REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH

CASE NUMBER: P151/2001

In the matter between:

ABEL HERMANUS KLEINHANS

Applicant

and

PARMALAT S.A. (PTY) LTD

Respondent

JUDGMENT

PILLAY D, J

1. There are three points in *limine* in this action brought in terms of section 158(1)(c) of the Labour Relations Act 66 of 1995 (LRA) for the alleged unlawful breach of an employment contract. The first point in *limine* was to

determine the true identity of the Applicant's employer i.e. whether it was Parmalat South Africa (PSA) or Parmalat Mozambique (PM); secondly, whether this Court has jurisdiction as, *inter alia,* the Applicant rendered services in Mozambique. Thirdly, it was submitted that the Court should exercise its discretion against hearing the matter as it was not conciliated. This point was not vigorously pursued but was left to the Court to decide.

2. The Applicant was employed by PSA since 1990 in South Africa. By letter dated 31 January 2000 the Applicant entered into a contract (the "three year contract") (Exhibit A11-12) in terms of which he was appointed to work at PM. The terms of contract were as follows:

"2. The terms and conditions of your employment will be as follows:

2.1 Your current basic salary will be R10 5000.00 per month, paid into a South African bank of your choice.

2.2 You will receive a C5 car allowance of R3 600.00.

2.3 You will be paid a service expatriate allowance of U$500 per month, which will not increase with your annual salary increase. This will be paid by Parmalat Mozambique.

2.4 To visit South Africa you may travel by road at Company costs twice a year, in which case you will receiver 1 day travel leave on either side of your normal leave period.

2.5 Parmalat Mozambique will provide you with free housing but you will be responsible for paying the water & electricity.

2.6 Parmalat Mozambique will carry the cost of you medical insurance.

2.7 The company will carry the cost of duties to transfer one private vehicle to and from Mozambique during re-location, provided that the vehicle transferred back to South Africa is the same vehicle transferred to Mozambique.

2.8 The company will carry re-location costs after three quotes have been

submitted for approval.

2.9 The terms of service is a minimum of 36 months, renewable by mutual agreement, and subject to a three month notice period by either party.

2.10 All other terms and conditions of employment will remain unaffected, unless changed by the company following consultations with yourself.

2.11 You will report to the General Manager: Mozambique.

2.12 The appointment is effective 1 February 2000.

3. Please sign this agreement (initial the first page) and send back to Port Elizabeth Human Resources office. Any questions can be addressed to me."

3. The contract was signed by the Group Manager–Human Resources on behalf of PSA and the Applicant. Ostensibly, each party represented itself personally.

4. The Applicant commenced work in PM in February 2000.

5. About a month later he was asked by the human resources official of PM to sign a document which, he was led to believe at the time, was a work permit. The document was in Portuguese which he did not understand. The official did not know English well enough to communicate the contents of the document to the Applicant.

6. About six months later the Applicant married a Mozambican. She translated the document for him. He realised then that it was a contract of employment for one year in PM (the "one year contract"). One page of the document was, however, a work permit.

7. The one year contract was required according to Mozambican law to

enable PM to remunerate the Applicant in terms of paragraph 2.3. of Exhibit A11-12. As a result, the Applicant was not perturbed by the one year contract. He did not believe that it substituted his three year contract.

8. A complaint of sexual harassment was lodged by the Applicant's wife against Mr Lopez the General Manager, PM. PSA undertook to investigate the complaint.

9. As a result of the complaint, relations between the Applicant and Mr Lopez deteriorated. According to the Applicant, this was the true cause of the termination of his contract.

10. By letter dated 21 December 2000 PSA informed the Applicant as follows:

"**RECORD OF CONSULTATIONS CONCERNNG YOUR POSITION IN MOZAMBIQUE**

Further to our consultations on the 14th and 21st December 2000 concerning your position in Mozambique, please be advised as follows:

1. In terms of the operational requirements of Parmalat, Mozambique, your services are no longer required in Mozambique and your position has become redundant.
2. Therefore, this letter serves to advise you of the termination of your secondment to Mozambique with effect from 1st January 2001.
3. As a result of the termination of your secondment to Mozambique, Parmalat will restore you to the same (or similar) position you held immediately prior to taking up the secondment on terms and condition that are no less favourable to you had you not taken up the secondment.
4. Therefore, please be advised of the details to which you will be restored:

   Position: Fitter

   Salary: R8300.00 per month

Dept: Maintenance Department, Port Elizabeth

Relocation: Parmalat will pay the costs of your relocation to Port Elizabeth on the same terms and conditions pertaining to relocation (points 2.7 and 2.8) as set out in your letter of appointment dated 31st January 2000.

5. Were you not to accept the position to which you are being Restored, Parmalat is under no obligation to pay you severance and your employment contract with Parmalat will be terminated as 31st December 2000 on one month's notice.
6. Without prejudice to our position in point 5 supra, and on your request that Parmalat consider you for voluntary retrenchment, attached please find a Memorandum of Agreement on Voluntary Retrenchment setting the terms and condition of such an offer. Attached, also find a copy of the estimated retirement quotation based on your actuarial reserve as at 31st December 2000.
7. In the event that the offer (point 6 supra) is acceptable to you, please sign the last page of the offer in full and initial all other pages and return the signed agreement to me by fax at (021) 933 2500.
8. In the event that the offer (point 6 supra) is not acceptable to you, Parmalat reserves it rights to proceed as in point 5 supra."

11. The Applicant relies on the contract. Its formation and breach was in South Africa. The terms of the contract quoted above imply that PSA was the contracting party representing itself. PSA did not represent that it was acting as an agent for PM. It was the employer. South African law applied to the contract. The Labour Court therefore had jurisdiction. So it was submitted for the Applicant.

12. PSA submits that it acted as agent for PM when negotiating the employment and termination of employment of the Applicant; it was not the

employer. It also relied on several authorities to support its defence that PM was the employer and that this Court did not have jurisdiction.

13. The Applicant sues on a fixed term contract [*Fedlife Assurances Ltd v Wolfaardt (2001) 12 BLLR 1301 (A)*]. As services were rendered in Mozambique and certain obligations were imposed on PM, there are foreign elements in the contract. It is therefore an international contract. As such, the approach I intend to pursue is from the perspective of the private international law of contract. The proper law which governs the contract must first be determined.

14. Although the parties did not argue the matter from the perspective of private international law, it is the duty of the Court to establish not only that it has jurisdiction, [*Xaba v Portnet Ltd (2000) 21 ILJ 1739 (LAC) at 1750E-F; Mgijima v Eastern Cape Appropriate Technology Unit and Another 2002 (2) SA 291 (Tk HC) at 297; Mcosini v Mancotywa and Another (1998) ILJ 1413 (Tk) at 1417 E-F; Veneta Mineraria SPA v Carolina Collieries (Pty) Ltd (In Liquidation) 1987 (4) SA 883*], but also what law it has to apply. Despite the choice of law and jurisdiction being conceptually distinct, they are nevertheless connected. The approach to determining both are similar. Although similar factors may go to determining whether there is a link to the law or jurisdiction of a specific state, the weight attached to particular factors can conceivably differ between assigning a choice of law and a choice of jurisdiction. Thus the terms of a contract may well suggest that the proper law is that of country X but that country Y shall have jurisdiction.

15. Before determining the proper law of the contract and jurisdiction the nature of the dispute must be characterised by reference to the *lex fori*

[*Laconian Maritime Enterprise Ltd v Agromar Lineas Ltd 1986 (3) SA 509 D & CLD at 520-521*]. The cause of action is characterised as the breach of an international contract.

16. The focus of the decisions in *Bolhuis v Natyre (Pty) Ltd (1995) 3 BLLR 37 (IC), Chemical and Industrial Workers Union v Sopelog CC (1993) 14 ILJ 144 (LAC)* and *Genrec Mei (Pty) Ltd v ICISEMI & Others (1995) 4 BLLR AD* (discussed below) was the interpretation and application of statutory provisions pertaining to industrial councils. As such, the characterisation of those disputes differ from this case. The statutory imperatives in *Bolhuis*, *Sopelog* and *Genrec* were also distinguishable from this case. Here, the Court is concerned with an alleged common law breach of an international contract.

17. However, those cases may be relevant to this case in that the courts had to decide jurisdiction in circumstances where employees rendered services at places other than where the contracts were concluded.

18. Consistent with the common law principle of party autonomy, parties to international contracts are free to agree, expressly or tacitly, on the specific legal system to govern the contract. [*Laconian, supra at 525 I-G.*] In the absence of such agreement it is open to the Court to assign the proper law of the contract and jurisdiction.

19. If the Court were to assign the proper law and jurisdiction, it may apply a subjective or objective test to the material facts. Although the subjective test of presuming the intention of the parties enunciated in *Standard Bank of South Africa v Efroiken & Newman 1924 AD 171 185* has not been rejected (*Guggenheim v Rosenbaum (2) 1961 (4) SA 21 WLD 31*), the

objective test favoured by the Appellate Division in *Ex Parte Spinazze & Another NNO 1985 (3) SA 650 AD* is preferable in a modern, global economy. The enquiry then is: to which law and jurisdiction does the contract have the most real connection?

20. In assigning the proper law of the contract, there is no clear conflict rule which can mechanically be applied to yield a certain answer. A coterie of connecting factors, including the *locus contractus*, the *locus solutionis*, the domicile and the nationality of the parties clamour for attention (C F Forsyth, *Private International Law*, third edition @ 288). These factors are also relevant to determining jurisdiction.

21. The determination of jurisdiction involves "weighing up of those features of the employment contract which fell outside the jurisdiction …against those which link the relationship to the South African territory".(*sic*) [*Serfontein v Balmoral Central Contracts SA (Pty) Ltd (2000) 21 ILJ 1019 (CCMA)*]. The test is qualitative rather than quantitative.

22. Similar factors also form the basis of various tests for determining whether there is an employment relationship [*Board of Executors Ltd v McCafferty (1997)18 ILJ 949 (LAC)*]. As Nugent J in *Liberty Life Association of Africa Ltd v Niselow (1996) 17 ILJ 673 (LAC)* cited with approval in *BOE @ 959J-956* states, such tests are, however, "pointers" to the existence of an employment relationship.

23. A court is not bound by an admission or consent to jurisdiction by the parties. [*Xaba v Portnet Ltd at 1750E-F; Mgijima v Eastern Cape Appropriate Technology Unit at 297 A; Mcosini v Mancotywa at 1417 E-F; Venetia Minerva SPA v Carolina Collieries (Pty) Ltd at 883, supra*]. It must

as a matter of law be empowered to exercise jurisdiction. The Labour Court as a creature of statute is confined to exercising its powers only in the provinces of the Republic (section 156 of LRA).

24. Furthermore, a court can only have jurisdiction if it has the power, not only of taking cognisance of the suit, but also of giving effect to the judgment. (*Veneta Mineraria SPA v Carolina Collieries, supra)*

25. Against this theoretical background, I turn to the facts of this case. Paragraph 2.10 of the three year contract guaranteed that the Applicant's conditions of employment would remain the same. South African labour laws are impliedly incorporated into the contract of employment. [*Key Delta v Marriner 1998 6 BLLR 647 (E); Wallis, MJD: Labour and Employment Law (Butterworths) at paragraph 12*] As the conditions of service were governed by South African law, that was the law that was imported into the three year contract. By choosing South African law to apply to the contract, the parties also made a choice of jurisdiction. They tacitly chose South African courts as the forum to adjudicate disputes pertaining to the contract.

26. Mr Kroon's reliance on the presumption against extra-territorial application of legislation referred to in *Viljoen v Venter NO (1981) 2 SA 152 (WLD) at 154 H and Bishop & Others v Conrath & Another 1947 (2) SA 800 TPD @ 804*] therefore does not assist him. the presumption will operate to favour South Africa having jurisdiction.

27. In *Ex Parte Spinazze, supra at 665 G-H* the contract was executed when a party was domiciled and resident in South Africa and the parties obviously intended South Africa to be the country where the contract was to operate.

Corbett JA said that those were factors to be taken as indicating a tacit choice of South African law or, at any rate, as showing that South African law was the system with which the contract had its closest and most real connection. A similar inference can be drawn in this case when similar facts obtain.

28. I accordingly find that the parties agreed to South African law being the proper law of the contract and to South African courts having jurisdiction.

29. If I am wrong in concluding that there was such a tacit agreement, then I turn to consider the connecting factors referred to by Forsyth and case law to assign the proper law of the contract and jurisdiction. No evidence was led as to what the law of Mozambique was about the breach of a private international contract.

30. The factors that support a finding that the proper law of the contract and the choice of jurisdiction is South African are discussed below:

31. The contract was concluded and cancelled in South Africa.

32. The parties to the contract were both South Africans.

33. PSA offered to pay the costs of travel by road twice a year to South Africa, thereby acknowledging that the Applicant retained his links to this country.

34. The letter of termination of the three year contract (Exhibit A21-22) informed the Applicant that his “secondment” to PM, not employment by PM, was terminated.

35. Ostensibly PSA, not PSA on behalf of PM, undertook to pay the Applicant's relocation costs back to Port Elizabeth.

36. His salary was paid in rands in South Africa and by PSA.

37. The Applicant paid taxes to the South African Revenue Services. During the period of his employment in Mozambique, the South African tax laws were such that taxes were payable in the country in which they were earned.

38. Unless PSA was an agent for PM, the financial costs of employing the Applicant in Mozambique were more substantial for PSA than for PM.

39. The Applicant instituted proceedings in Mozambique for compensation based on both the three year contract and the one year contract.

40. The Applicant pleaded that the three year contract was concluded with PSA and the one year contract with PM. He alleged that, following the deterioration in relations arising from Mr Lopez's sexual harassment of his wife, the latter succeeded in rescinding the Applicant's contract in Mozambique and securing his return to South Africa with effect from 31 December 2000.

41. PM stated that it only negotiated the one year contract with the Applicant. It alleged that the three year contract was "juridically non-existent in Mozambique Law". It denied cancelling the one year contract. If there was a rescission then it was of the three year contract between the Applicant and PSA to which PM was "totally alien" (Exhibit C16). So it was pleaded.

42. In reconvention, PM claimed losses arising from the Applicant's unilateral rescission of the one year contract, by absenting himself from the workplace without notice.

43. The following emerged from these pleadings which were handed in by PSA:

43.1 The Applicant considered himself to be employed in PM in terms of the three year contract.

43.2 PM's denial of any liability under the three year contract implies that it also denies having mandated PSA to conclude such a contract on its behalf.

43.3 PSA, acting on its own behalf, concluded the three year contract with the Applicant.

44. PM's denial of the cancellation of both contracts also implies that PSA was not mandated but acted on its own behalf to inform the Applicant that his services were redundant.

45. This analysis of the action in Mozambique negates PSA's version in this case entirely. Having pleaded thus, the inference can be drawn that PM acted independently of PSA and purely to protect its own interests without considering the implications for PSA. However, such an inference would be at odds with PSA's view that PM was "its Mozambican organisation". The more probable inference is that PM pleaded haphazardly with the limited objective of resisting the claim against it without contemplating the consequences of such a plea and the possibility of an action in South Africa against PSA.

46. Between the versions of PSA and PM either one or both of them are lying. The only witness called by PSA did not have personal knowledge of the contract of employment with the Applicant and its cancellation. That documentary evidence supports the Applicant's and not the PSA's version suggests that PSA is not truthful to this Court.

47. PM is not party to this case and no one testified on its behalf. If its defence succeeds in Mozambique and this Court declines jurisdiction, the Applicant would be without a forum to pursue his claim in terms of the three year contract. Constitutionally, this may be untenable as the Applicant may be deprived of a forum to ventilate his dispute.

48. With the credibility of PSA in serious doubt, I turn to consider the status of the one year contract and whether PSA acted as agent for PM.

49. PM was not allowed by Mozambican law to pay an expatriate allowance. Hence, the one year contract was concluded. There was no evidence on behalf of PSA to gainsay the Applicant's explanation of the purpose of the one year contract.

50. As the Applicant was not aware that it was a contract when he signed it, he can hardly be accused of fraud as suggested by Mr Kroon. If he acted fraudulently then PM was equally liable. However, PSA has no claim to any moral or legal high ground considering that it failed to pay over the taxes deducted from the Applicant to the Mozambican authorities which it should have done if it honestly believed that the Applicant was employed there.

51. It was submitted that the one year contract substituted the three year contract, that the Applicant desired to work in Mozambique and therefore acquiesced in such substitution. There is no evidence on behalf PSA that this in fact occurred. The Applicant's version that he considered both contracts to be valid is more probable. I also doubt that the Applicant would have tacitly abandoned the more lucrative three year contract for the one year contract without attempting to negotiate a better deal, however much he desired to be employed in Mozambique.

52. In so far as the one year contract may be valid – and I am not required at this preliminary stage of the proceedings to make any findings in that regard – the Applicant may hold PM liable thereunder without negating the three year contract as submitted by Mr Kroon.

53. Neither party relies on the cancellation of the one year contract as the cause of action or defence in this case.

54. Nothing from the text of the three year contract suggests that PSA was acting as agent. On the contrary, PSA clearly demarcates its own responsibilities from those of PM.

55. At no stage prior to the termination of the Applicant's employment in Mozambique was he expressly informed that PSA was not his employer but merely an agent for PM.

56. PSA submits that payments to the Applicant in terms of the three year contract were made on behalf of PM and were recovered from the latter. A journal voucher issued by PSA was submitted as proof of the reimbursement by PM. This internal arrangement was also not disclosed

to the Applicant during the subsistence of the three year contract.

57. Mr Kroon submitted that the Applicant was aware of the agency arrangement between PM and PSA because:

57.1 The HR department of PSA was engaged to address his wife's complaint of sexual harassment.

57.2 The HR official in PM did not speak English. He could therefore not be of any assistance to the Applicant.

58. Mr Lopez had to approve his appointment in PM.

59. The Applicant admits that PSA from time to time acted as an agent performing HR functions for the companies within the Parmalat Group, including PM.

60. The aforegoing three situations could have led to the inference that PSA was acting as an agent of PM. However, it is not the only reasonable inference to be drawn, having regard to all the circumstances.

61. Although PM was an independent company, PSA regarded it as "its Mozambican organisation" [Exhibit A23]. In the context in which it was used the phrase implies that PSA controlled PM. This is the opposite of agency.

62. Mr Lopez's interview of the Applicant could imply that in addition to PSA, he also needed to be satisfied that the Mozambican operations could be entrusted to the Applicant. Nothing from the fact that there was such an

interview or the content thereof informed the Applicant that PSA was merely an agent. PSA did not interview the Applicant because they were aware of his capabilities.

63. When the Applicant's services were no longer required by PM, purportedly because his position had become redundant, the PSA denied any liability for severance pay. But, it tagged this denial with advice that he would be "restored" to the position of fitter.

64. The more obvious inference flowing from this communication is that liability was denied because the Applicant's position was to be restored. The denial was not linked to the fact that PM is a separate company or that it, and not PSA, should be held responsible for its dismissal of its employees.

65. On cancellation, PSA was at pains once again to distinguish the responsibilities of PM from its own towards the Applicant. The responsibilities of PM were those arising from secondment.

66. The termination letter states that the Applicant's secondment to Mozambique would terminate with effect from 1 January 2001. If he rejected the position to which he was restored then his "employment contract with Parmalat (South Africa) would (*sic*) be terminated as at 31 December 2000 on one month's notice". This confirms that employment with PSA was automatically restored after the secondment terminated. It was not a new offer of employment with PSA. It also supports the inference that the Applicant remained employed with PSA whilst being seconded to PM.

67. Mr Kroon submitted that PSA offered the Applicant his previous position

out of altruism and without any obligation to do so. This is contradicted by PSA's own documentation: PSA had a contractual obligation which it sought to terminate by 31 December 2000. (paragraph 5 of Exhibit A21-22) As I stated above, it was not a new offer but an automatic restoration of the Applicant into his previous position with PSA.

68. The Applicant testified that at the end of the three year contract, PSA had no obligation to provide him with a job. He was free to contract with PM or any one else. He also had an option of renewal. (paragraph 2.9 of Exhibit A11-12)

69. From the aforegoing I conclude that PSA was obligated to the Applicant in terms of the three year contract. The evidence of the Applicant is that the obligation did not extend beyond the three years.

70. That the Applicant would agree to the termination of his services with PSA at the end of the three years is not unlikely if his employment by PM direct were to be significantly more lucrative. I also deduced that his skills were in demand as two previous job Applicants chose not to accept the offer to work in Mozambique. His bargaining position was therefore good. There was also the option of remaining there or returning to PSA if there was still a job for him.

71. Other factors that support the conclusion that PSA was personally obligated to the Applicant in terms of the three year contract are the following:

71.1 PSA drafted a voluntary retrenchment agreement (VRA) between itself and the Applicant which was to be the basis of a settlement.

71.2 It cited itself as “the employer” in the VRA.

72. Mr Kroon submitted that this was a mistake. The submission is rejected because firstly, it was made without evidence being lead. Secondly, the mistake is not formal or typographical. Coupled with the reference to “its Mozambican organisation,” it materially manifests a particular state of mind of the author which reveals the true relationship between PSA and PM and between PSA and the Applicant. PSA was obviously mindful of the distinction between the two organisations and must therefore have consciously drafted the VRA in that way.

73. On the basis of *Board of Executors Ltd v McCafferty, supra* Mr Kroon correctly submitted that the Court must look beyond the labels placed upon the contract and to have regard to the realities of the relationship. He was referring to PSA’s use of the word “secondment” to describe the Applicant’s employment by PM.

74. The fact that it is PSA’s own choice of word which is used on more than one occasion implies a state of mind which is consistent with a finding that the Applicant was seconded to PM.

75. The VRA also does not reveal that there was an agency contract between PSA and PM.

76. The secondment of the Applicant to PM was an extension of the services provided by PSA.

77. PSA did not lead the evidence of its representatives, Messrs Vermaak & Pratt who concluded and cancelled the three year contract respectively.

The journal voucher submitted as proof that PSA debited PM for services is for only 31 January 2001. If PSA was confidant of its version it would have made all its financial records relevant to this case available and led evidence to prove the alleged agency in this transaction. The only witness called by PSA had no personal knowledge of the contract or its termination. From the journal voucher, the issuing of which he supervised, he deduced that PSA was an agent of PM. The evidence is not sufficient to gainsay the Applicant's version or the version pleaded by PM that there was no agency. In concluding thus, I place no greater evidentiary weight on the documentary evidence than that they are what they purport to be.

78. If there is any doubt as to who the true employer is, then the fault lies squarely with PSA for expressly representing that it was the employer. In so far as its representations amounted to a misrepresentation to the Applicant it cannot be allowed to profit from it.

79. About a year after the Applicant's employment at PM was terminated, PSA saw fit to record in writing that it rendered support services to PM. (Exhibit D) The authors of Exhibit D were not called to testify. Instead of serving as proof of an agency relationship, it causes more suspicion that it was specially contrived for the purposes of this case. There is no explanation about what triggered Exhibit D a year later.

80. I accordingly find that at all material times PSA represented itself and did not act as agent for PM. I also find that PSA was the employer of the Applicant. This finding also strengthens the connection between the contract of employment and South Africa.

81. Conciliation is not a jurisdictional prerequisite for an action based on a

breach of contract. [*Fedlife Assurance Ltd, supra*] This finding reinforces the conclusion that the cause of action is the common law breach of a contract.

82. If the law of a forum subscribes to international labour and human rights standards it is, in my view, a factor that favours the law of such forum. No evidence was led in this regard. Nor was the point argued. I take it no further.

83. I turn to consider submissions that may support a finding that jurisdiction and the proper law of the contract are Mozambican, or, not South Africa since no evidence was led about the law of Mozambique.

84. The Applicant rendered services in Mozambique.

85. The *lex loci solutionis* is Mozambique. It applies if the contract is to be performed at a place other than the *lex loci contractus.* However, this is not a rigid rule (Forsyth @ 289-8; *Standard Bank of South Africa v Efroiken & Newman, supra*). Furthermore, the *lex loci solutionis* is but one of the connecting factors considered when determining the proper law of the contract and jurisdiction. I disagree with the submission by Mr Kroon and the authorities cited in support thereof, that it is decisive. As pointed out above, those cases dealing with the interpretation and application of statutory provisions are distinguishable from this case where the cause of action is the breach of contract.

86. Mr Lopez had to approve of the employment of the Applicant at PM.

87. PM was an independent legal entity.

88. The Applicant was supervised and controlled in respect of operational issues by Mr Lopez. Nugent J accepted that "control is of prime importance in determining whether the relationship is one of employment (*Liberty Life Association @ 682 G-H*). Mr Kroon also referred to *Bob Heppel: The Crisis in EEC Labour Law (1987) ILJ (UK) 77* for support for the control test.

89. The Applicant was employed at PM partly in terms of the one year contract.

90. Some taxes were paid by PM on behalf of the Applicant.

91. PM provided free housing and carried the cost of the Applicant's medical insurance.

92. The parties acknowledge that neither had an obligation to continue the employment relationship after the three year contract expired.

93. The Applicant instituted proceedings in respect of both contracts in Mozambique against PM thereby confirming, it was submitted, that he was aware of the identity of his employer as being PM and that Mozambique had jurisdiction. Determining the proper law of a contract and jurisdiction may be a question both of law and fact. Considering that the legal representatives before this Court cannot agree on jurisdiction, it can hardly be expected of a lay person such as the Applicant to be sure about the choice of forum.

94. Mr Kroon submitted that the case law supported a finding that this Court

did not have jurisdiction.

95. In *Sopelog, supra*:

"There is little to be gained from attempting to isolate the subject-matter of a dispute between employer and employee from the other aspects of their employer-employee relationship in an endeavour to attribute to the dispute a locus different from the work-place. It could, therefore, not have been the intention of the legislature that a labour dispute between employer and employees within the meaning of the LRA was to be attributed a locus different from that of the work-place. The connecting factor, whether to a particular area within the Republic or to the Republic as a whole, must ultimately be the work-place."

96. The Appellate Division cautioned against this approach in *Genrec, supra*. This case was relied upon by both parties. The material facts were that the Appellant had contracted with employees in Durban for the sole purpose of rendering services on an oil rig situated above the continental shelf but outside South African territorial waters. The Appellant had its principal place of business in Durban and the employees were also resident there.

97. The Appellate Division found that the industrial council, the first respondent, had no jurisdiction over the employees and the dispute because employment on the oil rig was divorced from the Durban undertaking. Furthermore, the relevant legislation did not apply to the undertaking on the oil rig.

98. The Court rejected the submission for the employees that a "section" of the relationship between the parties existed in South Africa because it ignored

the statutory requirement that an undertaking must be carried out in a particular area.

99. In concluding thus on the facts of that case, the Court was nevertheless critical of the decision in *Sopelog supra*, stating that Scott J "may have gone too far in equating the location of the workplace with that of the carrying on of an undertaking" (@7F-H)

100. Although the Industrial Court in *Bolhuis, supra* did not approach the employment from the perspective of private international law, it did consider relevant connecting factors (e.g. where salary and taxes were paid) to determine jurisdiction. As stated above, the most compelling factor was compliance with the statutory requirement that the council should have jurisdiction, which it did not have if the undertaking where work was performed fell outside the area of its jurisdiction.

101. The common theme in *Sopelog, Genrec* and *Bolhuis* is that the place of employment is a question of fact. For the purposes of this case it is but one of the connecting factors that go to determining jurisdiction.

102. The *ratio* in *De Kock v Executive Outcomes Ltd and Others (1995) 9 BLLR 96 (IC)* was that the Industrial Court did not have jurisdiction because the work was to be performed beyond the boundaries of South Africa. Although the Industrial Court relied on *Genrec supra*, it made no reference to the caution sounded in that case (discussed above). Nor is it evident from the judgment whether the Court placed any weight on the fact that the parties to the contract were South Africans and that the contract was concluded in South Africa.

103. I have no difficulty with the decision in *De Kock, supra* if the court found that the most compelling consideration for determining jurisdiction was the place where the work was performed. However, if that was the only consideration, then, with respect, I believe that it was wrongly decided.

104. The cause of action in *De Kock* was an unfair labour practice. The characterisation of the dispute in *De Kock* is therefore also distinguishable from this case.

105. In weighing the factors that support and do not support a finding that South African law is the proper law and that this Court has jurisdiction, I find that qualitatively South Africa is the forum and its law has the most real connection to the dispute.

106. I accordingly find that the Applicant has discharged his onus of proving that this Court has jurisdiction. (*Mgijima, supra*)

107. My rulings on the points *in limine* are as follows:

1. PSA was the employer of the Applicant under the three year contract.
2. This Court has jurisdiction to hear the dispute.
3. A referral to conciliation is not a jurisdictional prerequisite.
4. The Respondent must pay the costs.

PILLAY D, J

DATE OF HEARING: 6TH AND 7TH JUNE 2002

DATE OF JUDGMENT:	27TH JUNE 2002
FOR THE APPLICANT:	ATTORNEY LAUBSCHER
INSTRUCTED BY:	LAUBSHER ATTORNEYS
FOR THE RESPONDENT:	ADVOCATE KROON
D BY:	PERROT, VAN NIEKERK & WOODHOUSE INC.