

SOUTH AFRICA / JUDGMENT

Pitja v CCMA and Others (JR2186/21)

[2023] ZALCJHB 79 (16 March 2023)

[2023] ZALCJHB 79

COURT

Labour Court Johannesburg

BEFORE

N P Voyi

CASE / FILE NUMBER

JR2186/21

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: JR2186/21

In

the matter between:

KGALABI

PITJA

Applicant

and

THE

COMMISSION FOR CONCILIATION, MEDIATION

AND

ARBITRATION

First

Respondent

COMMISSIONER

RICHARD BYRNE, N.O. Second

Respondent

CONSULATE

OF THE UNITED STATES OF AMERICA Third

Respondent

Heard:

01 March 2023

Delivered:

16 March 2023

JUDGMENT

VOYI AJ

Introduction

- [1] This is an application to review and set aside a jurisdictional ruling issued by the second respondent (Commissioner Byrne) under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA) on 11 October 2021 and bearing case number GAJB1987-21.
- [2] The application is opposed only by the third respondent, being the Consulate of the United States of America (the Consulate).

Overview

- [3] The applicant, Kgalabi Pitja (Pitja) was employed by the Consulate in Johannesburg as a visa assistant. He was dismissed on 15 January 2021 after a disciplinary enquiry. Following his dismissal, he lodged an unfair dismissal claim with the CCMA.
- [4] In relation to his unfair dismissal dispute and on 15 May 2021, an advisory award was issued by Commissioner Buti Malubane. The advisory award pronounced that the dismissal of Pitja was substantively unfair

but procedurally fair.

- [5] In the advisory award, Commissioner Malubane advised the Consulate to either reinstate Pitja in the same position or settle the dispute by paying him three months' salary in the sum of R36 365.43.

He further advised that should the parties fail to resolve their dispute after the advisory award, they must inform the CCMA to issue a certificate of outcome.

- [6] Needless to say, the advisory award was not adhered to. The matter therefore proceeded to arbitration before Commissioner Byrne. On 11 October 2021, he issued the jurisdictional ruling under review. Inasmuch as the ruling is labelled as an arbitration award, that appellation does not detract from the fact that it is a jurisdictional ruling and nothing more.
- [7] In his jurisdictional ruling, Commissioner Byrne analysed the evidence and argument as follows:
- [12] Embassies and Consulates enjoy general immunity from the South African courts. However, this does not apply to certain commercial and domestic acts. Insofar as labour matters are concerned, section 5 of the [Foreign States Immunities Act 87 of 1981] sets out certain instances where the foreign entity does not have immunity, as well as exceptions to this.

[13] Section 5(1) indicates that immunity does not apply where the contract was entered into within South Africa and is performed mainly in South African. He worked in the Johannesburg area. Further, he is a South African. In terms of sub-section, jurisdiction exists.

[14] However, section 5(2)(b) sets out where section 5(1) will not apply, i.e. where the Consulate will still have immunity. It reads as follows:

“the proceedings relate to the employment of the head of a diplomatic mission or any member of the diplomatic, administrative, technical or service staff of the mission or to the employment of the head of a consular post or any member of the consular, labour, trade,

administrative, technical or service staff of the post.”

[15] [Pitja] sought to draw a distinction between his functions and those of his seniors, where a senior makes the final decision as to whether to grant or not grant a visa, and whereas he does the preparation of documents for the final decision. I disagree with the appropriateness of that argument in this case. Section 5(2)(b) speaks of “any member” of such a diplomatic, administrative, technical or service staff. That would include all employees of varying levels of seniority. Issuing of visas is clearly part of the functions of a foreign entity. In other words, [Pitja’s] job is directly

related to the sovereign powers of a foreign State. As such, the CCMA has no jurisdiction to Arbitrate the matter.

[8] It is the substance of this decision that Pitja is challenging on review. The answering affidavit by the Consulate was delivered late. It was filed on 07 February 2022.

[9] According to Pitja, the answering affidavit ought to have been delivered on 29 November 2021. He therefore objected to the late delivery of the answering affidavit. As a result, the Consulate launched an application for condonation.

[10] In view of my decision on the merits of the review application, I see no reason why condonation should not be granted. I therefore condone the late delivery of the Consulate’s answering affidavit.

Analysis

[11] By all accounts, this matter turns on the interpretation of section 5(2)(b) of the Foreign States Immunities Act.[1] As aptly put by the Labour Appeal Court (LAC) in South African Rugby Players Association (SAPRA) and Others v SA Rugby (Pty) Limited and Others; SA Rugby Pty Limited v South African Rugby Players Union and Another,[2] the issue for this court’s determination is:

... whether, objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed.

- [12] It was conceded by Pitja, correctly so in my view, that the Consulate is in fact the United States of America. The Consulate has no separate legal existence distinct from the United States of America.
- [13] Accordingly, Pitja is seeking to subject the United States of America to the jurisdiction of the CCMA in order for the said country to account for his dismissal. He was quite resolute in his quest to hold the United States of America accountable for having dismissed him.
- [14] It was Pitja's argument that Commissioner Byrne was bound by the pronouncement on jurisdiction as contained in the advisory award issued by Commissioner Malubane.
- [15] There is no merit to this argument. The award by Commissioner Malubane was an advisory award, advising the Consulate to either reinstate Pitja or pay him three months' salary. If the advisory award was, by itself, not binding on the Consulate, I cannot find a basis why it would be binding on Commissioner Byrne.
- [16] In this matter, the Consulate has elected not to comply with the advisory award by Commissioner Malubane. That is, in my view, a
- legally permissible choice if regard is had to the provisions of section 150C(5)(a) of the Labour Relations Act[3] (LRA).
- [17] It is a well-established principle of public international law that the courts (including quasi-judicial forums, in my view) of a country will not by their process make a foreign state a party to legal proceedings against its will. I refer in this regard to the judgment by Nicholas J in *Liebowitz v Schwartz*.^[4]
- [18] It is apposite to reflect briefly on the rationale behind this principle. First and foremost, this principle is grounded on the maxim: 'par in parem imperium non habet', which means that equals have no jurisdiction over one another. This maxim is interlinked with the principle of sovereign equality, which affirms that all states are equal members of the international community.
- [19] In *Democratic Alliance v Minister of International Relations and Co-operation and Others; Engels and Another v Minister of International Relations and Co-operation and Another*,^[5] Vally J deals with the matter thus:
- [17] The immunity is not for the personal benefit of the official but there to ensure that states function effectively and that there is a well-ordered workable system of international relations where peace and harmony can exist between states. It is a consequence of a simple idea, now recognised as a principle, and captured in the phrase, "par in parem imperium non habet". However, it is a derogation from another fundamental principle that each state shall enjoy supreme sovereignty over the operation of its laws.
- [18] In terms of the customary international law officials of a state enjoy immunity from civil and criminal jurisdiction. The immunity takes two forms: immunity based on the functions they perform (functional immunity or immunity *rationae materiae*); and, immunity granted

to certain officials because of the office they hold (personal immunity or immunity *rationae personae*). The former concerns immunity for acts performed in an official capacity. The immunity is functional to the work of the official of the state; it attaches to the function and not the individual. The immunity *rationae personae* on the other hand, is given to individuals by virtue of the position they hold, such as heads of state, heads of government or ministers of foreign affairs, while in office. It is these three officials only that enjoy this immunity. This immunity attaches to the individual. The immunity *rationae personae* covers acts committed prior to and while the official holds office. It is temporary: it takes effect as soon as the official takes office and ceases as soon as s/he leaves office. (footnotes omitted)

[20] In *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others*,^[6] the Supreme Court of Appeal (SCA) explained the concept of immunity in customary international law as follows:

[66] Professor Crawford describes the basic principles of the international law of immunity in the following terms:

‘State immunity is a rule of international law that facilitates the performance of public functions of the state and its representatives

by preventing them from being sued or prosecuted in foreign Courts. Essentially, it precludes the Courts of the forum state from

exercising adjudicative and enforcement jurisdiction in certain classes of case in which a foreign state is a party. It is a procedural bar (not a substantive defence) based on the status and functions of the state or official in question. Previously described as a privilege conferred at the behest of the executive, the grant of immunity is now understood as an obligation under customary international law ... [T]he existence of this obligation is supported by ample authority ... Immunity exists as a rule of international law, but its application depends substantially on the law and procedural rules of the forum.’

This immunity is available when it is sought to implead a foreign state, whether directly or indirectly, before domestic Courts, and also when action is taken against state officials acting in their capacity as such. They enjoy the same immunity as the state they represent. This is known as immunity *ratione materiae* (immunity attaching to official acts). In addition, heads of state and certain other high officials of state enjoy immunity *ratione personae* (immunity by virtue of status or an office held at any particular time). This form of immunity terminates when the individual demits, or is removed from, office. The country concerned may waive either form of immunity. (footnotes omitted)

[21] Gleaning from the above cases, certainly there can be no doubt about the importance and general recognition of sovereign immunity under customary international law. On the principle undergirding this immunity, the court in *Liebowitz v Schwartz*^[7] stated that it is ‘... founded on grave and weighty considerations of public policy, international law and comity.’

- [22] It is apparent that Pitja was, with this matter, courageously pursuing what he regards as a test case so as to break the established legal barrier in holding another sovereign state accountable in the local courts of a country. The principle upholding this barrier is, in my considered view, sacrosanct.
- [23] As the case before me is by Pitja challenging the decision of Commissioner Byrne, I disagree that this court has no jurisdiction to pronounce on the application itself.
- [24] In the end, the question is: was Commissioner Byrne correct in his interpretation of section 5(2)(b) of the Foreign States Immunities Act and in, ultimately, holding that the CCMA had no jurisdiction to arbitrate the matter? In my considered view, he was. Taking into account also the legal position on the immunity of sovereign states, Commissioner Byrne's reasoning and conclusion are unassailable.
- [25] I therefore conclude that the application for review has no merit and must accordingly fail. In the exercise of my discretion, I do not find that an order for costs against Pitja is warranted.
- [26] In the result I make the following order:

Order

1. The application for condonation of the late delivery of the Third Respondent's answering affidavit is granted.
2. The Applicant's application to review and set aside the Second Respondent's jurisdictional ruling is dismissed.
3. There is no order as to costs.

N P Voyi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

In person

For the Third Respondent: Mr Deon Visagie of Webber

Wentzel Attorneys

[1] No. 87 of 1981.

[2]

(2008) 29 ILJ 2218 (LAC) at para 41.

[3] No. 66 of 1995.

- [4] 1974 (2) SA 661 (T)
- [5] 2018 (6) SA 109 (GP)
- [6] 2016 (3) SA 317 (SCA)
- [7] Fn 3 supra
-

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALCJHB/2023/79.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/pitja-v-ccma-and-others-unknown-topic-alcjhb-2023>

Prepared on 14 October 2026 · Esheria