

CONCILIATION, MEDIATION AND ARBITRATION COMMISSION (CMAC)

HELD AT SITEKI

STK 055/11

In the matter between

KENNY NXUMALO

Applicant

And

IRRICON (PTY) LTD

Respondent

CORAM:

Commissioner : Mr. Mthunzi Shabangu
For Applicant : In person
For Respondent : Mr. Stephen Lea (Director)
Dates of hearing : 28th June, 2011 & 19 July, 2011

RULING ON JURISDICTION

-1-

Particulars of Proceedings and Representatives

1. This ruling is consequent to the hearing that was held at CMAC - Siteki on the 28th June, 2011 and 19th July, 2011.
2. During the hearing the Applicant represented himself whilst Mr. Stephen Lea, Director for the Respondent appeared for and on behalf of the latter.

Issue for Determination

3. The issue to be decided is whether or not CMAC has the requisite jurisdiction to entertain the Applicant's dispute as lodged against the Respondent at CMAC - Siteki under reference No. STK 055/11.

Background to the issue

4. The Applicant has reported a labour dispute to the Commission against the Respondent and is claiming compensation for unfair dismissal.
5. Conciliation proceedings were consequently set in motion as the initial mechanism or forum through which labour disputes are sought to be resolved in terms of the Industrial Relations Act, 2000 (as amended). I was appointed to be the conciliating Commissioner.
6. When the matter was called for conciliation on the 28th June, 2011, being the date of the first sitting, the Respondent's representative, Mr. Stephen Lea, raised a pre-liminary point objecting to CMAC's jurisdiction to deal with this dispute on the basis that the parties' employment contract was entered into, performed and terminated in Mozambique.

-2-

7. This is what prompted me to invite the parties to adduce evidence and make submissions on record to enable me to ascertain CMAC's jurisdiction to entertain this dispute.

Summary of evidence and arguments The Applicant's version:

8. The Applicant submitted that on or about the 4th January, 2009 whilst in Swaziland, he made a telephone call to the Respondent's Director, Mr. Stephen Lea, asking for employment. The Applicant

alleged that Mr. Lea was in South Africa during the time of the telephone conversation.

9. The Respondent did offer employment to the Applicant over the phone pursuant to the request. It is alleged that the parties negotiated both the job capacity and the salary over the phone. The rest of the terms of the employment such as the job description, base station and residence were negotiated and agreed upon in Mozambique, submits the Applicant.

10. Applicant started off as a General Labourer based at Timanguene in Mozambique. On promotion to being a Foreman, Applicant was stationed in Xinavane, still in Mozambique.

11. During the course of the employment, Applicant was resident in Mozambique. Since he did not have a work permit and was thus an illegal employee in Mozambique he would once a month, cross the boarder home to enable him to accumulate the 30 days official residence permit in that country. However, he denies that this was the sole reason why he

-3-

would cross the boarder from Mozambique to Swaziland on a monthly basis. He argues that he would also cross the boarder to Swaziland for work purposes, i.e. to do some work here in Swaziland for the Respondent, in particular at Siphofaneni where he says he would work as a reliever.

12. Applicant would receive his salary in Mozambique. He avers, however, that at times he would get his salary in an envelope whilst in Swaziland. Statutory deductions such as Pay As You Earn (PAYE), Swaziland National Provident Fund (SNPF) and graded tax were not effected on Applicant's monthly wage.

13. Applicant submitted further that he got dismissed in Mozambique, the reason for dismissal being theft of company property which also took place in Mozambique.

14. Mr. Nxumalo summed up his submissions by stating that the main reason why he came to CMAC with this dispute was simply because Irricon (Pty) Ltd is also registered in Swaziland where it has a branch. The other reason is that the Respondent company does not have registered offices in Mozambique, save for the site office where only tools and equipments are kept. If it were not for the foregoing reasons, Applicant concedes that

he would not have lodged his unfair dismissal dispute to CMAC -Swaziland.

The Respondent's version:

5. Mr. Stephen Lea submitted that the Applicant personally approached him in Mucombo, Mozambique to ask for employment. Mr. Stephen Lea, who

-4-

doubles up as director for Irricon (Pty) Ltd (the Respondent) and Mkhulu Plant Earthworks (Pty) Ltd averred that he did hire the Applicant first as a General Labourer but later promoted to being a Foremen for Mkhulu Plant Earthworks (Pty) Ltd and not for Irricon (Pty) Ltd.

16. The contract of employment was negotiated and sealed in Mucombo, Mozambique, albeit verbally as there were no written particulars of employment which were prepared and signed for by the parties.

17. The Applicant's work station was Mucombo and Xinavane both places are at Mozambique. Hence, full performance of the contract was carried out in Mozambique.

18. The Applicant's salary was paid in Mozambique. The Swaziland statutory deductions were not effected against the Applicant's wage.

19. The Applicant, so goes Mr. Stephen Lea's submissions, was also resident in Mozambique during

the course of this employment with occasional visits to home in Swaziland, something which would usually happen on month ends. According to Stephen, these monthly visits to Swaziland were necessary since the Applicant did not have a work permit to be employed in Mozambique as a foreigner. Therefore, he had to cross the 1 boarder to Swaziland, at least, once per month in order to secure the official 30 days residence permit in Mozambique.

20. When coming home, the Respondent would allow the Applicant to use one of its company vehicles and give him a letter of authority to confirm authority to drive the company vehicle across the boarder between

-5-

Mozambique and Swaziland. A copy of such a letter was handed over by Applicant and marked "KN 1".

21. Stephen Lea summed up his submissions by stating that even the dismissal of the Applicant occurred in Mozambique not in Swaziland, for theft of company property which also took place in Mozambique. He therefore submitted that this matter is better dealt with by the Mozambican Courts and not Swazi Courts including CMAC.

22. Mr. Andrew Lea, testifying as RW 2 corroborated Mr. Stephen Lea's submissions in several pertinent aspects. Testifying in his capacity as a Director for Mkhulu Plant Earthworks (Pty) Ltd, Andrew confirmed that there is a business relationship existing between his company and Irricon (Pty) Ltd.

23. Andrew further stated that he recalls that between October, 2009 and October, 2010 Irricon (Pty) Ltd was conducting some work around Siphofaneni (next to St Phillips) in Swaziland. Andrew's involvement in that work was that he was the Plant Manager - tasked with ensuring that Irricon was technically enabled to do the work by having the appropriate heavy plant machinery and equipment.

24. Andrew professed to have been in Swaziland to monitor the Respondent's works at St Phillips at least three (3) days per week. RW2 denied ever seeing the Applicant during this period and/or for the duration of the work at that place.

25. RW2 further confirmed knowledge of the fact that because the Swazi workers employed by Irricon at Mozambique did not have work permits,

-6-

they would thus be compelled to cross the boarder home after every three (3) weeks to enable them to accumulate the 30 days residence permit in that country when exiting Swaziland into Mozambique.

26. RW2 denied that these Swazi workers who included the Applicant would do any work in Swaziland for the Respondent's company as and when they had come home.

27. When cross- examined by Applicant as to how does he know that the Applicant was employed by Respondent and based in Mozambique, Andrew stated that he had seen the Applicant there in Mozambique doing

work for the Respondent, not at St Phillips - Siphofaneni in Swaziland.

Analysis of the evidence and arguments

28. CMAC is a statutory body established by the Industrial Relations Act, 2000 (as amended). It does not have inherent jurisdiction to entertain any labour or employment-related dispute but may only do so within the strict parameters of the statutory enactment.

29. The enabling statute, i.e. Industrial Relations Act, 2000 which establishes CMAC is not trans-boundary. Its application is territorial and is confined to the Kingdom of Swaziland and regulates

employment relations there within. For CMAC to have the requisite jurisdiction or legal competency to entertain any labour dispute, that particular labour dispute should have arisen in a place that is covered by the Industrial Relations Act, 2000. As soon as there is a dispute regarding the applicability of the Industrial Relations Act to any labour dispute, then a determination of the question of jurisdiction requires to be made in lieu of delving into the

-7-

merits of the labour dispute. Even more so in cases of territorial jurisdiction challenges.

30. The decided case of Bombardier Transportation (Pty) Ltd vs. Lungile Mtiya N.O and two others [2010] 8 BLLR 840 (LC) provides authority for this proposition. In summary, the facts of this case are as follows: The employer raised a jurisdictional point at conciliation, objecting that the CCMA (SA) had jurisdiction to entertain that dispute. The Commissioner declined to issue a ruling on that point, but simply certified the dispute unresolved, supporting herself by contending that the jurisdictional challenge will be dealt with at arbitration. The employer took up the certificate of outcome on review at the labour Court, seeking that it be set aside on the basis that when the Commissioner issued the certificate of outcome declaring the dispute unresolved, the Commissioner exceeded her powers because there was a jurisdictional challenge that she (the Commissioner) had failed to make a ruling on.

31. The Labour Court, per Van Niekerk J, reasoned as follows:

".....The issue in the present matter is rather narrower, in the sense that it relates to the appropriate time at which a party to a dispute may raise a challenge to jurisdiction. The crisp issue before the Court warrants restating, and can be expressed as follows - is it a reviewable irregularity to defer a challenge to the CCMA's jurisdiction to the arbitration phase of the statutory dispute settlement process?

It follows that the answer to this question must almost always be in the negative...."

-8-

32. Put in simple terms, the Court confirmed that some of the jurisdictional challenges require to be dealt with and ruled by a conciliating Commissioner, of course with the appreciation that some jurisdictional questions can be deferred to the adjudication phase, i.e. arbitration.

33. The same sentiments were shared in Augold-Target Division vs CCMA (2010) 18 LC wherein the Labour Court expressed itself as follows:

"....Before I make a finding on this point, it is necessary to briefly restate the law. It is trite that a Commissioner (being a statutory organ with no inherent powers) must make a ruling as to its own jurisdiction when a jurisdictional point is raised...."

34. The Court reiterates that if a jurisdictional point is raised at conciliation or if it becomes clear during the conciliation process that there is a jurisdictional issue, the Commissioner charged with the conciliation must deal with the issue and make a ruling. This ruling is, of course, subject to review by the High Court.

SEE also: BHT Water Treatment vs. CCMA & Others [2002] 2 BLLR 173 (LC);

SEE: Seeff Residential Properties vs. Mbhele NO & Others (2006) 27 IU 1940 (LC).

35. The specific term "jurisdiction", has been defined as the "power or competence of a Court [or tribunal] to hear and determine an issue between parties...."

-9-

SEE: Gcoba vs. Minister of Safety & Security & Others (2010) 31 ILJ 296 (CC); [2009]12 BLLR 680 (LC).

36. Generally CMAC has jurisdiction to resolve a dispute should all the parties reside, work or conduct their business within Swaziland and the dispute (cause of action) arose within Swaziland.

37. In *Kleinhans vs. Parmalat SA (Pty) Ltd* [2002] 9 BLLR 879 (LC) the Court held that it is obliged to establish if it has jurisdiction by weighing up those features of the contract which fall outside the jurisdiction against those which link the employment relationship to South Africa. The parties' consent to jurisdiction does not bind the Court or the CCMA. The assessment is qualitative, not a quantitative exercise.

38. One should be concerned with how the contract operates at the time of the dismissal. One needs to look at the 'base' of the employee. A person's base is the place where she/he ordinarily works even though the person may spend days or weeks overseas. A person's job may require him/her to constantly travel to other countries but that does not change his/her base station. The fact that a person was paid in foreign currency is also not decisive.

39. In *Astral Operations Ltd vs. Parry* (2008) 29 ILJ 2668 (LAC), wherein it was contended that the Court lacked jurisdiction to entertain the dispute because the dispute arose outside South Africa, the Labour Appeal Court reasoned as follows:

"In this matter the Respondent terminated his contract of employment with Astra! by agreement and took a severance

-10-

package amounting to R600, 000.00 even though he was being offered another job. He then concluded a completely new contract of employment for his new job. That is his Malawian job. That was the position of General Manager: Africa Operations. He then relocated to Malawi. He was working for a Malawian subsidiary of the appellant. He made monthly reports to the Head Office in South Africa. The operation in Malawi was separate from the South African operations of the appellant. That is why he was able to sell that operation separately. Those of the Respondent's duties that he performed outside Malawi were not performed inside South Africa. If he was to work in the South African undertaking of the Appellant, he and the appellant would have needed to enter into a new contract of employment. In my view when all the facts of this matter are considered and the question is asked as to where the undertaking was carried on in which the Respondent worked, the answer would be an easy one, namely: Malawi... In the light of all this I am of the view that the LRA did not apply to the Appellant's operations in Malawi and that the labour court had no jurisdiction to entertain the respondent's claims."

40. In the present case, the following factors which are quality features on the whole question of territorial jurisdiction are common cause:

40.1 That the contract of employment was concluded or sealed in Mozambique;

40.2 That the Applicant's base was in Mozambique;

-11-

40.3 That the cause of action (i.e. the dismissal of the Applicant) occurred in Mozambique;

40.4 That the whole performance of the parties' contract of employment which was concluded in Mozambique for work that had to be done in Mozambique took place in that country.

41. All the foregoing features link the parties' employment relationship to Mozambique as opposed to Swaziland.

42. It was submitted as a common cause fact that at the time of dismissal the Applicant's capacity was that of being Foremen, based at Xinavane, Mozambique. His argument that during the course of the contract he would do some work for the Respondent in Swaziland, at Siphofaneni, cannot outweigh the overwhelming quality features excluding CMAC's jurisdiction over this matter.

Moreover, that argument was, in fact, countered with evidence by Andrew Lea, who, in corroboration of Stephen Lea's submission, vehemently denied ever seeing the Applicant performing any duties on behalf of the Respondent at Siphofaneni during the course of the parties' employment for the work conducted in Mozambique. The Respondent's submission in this regard, as backed by the evidence, remains more probable when weighed against the Applicant's bare arguments.

43. In fact, the Applicant himself, stated that the reason why he brought this matter to CMAC - Swaziland was because the Respondent's company did not have registered offices in Mozambique, save for the site office. This submission was made by Applicant obviously being oblivious to the reasoning of the labour court in the case of Maslemany vs Unilever PLC

-12-

& Another [2006] 12 BLLR 1167 (LC) where the labour court considered that a foreign company which does business in South Africa is deemed to be resident in South Africa. This should mean that as at the time when the Respondent Company was conducting business in Mozambique, it was a resident company of that country and bound by all the Labour legislations of Mozambique.

44. It follows from the approach articulated above that the features excluding CMAC's jurisdiction over this matter outweighs those, if any, pointing towards the opposite direction. It is therefore my considered view that CMAC does not have jurisdiction over this dispute as the Industrial Relations Act, 2000 (as amended) does not apply in Mozambique.

Ruling

45. It is hereby ruled that CMAC does not have jurisdiction over this dispute.

46. This dispute is therefore rejected.

DATED AT SITEKI ON THIS 18th. DAY OF AUGUST, 2011.

MTHUNZI SHABANGU COMMISSIONER – LUBOMBO

-13-