

SOUTH AFRICA / JUDGMENT

Antonio v Commission for Conciliation, Mediation and Arbitration and Others (JR1110/15) [2018] ZALCJHB 351 (30 October 2018)

[2018] ZALCJHB 351

COURT

Labour Court Johannesburg

BEFORE

Rabkin-Naicker

CASE / FILE NUMBER

JR1110/15

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

no: JR1110/15

In

the matter between:

JOAQUIM
DOMINGOS
ANTONIO Applicant
and
COMMISSION
FOR CONCILIATION,
MEDIATION
AND ARBITRATION
First
Respondent
COMMISSIONER
ZAKHELE MHLAMBO Second
Respondent
YOKOGAWA
SOUTH AFRICA (PTY) Third
Respondent
Date
heard: 8 August 2018

Delivered:30 October 2018

JUDGMENT

RABKIN-NAICKER, J:

[1] This is an opposed application to review a jurisdictional ruling under case number GATW3489-11. The second respondent found that the Commission for Conciliation, Mediation and Arbitration (CCMA) did not have jurisdiction to hear the dispute. Unfortunately this Court had remitted the matter back to the CCMA after it had dealt with a jurisdictional review of the same dispute under case number JR1406/11, rather than substitute its own decision which would have been the proper course.[1] The record before me contains evidence from both arbitration proceedings. It is trite that I must determine whether the Award was

correct, rather than reasonable, and in so doing, I take all the documents and pleadings filed and the record in this matter into

account.

[2] The applicant entered into an employment relationship with Yokogawa Netherland BV on 17 May 2010. He was appointed as Business Development Manager with his main duty to assume full responsibility for the development of the Angola company business. Clause 1.3 of the contract reads: “You will be employed at the Luanda office and will report to the Managing Director of Yokogawa South Africa (Pty) Limited.”

[3] Clause 2 of the contract dealt with the duration of employment as follows:

“2.1 This contract is effective from 17 May 2010 until 31 January 2011, by which time you are expected to have fully relocated to Luanda with your family. At such time, the standard employment contract will be issued

2.2 Until such time as you have relocated, you will be expected to work the following:

Four weeks – Angola

One week – Johannesburg office

One week – Personal time in Johannesburg.”

[4] The Applicant was paid his remuneration in US Dollars. The clause in his contract dealing with his terms and conditions of employment reads as follows:

“11 Standard Terms and Conditions

11.1 This contract shall be interpreted and applied in accordance with the laws of Angola and any specific labour legislation in force from time to time.

11.2 Your remaining terms and conditions of employment shall be as set out in the relevant statutes.

11.3 The Company reserves the right to make reasonable changes to any of your terms and conditions of employment, which changes shall be Company

11.4 The terms and conditions of employment with the Company are of a confidential nature and at no time shall they be divulged to or discussed with any employee or client of the Company.”

[5] The contract was signed by the Managing Director of Yokogawa South Africa (Pty) Ltd, a subsidiary of Yokogawa Netherlands, Mr. H.J. Van den Berg. The contract of employment was concluded and terminated in South Africa. The letter of termination was signed by Van den Berg on behalf of the Angolan branch of Yokogawa Netherlands. It was dated 23 February 2011. In addition, the applicant was remunerated by Yokogawa Netherlands as his pay slips reflect. It is submitted by the third respondent that the applicant rendered his services in Angola for Yokogawa Netherlands and when he was working in South Africa during his weekly periods, he also rendered his services for Yokogawa Netherlands.

[6] Included in the record of the arbitration is the Memorandum of Agreement between Van den Berg, the third respondent and Yokogawa Europe. The Introduction to the Agreement reads:

“YEF-SA is a wholly owned subsidiary of YEF-HQ and requires to appoint the MD as a director of YEF-SA and for the MD to have local management control of YEF-SA. This agreement sets out the terms of the MD’s employment by YEF-SA and sets out his obligations to and authority levels from the holding company YEF-HQ.”

[7] Van den Berg was also appointed as the Manager of the Angolan branch of Yokogawa Netherlands in terms of a separate one-year contract renewable for a period of three years which was signed on 27 January 2007. That contract was subject to Angolan law. At the arbitration proceedings the applicant testified that Van den Berg was still earning a salary in Angola at the time of his dismissal. This corroborates the evidence of Van den Berg that he wore two hats, that of Branch Manager of Angola and MD of the third respondent. His evidence was that he made a mistake in signing the applicant’s contract of employment in his position as MD, rather than as the Branch Manager for Angola.

[8] In Astral Operations Ltd v Parry[2], the LAC per Zondo JP (as he then was) stated that given that s 115 of the Labour Relations Act[3] (LRA) provides that 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, is inside or outside the Republic. If it was carried on inside, the CCMA would then have jurisdiction and, where it was carried on outside, the CCMA would not have jurisdiction.”

[9] In the case of *SA Tourism v Monare and Others*[4], which was overturned on appeal, the Court considered earlier decisions on the extra-territorial application of the LRA, and found that the authority binding on it was that the primary, but not sole, consideration in determining the territorial application of the LRA was the location of the undertaking carried on by the employer. An important dictum in that judgment was that 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, it was a question of fact, to be determined by reference to all the available evidence.

[10] The LAC in the *Monare*⁵ matter overturned the court a quo's judgment on the facts and in doing so stated that:

"[34] What is clear from both Astral and Genrec Mei is that the undertaking where the employee was employed (which was situated beyond the territorial jurisdiction of the respective fora in each of those cases), has to be separate and divorced from the employer's

undertaking which is located within the jurisdictional territory of the relevant forum.

[35] In *Astral*, the employer's Malawian subsidiary, where the employee worked, was separate and divorced from the employer's South African undertaking. The Malawian undertaking was an incorporated concern with a separate personality. It was an independent company. In *Genrec Mei*, the court also emphasised the separateness and independence of the employer's undertaking in Durban, from its undertaking on the oil rig, where the employee was employed.

[36] The nub of the issue in this case, is not about where appellant was employed, because it is common cause that he was employed in the first respondent's London office, but whether the London office was an undertaking of the first respondent which was separate and divorced from its undertaking in the Republic of South Africa. In my view it certainly was not."

[11] In this case, the applicant was employed in the Angolan branch office of the third respondent's European holding company. A document contained in the papers which has been translated by a sworn translator reflects that "YOKOGAWA EUROPE BRANCHES B.V. – SUCURSAL DE ANGOLA" was registered as a company and taxpayer by the Angolan Department of Justice under registration number 1260/2006. The said legal entity is separate and divorced from the third respondent. Reporting lines to Van den Berg fall to be understood as between employees of the Angolan branch office of the global company. I am also of the view that given the fact that there was an express term in the applicant's employment contract, that Angolan law would apply to the employment relationship between him and the holding company, this must be taken into consideration and a court should not simply deal with the locality of the undertaking test without reference to the intention of the parties in the employment contract.

[12] In all the circumstances, the award correctly found that the CCMA did not have jurisdiction to hear the dispute before it. I make the following order, taking into account that the applicant is an individual who represented himself and in addition was ill-served by the remittal of his first review application to the CCMA.

Order

1. The review application is dismissed
2. There is no order as to costs

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: In person

For the Third Respondent: Solomon Holmes Attorneys

[1] SA Rugby Players Association and Others G v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v SA Rugby Players Union and

Another(2008)29 ILJ 2218 (LAC) at paras 39 and 40.

[2]

(2008) 29 ILJ 2668 (LAC).

[3] Act 66 of 1995 as amended.

[4]

(2014) 35 ILJ 2280 (LC). 5. Monare v SA Tourism and Others (2016) 37 ILJ 394 (LAC).

[4]

(2014) 35 ILJ 2280 (LC).

5. Monare v SA Tourism and Others (2016) 37 ILJ 394 (LAC).

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Prepared on 10 October 2026 · Esheria