SA Tourism case gives clarity on territorial application of LRA

By Andrea Taylor

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The Labour Court recently determined a review application, not on the grounds of review pleaded, but on the issue of territorial application of the Labour Relations Act, No. 66 of 1996 (LRA). The judge stated that this was permissible even though such aspect was never raised prior to the review application on the basis that the issue of jurisdiction can be raised at any time.

In the case of South African Tourism v Tebogo Brian Monare & Others (Reportable Judgement - JR2298/11), the judge directed, after hearing the parties on the grounds of review, to address him on the extra-territorial application of the LRA. The reason for doing so related to the employment relationship and whether the Commission for Conciliation, Mediation & Arbitration (CCMA) had jurisdiction to adjudicate an alleged unfair dismissal claim where the employee was employed at the employer's London office on a fixed-term contract.

The judge assessed the facts of the matter in reference to various case law and the following factors:

- the place the employee rendered his services;
- the place payment is made;
- the location of the parties;
- the method of calculating remuneration and the currency used; and
- the place in which the relationship was entered into.

Locality of undertaking

More specifically, the judge relied on the Labour Appeal Court (LAC) decision of Astral Operations Ltd v Parry (2008) 29 ILJ 2668 whereby the court determined that the territorial application of the LRA is to be determined ultimately by the locality of the undertaking carried on by the employer.

The judge also referred to judgments which determined that the LRA did find application. However, they were not applicable to the facts in the SA Tourism case as they related to a secondment agreement and a labour broker relationship.

When arriving at his conclusion, the Judge assessed the following facts:

- The employer operated an undertaking from within South Africa and entered into a specific contract of employment with the employee to work outside of South Africa;
- the employee worked at the employer's London office, which had its own information technology systems, control, time management, staff and premises, and was subject to a separate audit;
- the employee was paid in pound sterling in London;
- the employee was recruited overseas;
- the contract of employment was concluded outside of South Africa;
- the employee was obliged to work overseas with no right to return to South Africa and continue employment; and
- the employee committed acts of misconduct in London and was disciplined and dismissed in London.

Based on the facts of the case above, and the assessment required by the previous case law, the court held that the LRA has no territorial application and that the CCMA had no right to adjudicate the matter.

Jurisdiction of CCMA

In the recent Labour Court decision of Redis Construction Afrika (Pty) Ltd v CCMA & others (Reportable Judgment S1118/12), a construction administration company appointed an employee in South Africa to work in the Democratic Republic of Congo (DRC). The employee was charged with misconduct in the DRC and repatriated to South Africa to attend a disciplinary hearing, and was subsequently dismissed.

The court held that the CCMA had jurisdiction to adjudicate the dismissal dispute on the following basis:

- the contract was concluded in South Africa;
- when the employee returned to South Africa, he was promised further employment, but not in the DRC;
- the dismissal took place in Durban;
- the company employs persons for extra-territorial twork and it may be inferred that it performs the services of a labour broker; and
- he company had not business interests in the DRC aside the from administration which could be performed in South Africa.

The court essentially upheld the locality of the undertaking test and found that, in this case, it was in South Africa.

The Redis judgment was premised on a similar matter of MECS Africa (Pty) Ltd v CCMA & Others (2014) 35 ILJ 745 (LC) whereby the court held that a labour broker's locality of undertaking was where the company recruits and procures the labour and not the place where the client has operations.

The MECS decision further confirmed that the principles of private international law and choice of law did not apply, i.e. even if an agreement confers jurisdiction on the parties, the correct test is that of the locality of the undertaking test.

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