

Foreign employers, foreign employees and remote workers and South African labour laws – do they always apply?

20 September 2023 5 min read

and Kelly Sease, Candidate Attorney

The Labour Relations Act (“**LRA**”) amongst other important functions, regulates the rights of employees whose contract of employment has been terminated and affords the employee the right to refer a dispute to the Commission for Conciliation, Mediation and Arbitration (“**CCMA**”) upon receipt of such notice.

However, the position of an employee who needs to rely on legal protection in terms of labour law within the framework of diplomatic immunity remains vulnerable in view of the limitation of their employment rights, and a recent case in the CCMA demonstrates that the mere fact that the employee works in South Africa, does not always mean that the employee can appeal to the LRA or other South African labour laws, if there is an employment dispute.

This is seen in the case of *Pitya v United States of America* [2023] (“**Pitya**”), where the court had to determine whether an employee employed by a diplomatic or consular employer was entitled to refer a claim in damages for an unfair dismissal to the CCMA.

In this case Pitya was employed as a visa assistant by a consulate which is part of the US Diplomatic mission to South Africa and component of the US Department of State.

The consulate assists US citizens with documentation related to their status and issuing of visas to non-US citizens. Pitya’s role involved various duties such as accepting, reviewing, and processing nonimmigrant and immigrant visa applications, and providing information to applicants, government officials and members of the US mission in regard to data entry and visa printing.

Pitya was dismissed from his position at the United States diplomatic mission to South Africa and dissatisfied with his dismissal, referred a claim for payment of money arising from his dismissal to the CCMA.

However, the CCMA ruled that it lacked jurisdiction to arbitrate the unfair dismissal dispute on the basis that the applicant’s employment was directly related to the sovereign powers of foreign state and that the employer enjoyed immunity under the Foreign States Immunities Act 87 of 1981 (“**Act**”).

On a review before the Labour Court, it found that the CCMA commissioner’s reasons in finding that the Act ousted the CCMA’s jurisdiction were correct.

The Labour Court considered the Act and held that it clearly regulated legal immunity that is afforded to foreign states to include “government of foreign states” and “any departments of the government” in terms of section 1 (2) (b) and (c) of the Act. Critically, the Labour Court recognized that the Act provides that *“a foreign state shall be immune from the jurisdiction of the courts of the Republic except as provided in this Act or any proclamation issued thereunder”* and that courts are required to *“give effect to the immunity conferred by the Act even though the foreign state does not appear in the proceedings under question.”*

Notably however, there are exceptions to the above rule which apply to contracts of employment, so that if –

- the contract of employment was entered into in the Republic, or the work is to be performed wholly or partly in the Republic;
- at the time when the contract was entered into the individual was a South African citizen or was ordinarily resident in the Republic; and
- at the time when the proceedings are brought the individual is not a citizen of the foreign state,

then the laws of South Africa will in fact apply.

However, this exception does not apply if the parties to the contract have agreed in writing that the dispute or any dispute relating to the contract is subject to the courts of a foreign state, or the proceedings relate to the employment of the head of a diplomatic mission or any member of the diplomatic, administrative, technical or service staff of the mission or to the employment of the head of a consular post or any member of the consular, labour, trade, administrative, technical or service staff of the post.

In light of the above, the Court found that Pitya in his capacity as a visa assistant was a *“consular, labour, trade, administrative, technical or service staff of the post”* which fell within the bounds of the exemption and that the CCMA, and the Labour Court lacked jurisdiction to entertain a referral on account that the employer enjoyed immunity.

This case is important in confirming the principal that mere physical presence of an employee in South Africa does not always subject them to South African labour laws.

In the *Pitya* case, this was due to the fact that the employee fell within the bounds of the diplomatic exemption.

However, the case points to and recognises a more general principal, which is also accepted in South African law and which is not dependant on one of the parties being a diplomatic or consular staff member, namely that if the parties to the employment contract agree on the application of a foreign legal system, and submit to the jurisdiction of the foreign legal system, and there are sufficient other factors pointing the foreign legal system, rather than South Africa, as having the stronger or better nexus to the employment relationship, then South African laws may not apply even if the place of work is South Africa.

Especially in the modern world of employment in which South Africa is fast being recognised as a destination of choice for remote workers, it is important for foreign employers that may seek to engage with or deploy a workforce to South Africa that, provided that the relevant contractual care is taken to align the employment relationship to the correct foreign system of law, South African labour laws do not always have to apply to the relationship.



Bradley Workman-Davies

Director

[View Profile](#)