

EMPLOYMENT

Who has territorial jurisdiction over labour disputes where there is a foreign element?

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and Kelly Sease, Candidate Attorney

Technology has contributed to a significant increase in global mobility, which has enabled the ability of organisations to transfer employees from one country to another and to employ employees in foreign companies which are registered and located in foreign jurisdictions while working remotely in a different jurisdiction to that of their employer.

The increasingly globalised and digitised world has thus heightened the relevance of global mobility to businesses, with implications in the realms of employment and immigration, which has raised the question of which country would have territorial jurisdiction to decide labour disputes between parties, where there is some foreign element applicable to the employment relationship.

The issue of whether or not a labour dispute falls within the territorial jurisdiction of the Labour Relations Act, 66 of 1995 (LRA) is an issue which was dealt with in the recent case of *Sorrell v Petroplan Sub-Sahara Africa (Pty) Ltd* (2023) 3 BLLR 271 (LC). The Labour Court had to determine whether or not the various claims of the employee fell within the Court's territorial jurisdiction under the LRA.

After a prior history of engagement by a company registered in the United Kingdom, and providing services to a company in the British Virgin Islands, the employee's function was to supervise operations in Mozambique in association with other Mozambican companies. The employee eventually became employed by a South African registered company, to perform the Mozambique related services, in Mozambique.

The employee was dismissed by the South African employer. The employee claimed that the dismissal amounted to an automatic unfair dismissal and referred the matter to the Commission for Conciliation Mediation and Arbitration (CCMA) and thereafter to the Labour Court.

The validity of the employment relationship and/or enforceability of the agreement between the parties was subject to several conditions, including that the employee had to obtain a Mozambican or South African visa, and that the place where the employee's services were to be performed would be in Mozambique. The employee's place of work was important, the Court held. In its determination the Court considered *Monare v SA Tourism and others* (2016) 37 ILJ 394 (LAC) (*Monare*) which primarily focused on the principles governing the determination of territorial jurisdiction.

Drawing from the principles adopted in *Monare* the Court held that the determination of territorial jurisdiction is to be determined by the locality of the undertaking being carried out by the company in which the employee is/was employed and not the employment relationship between the employer and the employee. The Court held that it is not the place where the employer conducts its business which determines the place of employment but instead the location of the actual workplace where the employee rendered services. The Court found that it did not, accordingly, have jurisdiction to determine the dispute.

Therefore, employers should be aware that the mere fact that they operate generally in South Africa, does not mean that every employee engaged by it will be entitled to the protection of South Africa and the forum of South African courts to adjudicate disputes which arise in the employment relationship. Other foreign factors which may point away from South Africa are important. In its territorial jurisdiction determination, the courts will consider various factors to determine whether a nexus between the employment contract and the country in question has been created.

The factors to be considered comprise a non-exhaustive list and a sufficient number of factors should be present to argue that South African law (such as the LRA) has jurisdiction over a particular employee.

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Bradley Workman-Davies

Director

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