IN THE LABOUR COURT OF SOUTH AFRICA HELD AT BRAAMFONTEIN

CASE NO.: JR1890/03

In the matter between:

YOKOGAWA SOUTH AFRICA (PTY) LIMITED **Applicant**

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **First respondent**

MS RAFEE N.O. **Second respondent**

DAVID KITCHEN **Third respondent**

JUDGMENT

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. LANDMAN J:

Yokogawa South Africa (Pty) Limited (Yokogawa SA) applies in terms of s 158(1)(g) of the Labour Relations Act 66 of 1995 to review and set aside the ruling issued by the second respondent, a commissioner of the Commission for Conciliation, Mediation and

Arbitration, the third respondent, on 11 August 2003 which held, inter alia, that a contract of employment was entered into and concluded between Yokogawa SA and Mr David Kitchen, the third respondent.

The facts

Yokogawa South Africa is a wholly owned subsidiary of Yokogawa Europe BV (Yokogawa Europe). Yokogawa Europe nominated their Manager European Human Resources, Mr Ben Wesseling to assist its erstwhile President Mr Hans Dik in the recruitment of a new Managing director for Yokogawa SA. Mr Kitchen was presented to Messers Wesseling and Dik as a possible candidate. He attended a first interview in South Africa and a subsequent interview at the premises of Yokogawa Europe in Amersfoort, the Netherlands. Mr Kitchen was found to be the most appropriate candidate. A "Management Agreement" was signed by Mr Dik on 18 September 2002 and sent to Mr Kitchen for his signature. Mr Kitchen signed the agreement and returned it on about 23 October.

Mr Kitchen's official commencement date of employment was confirmed as being 1 October. A letter dated 14 October informed Mr Kitchen that he was required to take up his responsibilities on 21 October to give the representatives of Yokogawa Europe the opportunity to introduce him in a proper manner to the employees of Yokogawa SA.

Between 14 and 21 October Messers Hauptmeijer and Wesseling became aware that a number of Yokogawa SA's customers in South Africa were unwilling to deal with Mr Kitchen if he were appointed as Managing Director. One customer indicated in writing that Mr Kitchen would not be welcome on their premises.

This was a cause for concern. Messers Wesseling and Hauptmeijer determined that the negotiations with Mr Kitchen would be put on hold and the “offer of employment” would be suspended until they had had a proper opportunity to investigate the complaints and contrary indications from its customers.

It was accordingly decided that Mr Hauptmeijer would not meet with Mr Kitchen on 21 October. Accordingly he would not confirm his appointment and introduce him to the Yokogawa SA’s employees.

On 23 October Mr Hauptmeijer in a telephonic discussion with Mr Kitchen, conveyed the decision to Mr Kitchen. On 25 October Mr Kitchen addressed an e-mail to Messrs Wesseling and Hauptmeijer in which he stated that he was "continuing to offer myself for duty in the position of M.D."

On 30 October Mr Hauptmeijer ensured that Yokogama SA’s were instructed to deal with this matter. The attorneys accordingly wrote to Mr Kitchen on 1 November. The contents of that correspondence were marked "without prejudice".

Mr Kitchen alleged that he had been unfairly dismissed on 4 November 2002. He referred a dispute to the CCMA. The arbitration took place on 15 July 2003 and 5 August 2003. Yokogawa SA raised the following in limine points at the commencement of the arbitration proceedings:

(a) Whether a contract of employment was entered into and concluded between the Applicant and the Third Respondent.

(b) Whether the Third Respondent was an employee of the Applicant.

c) Whether the CCMA had jurisdiction to adjudicate the dispute.

Yokogawa SA submits that the commissioner, in ruling that a contract of employment was entered into and concluded between it and Mr Kitchen was an employee of Yokogawa SA,:

(a) failed to apply, or properly apply, his mind to the relevant issues;

(b) arrived at his decision arbitrarily;

(c) ignored relevant considerations;

(d) took irrelevant considerations into account;

(e) made decisions which are themselves so grossly unreasonable as to warrant the inference that he had failed to properly apply his mind to the matter;

(f) dealt with evidence selectively and only considered facts which supported his ultimate decision that the contract of employment existed and that Mr Kitchen was an employee of Yokogawa SA;

(g) committed a latent gross irregularity by ignoring the vast body of evidence, presented by both Yokogawa SA and Mr Kitchen, which supported a finding that the parties were engaged in ongoing negotiations and that no final contract of employment existed;

(h) made decisions which were not justifiable in relation to the reasons given for them; and

(i) failed to properly apply the law in respect of both the conclusion of a contract and the definition of an employee.

Evaluation

This review is concerned with the existence of a jurisdictional ground. The CCMA may entertain the dispute between the parties only if an employment relationship exists between them. In my opinion a single point of law needs to be decided. It is therefore unnecessary for me to traverse all the grounds of review.

In order for Mr Kitchen to invoke the jurisdiction of the CCMA he must show that he is an employee of Yokogawa SA. Mr Kitchen has produced a signed agreement between himself and Yokogawa Europe, the sole shareholder of Yokogawa SA.

I am prepared to assume that this agreement is a complete and full one and that there are no issues that are left open for negotiation. The agreement between Mr Kitchen and Yokogawa Europe does not, on its own, constitute a contract of employment between him and Yokogawa SA. It is a contract for the benefit of a third party namely Yokogawa SA. Should Yokogawa SA accept it, it will become a contract of employment between itself and Mr Kitchen.

Mr Kitchen has not shown that the board of Yokogawa SA accepted or ratified the contract. The result is that he has not shown that he is an employee of Yokogawa SA

in terms of a contract of service. The parties certainly did not contemplate that Mr Kitchen would become an employee in the absence of a contract of employment. It is therefore entirely inappropriate to examine the presumptions in s 200A of the LRA.

I need not decide whether Mr Kitchen will have any redress as regards Yokogawa Europe. If he has any redress, it will not be in the CCMA.

In the result the commissioner's ruling must be reviewed and set aside.

I make the following order:

1. The ruling issued by the second respondent on the 11 August 2003 under Case No GA39002-02 in the Commission for Conciliation, Mediation and Arbitration is reviewed and set aside and replaced by a ruling that Mr David Kitchen is not an employee of Yokogawa South Africa (Pty) Ltd and therefore the CCMA has no jurisdiction to entertain his dispute.

2. The third respondent is to pay the costs of this application with the exclusion of the costs associated with the affidavits of Ms U A Ferreira and Ms G Frangou.

SIGNED AND DATED AT PRETORIA THIS 25TH DAY OF SEPTEMBER 2004.

A A Landman
Judge of the Labour Court

Date of hearing: 2 September 2004

Date of judgment: 25 September 2004

For applicant: Adv DW van der Westhuizen instructed by Nomsa Mbileni & Joyce Tohlang Attorneys

For third respondent: Mr R Carr of Bowman Gilfillan