REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

CASE NO: JR 1651/01

In the matter between:

AUGUST LÄPPLE (SOUTH AFRICA) Applicant

and

DAVID JARRETT First Respondent

J MOLETSANE Second Respondent

THE DISPUTE RESOLUTION CENTRE FOR THE MOTOR INDUSTRY BARGAINING COUNCIL Third Respondent

JUDGMENT

NTSEBEZA, AJ:

[1] On the 24th July 2002, Mr Kennedy, appeared and argued on behalf of the Applicant for an order in the following terms:-

(a) Declaring that the arbitration ruling made by Second Respondent dated 12 October 2001 under case number NBNT157 is hereby reviewed and set aside;

(b) Declaring that the Motor Industry Bargaining Council, its Dispute Resolution Centre and arbitrators appointed under its auspices

do not have jurisdiction to hear the said case or to grant the relief sought by the First Respondent.

(c) Ordering the First Respondent to pay the costs of this application.

[2] The First Respondent, ably represented by Mr Freund who appeared with Mr Graham, strenuously – and very passionately, I observed – opposed the reliefs sought. He called for the dismissal of the application with costs, such costs to include the costs of two counsel, it being his submission that the matter was not only so important to the Applicant that it saw fit to brief Mr Kennedy, a senior counsel, but also very complex in the issues raised in it.

[3] At the end of submissions from Counsel – and I am extremely indebted to both Counsel for extremely well presented arguments which revealed the extent to which both parties had researched their respective cases – I reserved judgment in a matter in which it has not been easy to give a reasoned judgment. I now hand down that judgment.

EMPLOYMENT RELATIONSHIP

[4] The Applicant is referred to herein as Läpple South Africa, otherwise known as August Läpple South Africa (Pty) Ltd. Läpple South Africa ("LASA") is a wholly owned local subsidiary of the German parent

company, August Läpple GmbH Co KG, Läpple Germany ("LAG").

[5] David Jarrett, the First Respondent ("Jarrett") was an employee of LAG since 1993, in terms of a written contract entered into between the parties in Germany. It is a relationship that is not as simple as it looks and actually addresses issues of fact and law which I have to decide in this case.

[6] In its affidavit, deposed to by one Norbert Wegner, in support of the reliefs set out in paragraph 1 above, one of the issues being addressed is the question of whether Jarrett was employed by LAG or LASA, particularly because an answer to that would deal, decisively, with the question of whether the reliefs sought by LASA in these proceedings are capable of resolution or not.

[7] Wegner deposed, simply, as follows on this aspect:-

- Jarrett was employed by LAG in October 1993 in terms of a written contract entered into between the two. This is the only written contract in existence between "*either Läpple Germany and Mr Jarrett or Läpple South Africa and Mr Jarrett.*"

- During or about March 1998, Jarrett was appointed by LAG as its employee, to carry out services as managing director (MD) of LASA.

[8] In his opposing affidavit, Jarrett contested most of these allegations, and stated as follows:

- During or around February 1998, he was approached by one Dr Knowles (it should be Knohl, I believe), the then Chairman of the Board of LASA who offered him the position of MD of LASA;

- Having accepted the offer, he commenced employment in South Africa in that capacity;

- He was accountable to the Board of Directors of LASA, albeit based in Germany. He reported directly to Knohl;

- When Knohl was later replaced, as Chairman of LASA, by one Jochen Kuhlmann, he reported to him. He remained accountable to LASA's board of directors.

[9] In his capacity as MD of LASA, so Jarrett further deposed:-

- He rendered his services in South Africa where he ran LASA's operations;
- He was paid the Rand equivalent of DM 8000 here in South Africa;
- His perks, of which he availed himself, were South Africa

specific;

- He was liable for tax according to South African law.

[10] Jarrett further deposed to the fact that whilst he admitted that LASA was a wholly owned subsidiary of LAG, it was, however, a company registered according to the laws of the Republic of South Africa, with its own board of directors according to South African law. As an entity with its own legal ***persona***, it is capable of suing and being sued.

I will return to the true nature of the employment relationship later on in this judgment.

SUSPENSION AND TERMINATION OF JARRETT'S EMPLOYMENT

[11] According to LASA, Jarrett was suspended by LAG in terms of a letter of November 2000, signed by the Chairman of the Board of LAG, but also by the Chairman of the Board of LASA.

Following meetings of the shareholders of LAG and LASA, two more letters were sent to Jarrett. The first was from LAG, effectively terminating the contract then existent between it and Jarrett. The second letter was from LASA. It recorded that "*there was no legal relationship*" between LASA and Jarrett. However, "*as a mere precaution*" – whatever that was supposed to mean – Jarrett was afforded a chance before LASA's Board Chairman.

[12] In his response, Jarrett, by and large, admitted the fact of his suspension and the termination of his contract with LAG. He qualified his responses by arguing that:-

- LAG was not legally able to suspend him.
- Consequently, and because his attorney raised the unlawfulness of LAG's purported suspension of his services, the LASA Board took the steps that it did, purporting to suspend him with full benefits pending the resolution of this dispute, as aforementioned.

[13] Insofar as it was alleged he had been given an opportunity to address LASA's Board Chairman, Jarrett deposed that this proved to be an insubstantial invitation because the Chairman failed and/or refused to return his calls to him. For all practical purposes, he deposed, he was prohibited from having any dealings with LASA, its chairman or its board.

[14] Mr Jarrett maintained that he was still a registered director of LASA, and that in terms of South African law, he was employed by LASA as its managing director. He denied that by agreement LAG was to pay him the Rand equivalent of DM 8 000 in South Africa, DM 10 000 in Ireland and DM 4 000 in Germany. He described the agreement between him and LAG as having been that initially, he was remunerated by LAG but that subsequently, there was another agreement between him and LASA's

board of directors. When he was managing director of LASA, for example, it was LASA (and **not** LAG) that paid him the Rand equivalent of DM 8 000 in South Africa. LASA issued him with a monthly slip for that amount. He also, as managing director of LASA, received DM 10 000 in Ireland and DM 4 000 in Germany.

[15] He denied emphatically that his terms and conditions of employment, such as level of remuneration, increases, and so on, were determined by LAG. As managing director of LASA, all these were at all times determined by LASA's board of directors.

As for the disputes which he was alleged to have submitted to the Dispute Resolution Centre ("DRC") against LAG, that had to be seen in context. He deposed that he believes he has a claim against LAG in German law. The claim against LASA is separate. It is for his unfair dismissal as LASA's managing director. It was as managing director of LASA that he was accountable to LASA's board of directors, itself established in terms of South African law.

[16] His attendance at board meetings in Germany was neither here nor there, given that LASA's board of directors was based in Germany. Whilst meetings and his reporting functions were to persons in Germany, he deposed, that did not detract from the fact that he was employed in South Africa, by a South African company, and that he performed his duties in South Africa. His claim before the DRC was against LASA, a South African

company with a South African persona, operating and trading in South Africa. There could therefore be no suggestion, so he deposed, that in these proceedings he was asking the Council and/or the DRC to exercise jurisdiction over LAG.

[17] There was no substance to the submission, Jarrett deposed, that an order by the Council would be ineffective to the degree that it would not be enforceable against LAG. The issue – and the fact of the matter – was that there was no need for the Council to execute against LAG. The mere fact that LASA's board was physically situated in Germany did not alter the true character of LASA as a South African company that was liable under South African law, and against which orders of institutions like the DRC of Council were enforceable.

[18] In reply, Mr Wegner deposed, by and large, in reiteration of the averments he had made in his Founding Affidavit. A frequent refrain in the Reply was that inasmuch as Jarrett maintained that changes to the contract – the only written contract in existence – were varied and/or amended on numerous occasions, but did not give details of such amendments and/or variations, nor did he annex the alleged written exchanges or give details of the verbal changes, he was unable to deal therewith. Insofar as he insisted that Jarrett was employed by LAG, that fact was not altered by the fact that he "*obviously had to be paid in South Africa and was accordingly liable for income tax according to South African law*."

LEGAL ARGUMENT

[19] The depositions by Jarrett and Wegner pretty much captured the soul of the issue between the contending parties. The crisp question is one of jurisdiction. The case argued on behalf of Jarrett, in broad terms, is that he was employed by LASA, a company registered in accordance with the laws of the Republic of South Africa, in the capacity of Managing Director. As such he was an employee, in terms of the South African Labour Relations Act, No. 66 of 1995 ("the LRA"). The Bargaining Council ("the Council") is accordingly vested with jurisdiction.

[20] This claim by Jarrett, upheld in the DRC by the Second Respondent, Mr Moletsane (Commissioner) is now being challenged by LASA on several grounds. Principally, and also addressing the question of onus, Mr Kennedy argued that Jarrett's two employer argument was flawed and was not borne out by the facts. The mere fact that he was Managing Director of LASA did not make him an "employee". Even if this was "possible" – or so I understood Mr Kennedy to submit – it did not necessarily mean he was an "employee" (of LASA). He was employed by LAG, in terms of the only written contract in existence and when once he was no longer an employee of LAG, he could not remain even as an MD of LASA.

[21] Insofar as Jarrett alleged unfair dismissal, the onus was on him to establish such dismissal. In order to establish that, he had to prove, on

balance, that he was employed by LASA. For this submission Mr Kennedy referred me to the case of ***Pearson v Sheerbonnet SA (Pty) Ltd*** [1999] 7 BLLR 703 (LC) and to Grogan's *Workplace Law* p. 112.

[22] Mr Kennedy, relying on a judgment of the appellate section of this Court – ***Liberty Life Association of Africa Ltd v Niselow*** (1996) ILJ 660 (LAC) (in which various authorities were cited, and which judgment was upheld in the Supreme Court of Appeal in ***Niselow v Liberty Life Association of Africa Ltd*** (1998) 191 LJ 752 (SCA), argued that the term "employee" cannot be applied literally. It must be limited. Its definition is expressed in very wide terms. In this case, the answer would lie in a successful enquiry into the true nature of the legal relationship between Jarrett and LASA. What were the rights and obligations of each of the parties? In Mr Kennedy's submission, the source of rights and obligations between Jarrett and LAG was primarily the written agreement which they had concluded.

[23] The mere fact that Jarrett was a director of LASA did not make him an employee thereof. In the cases he had referred to, (see also: ***Board of Executors Ltd v McCafferty*** [1997] 7 BLLR 835 (LAC); ***Board of Executors Ltd v McCafferty*** 2000 (1) SA 848 (SCA) at 857 G-H), Mr Kennedy argued, a group of companies would appoint a person as a director of its subsidiary. The person might be an employee of the parent company but not an employee of the subsidiary of which he or she is a director. Such was the case in the ***Pearson's*** case which was, in fact,

remarkably on all fours with the present case, Mr Kennedy submitted.

[24] In that case, the Applicant had been appointed a managing director of a South African company, itself a subsidiary of a United Kingdom company. The appointment had been pursuant to a contract entered into with the UK company. The letter from the subsidiary company, confirming the applicant's appointment as its managing director, did not state that he was its employee. In correspondence with the UK company, the Applicant considered himself as having been assigned by his original employer to head the subsidiary. The letter of dismissal had been signed by the head of the UK company. Applicant was being fired from his managing directorship of the local subsidiary. Jammy AJ, in upholding the point that the Applicant was not an employee of the subsidiary, held that the fact that the Applicant had obtained permanent residence in South Africa, and paid taxes locally, was immaterial. (See also: ***Van Rensburg v Siemens Ltd*** (1999) 201LJ 720 CCMA; ***Boumat Ltd v Vaughn*** (1992) 131LJ 934 (LAC).)

[25] Mr Kennedy argued that it was therefore remarkable that Jarrett did not have any written contract with LASA, given that it was LASA's requirement that its employees should have either contracts of employment or letters of appointment signed and issued by LASA. According to Mr Kennedy, a letter of appointment instructing Jarrett to work for LASA was issued by Mr Läpple, the owner and chairman of LAG. Although he was employed by LAG, he had been appointed by LASA as managing director. Mr Kennedy

argued that all that LASA did was to terminate his appointment as managing director (and not his employment), consequent upon the termination of his employment by LAG. Mr Kennedy also placed reliance, (for his conclusion that these facts, like those in ***Pearson's*** case (**supra**), demonstrated that Jarrett was never an employee of LASA but of LAG), on the fact that only a minor portion of Jarrett's salary was paid by LASA in South Africa, where it was taxed, just like, in any case, the remainder was also taxed in Ireland and Germany.

[26] Kennedy argued that LAG exercised "ultimate control" over Jarrett because his productive capacity was, throughout, in the hands of LAG. LAG was the company which had – and had therefore exercised – its prerogative in deciding to dismiss him from its employment, in consequence whereof his appointment as managing director of LASA was accordingly terminated by that company, not as his employer but as "*merely the company which had appointed him in the implementation of*" LAG's original decision to employ him in that capacity.

[27] In response to Jarrett's averments in his affidavit outlining the history of his appointment with LASA – (see paras 8, 9, 10 ***supra***) – Mr Kennedy submitted that what was critical was the fact that Jarrett's appointment as managing director of LASA was decided upon by LAG. The chairmen of LASA (Dr Knohl and Kuhlmann) were appointees of LAG, the sole shareholder, with LASA being merely a cash cow for LAG, so to speak, or, as Mr Kennedy put it, LASA was "*merely the South African subsidiary*

generating profits for" LAG.

[28] Even though Jarrett accounted to the board of directors of LASA, all the board members held their positions as the nominees and representatives of LAG, the sole shareholder of all the shares in LASA. Throughout his sojourns in Germany, Ireland and South Africa, Jarrett's real employer never changed. It was LAG. In Ireland and South Africa, Jarrett was an employee of LAG still, though he had, as a consequence of such employment, been appointed as managing director of Läpple in Ireland and in South Africa.

[29] Mr Kennedy thus submitted that since Jarrett had been employed and dismissed in Germany, the DRC had no jurisdiction to entertain the issues dealt with by Mr Moletsane. Any reliefs Jarrett sought lay only against LAG, the sole employer party in the dispute which was wrongly referred to arbitration in this country, Mr Kennedy argued. Jarrett had correctly identified the forum in the claims he was pursuing in the Germany Labour Court. Not only was it therefore, jurisprudentially speaking, incompetent for him to litigate these issues before a South African forum against a non-employer company, it was also, in any event, inappropriate that there should be a duplication of proceedings in which Jarrett is seeking relief against LAG on the basis that LAG was his employer while at the same time he sought the same relief in South Africa both against LAG in the Council and against [LASA] before the arbitrator.

[30] Jarrett could not have his cake and eat it, argued Mr Kennedy. The true employment relationship, in this case, as with any employment relationship, had to take into account the structure and content of the contract between the contracting parties. ***In casu***, Jarrett was bound to LAG as employee, and to no one else. Kennedy referred to ***CMS Support Services (Pty) Ltd v Briggs*** (1998) 191LJ 274 (LAC), in which, Myburgh JP (as he then was) made the point that the nature of the relationship between parties is primarily to be determined by reference to the contract concluded by them at the commencement of their relationship.

[31] In that case, the Court had referred to the remarks of Bulbulia DP (as he then was) in ***Callanan v Tee Kee Borehole Casings (Pty) Ltd and Another*** (1992) 13 ILJ 1544 (IC) at 1550 D-E where the Court had expressed itself as follows:-

> "*The Court accepts that the applicant formed his close corporation in a bona fide belief that it will assist him in easing his tax burden … applicant cannot [however] have his proverbial cake and eat it. He cannot say that he was not the respondent's employee as a machinist for purposes of taxation … but simultaneously be regarded as an employee for the purpose of the Labour Relations Act*."

[32] According to Mr Kennedy, therefore, Jarrett was seeking relief from parties that did not fall within the jurisdiction of the Council, the DRC or the

Commissioner/Arbitrator. The Council had the power neither to consider a matter affecting an employment relationship between Jarrett and LAG, nor to give effect to any of its judgments. For example, in this case, reinstatement could only be effected by LAG. Two thirds of Jarrett's salary – retrospective and prospective – would have to be paid by entities over whom none of the parties from whom relief is sought had jurisdiction – from LAI and LAG. The judgment of the Council would not be able to be given effect to.

[33] Since on all of these grounds the Council, the DRC and the arbitrator had no jurisdiction, Molesame's award fell to be reviewed and set aside for being a violation of the principle of legality, for being irrational and unable to be justified, and also for being a violation of the principle that an arbitrator could not decide a matter that does not fall within his powers or that of the bargaining council under whose auspices he is appointed. Mr Kennedy accordingly argued for the grant of an order as prayed in the Applicant's notice of motion.

[34] Mr Freund set out by narrowing the legal issues that I must determine to, principally, three, namely:

- Onus
- Whether the jurisdictional issue is objectively justiciable
- Whether a contract of employment with LAG precludes one with LASA.

[35] I will deal with Mr Freund's argument, not necessarily in the order in which he identified these issues but in the way in which I believe I followed his argument both in Court and in terms of his Heads of Argument.

[36] On the question of onus, as I understood Mr Freund, he submitted that whilst he accepted that before the Arbitrator, it was Jarrett, claiming to be an employee of LASA, who had the onus to prove that he was an employee, in these proceedings, it was LASA, as Applicant, that bore the onus to prove that it was not the employer. It was LASA, as Applicant, that bore the onus to show that Jarrett was **not** its employee. This was so, firstly because the question of whether Jarrett was or was not an employee of LASA had already been dealt with, with Moletsane having ruled that he was. Secondly, whether he was or was not LASA's employee was an issue of fact. The acceptable issues of fact emanated from the Respondent's affidavit. Since it was the law as commanded by ***Plascon – Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** 1984 (3) SA 623 (A), Jarrett's version as to any disputed facts must be accepted. I must say here that I am in respectful agreement with this latter submission, and, to that extent, Mr Freund's submissions.

[37] On the above basis, Mr Freund argued that the facts from the affidavits filed, and from Jarrett's testimony before Moletsane, and from the documents on record, it was clear that he had been offered, in January 1998, by Dr Knohl, in his capacity as Chairman of the Board of Directors of

LASA, the position of managing director of LASA; that he had commenced employment in South Africa as such, accountable to LASA's board, albeit based in Germany. The offer had been made to him by LASA ("the senior management in Germany, including Dr Knohl, Chairman of the Board of LASA, based in Germany).

This evidence stood alone, uncontradicted by any other evidence. It was given orally, under oath and on affidavit. The only other evidence on the point was by Wegner who had, in his own evidence before Moletsane, stated that he was not even employed by LASA when Jarrett came to LASA, so argued Mr Freund.

[38] In any event, submitted Mr Freund in his heads, in terms of the articles of association of LASA, the power to appoint a managing director was vested in its directors – and not its shareholders. By agreement, Jarrett would continue to be paid in Ireland and in Germany to preserve his pension rights in both countries. Other than attending occasional meetings in Germany, Jarrett was engaged full time in South Africa.

[39] On the evidence, Mr Freund submitted, Jarrett was treated, administratively, as an employee of LASA. He had a LASA business card. For the company "spouse insurance" scheme in which he participated, monthly premiums were deducted from his salary. LASA's Human Resources Manager, in arranging for his salary to be paid into his bank account, had confirmed with the bank that Jarrett was "employed" as MD of LASA. He received bonuses from LASA. His salary was adjusted for tax

purposes such that a portion thereof was paid as and for entertainment allowance. He used a LASA credit card and his payslips, every month, reflected remuneration paid by LASA. Even in the suspension letter, there was a recognition that LASA had to be a party purporting to suspend Jarrett from his position as managing director. Even after suspension, Jarrett's attorneys were notified that "*his suspension [*would*] be with payment of all remuneration and benefits payable or provided by ALSA [*LASA*] pending resolution of dispute*," and so on.

THE TWO EMPLOYERS CONUNDRUM

[40] Mr Freund submitted that one of the "red-herrings" in the Applicant's case was the contention that because he was "employed" by LAG and, on their submission, merely appointed as managing director of LASA, it meant he was precluded from being an employee of LASA even if he was an employee also of LAG by virtue of the signed employment contract. Mr Freund submitted that it was trite that a person could be an "employee" of more than one employer. In the circumstances of this case, whether or not Jarrett had been a party to a contract of employment with LAG, he was also an "employee" of LASA within the meaning of that term as defined in s 213 of the LRA.

[41] The LRA defines "employee" as follows:

> "*(a) any person, excluding an independent contractor, who*

works for another person or for the State and who receives, or is entitled to receive any remuneration; and

(b) any other person who in any manner assists in carrying on or conducting the business of an employer."

[42] This statutory language of defining the term "employee" was as inclusive as possible, excluding only independent contractors. It was applicable to Jarrett insofar as his relationship with LASA, on the facts, was concerned. It did not necessarily depend on the existence of a contract of employment between the parties, when the wide language of s 213(b) is considered.

[43] Mr Freund submitted that cases in South African law in which facts are not dissimilar to the present, in which it was held that an employee could have more than one employer, were legion, and included ***Boumat v Vaughan*** *(**supra**)*; ***Camdons Realty (Pty) Ltd & Another v Hart*** (1993) 141 LJ 1008 (LAC); ***Board of Executors Ltd v McCafferty*** [1997] 7 BLLR 835 (LAC); ***Board of Executors Ltd v McCafferty*** 2000 (1) SA 848 (SCA).

[44] As a managing director of LASA, Jarrett, on the facts articulated in furtherance of his case, fitted the description of a managing director who is at once a director as well as a manger as articulated by **M S Blackman** (see: **LAWSA: (First Reissue) Vol. IV, Part II, para. 102**), where the

learned author authoritatively states that a managing director's powers are delegated to him by the board (not the shareholders) in terms whereof he, nonetheless, holds two distinct positions, that of a director and that of a manager. As a manager, a managing director is a party to a contract of employment.

[45] That managing directors are employees entitled to the protection of South Africa's labour legislation has been recognised in, ***inter alia***, the following judgments:-

> ***Brown v Oak Industries (SA) Pty Ltd*** 1987 (8) ILJ 510 (IC) upheld on review (Full Bench) in ***Oak Industries (SA) Pty) Ltd v John N.O. & Another*** 1987 (4) SA 702 (N); ***Maubane v The African Bank*** (1987) 8 ILJ 517 (IC); ***Edwards v EMI South Africa (Pty) Ltd*** [1996] 5 BLLR 576 (1C).

[46] The view of M S Blackman was indeed echoed in a foreign judgment, ***Anderson v James Sutherland (Peterhead) Ltd & Others*** 1941 SC 203 at 213, where the Lord President (Normand), reading the majority view spoke as follows:-

> "*In my opinion, therefore, the managing director has two functions and two capacities. Qua managing director he is a party to a contract with the company, and this contract is a contract of employment; more specifically I am of the opinion*

that it is a contract of service and not a contract for services. There is nothing anomalous in this; indeed it is a commonplace of law that the same individual may have two or more capacities, each including special rights and duties in relation to the same thing or matter or in relation to the same persons."

(See also: ***Southern Foundries (1926) Ltd v Shirlaw*** [1940] A-E 701 at 722; ***Fowler v Commercial Timber Co.*** [1930] 2 KB).

[47] On the facts as deposed to by Jarrett, and on all the evidence, I am satisfied that inasmuch as he was employed by LAG in terms of the written contract alluded to already, he was equally employed by LASA as its managing director. As such, he was, at the time of his suspension, an employee within the meaning of that word as defined in s 213 of the LRA. He is entitled to the protection of South Africa's labour laws as an employee of LASA, like any other managing director who has been protected by these courts before (see the authorities cited in paragraph 44 ***supra***).

[48] If externally based companies, like LAG, were led to believe by the Courts that they were free to avoid the reach or ambit of the LRA by merely resorting to the simple stratagem of contractually providing that persons, (who are clearly employees within the meaning of the very widely defined word "employee" in the LRA) are not employees of internally based subsidiaries, there would be complete and total disadvantage to South

African citizens working for these foreign companies. One would find an anomalous situation, like the present one, where a South African, by all accounts, in fact and in law an employee of a foreign based company, (albeit also an employee of its internally based subsidiary) the latter to which he/she is contractually bound by virtue of a position he/she holds, would be non-suited and be prejudiced on the mere allegation that he/she is not an employee of the internally based subsidiary, to whose board he/she is accountable for all his/her services, and for which he/she receives a salary. I cannot agree that that is an interpretation of the law that is fair and just. I reject it.

[49] If there is anyone in this case who cannot have his cake and eat it, it is certainly not Jarrett. It is the Applicant. LASA must face up to its responsibilities as an employer, and where there is a dispute, as there is one here, the LRA points to Moletsane (or any other Arbitrator/Commissioner) and the Council as the appropriate fora/forums for the resolution thereof. I cannot therefore, on the basis argued by Mr Kennedy, entertain his invitation that the ruling made by Moletsane ought to be reviewed and set aside, nor can I hold that the Council, its DRC and arbitrators appointed under its auspices do not have jurisdiction to hear the said case.

[50] It follows from what I have said that I respectfully disagree with Mr Kennedy that ***McCafferty's*** case ***supra***, and all the other cases relied upon by Mr Freund are distinguishable on the facts as articulated by Mr

Kennedy. I have already stated that insofar as the facts are in dispute herein, the facts I will accept are those emanating from the affidavit of Jarrett. ***A fortiori*** will I rely on those facts when they find support in the evidence given before Moletsane. Consequently, where on Mr Kennedy's submissions, the facts point to the nature of the relationship between Jarrett having been such that he concludes that the contract of employment was only with LAG, I disagree with him, and the authorities that are supportive of the view that the contract of employment with LAG did not preclude a contract of employment with LASA only serve to buttress my view of what I consider to be the reality in this case.

[51] Just as in ***Trythall v Sandoz Products (Pty) Ltd & Another*** (1994) 15 ILJ 661 (IC), the Court there held that it was the South African subsidiary, in the circumstances of that case, that had ***de facto*** employed the Applicant, and not the Swiss holding company, so also do I hold that in **this** case, it is LASA that ***de facto*** and ***de jure*** employed Jarrett. This Court, the Council, and Moletsane in his designated capacity, have jurisdiction, consequently, to deal with any disputes governed by the LRA, such as the present one. I am not satisfied, on whatever test, that LASA has discharged the onus resting on it that Jarrett was not its employee.

[52] I do not accept that the arbitrator did not have the power to consider the dispute brought before him. Consequently, I do not agree that, even before me, the onus is still with Jarrett to prove that he was LASA's employee. I also cannot see to what degree reliance can be placed, as

indeed it was placed by Mr Kennedy in reply, on ***SABC v McKenzie*** (1999) 201 LJ 585 (LAC), in deciding the question of whether Jarrett has discharged the onus that he was an employee, even assuming that I accepted – which I do not – that he had an onus to discharge. To the degree that Mr Kennedy's argument was premised on his assessment of the facts of this case that Jarrett had not discharged an onus resting on him, I cannot agree because I have accepted the facts as articulated in favour of Jarrett's case, on the basis already indicated above.

[53] In any event, in these proceedings, LASA is the Applicant. It seems to me, therefore, that it bears the onus to establish all the facts necessary to entitle it to the relief it seeks (see: ***Oak Industries*** (***supra***) the NPD judgment). On the facts, I have found that the Applicant, LASA, has not discharged its onus to prove, on balance, that Jarrett was **not** an employee of LASA.

[54] In the view that I have taken, I do not consider it necessary to deal with the other leg of Mr Freund's argument which canvassed quite extensively, the two category argument that sought to address the fundamental principle of legality and the principle of rationality or justifiability. With regard to the jurisdictional issue, the question would be whether the jurisdictional fact of whether or not there was an employer/employee relationship is something I can, ***de novo***, determine objectively, by applying my own mind to the question, without regard to the views expressed on the issue by Moletsane. That would be one approach. (***SA***

Defence and Aid Fund & Another v Minister of Justice 1961 (1) SA 31 (C).)

[55] The other approach would be whether Moletsane was competent to consider the matter, and had the necessary jurisdiction, in which event the only basis that this Court could review and set aside his award would be if the award fell foul of the review test applicable to awards of the nature that his award was. If, on this approach, I accepted that Moletsane was statutorily competent to decide the jurisdictional fact of whether there existed an employer/employee relationship between LASA and Jarrett, and that this is something that is to be left statutorily exclusively within his subjective authority, ***cadit quaestio***.

[56] On this approach, the power I would have by way of review would be restricted. I would have to accept that Moletsane was competent to determine the issue of employer/employee relationship. I would only, on review, upset his award on being satisfied that his award exhibited ***mala fides***, ulterior motive or a failure to apply his mind.

(See: ***SA Commercial Catering & Allied Workers Union v Speciality Stores Ltd*** (1998) 19 ILJ 557 (LAC).)

[57] As I have stated, I do not consider that I have to decide this issue. To the degree necessary to do so, I am persuaded that on either basis, the application ought to be dismissed. On the one approach, if I determined

that I was at large to determine the jurisdictional fact of the existence or otherwise of an employer/employee relationship without regard to what Moletsane decided, I would have established that this was established on the facts and the law. I would then, as I do, dismiss the application on that basis. On the other hand, if I determined that Moletsane was competent to deal with the issue, as he did, I would only review his decision and set it aside as contended by Mr Kennedy only if I determined that he failed to apply his mind, or acted ***mala fides***, and so on. I have already clearly shown that I think nothing of the sort.

[58] Besides, I am persuaded by Mr Freund's submission that this being a case involving an award of an arbitrator appointed by a bargaining council, and therefore governed by s 33 of the Arbitration Act, No. 42 of 1965, the test for reviewability of an award as laid down in ***Carephone (Pty) Ltd v Marcus N.O. & Others*** 1999 (3) 304 (LAC) does not apply. (See also: ***Stocks Civil Engineering (Pty) Ltd v Rip N.O. & Another*** [2002] 3 BLLR 189 (LAC)). In this case, I have not been persuaded, on the evidence, that Moletsane in any way either acted grossly irregularly or misconducted himself (neither of which has in any event been alleged) or acted in excess of his power.

PEARSON v SHEERBONNET ***(SUPRA)***

[59] By far the strongest submission in the Applicant's case was with regard to the decision of this Court in the ***Pearson's*** case. It is an earlier decision of

this Court and, as such, I am bound by it, unless I am satisfied that it was decided ***per incuriam*** or that it is clearly wrong. (See: ***Toyota South Africa Motors (Pty) Ltd v Radebe & Others*** [2000] 3 BLLR 243 (LAC). I must also be satisfied that a previous decision of this Court, for it to bind me, has laid down a binding principle.

[60] Mr Freund, in his supplementary heads of argument, has argued that the only principle that one would have to discern from ***Pearson***, and by which I would then be bound, would be the following: if a person is a party to a contract of employment with a holding company, but works for its subsidiary company, for which he is remunerated by the subsidiary company, the fact that he is an employee of the holding company establishes that he cannot be an "employee" of the subsidiary company within the meaning of the word "employee" as defined in the LRA. This Court's predecessor, in an even earlier decision in the ***Trythall v Sandoz Products*** case (***supra***) decisively held, effectively, that a contract of employment with the Swiss company in that case did not put the South African subsidiary company outside the reach and clutches of the provisions of the South Africa Labour Relations Act No. 28 of 1956 (as it then was).

[61] If what I have stated above as a binding principle was the ***ratio decidendi*** of the ***Pearson's*** judgment, I would therefore respectfully decline to follow it on the basis that it is irreconcilable with a string of cases, some of them judgments of the LAC, that there could conceivably

only be one true employer of a person in ***Pearson's*** position. It would also be irreconcilable with the authority of M S Blackman in LAWSA (***supra***) and the very persuasive foreign case law in para above.

[62] Nor do I think that that is the basis, necessarily, that I must rely on in order to decide that I am not bound in this case by ***Pearson***. In my considered view, ***Pearson*** was decided on its own facts which, though strikingly familiar with those in the present case, however, are distinguishable in certain critical material respects. In ***Pearson***, the Court found that the employee, at all material times, and particularly at the time of termination of the relationship, had accepted that his employer was the holding company. I have not, on the evidence before me. If anything, at the time of the termination of the relationship, Jarrett vigorously asserted that he was an employee of LASA.

[63] In all the circumstances that I have considered, I, after careful consideration, have come to the conclusion that the application cannot succeed. It is accordingly dismissed with costs. The matter was not without complexity, and even without Mr Freund remarking that it must have been so for Applicant to brief Mr Kennedy, a senior counsel, I would have been persuaded that it is indeed a matter in which the costs to be awarded justify costs consequent upon the employment of two counsel.

[64] The order of this Court is therefore the following:-

(a) The application is dismissed with costs.

(b) Applicant is ordered to pay costs, such costs to include the costs consequent upon the employment of two counsel.

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D B NTSEBEZA

Acting Judge of the Labour Court of South Africa

Date of Hearing: 24 JULY 2003

Date of Judgment: .....

For the Applicant: **P KENNEDY SC**

Instructed by: **MACROBERT INCORPORATED**

For the First Respondent: **MR FREUND** and **MR GRAHAM**

Instructed by: **BRIAN BLEAZARD ATTORNEYS**