafter “DIRCO” or “the Department”) replied to the letter from applicant’s attorney. DIRCO advised that it was not in a position to comply with the demand for reinstatement.

4.14 On 11 November, the applicant, again through her attorneys, applied to the Bargaining Council for condonation for the late referral of the dispute to conciliation. The third respondent opposed the application. In its answering affidavit, the third respondent stated: *“The applicant was employed by the Mission in New York as a local recruited personnel (LRP). The employment contracts of the LRP are concluded in terms of the local law and are regulated by the Foreign Service Code. The Foreign Service Code is attached hereto as annexure B. The LRPs are not employed in terms of section 9 of the Public Service Act, 1994 as amended (PSA)”*. Furthermore, in support of its position, the third respondent referred to the common law presumption against the extra territorial application of statutes, which prevents litigants outside of the country from relying on domestic law. The third respondent noted that *“lex loci solutionis”*³ and the *“lex loci contractus”*⁴ relate to the local law (i.e. the law applicable in New York State, USA).

³ The law applicable to the place where performance, under the contract, is due.

⁴ The law governing the place where the contract was made.

Legal issues and analysis

Jurisdictional ruling and legal principles

[5] The commissioner suggested, in para 24 of her ruling, that it was common cause that the applicant was employed by the Mission. She ruled that, because the Mission is not a government department included within the scope of the GPSSBC, it had no jurisdiction. However, it was not common cause that the applicant was employed by the Mission. The applicant had always maintained that she was engaged by DIRCO and the Mission was a branch of DIRCO.

[6] It was common cause that the Bargaining Council's registered scope extends nationally and, subject to very few exceptions,⁵ includes all government departments at both national and provincial levels. As a national department, DIRCO is specifically included in the scope of the Council.

[7] It is necessary to briefly consider the manner in which our courts have dealt with such jurisdictional issues:

7.1 In *Genrec Mei (Pty) Ltd v Industrial Council for the Iron, Steel, Engineering and Metallurgical Industry and others*,⁶ while in Durban, the employer had concluded employment contracts with a number of individuals, to work on an oil rig located on the continental shelf off South Africa's territorial waters. Upon dismissal, they challenged the dismissal as an unfair labour practice, under the old Labour Relations Act⁷. A dispute arose as to the jurisdiction of the Industrial Council, to which the dispute had been referred for conciliation. The Appellate Division noted that an employer may operate from several locations, and held that

⁵ For instance, the scope of the GPSSBC does not cover the registered scope of the Education Labour Relations Council, the scope of the Public Health and Welfare Sector Bargaining Council, or the Safety and Security Bargaining Council.

⁶ 1995 16 ILJ 51 (A)

⁷ Act No. 28 of 1956.

where the employment contract is concluded holds less significance than the location *where* the affected employees are engaged.

7.2 In *Astra Operations Ltd v Parry*⁸ the Labour Appeal Court considered a similar jurisdictional issue. The employer operated a business from South Africa but it also had subsidiary company, duly incorporated in Malawi. The employee had entered into an employment contract, in terms of which he was required to work for the employer's subsidiary company based in Malawi. The Court held that the employer's undertaking in which the employee was engaged was the Malawian subsidiary. The Court took into consideration that, at all material times, the workplace was Malawi, the Malawian subsidiary was a separate concern, which was incorporated as such. At para 22 of the judgment, Zondo JP (as he was then) stated: "*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.*"

7.3 In *Monare v SA Tourism and others*⁹ the Labour Appeal Court considered that, although the employee was employed at the London office of SA Tourism, that office was not an undertaking separate and divorced from the employer's undertaking in South Africa but inextricably linked to it.¹⁰ Accordingly, the CCMA had jurisdiction to hear and determine the dismissal dispute referred to it.

7.4 In *Antonio v Commission for Conciliation, Mediation and Arbitration and Others*¹¹ the Labour Court considered the jurisdiction of

⁸ (2008) 29 ILJ 2668 (LAC) at paras 49 and 50.

⁹ (2016) 37 ILJ 394 (LAC)

¹⁰ Ibid at paras 37 - 41.

¹¹ (JR1110/15) [2018] ZALCJHB 454 (30 October 2018).

the CCMA in a dispute where the employee had been engaged, by a South African company, to manage a separate legal entity in Angola, which was divorced from the South African company. The court considered the locality of the employer, in which the employee was engaged, but also considered that an express term of the employment contract was that Angolan law would apply. In the circumstances, the court found that the CCMA has no jurisdiction to hear and determine the dispute.

7.5 In *Sorrell v Petroplan Sub-Saharan Africa (Pty) Ltd*¹² the Labour Appeal Court held as follows: “[19] *The appellant contended however that the fact that the respondent is a TES distinguished this matter from the line of cases which preceded it. I am not persuaded that this is so. An employer may conduct more than one undertaking, with the location of an undertaking at any given time, ultimately being a question of fact. While the undertaking of the respondent TES is located in South Africa, this does not alter the fact that, as with other individuals similarly contracted, the clear facts show that the appellant was contracted to work on a limited duration contract in an undertaking in Mozambique which was separate and divorced from the recruitment business of the respondent TES located in South Africa.*” (own emphasis)

Jurisdiction of the third respondent

[8] The arbitration process and the resulting arbitration award both constitute administrative action. Accordingly, section 33(1) of the Constitution requires that the process and the outcome must be lawful, reasonable, and procedurally fair. It was in this context that the Constitutional Court fashioned the appropriate review test¹³ in relation to CCMA arbitration awards in the following terms: *is the arbitration award one which no reasonable commissioner could reach on the material before him or her?* The test has come to be known as the “*Sidumo* test” or the “reasonableness test.” However, in relation to jurisdictional issues, the

¹² [2024] JOL 67089 (LAC)

¹³ *Sidumo and another v Rustenburg Platinum Mines Ltd and others* (2007) 28 ILJ 2405 (CC)

test is different. In *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others*¹⁴ the court set out the position as follows:

[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. This means that, in the context of this case, the CCMA may not grant itself jurisdiction which it does not have. Nor may it deprive itself of jurisdiction by making a wrong finding that it lacks jurisdiction which it actually has. There is, however, nothing wrong with the CCMA enquiring whether it has jurisdiction in a particular matter provided it is understood that it does so for purposes of convenience and not because its decision on such an issue is binding in law on the parties. (Own emphasis)

[9] In the circumstances, in relation to jurisdictional rulings, the issue is not reasonableness but correctness.

[10] In my view, for the reasons explained earlier, none of the sections of the Administrative Code which are referred to above, are relevant to the applicant. In the circumstances, the Administrative Code does not reflect that local laws are applicable to the applicant's employment, nor does it reflect that local law are her choice of law.

[11] A brief survey of the Foreign Service Act¹⁵ particularly sections 3(1)(b) and 3(3) reveals that DIRCO is directly responsible for the management, administration and coordination of all foreign and diplomatic relations whether conducted through embassies, consulates and missions.

[12] Significantly, section 5(2) of the Foreign Service Act provides that the Head of Mission acts under the instructions and authority of the Director-General of the Department of International Relations and Cooperation. Section

¹⁴ (2008) 29 ILJ 2218 (LAC) at para 40

¹⁵ No 26 of 2019

1 clarifies that “Head of Mission” includes an Ambassador, Consult-General, High Commissioner, or a Permanent Representative.

[13] Accordingly, there can be little doubt that the Permanent Representative of the Mission is statutorily required to act under the instructions, and authority of, the Director-General of the Department of International Relations and Cooperation.

[14] In addition, the Foreign Service Act provides in section 3(2) that: “*The Foreign Service consists of all South African Missions and those persons who serve in a position in the South African Missions, including Heads of Mission, and who are accredited to a foreign state for the period of time that they hold that position, regardless of whether they are ordinarily employed by the Department or by any other national department or appointed on a contractual basis for a fixed period.*” (own emphasis). At face value, section 3(2) seems to confirm that the staff of the Mission are employees of DIRCO.

[15] The authorities state that the locality of the employer’s undertaking, in which the employee is engaged, is the key to the jurisdictional puzzle. If part of the employer’s undertaking falls outside of the territory of South Africa, and the affected employee is engaged outside of the country, then the issue is whether that external branch, office or undertaking, is independent or inextricable from the undertaking inside the country.

[16] Here, it appears to be common cause that the Mission operates on a budget determined by DIRCO, it acts on instructions and directions of the Department, and it acted on the instructions from the Department when it abolished her post. Furthermore, when the applicant was engaged, it appears that she was appointed by the Mission, on delegated authority from DIRCO itself.

[17] In my view, as previously explained, there is no indication from the Administrative Code, or elsewhere, that the applicant chose to have her employment contract governed by local law.

[18] It seems clear from the Foreign Service Act that the Mission is anything but a separate and independent entity. It is, in fact, inextricably linked to the Department of International Relations and Cooperation, which falls under the jurisdiction of the Bargaining Council.

[19] In my view, the applicant was employed by the fourth respondent, and the Bargaining Council has jurisdiction to hear the dispute. It is not proper that condonation be considered by the court before it has been considered by the Bargaining Council.

[20] While this issue has not been raised by the parties, it is worth noting, in passing, that, if applicant sought to subject the Mission to the jurisdiction of the local courts (i.e. the United States' federal or state courts) the question would arise whether the Mission is immune (under the doctrine of "sovereign immunity") to the jurisdiction of such courts for performance of its official acts. Sovereign immunity is a doctrine of international customary law but it is codified in the Vienna Convention on Diplomatic Relations (1961) and the Vienna Convention on Consular Relations (1963).¹⁶

[21] Whether sovereign immunity arises in this context would largely be dependent on the local legislation, in the form of the Foreign Sovereign Immunities Act of 1976 (FSIA)¹⁷ which establishes criteria as to whether a foreign state (or its political subdivisions, agencies, or instrumentalities) is immune from jurisdiction of the federal or state courts. The FSIA also establishes procedures for service of process, attachment of property and execution of judgment against a foreign state. Accordingly, even if the applicant were permitted to proceed with her dispute in the local courts, and she succeeded, the FSIA would make execution difficult.

¹⁶ Both Conventions are incorporated into South African law, under the Diplomatic Immunities and Privileges Act No. 37 of 2001

¹⁷ A United States law, codified at Title 28, §§ 1330, 1332, 1391(f), 1441(d), and 1602–1611 of the United States Code

Costs

[22] The parties are pursuing their respective rights, as they are entitled to. It is trite that in employment matters, costs do not follow the result, and more is required. In the circumstances, there is no reason in law and fairness to make any costs order.

Conclusion

[23] In the circumstances, for the reasons set out above, I make the following order:

23.1 The applicant is granted relief in terms of prayers 1 and 3 of the notice of motion.

23.2 The dispute is referred back to the second respondent to be enrolled before a commissioner, other than the first respondent, to consider the application for condonation.

23.3 There is no order as to costs.

Reynaud Daniels

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Adv N Schroeder
Steenkamp Van Niekerk Attorneys

For the Third Respondent:

Adv F Storm
State Attorney