

SOUTH AFRICA / JUDGMENT

Lime Global Ltd v Myhill NO and Others (JR827/18) [2020] ZALCJHB 144 (21 August 2020)

[2020] ZALCJHB 144

COURT

Labour Court Johannesburg

BEFORE

Gush

CASE / FILE NUMBER

JR827/18

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: JR827/18

In

the matter between:

LIME
GLOBAL
LTD
Applicant
and
MYHILL
E
N.O.
First Respondent
COMMISSION
FOR CONCILIATION,
MEDIATION
AND ARBITRATION
Second Respondent
BIJOUX
J
Third Respondent

Heard:

06 August 2020. In Chambers on the papers by consent of the parties.

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down is deemed to be 10h00 on 21 AUGUST 2020.

Summary: Review.

JUDGMENT

GUSH, J

[1] The applicant applies to this court for an order reviewing and setting aside the finding by the first respondent that the second respondent had jurisdiction to entertain the unfair dismissal dispute referred to the second

respondent by the third respondent.

[2] At the conclusion of the arbitration the first respondent handed down a "Default Award".

In the award the first respondent recorded that the issue to be determined was:

Whether the CCMA has jurisdiction to determine the dispute, and, if so whether the applicant was dismissed, and, if so whether this was procedurally and substantively unfair.[1]

[3] The first respondent concluded in the award that the third respondent was an employee of the applicant; that the third respondent had in fact been dismissed and that her dismissal was procedurally and substantively unfair. The first respondent awarded the third respondent compensation. The order read:

AWARD

I find that the [3rd respondent] was an employee of the respondent [Applicant]. She was dismissed by the [applicant] on 20 October 2017.

Such dismissal was procedurally and substantively unfair.

The [applicant] is ordered to pay compensation to the [3rd respondent] in the amount of R1,080,000 less income tax.

This amount must be paid to the applicant by 30 April 2018.[2]

[4] The applicant in this matter did not attend the arbitration but had addressed correspondence to the second respondent, in which the applicant explained its reason for its absence.[3] In this correspondence, the applicant averred that the third respondent was not an employee but an independent contractor. This

explains why the first respondent indicated on the award that it was a "default award".

- [5] The transcript of the hearing reveals that the third respondent's evidence was confined to establishing that she was an employee of the applicant.
- [6] Inter alia in her referral of the dispute and the transcript of the evidence the following appears:
1. "I was employed through a verbal contract as head of implementation in a remote working capacity for Lime global and affiliates". [4]
 2. "I asked if I needed to be based anywhere geographically specifically and they were like no, they had people working in Melbourne for them, they were going to have people in England." [5]
 3. [The employees] "were based in South Africa and worked remotely". [6]
 4. "there is no property or assets in South Africa ... I just bought a copy of the accounts you can see there's no property anyway it's a fully online business [7]
- [7] At no stage did the third respondent aver that the applicant conducted a separate business in South Africa.
- [8] In deciding that the third respondent was an employee of the applicant, the first respondent relied on the evidence adduced by the third respondent and the documents she produced.
- [9] In the correspondence addressed to the second respondent, the applicant, in addition to explaining why it would not be present or represented at the arbitration, raised the issue of jurisdiction by stating: "[the applicant) is a UK company and has no property, assets or business in South Africa. The [3rd respondent] commenced contracted services to the [applicant] in London in November 2015 ...". [8])
- [10] In the absence of any specific provision in the agreement regarding "territorial" jurisdiction, it is clear that the first respondent was aware that the jurisdiction of the second respondent to hear the matter, viz. geographical or "territorial" jurisdiction, was an issue that he had to decide. Although the first respondent does not refer to the correspondence, he would have been aware of the challenge raised by the applicant, despite it not being present at the arbitration. Accordingly, the first respondent appropriately addressed this issue in his award. [9]
- [11] The first respondent referred solely to the decision in *Astral Operations Ltd v Parry*. [10] In this matter, the court had concluded that the CCMA did not have jurisdiction as the employee was employed and worked in Malawi. The court accepted that applicant, Astral, was a South African company and subject to the CCMA's jurisdiction.
- [12] Somewhat perversely the first respondent held that this decision was distinguishable from the matter before him because the first

respondent "was not confined geographically" and that the applicant was not confined to "one or more geographical regions but was global"[11], (despite it being clear that the applicant carried on its business in the "UK"). This, the first respondent concluded, founded jurisdiction on the CCMA to determine the third respondent's dispute despite the absence of any evidence to establish that the CCMA had any jurisdiction over the applicant.

[13] What the first respondent appears to have overlooked is that the rationale behind the decision in *Astral* was based on the court's consideration of the nature and extent of the business carried on in Malawi (in that case) where the respondent,

Parry, was employed. The first respondent also apparently overlooked the decision of the Labour Appeal Court in *Monare v South African Tourism and Others*. [12] In these matters, it was clear that the employer did fall within the "territorial" jurisdiction of the CCMA and the question that arose was whether the employee, who worked outside the territorial jurisdiction of the CCMA, fell within the jurisdiction of the CCMA.

[14] In *Monare*, the court said:

"What is clear from both *Astral* and *Genrec Mei* is that the undertaking where the employee was employed (i.e. and 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". [13]

[15] There is no evidence to suggest that the applicant conducted a "separate" and "divorced" undertaking in South Africa. At all times the third respondent operated as an employee of the applicant serving its business in the United Kingdom "remotely" from South Africa. (As it appears did a number of its employees in various other countries). It is clear from both the third respondent's evidence and her documentation that the applicant's business was in fact based in the United Kingdom.

[16] In the absence of any evidence to establish:

1. that the employer (applicant) carried on a "separate and divorced business situated within the jurisdictional territory" of the CCMA;
2. and that the employee (3rd respondent) was employed in such an undertaking:

I am satisfied that the third respondent did not establish that CCMA (2nd Respondent) had jurisdiction to determine her dispute and accordingly the applicant's application must succeed.

[17] I am not persuaded that a costs order is justified and accordingly make the following order.

Order:

1. The arbitration award dated 17 April 2018 case number GAJB 25408/17 is reviewed and set aside and replaced with an order that the third respondent's dispute is dismissed on the grounds that the second respondent does not have jurisdiction to determine the dispute.
2. There is no order as to costs.

DH Gush

Judge of the Labour Court of South Africa

- [1] Pleadings page 28 award paras
- [2] Pleadings page 33 award paras 30 34
- [3] Pleadings page 34
- [4] bundle of documents page 45
- [5] Transcript page 8
- [6] Transcript page 38
- [7] Transcript page 24
- [8] Pleadings page 34
- [9] Pleadings page 32 award paragraphs 25,26 and 27
- [10]
- (2008) 29 /LJ 2668 LAC
- [11] Award para 27.
- [12] (JA45/14) [2015] ZALAC 47; [2016] 2 BLLR 115 (LAC); (2016) 37 IU 394 (LAC) (11 November 2015)
- [13] At para 34.

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