IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: C455/16 & C790/16

In the matters between:

SCHENKER SOUTH AFRICA (PTY) LTD **Applicant**

and

LAURENCE JEANNE ROBINEAU **First Respondent**

D. DU PLESSIS *N.O*. **Second Respondent**

H. MOSCOWITZ *N.O*. **Third Respondent**

Heard: 25 April 2018;

Delivered: 28 August 2018

Summary: Review of a jurisdictional ruling made subsequent to referral from CCMA to a Bargaining Council in terms of section 147 of the LRA and the reversion of the dispute to the CCMA in terms of section 51 (4) of the LRA; on a reading of LAC judgments in *Qibe v Joy Global Africa (Pty) Ltd: In re Joy Global Africa (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others (2015) 36 ILJ 1283 (LAC)* and *National Education Health & Allied Workers Union on behalf of Kgekwane v Department of*

Development Planning & Local Government, Gauteng (2015) 36 ILJ 1247 (LAC) the decision to refer a matter to a bargaining council in terms of section 147 amounts to a ruling which cannot be simply overturned by referral back to the CCMA in terms of section 51(4) of the LRA; the jurisdictional ruling and subsequent award by the CCMA therefore stand to be set aside; the Court also finding that this order would apply in any event, should its reading of the LAC judgments be incorrect based on the incorrect application of the law to the question of extra-territorial jurisdiction in this case.

JUDGMENT

RABKIN-NAICKER J

[1] In this judgment, I will first deal with the opposed review application of a jurisdictional ruling under case number C455/16. That matter was consolidated with case number C790/16, being a review of an arbitration award issued once the jurisdictional ruling confirmed that the CCMA had jurisdiction over the dispute. The latter review will be considered should I find that the CCMA had jurisdiction to hear the dispute between the parties. In deciding whether the Commissioner seized with the jurisdictional issue (the second respondent) was correct[1] in his finding, I will have regard to all the pleadings placed before me in this consolidated application, as well as the documents and submissions filed of record.

[2] In addition to the submissions and documents that were before me when the matter was argued in this Court, I asked for further submissions from the parties on 9 July 2018. I took this step given that neither party had addressed a jurisdictional question evident from some of the documents filed of record. These documents reflected that the dispute was first referred to a Bargaining Council, the CCMA having found it did not have jurisdiction. At the Bargaining Council, a ruling was issued stating that it did not have jurisdiction to hear the dispute. The

[1] See Uber SA Technology Services (Pty) Ltd v National Union of Public Service & Allied Workers & others (2018) 39 ILJ 903 (LC) in which the LAC jurisprudence on the applicable review test is succinctly set out in paragraphs 62 -64

matter was then referred back to the CCMA in terms of section 51(4) of the Labour Relations Act (LRA) and an arbitration was set down where a jurisdictional question raised by the applicant was dealt with by Second Respondent (turning on the CCMA's extra-territorial jurisdiction) and was decided in first respondent's favour.

[3] The material part of my directive was as follows:

> "1. Judge Rabkin-Naicker has requested that the parties to clarify the issue that the CCMA originally found it lacked jurisdiction in this matter on 8 December 2015 and the matter was then referred to the Bargaining Council.
>
> 2. The parties are requested to file short submissions in this regard and in particular on the status of the decisions made at the CCMA on 8 December 2015, and that made by the National Bargaining Council for the Road Freight Industry. Such submissions may attach any relevant documentation not in the records before me or refer to documents in those records."

[4] The parties duly filed submissions to assist the Court. On behalf of the first respondent (who was *dominus litus* at the CCMA and the Bargaining Council), it was submitted that the telefax informing the parties that the dispute had been referred to the Bargaining Council by the CCMA on 8 December 2015, which advised that "we do not have jurisdiction to conciliate this dispute":

4.1 Did not amount to a jurisdictional ruling by a competent decision maker of the CCMA in that Ms Wanza, who signed the letter is a staff member employed in the CCMA's Case Management office and not a Commissioner who is empowered to make a ruling on jurisdiction.

4.2 Was not adjudicatory in nature and was simply a clerical function, "apparently based on her (erroneous) reading of the 7.11 referral document".

4.3 That 'Ms Wanza's decision' did not amount to an administrative act since inter alia it did not have a direct, external, legal effect on the parties.

[5] The transfer of matters from the CCMA to a Bargaining Council is governed by section 147 of the LRA. For the purposes of this judgment it is useful to set out the section in full:

> "147 Performance of dispute resolution functions by Commission in exceptional circumstances
>
> (1) (a) If at any stage after a dispute has been referred to the Commission, it becomes apparent that the dispute is about the interpretation or application of a collective agreement, the Commission may-
>
> (i) refer the dispute for resolution in terms of the procedures provided for in that collective agreement; or
>
> (ii) appoint a commissioner or, if one has been appointed, confirm the appointment of the commissioner, to resolve the dispute in terms of this Act.
>
> (b) The Commission may charge the parties to a collective agreement a fee for performing the dispute resolution functions if-
>
> (i) their collective agreement does not provide a procedure as required by section 24 (1); 38 or
>
> (ii) the procedure provided in the collective agreement is not operative.
>
> (c) The Commission may charge a party to a collective agreement a fee if that party has frustrated the resolution of the dispute.
>
> (2) (a) If at any stage after a dispute has been referred to the Commission, it becomes apparent that the parties to the dispute are parties to a council, the Commission may-
>
> (i) refer the dispute to the council for resolution; or
>
> (ii) appoint a commissioner or, if one has been appointed, confirm the appointment of the commissioner, to resolve the dispute in terms of this Act.
>
> (b) The Commission may charge the parties to a council a fee for performing the dispute resolution functions if the council's dispute resolution procedures are not operative.
>
> (3) (a) If at any stage after a dispute has been referred to the Commission, it becomes apparent that the parties to the dispute fall within the registered

scope of a council and that one or more parties to the dispute are not parties to the council, the Commission may-

(i) refer the dispute to the council for resolution; or

(ii) appoint a commissioner or, if one has been appointed, confirm the appointment of the commissioner, to resolve the dispute in terms of this Act.

(b) The Commission may charge the parties to a council a fee for performing the dispute resolution functions if the council's dispute resolution procedures are not operative."

(4) (a) If a dispute has been referred to the Commission and not all the parties to the dispute fall within the registered scope of a council or fall within the registered scope of two or more councils, the Commission must resolve the dispute in terms of this Act.

(b) In the circumstances contemplated in paragraph (a), the Commission has exclusive jurisdiction to resolve that dispute.

(5) (a) If at any stage after a dispute has been referred to the Commission, it becomes apparent that the dispute ought to have been referred to an accredited agency, the Commission may-

(i) refer the dispute to the accredited agency for resolution; or

(ii) appoint a commissioner to resolve the dispute in terms of this Act.

(b) The Commission may-

(i) charge the accredited agency a fee for performing the dispute resolution functions if the accredited agency's dispute resolution procedures are not operative; and

(ii) review the continued accreditation of that agency.

(6) If at any stage after a dispute has been referred to the Commission, it becomes apparent that the dispute ought to have been resolved through private dispute resolution in terms of a private agreement between the parties to the dispute, the Commission may-

(a) refer the dispute to the appropriate person or body for resolution through private dispute resolution procedures; or

(b) appoint a commissioner to resolve the dispute in terms of this Act.

(6A) For the purpose of making a decision in terms of subsection (6), the Commission must appoint a commissioner to resolve the dispute-

(a) if an employee earning less than the threshold prescribed by the Minister, in terms of section 6 (3) of the Basic Conditions of Employment Act, is required to pay any part of the cost of the private dispute resolution procedures; or

(b) if the person or body appointed to resolve the dispute is not independent of the employer.

(7) Where the Commission refers the dispute in terms of this section to a person or body other than a commissioner the date of the Commission's initial receipt of the dispute will be deemed to be the date on which the Commission referred the dispute elsewhere.

(8) The Commission may perform any of the dispute resolution functions of a council or an accredited agency appointed by the council if the council or accredited agency fails to perform its dispute resolution functions in circumstances where, in law, there is an obligation to perform them.

(9) For the purposes of subsections (2) and (3), a party to a council includes the members of a registered trade union or registered employers' organisation that is a party to the council."

[6] The characterisation of the function performed by the CCMA in section 147 was considered by the Labour Appeal Court in *Qibe v Joy Global Africa (Pty) Ltd: In re Joy Global Africa (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[2] . The Court stated that:

"[6] Section 147 of the LRA provides a statutory exception to the rule that the CCMA may not pronounce upon its own jurisdiction. Where the disputing parties fall under the jurisdiction of a bargaining council, the CCMA will not have jurisdiction unless jurisdiction has been conferred on the CCMA in terms of the provisions of s 147 of the LRA……

[7] As recently held by this court in *Kgekwane*:

'Section 147 of the LRA makes provision for the performance of dispute-resolution functions by the CCMA in exceptional circumstances, in order

[2] (2015) 36 ILJ 1283 (LAC)

to avoid delays that might otherwise be caused by jurisdictional disputes. The section, accordingly, confers a choice on the CCMA whether to resolve a dispute that has been erroneously referred to it or whether to redirect it to the proper forum.'

In terms of subsections (2) and (3) of s 147 of the LRA respectively, if at any stage after a dispute has been referred to the CCMA, it becomes apparent (or evident) that the parties to the dispute are parties to a bargaining council or that the parties to a dispute fall within the registered scope of a bargaining council but one or more of the parties are not parties to that council, the CCMA may either refer the dispute to that bargaining council for resolution or appoint a commissioner, or if one has already been appointed, confirm the appointment of such commissioner to resolve the dispute."

[7] The Labour Appeal Court (LAC) in *Qibe* found that the court *a quo* had erred in its interpretation of section 147(2)(a)(i) of the LRA in the following dictum:

"[9] I am, however, of the view, that the Labour Court erred in interpreting subsection (2)(a)(i) of s 147 of the LRA as empowering a commissioner to refer a dispute to a bargaining council, once it becomes apparent to him or her that the parties to the dispute are parties to a bargaining council. To reiterate, s 147(2) and (3) of the LRA properly interpreted mean that if, at any stage after a dispute is referred to the CCMA, it becomes apparent to the CCMA or its delegate (or the commissioner hearing the matter) that the parties to the dispute are parties to a bargaining council or fall within the registered scope of a bargaining council, but one or more of them are not parties to the council, it is then for the CCMA or its delegate (and not the commissioner hearing the matter when this is ascertained) to determine whether to refer the matter to the bargaining council or to appoint a commissioner to determine the dispute or, if one has already been appointed, to confirm his or her appointment. Thus, in the current matter, once the respondent had placed its founding affidavit before the commissioner, in the rescission application, contending that it was a member of the MEIBC and that the appellant fell within its registered

scope, he was required in terms of s 147(3)(a) of the LRA to request the CCMA management to make a ruling on whether to refer the dispute to the MEIBC for resolution, or whether he could continue to determine the dispute. This was not a decision for the commissioner to make."

[8] In *National Education Health and Allied Workers Union on behalf of Kgekwane v Department of Development Planning and Local Government, Gauteng* [3] the LAC dealt with the election made by the CCMA in terms of section 147(3)(a)(i) and (ii) of the LRA:

> "[19] …. where the CCMA elects to appoint a commissioner to arbitrate the dispute or to confirm the appointment of one who has already been appointed, the matter may then proceed as the CCMA has jurisdiction to determine that dispute. **However, where the CCMA elects to refer the matter to the bargaining council, it ceases to have jurisdiction over the matter and the dispute which is before it therefore lapses**." (own emphasis)

[9] The applicant argued in its additional submissions that the CCMA was *functus officio* in that it had made a decision that was final when it referred the dispute to the Bargaining Council. The first respondent submits that the decision referring the matter to the Bargaining Council did not adversely affect any rights and had no direct legal, external effect and the doctrine of *functus officio* did not apply.

[10] However, the doctrine is not confined to the definition of administrative action as suggested on behalf of the first respondent. In *PT Operational Services (Pty) Ltd v Retail and Allied Workers Union on behalf of Ngweletsana* [4] the Labour Appeal Court referred with approval to an article by D M Pretorius entitled *'The Origin of*

[3] (2015) 36 ILJ 1247 (LAC).

[4] (2013) 34 ILJ 1138 (LAC).

the Functus Officio Doctrine, with Specific Reference to Its Application in Administrative Law', [5] as follows:

"[24] Pretorius explains the *functus officio* doctrine as follows:

'The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter. This rule applies with particular force, but not only, in circumstances where the exercise of such adjudicative or decision-making powers has the effect of determining a person's legal rights or of conferring rights or benefits of a legally cognisable nature on a person. The result is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker. However, this is not an absolute rule. The instrument from which the decision-maker derives his adjudicative powers may empower him to interfere with his own decision. Furthermore, it is permitted to make variations necessary to explain ambiguities or to correct errors of expression in an order, or to deal with accessory matters which were inadvertently overlooked when the order was made, or to correct costs orders made without having heard argument on costs. This list of exceptions might not be exhaustive and a court might have discretionary power to vary its orders in other cases. However, this power is exercised very sparingly, for public policy demands that the principle of finality in litigation should generally be preserved rather than eroded.

The same considerations that require finality for the decisions of courts of law apply to the decisions of administrative authorities. Consequently, the *functus officio* doctrine applies in administrative law as it does in relation to curial proceedings. In elementary terms, the effect of the *functus officio* doctrine in administrative law is that an administrative agency which has finally performed all its statutory functions or duties in relation to a

[5] (2005) 122 SALJ 832 at 832-3.

particular matter subject to its decision-making jurisdiction has exhausted its powers and has discharged its mandate in relation to that matter. Consequently, such an agency is without further authority as far as that matter is concerned because its duties and functions have been fully accomplished. Thus, an administrative agency which is *functus officio* is unable to retract or change its own earlier decision, unless it is authorised by its enabling legislation to do so."

[11] The first respondent referred to section 51(4) of the LRA in its submissions, arguing that this section is peremptory. Section 51 provides in material part as follows:

"51 Dispute resolution functions of council

(1) In this section, dispute means any dispute about a matter of mutual interest between-

(a) on the one side-

(i) one or more trade unions;

(ii) one or more employees; or

(iii) one or more trade unions and one or more employees; and

(b) on the other side-

(i) one or more employers' organisations;

(ii) one or more employers; or

(iii) one or more employers' organisations and one or more employers.

(2) (a) (i) The parties to a council must attempt to resolve any dispute between themselves in accordance with the constitution of the council.

(ii) For the purposes of subparagraph (i), a party to a council includes the members of any registered trade union or registered employers' organisation that is a party to the council.

(b) Any party to a dispute who is not a party to a council but who falls within the registered scope of the council may refer the dispute to the council in writing.

(c) The party who refers the dispute to the council must satisfy it that a copy of the referral has been served on all the other parties to the dispute.

(3) If a dispute is referred to a council in terms of this Act and any party to that dispute is not a party to that council, the council must attempt to resolve the dispute-

(a) through conciliation; and

(b) if the dispute remains unresolved after conciliation, the council must arbitrate the dispute if-

(i) this Act requires arbitration and any party to the dispute has requested that it be resolved through arbitration; or

(ii) all the parties to the dispute consent to arbitration under the auspices of the council.

(4) If one or more of the parties to a dispute that has been referred to the council do not fall within the registered scope of that council, it must refer the dispute to the Commission. (*emphasis mine*)

(5) The date on which the referral in terms of subsection (4) was received by a council is, for all purposes, the date on which the council referred the dispute to the Commission."

[12] Can section 51 (4) of the LRA be read to encompass a situation in which the CCMA has already referred the matter to a Bargaining Council in terms of section 147 of the LRA? The LAC jurisprudence referred to above, which binds this Court, does not support such an interpretation. According to the LAC authority, the referral to the Bargaining Council by the CCMA involves an election not to assume jurisdiction by the CCMA in terms of section 147 of the LRA, which has the consequence that its jurisdiction over the dispute lapses. The election is a

"ruling" made by the CCMA in the performance of one of its functions. It cannot be the case that section 51(4) of the LRA reinstates the CCMA jurisdiction. Rather, it has to be read as a provision dealing with a referral which was made to a Bargaining Council at first instance, and not received from the CCMA in terms of section 147.

[13] In view of the above, it is the Court's view that the CCMA was *functus officio* when the matter was remitted to it as it had ruled that it had no jurisdiction to hear the dispute. However, if my reading of the LAC judgments cited above is incorrect, this Court's order will not be affected thereby. This is because even on the assumption that the CCMA's jurisdiction had been resuscitated, Second Respondent's ruling on the issue of extra-territorial jurisdiction stands to be set aside in any event.

Background to the jurisdictional ruling review

[14] The applicant is an affiliated company of Schenker AG (the German Company). It operates its business through various branches in South Africa. Until August 2013, the business mainly involved general logistics comprising a range of global transportation and logistics solutions inclusive of ocean freight, air freight, land distribution, contract logistics and warehousing.

[15] With the discovery of oil and gas reserves in the northern regions of Mozambique, the applicant proposed to the German Company that it should consider opening a Schenker operation in Mozambique.

[16] Prior to September 2013, the applicant was involved in general logistics in Mozambique through a "partner", Imago, but had no involvement or skills and/or expertise in relation to the provisioning of logistics and/or clearing and forwarding in the oil and gas industry.

[17] In March/April 2013, the applicant consequently approached the first respondent (Robineau), an expert skilled in logistics in the oil and gas industry, with the intention of appointing her as general manager to establish Schenker's Mozambique operation. Prior to her appointment, she was asked to prepare a

business plan and there were negotiations between the applicant and Ms Robineau regarding the terms of her employment.

[18] On 21 June 2013, the applicant and Ms Robineau entered into a written fixed-term contract in terms of which Ms Robineau's employment commenced on 1 September 2013 and terminated on 30 June 2016. This was referred to as the 'South African contract' in submission before me. The applicant relied on the South African contract to terminate its relationship with Ms Robineau.

[19] The parties had also entered into a second contract on 23 June 2013, referred to as "the Mozambique contract" which on first respondent's version, was entered into, in order for Ms Robineau to obtain a work permit in Mozambique. That contract provides in clear terms that the labour law of Mozambique applies to all issues arising from its application or interpretation. It also contains a clause that its terms are: "the entire agreement between the Parties on the subject matter and supersedes all previous arrangements herein." This contract provides for employment of Ms Robineau as general manager in Mozambique from 1 December 2014 to 30 July 2016.

[20] There was also an addendum to the South African contract signed by the parties which appears to have been prepared in December 2014 and signed in February 2015. This addendum is not contained in the 'jurisdictional' record which served before the second respondent and in the records filed before me. It is however to be found in the record of the arbitration before the third respondent. The addendum reads as follows in material part:

> "1. This addendum in reference to the primary agreement dated 19 June 2013[6], between the parties that are named therein and as amended here.
>
> 2. The undersigned parties do hereby agree to make the following changes and/or additions as outlined below.
>
> 3. It is agreed that the employee is employed by Schneker South Africa (Pty) Ltd in Mozambique and the employment relationship and all matters

[6] The date of Robineau's letter of appointment to which the first contract was attached.

> pertaining thereto will be governed by and be subject to all laws in Mozambique including labour, immigration and taxation laws.
>
> 4. The employee's agreed place of residence (home and office) will be Pemba, Mozambique, the cost of which will be borne by Schenker SA."

[21] It was undisputed that Ms Robineau is a French citizen and had not paid any taxes in South Africa as a result of her appointment. She was paid in US Dollars by the applicant into an overseas bank account. She has not been resident in South Africa.

[22] According to the approach taken by Ms Robineau's representatives in this Court and in the CCMA, the contractual terms I have highlighted above are not relevant to a determination as to whether the CCMA had jurisdiction to hear Ms Robineau's alleged unfair dismissal dispute. As the Second Respondent wrote in the Jurisdictional Ruling:

> "14. Advocate Leslie referred me to various ways in which the question as to whether the CCMA has jurisdiction could be approached. It is not necessary to approach it by way of an international contract and thus in terms of Private International Law."

[23] The case law referred to at the jurisdictional hearing and the approach reflected above, was also relied on before this Court. Mr Leslie, appearing for Ms Robineau cited the cases of *Astral Operations Ltd v Parry*[7] and *Monare v SA Tourism and Others*[8] in particular. It was submitted that the "locality of the undertaking test" must be applied to establish that the CCMA had jurisdiction to hear the dispute. The Second Respondent heeded this advice. This Court needs to consider whether the locality of the undertaking test applies notwithstanding the fact that the contracts entered into between the parties expressly recorded that the laws of Mozambique will govern the employment relationship between them.

[7] (2008) 29 ILJ 2668 (LAC).
[8] [2016] 2 BLLR 15 (LAC); (2016) 37 ILJ 394 (LAC).

[24] It must be stated at the outset that the judgments in *Monare* and *Astral* matters fall to be distinguished. The said cases did not concern an employment contract that specifically provided for a foreign law, (in *casu* Mozambique law) to apply. Nor as in this matter, did the employees in those cases approach a tribunal in another country (in *casu* in Mozambique) after the termination of the employment relationship, and before approaching the CCMA with an unfair dismissal claim[9]. In addition, the LAC in those matters did not deal with a CCMA decision on jurisdiction. In *Monare* the question of jurisdiction was not in issue at the CCMA. In *Astral*, the LAC per Zondo JP (as he then was), recorded that it was common cause between the parties that the contract between them made no reference to the employment relationship being governed by a legal system other that South African law.[10]

[25] Mr Leslie cautioned against an excursus into the principles of private international law in this matter on the premise that the application of the "locality of the undertaking test" applies to matters in which the extra-territorial jurisdiction of the CCMA is at issue, and on first respondent's submission the undertaking was located in South Africa. However, I find no authority for the proposition that the test is applicable to every matter in which the issue of extra-territorial arises, whatever the facts and circumstances. The contracts of employment in this case brooked no ambiguity as to what law applied to the employment relationship between the parties i.e. the law of Mozambique. The parties explicitly agreed this in the various employment contracts they entered into. In such circumstances, private international law principles do not arise. It is well established that effect must be given, if the terms of a contract permit, to the obvious intention and agreement of the parties. That applies no less to choice of law and chosen forum clauses in contracts.[11]

[9] The determination of that dispute was dated 12 November 2015.
[10] This is recorded in paragraph 6 of the judgment.
[11] See: *Iran Dastghayb, MV Islamic Republic of Iran Shipping Lines v Terra-Marine* SA 2010 (6) SA 493 (SCA) at 34.

[26] In all the circumstances, both the ruling and award must be set aside. Given the first respondent is an individual and sought to defend a ruling and award in this Court which had been made in her favour, I exercise my discretion not to make a costs order in this matter. My order is as follows:

Order

1. The Jurisdictional Ruling and Arbitration Award under case number WECT 18509/15 are reviewed and set aside.

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H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances

For the Applicant: GL Van Der Westhuizen instructed by Prinsloo Inc
For Third Respondent: GA Leslie instructed by Bernadt Vucik Potash & Getz