IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

CASE NO: J2857/07

In the matter between:

KRUSE, HANS ROEDOLF Applicant

and

GIJIMA AST (PTY) LIMITED Respondent

Judgment

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[1] The applicant, Hans Roedolf Kruse, claims payment of the amount of R704 945-88 from the Respondent. No evidence was led at the trial. Instead, the parties argued their respective cases on the basis of an agreed statement of facts.

The Facts

[2] This statement of facts reads as follows:

"

1.1. The applicant became employed by the respondent as a result of the respondent acquiring the ITI business of Iscor as a going concern with effect from 31 July 1998. Section 197 of the LRA applied to the

transaction, and the employment of the applicant was transferred to the respondent in terms of such transaction.

1.2. *The applicant had 33 years service with Iscor at the time of the transfer. The respondent refused to recognize such length of service of the applicant with Iscor, as length of service in the respondent.*

1.3. The applicant actually commenced work for the respondent on 1 September 1998.

1.4. Finally, and in respect of employment with the respondent, and with effect from 1 April 2000, the applicant was transferred to the AST Distributed Technology division of the respondent's on the ABSA contract.

1.5. The applicant's employer from 1 September 1998 was AST-A Holdings (Pty) Ltd and later renamed Gijima AST Holdings (Pty) Ltd, being the respondent cited in the heading.

1.6. Within the AST Group of companies was a Namibian company known as GijimaAst Information Technology Service (Pty) Ltd. This company traded as AST Namibia and is hereinafter referred to as AST Namibia.

1.7. AST Namibia conducted business only in Namibia, and was in fact a Namibian registered company and corporate entity under registration number 99/465. The registered office and principal place of business of AST Namibia was in Windhoek in Namibia.

1.8. In November 2001, the applicant and the respondent agreed that the applicant commence work with AST Namibia.

1.9. The agreement between the applicant and the respondent was confirmed in a letter issued to the applicant on 22 November 2001. The salient terms of the letter are as follows:

1.9.1. The minimum period of appointment would be two years, but this could be for three years;

1.9.2. The respondent would provide a number of instances of financial assistance to relocate the applicant and his wife to Namibia;

1.9.3. The applicant's medical aid be transferred to Medscheme in Namibia;

1.9.4. The existing retirement and provident fund provisions of the applicant would remain unchanged (contributions to continue to be made to the Funds resident in South Africa);

1.9.5. The applicant's length of service would remain unchanged.

1.10. *Upon request of the applicant, the applicant was also informed at the time by the respondent that when he at any stage be transferred back to South Africa, his relocation costs back to South Africa will be paid by the respondent.*

1.11. The applicant's medical aid was transferred to Medscheme in Namibia, being a Namibian medical aid, along with his wife as dependant on the fund, with effect from 1 March 2002.

1.12. The applicant's salary payment was also transferred to the Namibian payroll, and paid after the transfer by AST Namibia.

1.13.The applicant was registered as a Namibian taxpayer and for the payment of income tax in Namibia, with his own Namibian income tax reference number.

1.14.The applicant opened a bank account in Windhoek in Namibia and his salary was paid every month in Namibian $ into this bank account as aforesaid, after the deduction of payment of income tax in Namibia to the Receiver of Revenue in Namibia.

1.15.As from 1 February 2002, the applicant only worked for AST Namibia, being a Namibian company, in Namibia itself. The applicant did not do any work, or occupy any position, in the Republic of South Africa, with any other company in the AST Group, with effect from such date.

1.16.The applicant remained employed by AST Namibia for longer than the minimum initial envisaged employment period of three years.

1.17.The applicant's annual salary reviews after transfer in 2002 to AST Namibia were conducted by AST Namibia's management, in Namibia.

1.18.In April 2006, AST Namibia restructured. The applicant was affected and after consultation with him, the applicant opted for voluntary retrenchment.

1.19.The agreed retrenchment of the applicant was effected in Namibia and in terms of Namibian law. In terms of this process the Labour Commissioner in Namibia was advised on 25 April 2006 of the retrenchment as well as the terms of the retrenchment, and the effective date of retrenchment being 31 May 2006, for approval.

1.20.The Office of the Labour Commissioner in Namibia responded on 27 April 2006 requesting further information.

1.21.AST Namibia responded on 2 May 2006, providing further information. The applicant's retrenchment was then approved by the Namibian Labour Commissioner on the terms as set out.

1.22.A tax directive was requested from the Receiver of Revenue in Namibia in respect of the deduction of taxation from the final payment, including severance pay, due to the applicant, pursuant to the retrenchment.

1.23.A tax directive was issued by the Receiver of Revenue in Namibia, on 17 May 2006, prescribing the taxation to be deducted from the final payment due to the applicant.

1.24.An agreement was signed between the applicant and Roger Lawrence, the chief executive officer of AST Namibia, on 22 May 2009, in terms of which the applicant's employment was terminated with effect from 31 May 2006. This agreement recorded inter alia that the termination was effected in terms of the procedural requirements of the Labour Relations Act 6 of 1992 of Namibia, and approved by the Labour Commissioner in terms of such Act. The agreement also recorded that the applicant did not waive his rights to pursue the payment of severance pay for Iscor years of service.

1.25.The applicant's employment was thus terminated in Namibia from an employer in Namibia, being AST Namibia. The applicant's final payment was effected in Namibian $, in which currency he was remunerated throughout, and taxation was deducted in Namibia and paid to the Receiver of Revenue in Namibia. The applicant's employment was also terminated in terms of Namibian law.

1.26. *The applicant was issued with a certificate of service, recording that he was employed by GijimaAst Information Technology Service (Pty) Ltd (being AST Namibia), as from 1 November 1998 to 31 May 2006.*

1.27. The applicant was paid severance pay in an amount equivalent to two weeks' salary for every year of service from 1 November 1998 to 31 May 2006, by AST Namibia.

1.28. *In May 2007 the Labour Appeal Court handed down judgment in the matter of* ***AST Holdings v Andre Roos*** *(2007) 28 ILJ 1988 (LAC), in terms of which it was determined that the length of service of employees of AST that were transferred from Iscor in terms of the transaction as set out above, had to be recognized by AST when calculating severance pay.*

1.29. The applicant then filed the statement of claim in this matter in the Labour Court in Johannesburg on 18 January 2008. The applicant's claim is brought in terms of Section 77(3) of the BCEA.

1.30. The applicant claims severance pay from the respondent in terms of the statement of claim, for the period of 33 years the applicant was employed with Iscor.

1.31. *The parties finally agree that the bundle of documents submitted in this matter, being a bundle containing 260 pages, shall be admitted as evidence before the Court and shall referred to by the parties in argument."*

Issues Requiring Determination by this Court

[3] The agreed statement of facts sets out the issues that I am required to determine as follows:

> *"2.1 Based on the above facts, the Court is to decide whether it has jurisdiction by determining whether this is a matter concerning a contract of employment in terms of Section 77(3) of the BCEA.*
>
> *2.2 Should the above Honourable Court determine that the dispute falls within the ambit of Section 77(3) of the BCEA, the above Honourable Court will be required to determine whether the applicant should have instituted proceedings against AST Namibia in Namibia, for payment of the claimed severance pay, and as a matter of law, whether it was not competent to institute the claim in the Labour Court in South Africa.*
>
> *2.3 Should the Court determine both the above two issues in favour of the applicant, the parties agree that the applicant be awarded severance pay in the sum of R704 945-88.*
>
> *2.4 The Court will be required to determine the issue of costs."*

The Essential Facts

[4] From the above statement of agreed facts the following facts may be extracted as being directly relevant to the issues that I am required to determine.

[5] The applicant was formerly employed by the respondent.

[6] On 22 November 2001 and whilst he was still employed by the respondent, the

applicant and the respondent agreed that the applicant would take up employment with AST Namibia. As part of this agreement the respondent undertook "*that the applicant's length of service would remain unchanged".* Pursuant to this agreement the applicant took up employment with AST Namibia.

[7] Both the respondent and AST Namibia were part of the AST group of companies.

[8] With effect from 31 May 2006 the applicant was retrenched by AST Namibia. This retrenchment was effected in terms of Namibian law and approved by the Namibian Labour Commissioner.

[9] The terms of this retrenchment were recorded in a written agreement between the applicant and AST Namibia (the retrenchment agreement).

[10] In terms of the retrenchment agreement the applicant was paid severance pay for the period 1 November 1998 to 30 May 2006, that is for the period he had been employed by the respondent in South Africa in addition to the period he had been employed by AST Namibia. He was not paid severance pay for the period of prior employment with Iscor. The applicant had worked for Iscor for 33 years before his transfer to the respondent in terms of section 197 of the Labour Relations Act, 1995 ("the LRA").

The Applicant's Claim

[11] The applicant does not claim severance pay arising out of his retrenchment in

Namibia. What he does claim is damages from the respondent for its failure to meet its undertaking to ensure that the full period of service would be recognised for the purposes of the calculation of severance pay in the event of his retrenchment in Namibia. The distinction is important.

[12] I am not asked to decide whether the claim of the applicant has merit.

[13] I am asked instead to determine two issues:

13.1 First, whether the applicant's claim falls within the ambit of sections 77(3) of the Basic Conditions of Employment Act, 1997 ("the BCEA"). In other words I am asked to determine whether the applicant's claim is a: "*matter concerning a contract of employment …"*

13.2 Second, I am asked to determine whether the applicant ought to have pursued his claim in Namibia against AST Namibia or whether the applicant may bring his claim in the Labour Court in South Africa.

[14] I will deal with each issue in turn.

The First Issue: The Scope of Section 77(3) of the BCEA

[15] The following considerations are relevant to this issue:

15.1 The claim concerns an alleged breach of an agreement entered into between the

applicant and the respondent.

15.2 At the time the agreement was entered into the applicant was employed by the respondent.

15.3 The agreement concerned the terms upon which the applicant accepted a transfer of his employment to AST Namibia, a member of the group of companies of which the respondent was also a part.

[16] In University of the North v Franks and Others [2002] 8 BLLR 701 (LAC) the Labour Appeal Court had occasion to consider the scope of section 77(3) of the BCEA. The Labour Appeal Court was concerned with a dispute as to the existence or validity of a contract of retrenchment, the effect of which would be to terminate the contract of employment (at para [26]). For the purposes of this judgment I will refer to such an agreement as a "collateral agreement." In that case the Labour Appeal Court decided (at paras [29] and [30]) that the Labour Court did indeed have jurisdiction to determine a dispute concerning a collateral agreement.

[17] The Labour Appeal Court gave a wide interpretation to section 77(3) and stated: "*In short, the Labour Court is to have jurisdiction in respect of all employment contracts and exclusive jurisdiction in respect of some. But the jurisdiction is even wider. It is in respect of any matter concerning a contract of employment.*" (at para [29]) (own emphasis)

and

"In this appeal it is not necessary to decide exactly how wide the jurisdictional net is cast. The termination of an employment contract and the terms and conditions upon which this is to occur are clearly matters concerning such contracts. The Labour Court correctly held that it had jurisdiction." (at para [30]).

[18] A similar result was reached by Freund AJ in Inspektex Mmamaile Construction and Fire Proofing (Pty) Limited v Coetzee and Others (J1264/08 ZALC 94(1 September 2009) where it was decided that a dispute about the validity of a settlement agreement concluded by an employer and an employee fell within the meaning of "*any matter concerning*" a contract of employment and thus fell within the jurisdiction of the Labour Court in terms of section 77(3) of the BCEA.

[19] It is not necessary for me to delineate the precise limits of the jurisdiction afforded to this court by section 77(3) of the BCEA.

[20] Having regard in particular to the intention of the legislature as decided in Franks, above, and in particular to the words "*any*" and "*concerning*" in section 77(3) of the BCEA I am satisfied that the facts of this particular case fall within the ambit of section 77(3) and that accordingly this court has jurisdiction.

[21] It is clear from Franks that the ambit of section 77(3) of the BCEA is wide enough

to cover a collateral agreement, for example, one which has the effect of terminating a contract of employment. The ambit of section 77(3) is not limited to disputes directly concerning contracts of employment. Where there is a dispute about a collateral agreement which is not entered into between the parties to the employment contract rather but between the employee and a former employer (who was part of the same group of companies as the employer party) there is to my mind a sufficient basis for the invocation of section 77(3) of the BCEA.

[21] In argument it was submitted on behalf of the respondent that in order for a dispute concerning a collateral agreement in the sense described above to fall within the ambit of section 77(3) of the BCEA it had to be a contract between the parties to the employment agreement concerned. I disagree. There is nothing in section 77(3) which warrants such a limitation on its application.

[22] Accordingly, and subject to what is said below, I find that this court has jurisdiction in terms of section 77(3) of the BCEA to determine this dispute.

The Second Issue: Territorial Jurisdiction

[23] In contending that this court did not have jurisdiction to entertain the dispute and that the applicant's claim should rather have been brought in Namibia, the respondent relied principally on the decision of the Labour Appeal Court in Astral Operations Limited v Parry [2008] 29 ILJ 2668 (LAC).

[24] The applicant in that case, Parry, was employed by Astral Operations Limited

(African Operations). The relevant contract of employment was entered into in South Africa. The undertaking in which the employee worked in terms of this contract of employment was located in Malawi. The Labour Appeal Court held that the BCEA and the LRA had no application to a workplace outside South Africa since these acts had no extra-territorial jurisdiction. For this reason the BCEA and the LRA and in particular section 77(3) of the BCEA had no application.

[25] In Parry's case, his claim was based on a breach of the contract of employment, was for payment of salary in terms of the contract of employment and was for compensation for unfair dismissal from his employment. In addition, Parry brought a claim based on section 23 of the Constitution in respect of the employer's conduct in terms of that contract of employment.

[26] It will be noted that all the claims in Parry's case were based directly on the contract of employment, its breach or unfair conduct in relation thereto.

[27] Being bound by the decision in Astral Operations I have little doubt that had the applicant in the present case brought a claim for severance pay arising out of the termination of his contract of employment in Namibia against the respondent he would have been non-suited for the same jurisdictional reason that disqualified Parry.

[28] However that is not the applicant's claim in the present case. In the present case

the applicant relies on the collateral agreement entered into between himself and the respondent. He does not rely on the contract of employment. Rather, the conduct of AST Namibia in relation to his Namibian contract of employment is but one of the facts giving rise to the applicant's claim which is a claim for damages against the respondent for breach of its undertaking to ensure a particular outcome. On this basis the decision in Parry v Astral Operations Limited is distinguishable.

[29] Accordingly I find that where the matter to be determined is itself an agreement (in this case the collateral agreement) entered into in South Africa and where performance is contemplated by the parties to be carried out in South Africa this court has jurisdiction.

[30] In my view therefore, this is not a case of extra-territorial jurisdiction.

[31] Accordingly and in respect of the issues that I am required to determine, I find as follows:

31.1 This court has jurisdiction to determine this matter in terms of section 77(3) of the BCEA; and

31.2 In so far as the applicant claims damages for breach of a contract entered into between it and the respondent, it is competent for the applicant to bring such claim in the Labour Court in South Africa.

[32] This is a matter in which the costs should follow the result.

[33] Accordingly, I make the following order:

1 Both questions reserved for the decision of this court are answered in favour of the applicant.

2. The respondent is to pay the applicant's costs on the ordinary scale as between party and party.

DATED AT JOHANNESBURG THIS 8th DAY OF DECEMBER 2009.

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P J Pretorius AJ

Appearances:

For the Applicant: Adv. AP Landman

Instructed by: Jose Nascimento Attorneys

For the Respondent: Mr. S Snyman from Snyman Attorneys