IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

Reportable
CASE NO **D102/06**

DATE
2006/06/26

In the matter between

I E L MOSLEMANY
Applicant

and

UNILEVER PLC 1ST Respondent

UNILEVER SA FOODS
2ND Respondent

JUDGMENT DELIVERED BY
THE HONOURABLE MADAM JUSTICE PILLAY
ON 26 JUNE 2006

ON BEHALF OF APPLICANT: MR M PILLEMER SC
(Instructed by Brett Purdon Attorneys)

ON BEHALF OF RESPONDENTS: MR A WINCHESTER SC

(Instructed by Deneys Reitz Inc)

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JUDGMENT 26 JUNE 2006

PILLAY D, J

[1] The applicant was employed within the Unilever Group since 1980. During his employment he was engaged in various assignments throughout the world in terms of specific contracts. The most recent such contract was concluded on 25 February 2003 in terms of which he was appointed Head of Development with Unilever Best Foods, South Africa and North Africa, Middle East and Turkey Business Group (AMET Foods Solutions) based in South Africa. The appointment was made by the first respondent on behalf of AMET. It is recorded on the letterhead of the first respondent that the period of appointment was for 2 to 3 years. This contract of employment will be referred to as "(the) contract".

[2] During October 2005, the respondents purported to terminate the applicant's contract by retrenching him with effect from 31 January 2006. The applicant resists the termination on the grounds that the first respondent, represented by Kurt Matter, the applicant's immediate superior, had allegedly agreed to allow him to be employed on local terms in Ireland on a lower grade 3 level until May 2007, when he would qualify for early retirement and certain other terms. This agreement will be referred to as "(the) disputed agreement".

[3] Matter admits that the respondent engaged in discussions with the applicant to explore the options of his early retirement or redundancy, but denies that any agreement was concluded on the terms contended for by the applicant.

[4] The applicant launched this application for a declarator to confirm the terms of the disputed agreement and to interdict the respondents to prevent them from terminating his employment and rights to residence.

[5] The respondents undertook not to terminate the applicant's services "until this urgent application has been determined in the Labour Court". On the basis of the undertaking, the parties obtained an order adjourning the matter *sine die* and directing the exchange of further affidavits.

[6] The parties jointly approached the Registrar for dates for referring certain disputes of fact for oral evidence. The Registrar allocated dates for the end of August 2006 for this purpose. Thereafter the parties arranged 15 July 2006 for argument on certain matters on the papers. This judgment relates to those matters.

[7] The five matters are jurisdiction, urgency, balance of convenience, the existence of a clear right and the availability of appropriate alternative remedy. None of these defences was specifically pleaded. Consequently the evidence, especially on the issue of jurisdiction, is sketchy.

[8] The respondents request that these matters be dealt with finally. The Court accedes to this request. However, its determination is based on the limited facts available and the inferences drawn from them in the absence of any express admissions or denials of fact pertaining to the five challenges specifically.

The Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy

[9] The context in which this matter arises is that it is a labour dispute involving multinational enterprises (MNEs). In November 2000 the International Labour Organisation (ILO) adopted the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (the Declaration). The ILO uses the term "multinational enterprise" to designate the various entities (parent companies or local entities or both, or the organisation as a whole) according to the distribution of responsibilities among them. The aim of the

Declaration is, on the one hand, to encourage the positive contribution which multinational enterprises can make to economic and social progress and, on the other hand, to minimise and resolve the difficulties to which their various operations may give rise. Difficulties arise from the complexity of MNEs. Unravelling their diverse structures, operations and policies sometimes give rise to concern either in the home or in the host countries, or in both.

[10] This observation applies precisely to the situation in this case. The contract was issued on the letterhead of the first respondent. The notice of termination was issued on the second respondent's letterhead. The applicant was employed by the first respondent, but rendered services to AMET whose status, apart from being described as a business group, is unclear. Its scope of responsibility and its relationship with the respondents is also not disclosed fully.

[11] The applicant reported to Matter. However, Matter is employed by neither the first nor the second respondent, yet he, Matter, deposed to the answering affidavit. Both Matter and the Human Resources staff of the second respondent were involved in discussions with the applicant regarding the termination of the contract and

the disputed agreement. The relationship between the respondents, in particular, who has authority over whom and what their respective rights and obligations are in relation to the applicant is obscure. The respondents should not be allowed to draw any advantage from this obfuscation as that would defeat the spirit and purpose of the Declaration.

[12] The ILO anticipates that MNEs will co-operate and provide assistance to one another to facilitate observance of the principles laid down in the Declaration (clause 6). One such tenet is that MNEs as well as national enterprises should seek to establish voluntary conciliation and arbitration machinery to assist in the prevention and settlement of industrial disputes between employers and workers (clause 59). If that had been done in this case the parties could have been well on their way to resolving the dispute substantively instead of perambulating as they now are around procedural issues. As far as possible, Courts should opt to exercise jurisdiction and overcome procedural issues so that disputes can be resolved substantively as soon as possible.

[13] The Declaration is more than aspirational. It is as much a tool for regulating the effects of globalisation on

employment as it is a weapon for holding MNEs and other stakeholders accountable for upholding and promoting the standards set in the Declaration. Although neither party relied on the Declaration, the court is obliged to have regard to it as it forms part of International Labour law which is binding on South Africa as a member of the ILO.

Jurisdiction

[14] Mr *Winchester* SC, for the respondents, contended that the Labour Court of South Africa has no jurisdiction over the Irish Pension Fund because -

(a) it is a foreigner (*peregrinus*);

(b) it is not cited as a party to the proceedings.

Consequently, a declarator that the applicant will remain a member of the Fund until early retirement, was not competent.

[15] In the opinion of the court, the applicant's membership of the Fund is dependent on his employment with the first respondent. In that context the relief he seeks to protect his pension, is appropriate.

[16] As Mr *Pillemer* SC for the applicant points out, no dispute exists with the Fund and no relief is claimed against it. The declaratory order regarding membership of the Fund

is therefore not beyond the jurisdiction of this Court. (discussed further below)

[17] Mr *Winchester* submitted that the Court also does not have jurisdiction because -

(a) the applicant and the first respondent are *peregrini*;

(b) the declaratory relief claimed is such that it will not be enforceable. The test for jurisdiction is the Court's power to grant effective orders and the relief claimed will not meet that test. Mr *Winchester* referred to the following cases in support of these submissions -

South Atlantic Islands Development Corporation Limited v Buchan 1971 (1) SA 235 (C);

Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in liquidation) 1987 (4) SA 883 (A);

Makoti v Brodie and Others 1988 (2) SA 569 (B);

Metlika Trading Limited and Others v Commissioner, South African Revenue Services 2005 (3) SA 1 (SCA);

(c) the contract in dispute was concluded in Israel, to be performed in Ireland. Accordingly, there is no connection to South Africa.

[18] Jurisdiction is "the power vested in the Court by law to

adjudicate upon, determine and dispose of a matter". (C F Forsyth, Private International Law - the Modern Roman-Dutch Law including the Jurisdiction of the Supreme Court 3rd edition, 149.) A Court has jurisdiction in a matter if it has the power not only to take cognisance of the suit but also to give effect to the judgment. (*Veneta Mineraria* above at 891-893.) The doctrine of effectiveness arises from the practical consideration that a Court must have control over the defendant or its property; otherwise its decisions would be little more than theoretical propositions. (Forsyth 150). But effectiveness is not the only consideration. Thus, even if the procedural impediment of effectiveness can be overcome by the machinery of an arrest, something more is required for a Court to exercise jurisdiction where both parties are peregrine and submit to the jurisdiction of the Court (*Veneta Mineraria* above). Convenience, for example, can be a basis for an action being launched in a place where the cause of action arises. (Forsyth 150.)

[19] The challenge to jurisdiction in this case is pitched at three levels -

- jurisdiction over persons;
- territorial jurisdiction arising from cause; and
- subject-matter jurisdiction regarding the relief.

Jurisdiction over Persons

[20] The Court has jurisdiction over *incolae* but not over *peregrini* because effect can be given to its orders against the former but not the latter. (*Veneta Mineraria* above; *Jamieson v Sabingo* 2002 (4) SA 49 (SCA); *Hay Management Consultants (Pty) Ltd v P3 Management Consultants (Pty) Ltd* 2005 (2) SA 522 (SCA) - para 24 at 529I-J.)

[21] To acquire jurisdiction over *peregrini*, there has to be an arrest or attachment of the person or property of the peregrine to found or confirm jurisdiction. Or, the peregrine can submit to the jurisdiction of the Court. Plaintiffs always submit to the Court in which they institute proceedings. (*American Flag plc v Great African T-Shirt Corporation CC*; *American Flag plc v Great African T-Shirt Corporation CC; in re ex parte Great African T-Shirt Corporation CC* 2000 (1) SA 356 (W).)

[22] If either party submits to the jurisdiction of the Court an attachment to found or confirm jurisdiction would be neither necessary nor permissible. (*Hay Management Consultants* above: *American Flag* above.)

[23] In *Jamieson* above, the SCA pointed out that:

"This was because a judgment given by a court against a *peregrinus* who has submitted to its jurisdiction would be internationally enforceable and will, for example, be recognised by the court of the judgment debtor's domicile. A judgment founded on a voluntary submission to jurisdiction by the defendant is in many ways better than a judgment founded on an attachment where the defendant has not appeared and contested the suit. Such a judgment binds only the property attached and has no extra-territorial force and obligation. (Paragraphs 24 and 25 at 58D-E, H-I and F-G.)".

[24] Where both parties are peregrine a submission by the defendant to the jurisdiction of the Court was held not to be enough; one or more of the traditional grounds of jurisdiction had also to be present. Effectively, peregrine cannot confer jurisdiction on Courts by consent. (*Veneta Mineraria* above.)

[25] It is common cause that the first respondent submitted to the jurisdiction of the Court when it consented to action being instituted in South Africa and papers being

served on it at the offices of its South African attorney. Furthermore, it undertook to stay the termination of employment "until the application was determined by the Labour Court". In so saying, the respondent consented, not merely to the jurisdiction of a South African Court, but specifically to the Labour Court.

[26] As the dispute concerns the alleged breach of a contract of employment, if any South African Court has jurisdiction, it would be the Labour Court in terms of Section 77(3) of the Basic Conditions of Employment Act 75 of 1997.

[27] Whether the applicant and first respondent are *peregrine* or *incolae* was not specifically pleaded. The Court is confined to drawing such inferences as are necessary from the facts not in dispute.

[28] The first respondent has its principal place of business in London. AMET, a business group of the first respondent has its head office in Kwazulu-Natal. The applicant was contracted to work for the first respondent by rendering services to AMET in South Africa. The dispute arose out of the applicant's employment in South Africa. The location of the principal place of business of a company or partnership is sufficient to confer jurisdiction of the

Court over those entities. (*Metlika* above). AMET is neither a company nor a partnership. It has no legal personality separate from the first respondent. As a business group dedicated to rendering services in South Africa, there is no reason why its location should not be a sufficient connecting factor as much as the location of a partnership or a company is regarded as a connecting factor. MNE's should not be allowed to evade liability by blockading themselves with new and evolving forms of corporate entities. Furthermore, a company incorporated outside South Africa, which has its principal place of business abroad but which does some business in South Africa, is deemed to be resident in South Africa. (Forsyth 182-183; Pollak 99.) Provided that the cause of action arises from the company's local activities, the company will be regarded as an *incolae*. (Forsyth 183 fn 284.) Residence makes a litigant an *incolae*, that is, a person belonging to the Court's area of jurisdiction. (Forsyth 184-185.)

[29] The applicant resides and works in KwaZulu-Natal and has done so since 2003. It can be inferred therefore that at least for the duration of the contract he intended to be resident in KwaZulu-Natal. During the negotiations leading to the disputed agreement and termination of employment, the "repatriation" of the applicant to

Ireland was canvassed. The probabilities are therefore that the applicant is an expatriate of Ireland resident in KwaZulu-Natal. As the first respondent does business in South Africa through AMET which is in KwaZulu-Natal, it is also resident in KwaZulu-Natal.

[30] As all the litigants are resident in South Africa, they are *incolae*. The Court has jurisdiction over them. However, neither party canvassed residence specifically as a connecting factor for purposes of jurisdiction. Both counsel seemed to accept that the applicant and first respondent were *peregrini*. Because the parties did not discuss the issue and as the Court could be wrong in its conclusions, it proceeds to consider the other factors.

Territorial Jurisdiction over Causes

[31] The applicant's causes of action arise mainly from the respondents' alleged breach of the disputed agreement and secondarily from the termination of his employment under the contract.

[32] The disputed agreement was allegedly reached in Israel and confirmed in South Africa. There is a dispute about whether services were to be rendered in Ireland exclusively, or in Ireland and South Africa. In any case, the dispute is not about the services which are yet to be

rendered, but about the existence and the alleged breach of the disputed agreement.

[33] It is not evident where the contract was concluded. However, services were rendered in South Africa. The termination of the contract occurred in South Africa. Both respondents effected the termination of the contract. Mainly the first respondent negotiated with the applicant to secure his exit on mutually acceptable terms; the second respondent participated in terminating the contract and on the applicant's version, in breach of the disputed agreement. The second respondent issued the letter of termination.

[34] Furthermore, the respondents alleged that the second respondent is the applicant's employer. The applicant accepts that the second respondent could be his employer jointly with the first respondent and responsible for administering the contract.

[35] As the second respondent is an *incolae*, there is no dispute that the Court has jurisdiction over it. Whether a foreign Court will have jurisdiction over it, was not specifically canvassed. The possibility of similar jurisdictional disputes arising before a foreign Court, cannot be excluded if this Court refuses to accept

jurisdiction. Furthermore, the involvement of the respondents in the applicant's employment is so intricately enmeshed, that to separate the actions against them is likely to result in injustice, not only because of the inevitable delay, but also in the substantive outcome of the matter. (*Spiliada Maritime Corp v Consulex Ltd, The Spiliada* 1986 3 All ER 843, 1987 (AC) 460, 1986 3 WLR 972 (HL); *Lubbe & Four Others v Cape (Plc)* 2000 All ER 268 (HL) 269a-b, 274j-275c.)

[36] In the circumstances, the Court finds that the causes of action arose as a result of his employment which was within the area of jurisdiction of the Court. As such, his employment confers jurisdiction on the Court.

Jurisdiction regarding the Relief

[37] The first order sought is a declarator to confirm the terms of the disputed agreement. The remaining orders are in the form of prohibitory interdicts to prevent the termination of the applicant's employment by retrenchment or otherwise and his occupation of his residence at any time before May 2007.

The Court may grant a declarator in labour disputes if -

(a) the claimant has an interest in an existing, future or contingent right or obligation; and

(b) there are interested parties on whom the order will be binding; and

(c) there are causes arising in the sense of legal proceedings arising; or

(d) no consequential relief is sought, there are sufficient connecting factors between the Court and the matter before it; or

(e) consequential relief is sought, the Court is satisfied that its order can effectively be enforced. (David Pistorius Pollak on Jurisdiction 2nd ed 153 – 154; Forsyth 230; *African Bank Ltd v Weiner & others* 2004 (6) SA 570 (C) 27-39.)

[38] In this case all the parties have an interest in the rights and obligations that form the subject of this dispute. For reasons discussed above, there are sufficient connecting factors between the Court, the parties and the causes of action. The applicant does not expressly claim any consequential relief in this application. The prohibitory interdict is not consequential upon, but additional to the declarator. The possible causes arising from the declarator could be the enforcement of the disputed agreement if it is proved. The declarator without consequential relief falls within the scope of the Court's jurisdiction. The Court can grant prohibitory interdicts if it has control over the respondents. (Forsyth 212-213.)

This is so even if the interdict prohibits the commission of an act abroad as that would not infringe the sovereignty of the other State. (Pistorius above, 116.) For as long as the respondents wish to remain in South Africa, they will have to abide by a prohibitory interdict.

Other Procedural Challenges

[39] The respondents raise for the first time in their heads of argument challenges to the urgency of the matter, the absence of a clear right, the balance of convenience and the absence of an appropriate alternative remedy. The moment for raising these challenges to the application was when it was first enrolled. That moment has been overtaken by the respondents' undertaking not to terminate the applicant's employment until this application is finally determined. Furthermore, the Court was not invited to consider these issues before the parties arranged trial dates with the Registrar. The respondents did so without any reservation of their rights to raise these objections later.

[40] The order that the Court grants is the following:

(a) The objections on the grounds of the lack of jurisdiction of the Court, the urgency of the matter, the absence of a clear right, the balance of convenience and the availability of an alternative

remedy are dismissed with costs.

(b) The matter is referred for oral evidence in terms of the Draft Order submitted to the Court by consent.

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Judge D Pillay

Date: 18 August 2006