

**IN THE LABOUR COURT OF SOUTH AFRICA  
(HELD AT BRAAMFONTEIN)**

CASE NO. JR 789/06

In the matter between:-

LUCKMANN, JOHN ARTHUR

APPLICANT

AND

STONE, PAT N.O.

1<sup>ST</sup> RESPONDENT

COMMISSION FOR CONCILIATION  
MEDIATION AND ARBITRATION

2<sup>ND</sup> RESPONDENT

DEMOCRITUS (PTY) LTD

3<sup>RD</sup> RESPONDENT

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JUDGMENT

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**MOKGOATLHENG AJ**

Introduction

[1] This is an application to review and set aside the jurisdiction ruling made by the First Respondent on the 1<sup>st</sup> of March 2006, when he determined that the Second Respondent does not have jurisdiction to arbitrate the alleged unfair dismissal of the Applicant by the

Third Respondent.

[2] The Applicant on the 8<sup>th</sup> August 2005 referred a dismissal dispute to the Second Respondent alleging that his dismissal by the Third Respondent on the 31<sup>st</sup> of July 2005 did not comply with section 188 & 189 of the Labour Relations Act 66 of 1995 “the Act”, and sections 20, 29, 37, 40, 76, 79, 81 and 90 of the Basic Conditions of Employment Act.

[3] The Third Respondent in response instituted an interlocutory application contending that the Second Respondent lacked jurisdiction to arbitrate the dismissal dispute.

[3] The Third Respondent’s deponent a French nation permanently resident in South Africa Benoit Allanic who in the founding affidavit alleges that;

(a) the Applicant was appointed as an assistant project manager by the Third Respondent on the 1<sup>st</sup> November 2002, on a one (1) year renewable contract,

- (b) the Applicant would be paid 7350 Euro tax free per month,
- (c) the Applicant was to render services in France on a project, as instructed by the Third Respondent's client, and
- (d) the Respondent was entitled to return to Johannesburg from Paris every six months for leave purposes.

[4] Benoit Allanic states that, pursuant to the incorporation of the Third Respondent in Mauritius, the Third Respondent discussed the operational changes with the Applicant which were necessitated by this incorporation, that consequently it was resolved that;

- (a) The Third Respondent was to pay the Applicant his remuneration by depositing such into Applicant's bank account held in a Mauritian Bank.

[5] The Third Respondent avers that the Applicant was employed by a

Mauritian Company and rendered services in France in accordance with an international contract, which did not specify which jurisdiction would govern the contract and adjudicate disputes arising there from as between employer and employee.

- [6] The Respondent stated that the Applicant was paid in Mauritius bank account, that consequently no tax was deducted in terms of South African tax legislation.
- [7] The Respondent contends that the Applicant was rendering services in France when his employment contract was terminated, that consequently the employment contract was terminated in France.
- [8] The Respondent stated that in France, the Applicant paid certain social security benefits stipulated by the French Law, pertaining to,
- (a) unemployment,
  - (b) retirement, and
  - (c) family benefits.
- [9] The Third Respondent states that it paid the Applicant's share and

its share of these social contributions which amounted to € 3089.37 per month, that consequently the Second Respondent lacks jurisdiction to determine the dismissal dispute.

[10] The Applicant in his answering affidavit alleges that;

- (a) he is an Australian citizen with permanent resident status in South Africa and resides in Johannesburg,
- (b) The contract of employment with the Third Respondent was entered into and signed in Johannesburg by himself and the Third Respondent's management director *A Campos de Carvalho* in the offices of the Third Respondent on the 2<sup>nd</sup> Floor, 377 Rivonia Boulevard, Rivonia, Johannesburg on the 1<sup>st</sup> November 2002, witnessed by Dr R Madams the Third Respondent's manager,
- (c) his employer was Democratus (Pty) Ltd registration no. 002047/07 registered on 10 April 1989 of 2<sup>nd</sup> Floor, 377

Rivonia Boulevard, Rivonia, Johannesburg with its Board of Directors comprising of *AM Campos de Caevallo* (French), SK Togo and J Jungree.

[11] The Applicant states that he was instructed by *Campos de Carvalho* and Robert Madam that he will report at the project site in France under supervision of the Third Respondent's project manager Allain Rolland. He says that he never reported to ANDRA, the Third Respondent's client in France.

[12] The Applicant denies that the Third Respondent discussed neither operational changes, nor the reasons for the registration of a new company in Mauritius with him and says that he never signed a contract to give effect to the operational changes as claimed by the Third Respondent.

[13] The Applicant states that the Third Respondent paid his salary into his account at the Standard Bank South Africa.

[14] The Applicant states that the third respondent paid his accommodation in France.

[15] The Applicant denies that he was ever employed by an entity named Democritus (a Mauritius Company) in Mauritius.

[16] The Applicant states that in terms of paragraph 2 (1), 4 and (5) (c) of the Fourth Schedule and section 10(1)(0) of the Income Tax Act.

i) he was rendering services in France and was out of Africa for a period exceeding 183 full days during and 12 months period exceeding 60 full days during that period, it was the reason that he was not eligible for taxation in South Africa.

ii) The third respondent served him notice to terminate his contract on the 22<sup>nd</sup> June 2005 together with a proposal for retrenchment at the Third Respondent's offices in Revonia Johannesburg, that consequently the Second respondent has jurisdiction to arbitrate the dismissal dispute.

### The Evidence

[18] The affidavit of the parties and annexure these being;

- (a) The contract of employment entered into and signed on the 1<sup>st</sup> of November 2002,
- (b) Undated payment slips of the Applicant's salary of 7350 Euro,
- (c) Letter of transfer instructions by Campus de Carvalho to Barclays Bank PLC Harbour front, Building, 8 Floor, Port Louis Mauritius dated the 26<sup>th</sup> January 2005 instructing Barclays Bank PLC to transfer 7350.00 Euro to the Applicant in France for payment of his January 2005 salary. This letter states further that in the event there are any queries, please do not hesitate to contact our Mr Neel Daya at our Johannesburg office on tel. 27(0)11 808 3000 or by fax 27 (0) 11808 3001, your prompt assistance will be appreciated, yours faithfully. *A Campus de Carvalho*  
Managing Director,



- (d) Letters of transfer instructions by *A Campus de Carvalho* dated,
  - (i) 6 June 2005 for the 1 May 2005 salary,
  - (ii) Accommodation allowance for May 2005 of 1580.00 transfer instruction dated 6 June 2005,
  - (iii) Transfer instruction in respect of July 2005 salary dated 28 July 2005,

- (e) Letter dated the 3 February 2003 by Robert Madams to the Applicant in France whose the salient contents are;

“I am writing this letter to keep you informed of a number of administrative issues that have surfaced with respect to your residential status in France. Firstly I need to let you know that ANDRA have requested us to write to them a letter confirming that at the end of the contract you will be repatriated to South Africa.

ANDRA needs this letter to present to the French authorities in order to obtain a temporary residence permit for you... from the feedback we have obtained this could be interpreted

(as having members of Applicants family staying permanently in France) by the French Authorities as *de facto* evidence that your main residence is in France. In this could be consequences in terms of payment of French Tax and social security. In the light of this we suggest that you make use of the return air ticket back to South Africa that we provided for in terms of your contract every six months.

Lastly, ANDRA had begun to make payments into your French bank account for your accommodation. However in order to avoid you being seen as having a regular income in France, we have now taken the decision to make your payment for accommodation into your French bank account from our bank account. We are therefore invoicing ANDRA for your accommodation and making payment. ANDRA will no longer be making these payments to you”

- (f) Democritus (Pty) Ltd certificate of incorporation is issued on the 10<sup>th</sup> of April 1989 with *A Campus de Carvalho* and Botha A J as directors.

The organ gram of reporting structure

[19] The Applicant denies reporting to Andra and states that he reported to Allan Roland the Third Respondent's project manager in France.

[20] The Applicant denies that the Third respondent was registered in Mauritius on the 30<sup>th</sup> of December 2003 and has annexed a certificate of incorporation of the Third Respondent in South Africa,

[21] The salary advices of the Applicant issued by the Third Respondents for the months

- i. February 2004
- ii. March 2004
- iii. April 2004
- iv. May 2004
- v. November 2003
- vi. January 2004 were paid – South Africa.

[22] The letter addressed by the Third Respondent to the Applicant dated the 22<sup>nd</sup> of June 2005 reads as follows;

Re: Your Retrenchment:

REASONS

[23] As set out in your initial contract of employment of the 1<sup>st</sup> of November 2002, your contract was subject to the renewal of the project by the client. We alerted you on the 29<sup>th</sup> of April 2005 to the decision by ANDRA to scale down the terms of experts is seconded by Democritus to the Bure underground laboratory. Our letter followed consultation with the whole team organised by our team manager at Bure, Mr Allan Rolland. It is necessary to institute formal retrenchment procedure with you. Alternatives at this juncture we are not aware of any viable alternatives which exist to your retrenchment, but the purpose of the process which we have embarked is to solicit your input and obtain from you such proposals as you may wish to make regarding what alternatives you think exist.”

[24] The letter has the following headings,

- (a) number of employers affected, “two positions i.e. yours and

one of Mr Koekemoer, and

(b) Proposed selection criteria.

It is proposed that experience be the determining factor unfortunately you do not hold as much appropriate mining experience as the other experts retained,

#### TIMING

[25] As outlined to you in our letter dated the 29<sup>th</sup> of April 2005, it is envisaged that the termination of your contract would be effected on the 31<sup>st</sup> of July 2005.

#### SEVERANCE PAY

[26] The Labour Relations Act provides for payment of severance for one week for every completed year.

## PROCEDURE

[27] The Labour Relations Act envisages a process in terms of which we engage in a meaningful joint consensus seeking process and it is in this spirit that this letter is addressed to you.

### Evaluation of Evidence and Argument

[28] The merit in the Applicant's contention that the First Respondent in refusing the application by the Applicant to adduce *viva voce* evidence was a violation of the Audi Alter an Principle, or that such refusal amounted to a failure by the by the First Respondent to exercise his discretion in a judicial manner.

[29] The fact that the parties agreed in a pre-arbitration minute that the Third Respondent would raise the jurisdictional issue in *limine* by way of an application, and that the Applicants former legal representatives did not at this stage indicate that he intended to make an application to introduce *viva voce* evidence, did not preclude the First Respondent from entertaining an application by the Applicant's new set of legal representatives to introduce further

documentation adduce *viva voce* evidence.

[30] The First Respondent is enjoined in section 138(2) of “the Act”, in dealing with the substantial merits of the dispute to allow a party to the dispute to give evidence, call witness, and to question the witnesses of any other party in order to properly exercise discretion in a judicial manner upon a consideration of all relevant facts.

[31] The First Respondent was obliged to enquire into the relevance of the oral evidence, and further document in relation to the primary issue he had to determine. The failure to undertake such an enquiry immasculates his judicial exercise discretion, and it cannot therefore be said that in making his decision, he made same upon the consideration of all relevant facts.

[32] The First Respondent does not in his ruling give reason for refusal of the Applicant’s application. The Applicant is in law entitled to such reasons. The First Respondent is in law obliged to give such reasons. I concur with the Applicant’s submission that the absence of reason, or, at the very least, the absence of a justifiable reason renders the First Respondent’s exercise of his judicial discretion to be commuted as arbitrary due to the failure to properly apply his mind and consider all the relevant facts before making his decision. See *Woolworths (Pty) Ltd v Whitehead (2000) 6 BLLR 640 (LAC)*

*at para 128.*

[33] The Third Respondent's jurisdictional objection was premised on the basis that prior to the Applicant's retrenchment, the latter's contract of employment was transferred to a Mauritian entity of the same name in the Third Respondent's affidavit.

[34] There is no evidence that the Applicant's contract of employment was ever transferred to a Mauritian entity bearing the same name as the Third Respondent.

[35] The First Respondent identified the issue as the crux of the jurisdiction dispute, but did not determine whether the Applicant was ever employed by a Mauritian Company bearing the same name as the Third Respondent.

[36] The Third Respondent does not allege that the Applicant's contract of employment was transferred to the Mauritian entity by the consent of the latter, because it certainly could not occur by the operation of law. The Third Respondent was not despite the Applicant's denial, pleaded the terms of the purported agreement or transfer of the Applicant's contract of employment to the Mauritian entity.

[37] The First Respondent was in essence enjoined to determine whether at the relevant time the dispute arose, the Third Respondent was the Applicant's employer as contemplated by section 1 of "the Act". The First Respondent was enjoined to



determine whether an employment relationship existed between the parties.

[38] In interpreting section 1 of “the Act”, one is obliged to apply the golden rule of construction restated by Joubert JA in *Adampol (Pty) Ltd v Administrator Transvaal* 1989(3) SA 800 at 804B.

[39] The enquiry whether an employment relationship exists encapsulates whether the Third Respondent exercised a right to supervision and control over the Applicant. This enquiry entails that the terms of the contract of employment should be analysed and considered, because it is in terms of the contract that which determine the employment relationship. See *Smit v Workmans Compensation Commissioner* 1979(1) SA 51(A) at 62D.

[40] The enquiry the First Respondent was enjoined to conduct is to consider the indicia of the parties relationship which dependent on the provisions of the contract in question as a whole, that is “a review of those factors which may tend to indicate the object of the contract” to weigh up the factors as against each other in order to determine where the dominant impression reposes. See *Borchards v C W Pearce and J Sheward t/a Lubrite Distributors* (1993) 14 ILJ 1262 LAC, *Dempsey v Home and Property* (1995) 16 ILJ 378

*LAC.*

### The Award

[41] The First Respondent found that; “the intention of the parties in the original contract of employment was for the Applicant to be paid in foreign currency and for the Applicant to be subject to the relevant SARS regulations regarding foreign work” is not rational and is not connected to the evidential material before him.

### The Contract

[42] The contract was signed in Johannesburg at the Respondent’s offices.

[43] The contract of employment is between the Applicant of 48 First Avenue Westdene and Democritus (Pty) Ltd of 377 Rivonia Boulevard Rivonia.

### Remuneration

[45] The Applicant is to paid remuneration of Euro 7350.00 tax free (provided you adhere to the relevant SARS regulations concerning foreign based work). The Applicant’s salary was to be paid in ZAR directly into bank of your choice.

### Air Travel

[46] The Third Respondent pays for the Applicant's return economy air fare from Johannesburg to Paris (start finish of contract) plus a return airfare from Paris to Johannesburg every six months for leave.

### Leave

[47] The Applicant was entitled to annual leave of ten working days every two months on site, plus all applicable holidays.

### Working Hours

[48] The Applicant was expected to work a maximum of 40 hours per week under normal conditions additional work maybe required under exceptional circumstances. You will be expected to complete a time sheet.

### Termination

[49] The Applicant's appointment was subject to one calendar month's notice in writing either by him. Either party had to the right to terminate the contract without notice, for any cause recognised by law as sufficient.

[50] In my view the Third Respondent exercised control over the Applicant even though the former sub-contracted the latter's services to its French client. ANDRA, that is the dominant feature

of the employment.

[51] The Applicant was paid by the Third Respondent in South African Rands, and was subject to South African Tax Laws and regulations. The Third Respondent paid the Applicant's tax in France, through its client ANDRADA.

[52] The Third Respondent has not shown that an entity with a similar name was incorporated in Mauritius. The Third Respondent has not shown that this purported Mauritian entity entered into contract of employment with the Applicant.

[53] In my view the First Respondent misdirected himself by finding that the CCMA had no jurisdiction to adjudicate the matter.

[54] In the premises:

- (a) The First Respondent's ruling made on the 1<sup>st</sup> of March 2006 is set aside.
- (b) It is declared that the Second Respondent has jurisdiction to adjudicate the dismissal dispute between the parties.
- (c) The Third Respondent is ordered to pay the Applicant's costs.

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**MOKGOATLHENG AJ**

ACTING JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

Date of hearing : 24<sup>th</sup> October 2006

Date of Judgment :

Appearance

For the Applicant : Adv. G Fourie

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