

## THE JURISDICTION OF THE LABOUR COURT IN INTERNATIONAL EMPLOYMENT CONTRACTS IN RESPECT OF WORKPLACES OUTSIDE SOUTH AFRICA

### 1 Introduction

Does the Labour Court have jurisdiction to adjudicate disputes between a South African employer and a South African employee where the employee performs work for the employer in a foreign country? This is a question that should be considered, as one effect of globalisation is that South African employees are increasingly working for South African employers outside of South Africa. The difficulty is that the answer to the question is to be found in the area of private international law (conflict of laws) and that very few labour disputes involving private international law have been decided by South African courts (*Parry v Astral Operations Ltd* 2005 26 ILJ 1479 (LC) par 30).

In 2002 in *Kleynhans v Parmalat SA (Pty) Ltd* (2002 9 BLLR 879 (LC)) and in 2005 in *Parry v Astral Operations Ltd* (*supra*) the Labour Court held that it did have the necessary jurisdiction to adjudicate disputes where the workplace was outside South Africa, provided that certain requirements are met. However, in *Astral Operations Limited v Parry* (2008 29 ILJ 2668 (LAC)) the Labour Appeal Court overturned the decision of the Labour Court. Zondo J reasoned that both the Labour Relations Act and the Basic Conditions of Employment Act do not have extra-territorial application in terms of the presumption against extra-territoriality and that, as the workplace was outside South Africa, the Labour Court, which was created by these two acts, did not have jurisdiction to adjudicate the matter.

In this article I shall briefly discuss the four-stage private international law process of adjudication that should be followed in disputes where international employment contracts are involved. After that I shall discuss the judgments in *Parry v Astral* in the Labour Court and the decision in *Astral Operations v Parry* in the Labour Appeal Court as well as the effect of this decision. This will be followed by a discussion of the position regarding the jurisdiction of courts and tribunals adjudicating international employment disputes in the European Union, the United Kingdom and in Ontario, Canada. In conclusion, the judgment of the Labour Appeal Court in *Astral Operations v Parry* will be examined in the light of the constitutional right to fair labour practices and the necessity for employees to be protected in a globalised employment context in which multi-national enterprises operate across borders.

## 2 The four-stage-process in adjudicating private international law disputes

According to Dicey, the justification for a private international law or conflict of laws approach is the fact that “it implements the reasonable and legitimate expectations of the parties to a transaction or occurrence” (Collins “Nature and Scope of the Conflict of Laws” in Dicey, Morris and Collins (eds) *The Conflict of Laws Vol 1* 4ed (2006) 4-5 (par 1-005)). Forsyth explains that cases can arise in which the application of the rules of the *lex fori* would be inappropriate and unjust (Forsyth *Private International Law* 4ed (2003) 2).

Each country has its own private international law rules that will be followed in adjudicating a dispute with international (foreign) elements (Dicey “Nature and Scope of the Conflict of Laws” Dicey, Morris and Collins (eds) *The Conflict of Laws Vol 1* (2006) 4 (par 1-004)). In terms of Roman-Dutch law, which provides the basis for the South African rules of private international law (Forsyth 4), a four-stage process will be followed by courts to establish the applicable law (Calitz “Globalisation, the Development of Constitutionalism and the Individual Employee” 2007 2 *PER* 4/19). The first step in adjudicating an international dispute between private parties is for the court to establish whether it has jurisdiction. In general a court could have jurisdiction if its judgment will be effective (the defendant must be domiciled or resident in the area over which the court has jurisdiction) and if there is some *nexus* between the case and the court. To satisfy this latter requirement, connecting factors (*rationes jurisdictionis*) between the dispute and the court have to be identified. The factors that the court will take into consideration to establish whether it has jurisdiction will be discussed below. Parties may also choose the courts of a certain country to adjudicate a dispute, but this does not mean that the choice will establish jurisdiction if the requirements for assuming jurisdiction are not met (Forsyth 203).

The second step in adjudicating an international dispute is to characterise the dispute, although courts may first characterise the dispute and then determine whether they have jurisdiction. Characterisation has been described as the categorising of legal rules by which the court will establish whether the rules of the law of delict, contract or immaterial property are the relevant rules that have to be applied to adjudicate the case (the terms “classification” and “qualification” have also been used to describe the process (Dicey “Characterisation and the Incidental Question” in Dicey, Morris and Collins (eds) *The Conflict of Laws Vol 1* (2006) 37 (par 2-001)).

The third stage would be to consider the *lex causae* (proper law or choice of law (Dicey (2006) 4 (par 1-003)) regulating the dispute, thus which country’s legal system will be applicable to the dispute. If parties to the dispute did not choose a legal system, the connecting factors (which may coincide with connecting factors establishing jurisdiction) between the matter as characterised and the legal systems that could be applicable will be taken into account by the court (Forsyth 10). The choice of parties may not have the effect that directly applicable statutes or mandatory rules (which can be described as crystallized public policy) of the *lex fori* are replaced by rules of a foreign system (Forsyth 13-15. This is also in line with article 6 of what was

previously known as the Convention on the Law Applicable to Contractual Obligations (the Rome Convention), which has been replaced by Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177 6. This regulation applies to contracts concluded after 17 December 2009.) Labour legislation such as the Basic Conditions of Employment Act and the Labour Relations Act will, for instance, be regarded as mandatory rules (*Parry v Astral Operations Ltd supra* par 55-59). The *lex causae* may be a legal system different from that of the court adjudicating the matter (Forsyth 2). A court of a certain country may thus assume jurisdiction if all the requirements are met, but will not apply the rules of the *lex fori*. The court will apply the rules of a foreign legal system if the connecting factors point to a foreign legal system being the *lex causae*.

In the fourth and final stage of establishing the law that governs the contract, the court will establish the content of the *lex causae*, often by way of expert evidence regarding the content of the foreign country's law (Forsyth 11).

### 3 The South African High Court's jurisdiction in private international law disputes

Although the South African High Court is a creature of statute and the Constitution, its jurisdiction is derived from the common law and it thus possesses inherent powers (according to Taitz *The Inherent Jurisdiction of the Supreme Court* (1985) 10, this power is derived from English rather than Roman-Dutch law). Pollak remarks that the inherent jurisdiction of the Supreme Court means that the power of this court is not spelled out in a legislative framework and is not limited by its creative statute (Pistorius *Pollak on Jurisdiction* 2ed (1993) 28).

The High Court's jurisdiction will generally be established in private international law disputes if the defendant is an *incola* (inhabitant) of the area of the court's jurisdiction (Forsyth 206). A legal person will be regarded as an *incola* of the court if it is registered within the court's area of jurisdiction (*ISM Inter v Maraldo* 1983 4 SA 112 (T)). If the defendant is a *peregrinus*, (foreigner), his property within the geographical area of the court's jurisdiction will have to be attached to confirm jurisdiction so that the doctrine of effectiveness (this doctrine refers to the effective execution of an order of court) may be satisfied. Closely connected to the doctrine of effectiveness is the doctrine of territoriality. In *Hugo v Wessels* (1987 3 SA 837) the court explained the test for jurisdiction as follows:

"Dit bring mee dat die vraag of 'n Hof in 'n bepaalde geding regsbevoeg is om die saak te bereg 'n tweeledige ondersoek omsluit. In die eerste deel van die ondersoek moet daar bepaal word of die Hof bevoeg is om hoegenaamd van die bepaalde saak kennis te neem; die antwoord daarop sal afhang van die bestaan van een of meer van die erkende jurisdiksiegronde (*rationes jurisdictionis*). Die tweede deel van die ondersoek het betrekking op die onderworpenheid al dan nie van die verweerder aan die hof se regsmag: die antwoord daarop moet gesoek word aan die hand van die sogenaamde leerstuk van doeltreffendheid of effektiwiteit: die Hof se bevoegdheid om, indien hy die regshulp wat die eiser aanvra sou toestaan, uitvoering aan sy bevel te kan gee" (*Hugo v Wessels supra* 849-850).

In the case of breach of contract, the place where the contract was concluded (*loci contractus*) or where the contract was performed (*loci solutionis*) or the place where the contract was breached may be regarded as a *rationes jurisdictionis*. If all elements in the case of a contractual dispute did not arise in the same court's geographical area of jurisdiction, the court with the closest connection will have jurisdiction. It seems as if the court seized with the matter would not have jurisdiction if the cause of complaint (breach) did not arise in the area of the court's jurisdiction (*NCS Plastics (Pty) Ltd v Erasmus* 1973 1 SA 275 (O) 277). It is possible that the courts of two different areas may both have jurisdiction. In terms of the doctrine of *forum non conveniens*, a court can exercise its discretion to decline jurisdiction if it would be more appropriate for another court to hear the matter. It is uncertain whether this doctrine forms part of South African jurisprudence (Pollak 23-26). If not, South African courts may not turn down jurisdiction in favour of another court, provided that all the requirements for jurisdiction are met.

Where the claim is for the payment of money (claims sounding in money) or as an alternative to another claim such as specific performance, the plaintiff may choose the forum and the court will have jurisdiction if the defendant is domiciled or resident in the area of the court's jurisdiction. No other *ratio jurisdictionis* is needed (Pollak 41). Where the defendant is a foreign *peregrinus* (not South African), his property will have to be attached to confirm jurisdiction.

In view of the fact that the High Court has different divisions and that each division has jurisdiction only over the area where the court is situated, a person living in Cape Town may be regarded as a *peregrinus* of the Gauteng court, even though he is a South African citizen. If the plaintiff is an *incola* of the court and there is a *ratio jurisdictionis* linking the case to the specific court, there is no need to attach the property of a South African *peregrinus* in respect of actions in which a judgment sounding in money is claimed. This will, however, be necessary in the case of a foreign *peregrines* (Forsyth 208).

#### **4 Jurisdiction of the Labour Court and High Court in international employment disputes**

The jurisdiction of the Labour Court is determined by the Basic Conditions of Employment Act (55 of 1997) (BCEA), the Labour Relations Act (66 of 1995) (LRA) and the Employment Equity Act (55 of 1998). The Labour Court has concurrent jurisdiction with civil courts to hear and determine any matter concerning a contract of employment and is a superior court that has authority, inherent powers and standing in relation to matters under its jurisdiction equal to that of the Supreme Court (s 151(2) of the LRA). The Labour Court further has exclusive jurisdiction in respect of all matters that are to be determined by the Labour Court in terms of the LRA and any other law (s 157(1) of the LRA), and has jurisdiction in all provinces of the Republic (s 156 of the LRA).

The above sections have the effect that the Labour Court has the same powers as the High Court in regard to matters concerning employment disputes. Thus the rules of private international law which regulate international disputes and which are applicable to the South African High Court are also applicable to the Labour Court. The jurisdiction of the Labour Court is limited to employment matters as provided for in the relevant acts, and the Labour Court therefore does not have inherent power in the sense of the inherent power enjoyed by the South African High Court. This has the effect that the Labour Court will not have the power to rule that a foreign legal system is applicable to a dispute.

The High Court has limited jurisdiction in regard to employment disputes. If the dispute is brought in terms of a breach of an employment contract, the High Court may adjudicate the dispute (*Makhanya v University of Zululand* 2009 30 ILJ 1539 (SCA)). However, the High Court does not have the jurisdiction to adjudicate on the fairness of a dismissal (*Makhanya v University of Zululand supra* par 37; and *Tsika v Buffalo City Municipality* 2009 2 SA 628 (E)).

From the above it should be clear that the Labour Court has exclusive jurisdiction in regard to unfair dismissal and unfair labour practices, and that it also has concurrent jurisdiction with the High Court to adjudicate common law breaches of the employment contract. Since the Labour Court does not have different divisions and has jurisdiction in the whole of South Africa, many of the difficulties associated with claims against local and foreign *peregrini* in the South African High Courts, as outlined above, are not applicable to actions brought in the Labour Court.

The Labour Appeal Court ruled in *Astral Operations v Parry* that the Labour Court could not assume jurisdiction in such disputes if the workplace is outside South Africa. The reasons for this decision and its implications will be analysed below, after a discussion of the decision of *Parry v Astral Operations* in the Labour Court.

## **5 The judgment of the Labour Court in *Parry v Astral Operations***

In *Parry v Astral Operations Ltd (supra)* the Labour Court assumed jurisdiction in a dispute about the termination of an employment contract where an employee who worked in Malawi was retrenched. The employee (Parry) was a South African who had worked for the South African-based Astral group of companies for more than 23 years. He was retrenched by agreement in 2001 and received an amount of R600 000 as severance pay. He was re-employed by Astral Operations to work in Malawi for a subsidiary of the South African company. The contract was concluded in South Africa and he reported to officials of the holding company in South Africa. He spent most of his time in Malawi, but also worked for the company in Zimbabwe and Zambia. Parry's employment was terminated in 2002, when the subsidiary company in Malawi was sold (by Parry acting on the instruction of his South African superiors) and his position became redundant again. He approached the South African Labour Court for relief. His claim was based on breach of contract, breach of the employer's duties in terms of the BCEA

(severance pay and unpaid salary), unfair dismissal in terms of sections 188(1) and 189 of the LRA (dismissal due to operational requirements) and, alternatively to the last claim, a breach of his right to fair labour practices as entrenched in section 23 of the Constitution.

The Labour Court applied the rules of private international law and characterised the dispute as arising from an international employment contract. The court found that since the employment contract was concluded and breached in South Africa, there existed a *ratio jurisdictionis* (*Parry v Astral Operations Ltd supra* par 77), which had the effect that the Labour Court could assume jurisdiction. The court pointed out that, as the employee was a South African citizen and the employer company was registered in South Africa, both were *incolae* of the court and thus the doctrine of effectiveness could be satisfied (*Parry v Astral Operations Ltd supra* par 75). The court further held that it did have jurisdiction over the parties as well as over all the causes of action (breach of contract, breach of the LRA and the BCEA as well as infringement of a constitutional right) (*Parry v Astral Operations Ltd supra* par 77).

It was submitted on behalf of Astral Operations that the workplace (the place where the employee performs his duties) should determine which court has jurisdiction. As Parry performed his duties in Malawi, it was argued that Astral Operations was not bound to retrenchment procedures prescribed in the LRA and the BCEA (*Parry v Astral Operations Ltd supra* par 24). It was submitted that reliance on the place of work (*lex loci solutionis*) was logical in the light of the prohibition (*sic*) on the extra-territorial application of statutes. Astral Operations relied on a line of cases decided under the 1956 LRA, which all held that jurisdiction is determined by the workplace (*Chemical & Industrial Workers Union v Sopedog CC* 1993 14 ILJ 144 (LAC); *Bolhuis v Natyre* 1995 3 BLLR 37 (IC); and *Genrec Mei v Industrial Council for the Iron, Steel, Engineering Metallurgical Industry* 1995 4 BLLR 1). *Kleynhans v Parmalat (supra)* was the first case in which the workplace was not regarded as the most important factor determining jurisdiction, but on behalf of Astral Operations it was submitted that this case should be distinguished as the employee in *Kleynhans* was seconded to Mozambique for a fixed period.

In *Parry* Pillay R ascribed the preference for the *lex loci solutionis* to the fact that in general employees will be better protected at the place where they work and are stationed, but that “the law of the place of work can disadvantage workers if it offers less protection than the law of the place chosen by the parties” (*Parry v Astral Operations Ltd supra* par 67-68).

The Labour Court in *Parry* emphasised that “In South Africa an added consideration (to apply South African law) is the elevation of labour rights to a constitutional right. In my opinion the constitutionalisation of labour rights strengthens the public policy and protective components of labour law” (*Parry v Astral Operations Ltd supra* par 53). A further reason for the Labour Court to assume jurisdiction was that a Malawian court could refuse jurisdiction, which would have had the effect that the employee was left without a remedy (*Parry v Astral Operations Ltd supra* par 78). This is the same argument used in *Kleynhans v Parmalat (supra)*, where the Labour

Court indicated that the court in Mozambique (where the workplace was in that case) could decline jurisdiction and would then leave the employee without a remedy (*Kleynhans v Parmalat supra* par 47).

Could this argument be applied to the process of establishing whether a court has jurisdiction? In other words, can a court assume jurisdiction if the employee would be better protected by the *lex fori*? In terms of the factors that could be taken into account to assume jurisdiction according to the South African common law (*rationes jurisdictionis*), the answer must be negative. However, if it is established that the doctrine of *forum non conveniens* does form part of South African private international law, such factors could be taken into account, as is done in Ontario, Canada in terms of the *forum non conveniens* doctrine. This doctrine and the uncertainty about whether it forms part of the rules of South African private international law will be discussed below.

## 6 *Astral Operations v Parry* (LAC)

The Labour Appeal Court (LAC) held in *Astral Operations Limited v Parry* (*supra*) that the Labour Court was wrong in assuming jurisdiction in the matter, since the undertaking in which the employee (Parry) worked was carried on in Malawi and the workplace was thus in that country (par 20). The LAC held that, as Parry's claims were based on the LRA as well as the BCEA, the Labour Court had no jurisdiction due to the presumption against territorial application (par 9). The Labour Appeal Court further held that even although some of the employee's claims were based on breach of contract (and not on the BCEA and LRA), the Labour Court could only consider such claims in terms of section 77(3) of the BCEA, which confers concurrent jurisdiction with the High Court on the Labour Court. As the BCEA does not apply to an extra-territorial workplace, section 77(3) also does not apply and the Labour Court thus has no jurisdiction if the workplace is outside South Africa (par 21).

The LAC criticised the Labour Court for first establishing the proper law as South African law and afterwards assuming jurisdiction based on the fact that the proper law is South African law (par 22). This would have been a conflation of grounds for jurisdiction and grounds for establishing the proper law (this type of approach of the LC in *Kleynhans v Parmalat* was criticised by Roodt "Jurisdiction in the SA Labour Court: Employer Identity" 2003 *SA Merc LJ* 135). This criticism seems to be unfounded, since the Labour Court first assumed jurisdiction before referring to the proper law. Under the heading "Jurisdiction" the Labour Court set out the grounds on which it assumed jurisdiction (*Parry v Astral Operations Ltd supra* par 74-77), namely the fact that the parties were both based in South Africa (doctrine of effectiveness), that the contract was concluded and breached in South Africa (*rationes jurisdictionis*), and that the claims concerned matters on which the Labour Court could adjudicate.

Zondo J relied to a great extent on the interpretation of the Appellate Division regarding the jurisdiction of industrial councils under the 1956 LRA in a dispute where the workplace was not in South Africa. In *Genrec Mei (Pty) Ltd v Industrial Council for the Iron, Steel, Engineering & Metallurgical*

*Industry* (1995 1 SA 563 (A); 1995 16 ILJ 51 (A)) the dispute, which was about the unfair dismissal of employees working on an oil rig outside the territorial waters of South Africa, had to be referred to an industrial council for conciliation. The councils only had jurisdiction in a specific area and for a specific sector, and further only in respect of undertakings carried on in the registered area of the specific council (*Genrec Mei (Pty) Ltd v Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry supra* 4-5). *Genrec Mei* had its principal place of business in Durban, the employees were from Durban and contracts of employment were concluded in Durban. The question was where the employer's undertaking was being carried on. The Appellate Division in *Genrec* relied on the judgment in *CIWU v Sopellog CC* (1993 14 ILJ 144 (LAC)) with similar facts, also dealing with employees working on an oil rig outside South African territorial waters. In *Sopellog* the court equated the place where the employee worked with the place where the undertaking of the employer was carried on (*CIWU v Sopellog CC supra* 150B-C). As the employees worked on an oil rig outside the territorial waters, this was seen as the place of the undertaking of the employer (even though the business was registered in Johannesburg and its principal place of business was Cape Town), and thus as falling outside the area in terms of which the industrial council was registered (*Genrec Mei (Pty) Ltd v Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry supra* 7). As the councils had no jurisdiction to conciliate and mediate a dispute outside the area and sector, the then Industrial Court (to which the dispute would have been referred if conciliation failed) could according to the court also not have jurisdiction (*Genrec Mei (Pty) Ltd v Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry supra* 7-8). The effect was that the employees were literally left out in the cold with no remedy, since no other tribunal or court had jurisdiction in that part of the ocean.

Zondo J held in *Astral Operations* that the industrial councils under the old LRA could be equated to the CCMA under the current LRA. The same argument in regard to territorial jurisdiction could be applied to bargaining councils and the CCMA under the current LRA, since the CCMA had jurisdiction in the whole of the Republic in terms of section 115 of the LRA and, according to Zondo R, "obviously has no jurisdiction outside the Republic" (*Astral Operations Limited v Parry supra* par 18-19). Zondo R further stated that "it seems to me that in a case involving the CCMA the court could ask whether the employer's undertaking in which the employees' work is carried on, inside or outside the Republic. If it was carried on inside, the CCMA would then have jurisdiction and, where it was carried on outside, the CCMA would not have jurisdiction" (par 19).

The LAC followed the very narrow approach of interpreting words in the old Act that are not even to be found in the current LRA. These older decisions were moreover decided before the advent of the Constitution, which provides in section 23 that everyone has the right to fair labour practices, and in section 34 that everyone has the right to access to the courts. Zondo R did not test the interpretation in *Genrec Mei* to establish whether this interpretation should be reconsidered in the light of the right to fair labour practices in section 23 of the Constitution, even though Parry claimed that there was an infringement of his constitutional right. The LAC

thus relied on the interpretation of a statute alone to reach its decision. No other factors (*rationes jurisdictionis*) were taken into account to reach its decision in this dispute, which should have been characterised by the court as an international employment dispute. The LAC reached its conclusion in spite of the precarious basis of the *Genrec Mei* decision acknowledged by Zondo J in the following words:

“Although it is not very easy to determine the actual basis for the court’s decision that the old Act did not apply to the case of *Genrec*, it seems that the court made the decision on the basis of where the employer was carrying on its undertaking in which the employees concerned were working” (par 14).

The LAC thus overruled the decision in *Parry v Astral Operations Ltd* (*supra*), which followed the decision in *Kleinhans v Parmalat SA (Pty) Ltd* (*supra*) that the workplace used to be, but is no longer, the most important factor in determining jurisdiction. (*Parry v Astral Operations Ltd supra* par 65. This approach of the LC was criticised by Fredericks “The Proper Law of the International Contract of Employment” 2006 *SA Merc LJ* 80 on the ground that such an approach would lead to a lack of certainty. An approach in terms of which all factors should be weighed up, but with the workplace being regarded as the most important factor, would according to the author be more appropriate.) In both these cases the Labour Court assumed jurisdiction, because although all the *rationes jurisdictionis* did not all fall in the territorial area of the Labour Court’s jurisdiction, the overall weight of factors was connected to South Africa.

The view of the LAC that the presumption of extra-territoriality will be applicable where the workplace is outside South Africa, in spite of the fact that the employer is an *incola* of South Africa and *rationes jurisdictionis* has been established, should be questioned. Both these factors for establishing jurisdiction were present in *Astral Operations v Parry*. The doctrine of effectiveness was satisfied and there was more than one cause of action linking the dispute to South Africa. Why Zondo R elevated the *loci solutionis* to the only factor in determining jurisdiction in a dispute regarding an employment contract is not clear. The presumption against extra-territorial application could have been appropriate had the employer been a *peregrinus*. In such a case neither the High Court nor the Labour Court would have had jurisdiction, as they would not have been able to enforce the provisions of South African legislation on a Malawian employer. That would go against the principle of comity (or sovereign immunity) as well as the doctrine of effectiveness.

## **7 The effect of the judgment in *Astral Operations Limited v Parry***

The effect of the judgment of the LAC in *Astral Operations v Parry* is that the Labour Court does not have any jurisdiction in labour disputes if the employee’s workplace is outside South Africa. However, not only is the Labour Court’s jurisdiction limited by the decision, but also that of the High Court. Where claims based on the BCEA are brought in the High Court (the employee is entitled to bring a claim based on the BCEA to the High Court in the light of the High Court’s concurrent jurisdiction with the Labour Court in

terms of s 77(3) of the BCEA) by an employee working outside of South Africa, the High Court would also not have the jurisdiction to enforce claims in the light of the decision that, if the workplace is outside South Africa, the application of labour legislation would be extra-territorial. The High Court will moreover have no jurisdiction to adjudicate a claim based on the fairness of a dismissal brought in terms of the constitutional right to fair labour practices. In *Tsika v Buffalo City Municipality* (2009 30 ILJ 105 (E)) it was held that, as the LRA gives effect to section 23, employees may not bypass the dispute resolution mechanisms of the LRA by basing a claim regarding an unfair labour practice on the constitutional right (par 66).

As pointed out above, the High Court would have no jurisdiction to adjudicate on the fairness of a dismissal, even if the workplace is in South Africa. It seems as if the only claim that could possibly be enforced in the High Court is a claim of breach of contract, since no legislation is involved. Here again, if the workplace is seen as the most important *ratio jurisdictionis*, the High Court would not have jurisdiction even in this case.

The judgment in the LAC will have a severe negative impact on South African employees working for South African employers in foreign countries. In the era of globalisation, multinational enterprises could establish subsidiary companies in South Africa's neighbouring countries and post-South African employees there with the purpose of evading South Africa's protective labour legislation.

Had the LAC considered the possible application of section 23, the opportunity would have arisen to test the common-law rule of the presumption against extra-territoriality of the LRA against the constitutional right of the employee. The limitation of the constitutional right by the common-law presumption could then have been examined in the light of the limitations clause (s 36) of the Constitution. Furthermore, had the LAC interpreted the constitutional rights of the employee, the court would have been obliged to take international law into consideration and could have taken foreign law into account in terms of section 39 of the Constitution (s 39 of the Constitution provides that a court, when interpreting the Constitution, must consider international law and may take foreign law into consideration). The Brussels 1 Regulation (see the discussion in the next paragraph), as well as legal development in the United Kingdom and Ontario, Canada are examples of international and foreign law which are relevant to a discussion of the importance of the workplace in regard to jurisdiction in international employment disputes and will be discussed below.

## **8 Jurisdiction in international employment disputes in the European Union**

The Brussels 1 Regulation, also known as Council Regulation (EC) No 44/2001 (the Regulation came into force on 1 December 2002), forms the basis for the jurisdiction of courts in the European Union (EU) and is similar to the Lugano Convention on Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the revision of the Lugano Convention was finalised in 2007 between the EU, Switzerland,

Norway, Iceland and Denmark). The Brussels 1 regulation is directly applicable to all EU member states.

The basic rule in terms of the Regulation is that the courts of the EU country in which the defendant is domiciled will have jurisdiction, regardless of the nationality of the defendant. Where one of the parties is in a weaker position than the other party, namely in consumer contracts (s 4 of the Regulation), insurance contracts (s 3 of the Regulation) and individual contracts of employment (s 5 of the Regulation), the weaker party is protected by rules of jurisdiction more favourable to his or her interests than the general rules would be.

Article 18(2) of the Brussels 1 Regulation provides that, “where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.”

Article 19 provides that an employer domiciled in a Member State may be sued:

- “1 In the courts of the Member State where he is domiciled; or
- 2 In another Member State:
  - (a) In the courts of the place where the employee habitually carries out his work or in the courts of the last place that he did so, or
  - (b) if the employee does not or did not habitually carry out his work in any one country, in the courts of the place where the business which engaged the employee is or was situated.”

Employees may thus claim against their employer in the country where the employer is domiciled, or in the courts of the country where the employee habitually works. If the employee does not habitually (usually) work in one country, he may sue the employer in the country where the business of the employer that engaged him is conducted. An employer who does not have his domicilium in an EU country may be sued in an EU country if he has a subsidiary or branch of the undertaking in an EU country (Council Regulation (EC) No 44/2001 of 22 December on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters Official Journal L 012, 16/01/2001 0001-0023 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:EN:H>).

In the case of *Heiko Koelzsch v Grossherzogtum Luxembourg* (C-29/10 ECJ 15 March 2011), the European Court of Justice analysed the meaning of “the place where the employee habitually carries out his work” in the Rome Convention (the Rome Convention was replaced by Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177 6), but is only applicable to contracts concluded after 17 December 2009, while Mr Koelzsch’s contract was concluded in 1998, and he was dismissed in 2001), which contains the same phrase as the Brussels 1 Regulation. Although the Brussels 1 Regulation deals with jurisdiction and the Rome Convention with the applicable legal system in the absence of choice, both these instruments contain the same phrase and the judgment in *Heiko*

*Koelzsch* will certainly influence the interpretation of the Brussels 1 Regulation. In this case the court had to decide which legal system would be applicable in the case of a transport driver who performed his duties in different countries. The court stated as follows:

“the country in which the employee habitually carries out his work in performance of the contract, within the meaning of that provision, is that in which or from which, in the light of all the factors which characterise that activity, the employee performs the greater part of his obligations towards his employer” (*Heiko Koelzsch v Grossherzogtum Luxembourg supra* par 50).

The European Court in *Rutten v Cross Medical Ltd* (Case c 383/95 [1997] E.C.R. 1-57,[1997] I.C.R. 715) stated that the purpose of the provision is to protect the employee, who is regarded as the weaker party to the employment contract. The employee would normally be best protected if the court of the place where the employee discharged his duties has jurisdiction in a dispute concerning an employment contract, since this is the place where it is least expensive for the employee to bring an action against the employer (as discussed in Collins “Jurisdiction in Claims in *Personam*” Dicey, Morris and Collins (eds) *The Conflict of Laws Vol 1* (2006) 446 (par 11-377)). However, having the case heard by the court of the workplace is not always to the advantage of the employee.

From the above position it is evident that in order to protect the weaker party, less strict rules for jurisdiction apply in the European Union to give a wider choice of forums to employees suing their employers in disputes relating to employment contracts. A simple reliance on the physical place where the employee performs his duties is ousted by looking at the performance of the duties of the employee as a whole.

## **9 Extending UK labour legislation to certain categories of employees working in foreign countries**

The House of Lords had to decide in a recent decision whether section 94 of the Employment Relations Act 1999 (ERA), which protects employees against unfair dismissal in Great Britain, applies to employees working abroad. The ERA does not explicitly provide for extra-territorial jurisdiction, nor does it exclude such jurisdiction. The House of Lords had to decide the issue in three conjoined appeals, namely *Serco Ltd v Lawson*, *Botham v Ministry of Defence* and *Crofts v Veta Ltd* ([2006] UKHL 3). The employees in these cases worked for British companies outside of England. The outcome of these matters was that the House of Lords held that all three employees were entitled to sue their employer in employment tribunals in the United Kingdom for unfair dismissal.

Lord Hoffman cautioned that employees working outside Great Britain would be protected by the section only in exceptional circumstances. Two categories of workers could, according to the court, be protected if certain requirements were met. In the case of peripatetic employees (those who travel from one location to another to perform their job), the employment tribunal would have jurisdiction if employees were based in Great Britain (*Serco Ltd v Lawson*, *Botham v Ministry of Defence* and *Crofts v Veta Ltd*

*supra* par 28). The court relied on Lord Denning's opinion in *Todd v British Midland Airways* ([1978 ICR 959) for a description of the meaning of being based in a certain place: "A man's base is the place where he should be regarded as ordinarily working, even though he may spend days, weeks or months working overseas" (*Serco Ltd v Lawson, Botham v Ministry of Defence* and *Crofts v Veta Ltd supra* par 29). In the case of *Crofts v Veta* (one of the three cases before the House of Lords) Crofts was an airline pilot who spent more time outside Great Britain than in the country, but was regarded by the House of Lords as being based in Great Britain and thus covered by section 94 of ERA.

The second category of employees that, according to the House of Lords, could be protected are expatriate employees (employees who are based and work in another country). Employees working in another country for a business conducted in Great Britain (*Serco Ltd v Lawson, Botham v Ministry of Defence* and *Crofts v Veta Ltd supra* par 38) would be protected by section 94, but an employee working for a branch of a British business or a business owned by a British employer carried on in a foreign country would not, according to the court, fall within the category of employees that could claim in the employment tribunals in Great Britain (*Serco Ltd v Lawson, Botham v Ministry of Defence* and *Crofts v Veta Ltd supra* par 38). Expatriates who work for a British employer in a British enclave in a foreign country would also be regarded as having a strong enough connection with Great Britain to claim in its employment tribunals. Thus, in the case of *Lawson v Serco*, where the employee was based on Ascension Island, the House of Lords stated that "although there was a local system of law, the connection between the employment relationship and the United Kingdom was overwhelmingly stronger".

Mr Botham worked in a British enclave in Germany. He was a youth worker who worked with the British Forces Youth Service at different military bases in Germany. He paid tax in the UK, paid National Insurance contributions, *etcetera*. In this case Lord Hoffman also held that the labour tribunals had jurisdiction. His Lordship indicated that there might also be other exceptions to the rule that employees have to work in Great Britain to be able to bring a claim in the British employment tribunals, but he was "not been able to think of any and they would have to have equally strong connections with Great Britain and British employment law".

It is difficult to distil guidelines or principles from this very cautious judgment in which Lord Hoffman was reluctant to open the door for the ERA to be applicable to employees working outside Great Britain. It seems that, if the connection between the employment and Great Britain is strong enough, the employee may bring such a claim to British employment tribunals. But that is begging the question: When will the connection be strong enough? The lack of guidance from the House of Lords is evident in the *Ravat* case decided after the *Serco* trilogy.

In *Ravat v Halliburton* ([2010] CSIH 52), in an appeal to the Court of Sessions (the Scottish equivalent of the Court of Appeal) all three judges came up with different views of what the test for extra-territorial jurisdiction laid down by the House of Lords entailed. Lord Osborne held that the Employment Tribunal did have jurisdiction to adjudicate a claim of unfair

dismissal of an employee who worked mostly in Libya for a British company on the ground that Ravat's employment had a strong connection with the UK, *inter alia* because he paid tax and National Insurance in Britain (*Ravat v Halliburton supra* par 17-20). Lord Carlway agreed that the employment tribunal had jurisdiction in this case, but held that a strong connection with Great Britain was the wrong test and that the test must be whether Parliament had intended that the law pertaining to unfair dismissal be applicable to employees in Ravat's position. As he paid UK tax, lived in Britain, was described as a commuter by his employers and his salary was paid in Britain, Lord Carlway held that Parliament must have intended that someone in his position will be covered (*Ravat v Halliburton supra* par 30). Lord Brodie did not agree that the employment tribunal had jurisdiction, as Ravat did not clearly fall within the categories of either expatriate or parapatetic employee as set out by the House of Lords. Lord Brodie regarded the place of employment as being decisive for jurisdiction and reasoned that the exceptional circumstances required by the House of Lords for jurisdiction over such an employee did not exist in this case (*Ravat v Halliburton supra* par 55).

Two judges in the Court of Sessions were thus prepared to go further than the judgment in *Serco* and they extended unfair dismissal law to an employee who worked mostly outside of Great Britain for a business that was conducted outside Britain. This is in spite of this employee not meeting the special circumstances as required by the House of Lords in *Serco*, namely being posted abroad for the purposes of a business being conducted in Great Britain. The difference in opinion of the judges in *Ravat*, even though two of them reached the same end result, indicates that the House of Lords in the *Serco* trilogy did not give the necessary guidance in this field, in which litigation will certainly escalate due to the effects of globalisation. Although Lord Hoffman's judgment is open to criticism, his categories of protected employees are seen as a less complex (statutory) way of providing protection against unfair dismissal instead of applying complex rules of private international law (McKinnon "Dismissal Protections in a Global Market: Lessons to be Learned from *Serco Ltd v Lawson*" 2009 38 *ILJ* 101).

The strong connection test applied by Lord Osborne bears a striking similarity to the real and substantial connection required by courts in Ontario, Canada to assume jurisdiction in the case of a workplace outside Ontario. The development of rules for assuming jurisdiction in Ontario will be discussed in the next paragraph.

## **10 The real and substantial connection test for assuming jurisdiction in international employment disputes in Ontario, Canada**

The Canadian case *Muscutt v Corcelles* ((2002) 60 O.R. (3d) 20) turned on whether the Ontario Court of Appeal could assume jurisdiction in the case of a tort committed in Alabama, another Canadian province. Although this case concerned a delict, the principles in regard to jurisdiction in international cases which were laid down by the court were later applied to disputes in

regard to employment contracts. The *Muscutt* court remarked as follows on outdated rules against assuming jurisdiction in cases with a foreign element:

“The jurisdictional issues that arise on this appeal emerge from a rapidly evolving area of law. Until the early 1990s this area was governed by a set of rigid common law rules developed in England in the nineteenth century. These rules ... were shaped by the sovereignty concerns of a dominant nineteenth century world power anxious to safeguard its territorial sovereignty and jealous of any attempt by foreign states to intrude” (*Muscutt v Corcelles supra* par 12).

Regarding the development of rules regulating the jurisdiction of courts in extra-territorial disputes, the court remarked that “[c]oncern for the rights of domestic plaintiffs who sought justice in the courts of their home province began to prevail over concern for the sovereignty of other states” (*Muscutt v Corcelles supra* par 24).

The court held that a real and substantial connection with Ontario must be present before the Ontario court can assume jurisdiction. The following factors should *inter alia* be weighed up to assess whether there is a real and substantial connection with Ontario: the connection between the forum and the plaintiff’s claim; the connection between the forum and the defendant; unfairness to the defendant in assuming jurisdiction and unfairness to the plaintiff in not assuming jurisdiction (*Muscutt v Corcelles supra* par 77-110).

Even after having weighed up these factors, the court may still decline to assume jurisdiction in terms of the *forum non conveniens* doctrine, if there is another more appropriate forum which could also assume jurisdiction (*Muscutt v Corcelles supra* par 42-43). In exercising their discretion in this regard, the following factors have been developed by Canadian courts before declining jurisdiction: the location of the parties; the location of key witnesses and evidence; contractual provisions that specify applicable law or accord jurisdiction; the avoidance of a multiplicity of proceedings; the applicable law and its weight in comparison to the factual questions to be decided; geographical factors suggesting the natural forum and whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in the domestic court (*Muscutt v Corcelles supra* par 41).

The principles in *Muscutt v Corcelles* were taken into account in several cases dealing with the unfair dismissal of employees who performed their work outside Ontario. In *Hodnett v Taylor Manufacturing Industries* ((2002) 18 C.C.E.L. (3d) 297 (Ont. S.C.J.)) an employee who had worked for a company in Ontario since 1992 was relocated in 1998 to Atlanta, Georgia to manage an associated company. He regularly attended meetings in Canada and there reported to Burgess, the CEO of both companies. In 2001 his employment was terminated without notice in Atlanta. He instituted action in Ontario for wrongful dismissal. In determining whether it should assume jurisdiction in this case, in which there was a corporate connection between the two companies involved, the Ontario court quoted with approval the following dictum from *Gauthier v Dow Jones Markets Canada Inc* ((1998), 41 CCEL (2d 10 (Ont. Gen. Div) 18):

“In the current world in the ever-increasing forces of ‘globalization’, it is very common to see a business enterprise that is active in many jurisdictions. ... The real question on a motion such as the one at hand is whether there are

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sufficient connecting factors between the foreign defendant and the domestic jurisdiction such that it is just (and is seen to be just) for the domestic court to retain jurisdiction" (*Hodnett v Taylor Manufacturing Industries supra* par 29).

The court in *Hodnett* applied the real and substantial connection test as set out in *Muscutt* and found that there existed such a connection with Ontario. In regard to the argument of *forum non conveniens*, the court held that the employee would suffer a significant loss of judicial advantage if he were forced to litigate the matter in Georgia, which is an "at will" jurisdiction where employees can be dismissed without reasonable notice (*Hodnett v Taylor Manufacturing Industries supra* par 24).

The facts in *Newton v Larco Hospitality Management Inc* ((2004), 70 O.R. (3d 04), 70 O.R. (3d 0427 (Ont.S.C.J.)) were very similar to those in *Hodnett*. Newton was initially employed in Ontario, but relocated by the employer to Nevada. He was dismissed in Nevada and subsequently brought an action in Ontario for wrongful dismissal. The Ontario court held that although he worked in Nevada, and even though the parties agreed that the law of Nevada would regulate the contract, the Ontario court could assume jurisdiction as there was a real and substantial connection with Ontario. The court further stated that "refusal to assume jurisdiction would result in the loss of a substantial juridical advantage, with the probable result that the plaintiff would be without a remedy. Canadian courts view employees as vulnerable parties to employment contracts, deserving of protection from more powerful employees. Nevada courts apparently do not" (*Newton v Larco Hospitality Management Inc supra* 435).

From the above cases it is clear that courts in Ontario are willing to assume jurisdiction to protect employees from unfair dismissal in foreign countries where they work and where protective measures against unfair dismissal are not in place, provided that there is a real and substantial connection with Ontario.

This approach has, however, been criticised on the ground that the search for the real and substantial connection leaves too much freedom to the courts and that this development has led the way to uncertainty (Castel "The Uncertainty Factor in Canadian Private International Law" 2007 52 *McGill LJ* 569).

## **11 Suggestions for the development of the rules of South African private international law regarding jurisdiction in international employment disputes**

From the above discussion it should be clear that the realisation that employees need protection in the era of globalisation has led to measures in different regions in terms of which the courts of the place where the work is performed will not always be regarded as the appropriate court or the only court that could assume jurisdiction. South Africa lags behind in that the LAC regards the workplace as determinative for jurisdiction. South African courts should develop the common law in terms of sections 8(3)

“When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –

- (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
- (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).”

or 39(2):

“When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –

- (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
- (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).”

of the Constitution to ensure that effect is given to the constitutional protection of employees in a globalised work environment. In interpreting the constitutional right to fair labour practices, the courts could take the international and foreign law discussed above into consideration in terms of section 39(2). The presumption against the extra-territorial application of labour legislation could be rebutted in the light of the negative impact that the upholding of the presumption would have on the constitutional rights of employees working outside South-Africa.

Firstly, South African courts could apply a less strict interpretation of the presumption against the extra-territorial application of labour legislation. An example of this approach is the action of the House of Lords, which interpreted the Employment Relations Act to be applicable to employees whose workplace is outside the UK, if there is a close connection between their employment and the UK (*Serco Ltd v Lawson, Botham v Ministry of Defence* and *Crofts v Veta Ltd supra*). If this route is followed, the complicated rules of private international law need not be applied.

Secondly, the doctrine of *forum non conveniens* could be developed so that courts could take into consideration factors such as the constitutional protection of labour rights and whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in the domestic court (*Hodnett v Taylor Manufacturing Industries supra* par 29). In Ontario a real and substantial connection to the forum is required, which is similar to the requirement for a *ratio jurisdictionis* in Roman-Dutch law. Even if the requirement for a real and substantial connection is satisfied, the court may decline to assume jurisdiction in terms of the doctrine of *forum non conveniens* (*Newton v Larco Hospitality Management Inc supra* 435). There is some doubt as to whether this doctrine forms part of modern Roman-Dutch law, although the judgment in *Estate Agents Board v Lek* (1979 3 SA 1048 (A)) held that convenience and common sense are valid considerations in determining jurisdiction. The doctrine is usually seen as allowing the court to decline jurisdiction if there is another more appropriate forum that could adjudicate the dispute. However, it could also be seen as a doctrine which will allow a court to assume jurisdiction (by taking certain factors over and above the traditional *rationes jurisdictionis* into consideration) where there is

some uncertainty about whether the court in effect has such jurisdiction. Forsyth, one of the leading experts on private international law, is in favour of the development of such a doctrine (Forsyth 176). Pollak explains, with reference to *Estate Agents Board v Lek*, that convenience is a factor to be weighed with other factors, but that it is not a connecting factor that will establish jurisdiction (Pistorius 24-25). Should the South African common law be developed to regard *forum non conveniens* as a jurisdictional factor, the example of the courts in Ontario could be followed in dealing with international employment disputes. This doctrine may be the vehicle through which aspects such as constitutional protection of employees, the mandatory nature of labour legislation, as well as the possibility that the foreign court may not assume jurisdiction (leaving the employee without a remedy) could be taken into account.

Should development of common-law rules by the courts not take place, the application of labour legislation could be extended extra-territorially by the legislature to cover certain categories of employees with a real and substantial connection to South Africa. An example would be South African employees who are posted by a South African employer to a foreign country for a number of years.

The territorial exercise of state power does not preclude a state from adopting legislation which will have extraterritorial application (Forsyth 161). Examples of extra-territorial South African legislation include the Electronic Communications and Transactions Act (12 of 2004) and the Prevention and Combating of Corrupt Activities Act (25 of 2002).

In line with the Brussels 1 Regulation and the Lugano Convention, South African legislation could further give a choice to an employee working outside South Africa to claim against the employer if the employer is domiciled in South Africa, or if the business through which the employee was engaged is managed or registered in South Africa.

## 12 Conclusion

The judgment in *Astral Operations v Parry* closed the door of South African courts to South African employees whose workplace is outside South Africa, regardless of the strength of the connection with South Africa. The LAC considered itself bound to the judgment of the court in *Genrec Mei*, which held that (in terms of the old LRA) if the place where the employee works is outside South Africa, the South African Labour Court will not have jurisdiction. This decision also has the effect that the High Court will not have jurisdiction in most international employment disputes if the employee works outside South Africa. Owing to the increased movement of employees across borders, this judgment will have a severely negative impact on South African employees who have a dispute with their South African employers.

In the light of the constitutional dimension of labour legislation, the court should have reconsidered the rule that the workplace is the determinative factor in deciding which court would have jurisdiction in an employment dispute. In order to protect "globalised" South African employees, the common-law rules of South African private international law could be

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developed in terms of section 8(2) or 39(2) of the Constitution to give effect to employees' constitutional rights, especially the right to fair labour practices. The mandatory nature of South African labour legislation could justify an approach in terms of which a less strict interpretation of the presumption against extra-territorial application of legislation is applied for certain categories of employees whose employment has a close connection with South Africa. This was the approach followed by the House of Lords in the *Serco* trilogy. The development of the common law to include the doctrine of *forum non conveniens* (as in Ontario), in terms of which factors such as the disadvantage to the employee if the court does not assume jurisdiction, could be taken into consideration in establishing whether there is a real and substantial connection.

Should the courts not develop the common law to protect employees, the lack of protection afforded to "globalised" South African employees could be addressed by legislation which provides a choice to employees to bring a claim against an employer in the country where the employer is domiciled, or where the employee habitually works, and in cases where the employee does not habitually work in any one country, in the country where the employee was recruited. This approach would be in line with the Brussels 1 Regulation in the EU. The legislature could further expressly extend the application of labour legislation to certain categories of employees with a real and substantial connection to South Africa.

The presumption against the extra-territorial application of legislation is based on respect for the sovereignty of other states. This presumption upholds an archaic principle which is no longer appropriate in regard to employees who work in a globalised context. The protection of categories of vulnerable South African employees who seek remedies in their home country against their employer should outweigh the concerns about the sovereignty of other states.

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