REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No: JR455/12

In the matter between:

MECS AFRICA (PTY) LTD **Applicant**

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **First Respondent**

MARLEZE SWANEPOEL N.O. **Second Respondent**

THEO PAUW **Third Respondent**

Heard: **18 July 2013**

Delivered: **16 August 2013**

Summary: Jurisdiction of the CCMA – LRA and BCEA do not apply Extra-Territorially – Employee employed by South African Temporary Employment Service (TES) – Employee placed with Client outside South Africa – Location of Undertaking to found CCMA Jurisdiction – TES undertaking is the Procurement and Supply of Labour – Procurement and Supply of Labour takes place in South Africa even if employee placed at Foreign Client – CCMA has jurisdiction when TES places employee with Foreign Clients

JUDGMENT

LEPPAN, AJ

Introduction

[1] This is an application in terms of section 158(1)(g) of the Labour Relations Act[1] ("LRA") to review and set aside a jurisdictional ruling issued by the Second Respondent ("the Commissioner") acting under the auspices of the First Respondent ("the CCMA").

[2] In September 2011, the Third Respondent, Mr Theo Pauw ("Pauw"), referred a dispute to the CCMA alleging that he was unfairly dismissed by the Applicant ("MECS-SA"). MECS-SA raised a point *in limine* claiming that the CCMA lacked jurisdiction to hear the dispute because, *inter alia*, Pauw did not work in South Africa but was employed by a different entity in the Democratic Republic of Congo ("the DRC").

[3] After raising the point *in limine*, the parties at the arbitration agreed that they would lead evidence by affidavit only. The significance of this arrangement will be considered later in this judgment. After perusing the affidavits and hearing argument, the Commissioner ruled that the CCMA had jurisdiction to hear the dispute because MECS-SA was a temporary employment service provider (also known as a "TES" or a "labour broker") and, as such, the locality of the TES's undertaking was in South Africa.

[4] The issue before this Court is whether the CCMA has jurisdiction to hear the dispute referred to it by Pauw.

The Facts

[5] MECS-SA conducts business as a TES. While the locality of MECS-SA's undertaking is in dispute, it is a South African company having its registered place of business in Johannesburg, South Africa.

[6] MECS-SA is a subsidiary of Micro-Mega Holdings Limited ("MECS Holdings").

[1] Act 66 of 1995

[7] On 6 July 2011, Pauw signed a fixed term contract of employment with MECS-SA. In that contract (hereinafter referred to as the "MECS-SA Contract"), Pauw undertook to provide his services as a civil construction manager to clients of MECS-SA for the duration of the fixed term period. In particular and in accordance with Schedule A to the contract, Pauw agreed to provide his services to a client of MECS-SA by the name of Tenke Fungurume Mining ("TFM").

[8] TFM is a mining company which operates in the Katanga province of the DRC. In return for providing his services to TFM, MECS-SA paid Pauw a salary of US$ 22,500.00 per month.

[9] However, on 8 July 2011 and at the insistence of MECS-SA, Pauw signed another fixed term contract of employment with a company by the name of Micro-Mega Services and Support SPRL ("MECS-DRC"). This company is registered in the DRC and is also a subsidiary of MECS Holdings. This contract (which I shall refer to as "the MECS-DRC Contract") was on substantially the same terms as the MECS-SA Contract. In essence, Pauw would provide his services as a civil construction manager to clients of MECS-DRC. MECS-DRC was, therefore, performing the function of a TES in the DRC.

[10] The MECS-SA Contract states that Pauw can and will only be only employed by MECS-SA. The MECS-DRC Contract has a similar provision stating that Pauw may not engage in any business that would in any way conflict with his employment with MECS-DRC.

[11] In his affidavit, Pauw makes the allegation that, although he agreed to provide his services as a civil construction manager to clients of MECS-DRC, he did not agree to the amount of remuneration or to which client he would provide his service. He states that this information was written into the contract by hand without his knowledge. MECS-SA, on the other hand, states that the MECS-DRC Contract (containing the handwritten amendments) accurately reflected the agreement between the parties. These handwritten amendments state that Pauw would provide his services to TFM and that he would be remunerated at US$ 22,500.00 per month.

[12] It appears to have been common cause between the parties at the arbitration that the reason for entering into the MECS-DRC Contract was to facilitate Pauw obtaining a Congolese work permit, without which, Pauw would not have been able to provide his services to TFM. Pauw maintained that he only entered into the MECS-DRC Contract for the purposes of obtaining a work permit, and that there was "no formal relationship" between Pauw and MECS-DRC (meaning that he signed the contract absent an intention to be employed by MECS-DRC).

[13] MECS-SA, on the other hand, argued that MECS-DRC was either Pauw's sole employer, or that Pauw was employed by MECS-SA and MECS-DRC simultaneously. Notwithstanding this argument, it appears from the evidence that MECS-SA was the only entity that paid Pauw's salary. MECS-SA also paid PAYE tax to SARS in respect of Pauw.

[14] Pauw claimed he had begun to work for TFM in Sandton as early as 7 July 2011 but it is common cause that he was working for TFM in the DRC by at least 11 July 2011.

[15] On 17 August 2011, MECS-SA corresponded with Pauw in the DRC with a view to amending the MECS-SA Contract. The proposed amendment was pursuant to a determination made by the Minister of Labour in terms of the Basic Conditions of Employment Act 75 of 1997 ("BCEA"). Indeed, the addendum to the MECS-SA Contract specifically speaks about "BCEA benefits".

[16] Although there is also some dispute as to when exactly Pauw returned to South Africa from the DRC, it was nevertheless common cause that Pauw was in South Africa on 2 September 2011 when MECS-SA sent him a letter via email ("the Termination Notice") which stated that:

> 'This letter serves to confirm that the contract between yourself and MECS Africa (Pty) Ltd [i.e. MECS-SA], and its subsidiaries, will terminate on Thursday, 1 September 2011, as per our client's instruction received on 1 September 2011.
>
> As per your contract we hereby give you one week's notice which will commence on 1 September 2011….

Yours faithfully,

MECS AFRICA (Pty) Ltd'

[17] Pauw did not receive a similar letter from MEC-DRC.

[18] Pauw, thereafter, referred an unfair dismissal dispute to the CCMA against MECS-SA.

[19] At the CCMA proceedings, MECS-SA raised a point *in limine* claiming that the CCMA lacked jurisdiction to hear the dispute. MECS-SA based its argument on the case of *Astral Operations Ltd v Parry*[2] where the Labour Appeal Court ("LAC") held that the determining factor in cases such as this is "the locality of the employer's undertaking in which the employee worked". If this locality was outside South Africa's borders then the CCMA lacked jurisdiction. MECS-SA argued that the locality of the undertaking in which Pauw worked was in the DRC, and therefore the CCMA lacked jurisdiction.

[20] Pauw argued that the CCMA had jurisdiction to hear the dispute because the locality of MECS-SA's labour broking undertaking was in fact in South Africa.

[21] The Commissioner held, correctly in my view, that the principles of private international law and choice of law did not apply in this instance. This is because an agreement between two parties cannot confer jurisdiction upon the CCMA, only the LRA can do so. As such, the correct approach to be taken is the "locality of undertaking test" as set out in the *Astral* decision.

[22] After considering the matter, the Commissioner held as follows:

> '[29] MECS-SA's business was that of a TES. Section 198 [of the LRA states] that the person whose services have been procured is the employee of the other party. It is common cause that [Pauw] was not employed by the client, TFM, to such an extent that Pauw was even forbidden to suggest that he was an employee of TFM. It was also common cause

[2] (2008) 29 ILJ 2668 (LAC) at para 18.

that MECS-SA had procured Pauw's services, but that those services were provided to the client through MECS-DRC…

[31] [MECS-SA's] business operates from South Africa. Moreover, it finds and recruits staff in South Africa. [MECS-SA] also considers itself bound to South African legislation in respect of taxes and UIF payments. [MECS-SA] also has no presence in the Congo. Was [Pauw] going to work in MECS-SA's operations in the Congo? The answer is clearly no. He was going to work in [MEC-SA's] client's business.'

[23] The Commissioner concluded that:

'As I was not asked to pronounce on [the MECS-DRC Contract] and as [Pauw] does not base his claim on this particular contract, or against [MECS-DRC], I am of the view that at this stage it has no true impact on the question whether or not the CCMA has jurisdiction to determine this alleged dismissal dispute... All I was required to determine was whether or not the CCMA has the requisite jurisdiction to hear this case which question I without hesitation find to be in the affirmative.'

[24] MECS-SA has approached this Court to have the award reviewed and corrected, or set aside.

The Correct Test on Review

[25] It is trite law that the review test as set out in the case of *Sidumo and Another v Rustenburg Platinum Mines and Others*[3] does not apply to the review of a jurisdictional ruling of this nature made by the CCMA. See *Global Outdoor Systems Ltd v Du Toit and Others*[4] *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others.*[5]

[26] As Francis J stated in the *Global* case (supra):

'The question is not whether the finding of the commissioner was… justifiable, rational or reasonable. The issue is simply whether,

[3] [2007] 12 BLLR 1097 (CC) at para 110.
[4] (2011) 32 ILJ 1100 (LC) at para 18.
[5] (2008) 29 ILJ 2218 (LAC).

objectively speaking, the facts which could give the CCMA jurisdiction to entertain the dispute existed.'[6]

Applicant's Submissions

[27] Initially, Mr Hutchinson (for MECS-SA) argued in the CCMA that MECS-SA was not Pauw's true employer. He suggested that MECS-DRC was the true employer and that the CCMA lacked jurisdiction because Pauw was employed by a foreign entity in a foreign jurisdiction. He based his argument on the fact that, because Pauw's employment with MECS-SA was contingent on him being able to provide his services to TFM, if he was not employed by MECS-DRC, he could not have obtained a work permit and therefore could not provide his services to TFM. Furthermore, Mr Hutchinson pointed out that MECS-SA did not have a service level agreement ("SLA") with TFM and that only MECS-DRC enjoyed an SLA with TFM and therefore only MECS-DRC could provide Pauw's services to TFM. This meant that it was legally impossible for Pauw to work for MECS-SA because MECS-SA could not provide Pauw's services to TFM.

[28] However, Mr Hutchison then adjusted his argument. He stated that, although "strictly speaking" Pauw was not employed by MECS-SA, his client did not "take that point" because there was "an association" between MECS-SA and MECS-DRC.

[29] Mr Hutchinson referred the Commissioner to the case of *Astral Operations Ltd v Parry.*[7] In that case the employee (Parry) had entered into an employment contract with a South African company (Astral), the contract was concluded in South Africa and it appeared that South African law would apply to the contract. However, Parry was to be employed in Malawi and rendered his services to a Malawian subsidiary of Astral.

[30] Referring to the Appellate Division decision of *Genrec Mei (Pty) Ltd v Industrial Council for the Iron, Steel, Engineering and Metallurgical Industry and Others*[8] the Labour Appeal Court in *Astral* held that the LRA and the BCEA only applied within South Africa's borders. Accordingly, the Labour

[6] *Global* case above n4 at para 18.
[7] Above n1.
[8] (1995) 16 ILJ 51 (A) paras 21-22.

Court only had jurisdiction over employment disputes that arose within South Africa's borders. The LAC held that it should apply the test set out in the *Genrec* decision, namely, "where was the locality of the employer's undertaking in which the employee worked?" If the locality was outside South Africa's borders then the Labour Court would not have jurisdiction to hear the matter.

[31] The LAC held further that, although Astral had operations in South Africa, Parry actually worked for Astral's Malawian operation. Parry performed his services in Malawi and reported to Astral's Malawian subsidiary. In light of these facts, the LAC held that the locality of the undertaking in which Parry worked was Malawi and therefore the Labour Court had no jurisdiction to entertain his claim.

[32] I should point out that the *Genrec* matter was concerned with the jurisdiction of an old Industrial Council under the Labour Relations Act 28 of 1956 ("the Old Act"). In that case, the then Appellate Division set out the "locality of undertaking test" and held that if the locality of the undertaking was outside South Africa then the Industrial Council would not have jurisdiction because the Old Act did not apply extra-territorially. In the *Astral* matter, Zondo JP, as he then was, held that the locality test applied to contractual claims in terms of section 77(3) of the BCEA. This was because section 77(3) clothed the Labour Court with jurisdiction and, if the BCEA did not apply extra-territorially, then quite obviously section 77(3) of the BCEA could not apply to disputes which arose extra-territorially. Zondo JP also held, albeit *obiter*, that the locality test would apply to disputes referred to the CCMA in terms of the LRA.

[33] Mr Hutchinson argued that, when read together, the *Astral* and *Genrec* cases provided authority for the proposition that the CCMA does not have jurisdiction to entertain an unfair dismissal dispute where the employee worked in an undertaking outside of South Africa's borders. He argued that Pauw worked in an undertaking in the DRC and that Pauw's remedy lay with issuing legal proceedings in the DRC against either MECS-DRC or MECS-SA, or against both companies.

[34] Mr Hutchinson also stated that MECS-SA "does have its tentacles extended to other countries, it has a presence through associations". Mr Hutchinson appeared to suggest that MECS-SA actually had a presence in the DRC and that, because Pauw worked at MECS-SA's DRC undertaking, according to the *Astral* test the CCMA would not have jurisdiction to hear the dispute.

[35] In MECS-SA's founding affidavit to this review application, deposed to by a Mr Darren Helwick, Mr Helwick avers that MECS-DRC was Pauw's *de jure* employer but that MECS-SA viewed itself as a "co-employer" due to the close relationship that existed between the two companies. Mr Helwick states that both entities acted together in order to advance their common business interests.

[36] Mr Helwick also stated that MECS-SA and MECS-DRC had a joint interest in engaging the services of Pauw for a joint client of theirs, namely, TFM. He states further that the Commissioner was clearly wrong to hold that MECS-SA did not have a presence in the DRC.

[37] Mr Helwick went on to say that the employment contracts with MECS-SA and MECS-DRC did not establish two different and distinct employment relationships, but were in fact two aspects of the same employment relationship. This is borne out by the fact that both contracts made provision for payment of the amount of $22,500.00 per month but that only one such payment was ever made. Interestingly, Mr Hellwick states that while the two companies were co-employers of Pauw, MECS-SA did not act as a TES in employing Pauw but that only MECS-DRC acted as the TES.

[38] Helwick concludes his affidavit by saying that, given the nature of Pauw's dual employment with MECS-SA and MECS-DRC, MECS-SA cannot be considered wholly separate and distinct from MECS-DRC when utilising the "locality of undertaking test".

[39] In MECS-SA's heads of argument, Mr Hutchinson supplements the arguments raised in the founding affidavit by stating that "[MECS-SA was for all intents and purposes, an agent for [MECS-DRC]". This was the first time that the argument of agency was raised in these proceedings.

[40] The heads also reveal, again for the first time, that MECS-SA owns a 1% share in MECS-DRC.

Third Respondent's Submissions

[41] Pauw argued, in the arbitration, that he signed the MECS-DRC contract for the sole purpose of obtaining a work permit. He said it was never agreed that the MECS-DRC contract would nullify the MECS-SA contract. He considered MECS-SA to have been his sole employer. He argued further that because the MECS-SA contract was amended in August 2011 pursuant to a determination by the Minister of Labour, this meant that the employment relationship between himself and MECS-SA persisted.

[42] Pauw argued that it was significant that the MECS-SA contract stipulated that the parties would be bound by South African law; that extensive reference was made therein to South African employment legislation; that it was MECS-SA who paid Pauw's salary (in South African Rands); and that MECS-SA considered itself liable to pay PAYE tax on Pauw's behalf to SARS.

[43] At the arbitration, Mr Campanella (on behalf of Pauw) argued that, because MECS-SA was acting as a TES when it employed Pauw, Section 198 of the LRA established an employment relationship between Pauw and MECS-SA. He argued that, even if there was an additional employment relationship between Pauw and MECS-DRC, this relationship persisted and did not affect the existence of the MECS-SA contract. Furthermore, when MECS-SA terminated Pauw's service by way of written notice, that notice only terminated the MECS-SA contract and did not terminate the MECS-DRC contract.

[44] After making reference to the *Astral* case, Mr Campanella argued that Pauw's situation can be distinguished on the facts because Pauw's case involves a TES, whereas both *Astral* and *Genrec* applied to conventional employment relationships that took place outside of South African borders.

[45] Mr Campanella argued that, when considering the "locality of undertaking test", a TES's undertaking is to procure and supply services for its clients. Once a TES procures a suitable employee and then supplies that

employee's services for the benefit of one of its clients, it has carried out its undertaking. He argued that the locality of the client's undertaking is immaterial. In terms of Section 198 of the LRA, it is the locality of the TES's undertaking that should be decisive when considering the test set out in *Astral*. He argued further that MECS-SA's undertaking as a TES was located in South Africa, and that it has no presence in the DRC.

[46] Mr Campanella also argued that the *Astral* case made sense because if the employer had an undertaking in another country that meant that the employer had assets in that country. He argued that MECS-SA had no assets in the DRC and that Pauw could not institute proceedings against MECS-SA in the DRC because MECS-SA had no assets there to found jurisdiction.

[47] Finally, Mr Campanella stated that it would be in keeping with the purpose of the LRA (and Section 198 in particular) to find that the CCMA had jurisdiction in this matter. To hold otherwise would be to allow labour brokers to avoid their duties as statutory employers simply by placing their employees outside South Africa's borders.

Analysis of the Facts

[48] There have been a number of arguments put forward about the true nature of the employment relationship between the parties. It is undisputed that Pauw signed two contracts of employment. MECS-SA seems to place more reliance on the MECS-DRC contract and Pauw argues that the MECS-SA contract is the only contract that has relevance.

[49] It would, therefore, appear that there is a dispute of fact regarding the parties' true intentions at the time of signing the two contracts. MECS-SA seems to suggest that the MECS-DRC contract somehow reduced the significance of the MECS-SA Contract, without going so far as to suggest that the former nullified the latter. In fact, MECS-SA later states that the two contracts were really two separate aspects of one employment relationship.

[50] Pauw, on the other hand, avers that he signed the MECS-DRC contract for the sole purpose of obtaining a work permit and that he never intended MECS-DRC to be his employer.

[51] The evidence at the CCMA arbitration was led by means of affidavits and, as such, I am bound by *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[9] to prefer the version put forward in Pauw's answering affidavit in those proceedings (unless the allegations are so unlikely that they can be rejected merely on the papers).[10]

[52] I am satisfied that Pauw's allegations about the MECS-DRC contract are sufficiently unlikely that they may be rejected. Although Pauw's intention in signing the MECS-DRC contract was to obtain a work permit, it was not as if he was simply signing an application for a work permit. As a professional person, it is very probable that he knew that he was signing an employment contract and that such actions would have legal consequences. I am, therefore, satisfied that, in all probability, an employment relationship existed between Pauw and MECS-DRC.

[53] However, the above does not mean that Pauw was only employed by MECS-DRC. No evidence was led at the arbitration that the MECS-SA contract constituted anything other than an employment agreement between an employee and a TES. In terms of that contract, Pauw was employed for the purpose of providing his services to TFM. The evidence reveals that Pauw performed his side of the bargain by providing his services to TFM. MECS-SA performed its side of the bargain by paying Pauw's salary.

[54] I do not agree with Mr Hutchinson when he says that Pauw could not have performed in terms of the MECS-SA contract because MECS-SA did not have an SLA with TFM. The provision of Pauw's services was not contingent on MECS-SA being remunerated by TFM. Indeed, it would appear that the objective was for MECS-DRC to be so remunerated for the greater benefit of the group of companies.

[55] The argument that it was legally impossible for Pauw to be employed by MECS-SA because he could not perform his services without obtaining a work permit, which means he had to have been employed by MECS-DRC,

[9] 1984 (3) SA 623 (A) 634H-635B.
[10] This is not to be confused with Pauw's answering affidavit in the review proceedings. That affidavit must be discounted because it was filed out of time without an application for condonation.

in my respectful opinion, begs the question. Furthermore, being employed by MECS-SA and being employed by MECS-DRC are not mutually exclusive concepts.

[56] Although both contracts prohibited Pauw from working for another employer, it would appear that both MECS-SA and MECS-DRC implicitly waived their rights in terms of this prohibition. This means that it was possible for Pauw to be employed by both companies at the same time. Even if there was no implicit waiver, the two companies have not sought to exercise these contractual rights. Indeed, MECS-SA actively encouraged Pauw to sign the MECS-DRC contract in contravention of this prohibition.

[57] In light of what is stated above, I am inclined to agree with Mr Helwick's submission that two contracts of employment co-existed. The idea of co-employment by two different entities was endorsed by the Labour Appeal Court in the case of *Footwear Trading CC v Mdladose*.[11]

[58] I reiterate that the parties to the MECS-SA Contract both performed their obligations in terms of the contract. However, while it would appear that Pauw performed his obligations in terms of the MECS-DRC Contract, it is apparent that MECS-DRC did not fulfill its obligations in terms of contract by not paying Pauw his salary of US$ 22,500 per month.

[59] However, Pauw alleges that in terms of the MECS-DRC contract, the parties did not reach consensus on the amount of remuneration he would receive. MECS-SA states that an arrangement for the same remuneration was reached. Based on the *Plascon-Evans* rule, I am inclined to prefer Pauw's version on this particular issue.

[60] Nevertheless, it makes little difference whether Pauw was to receive remuneration under the MECS-DRC contract. The point is that the parties entered into an employment relationship either on the basis of remuneration (which MECS-DRC failed to pay to Pauw and for which Pauw has a remedy against MECS-DRC in a Congolese court), or on the common understanding that Pauw would be remunerated by another company within the group of companies. Either way, it cannot really be said that Pauw was

[11] (2005) 26 ILJ 442 (LAC) at para 39.

not employed by MECS-DRC simply because the MECS-DRC contract did not provide for remuneration.

[61] Furthermore, it is very likely that Pauw was also employed by MECS-DRC in addition to being employed by MECS-SA because, (a) Pauw was given a work permit by the Congolese government; and (b) MECS-DRC had an SLA with TFM.

[62] I now turn to the submission, made on behalf of MECS-SA, that the two contracts were merely two different aspects of the same employment relationship. Essentially, the argument is that MECS-SA cannot be considered wholly separate and distinct from MECS-DRC and that for this reason, Pauw only really had one employer (presumably some kind of amorphous mixture of the two companies or possibly the "group of companies" as a whole).

[63] I have little doubt that the MECS Group chose to conclude employment contracts with specific subsidiaries in order to obtain the maximum benefit derived from the separate legal status of each subsidiary. Indeed, the benefit of the MECS-DRC contract was that Pauw could obtain a work permit in the DRC. Pauw could not obtain a work permit if he was only employed by either MECS-SA or MECS Holdings.

[64] I am of the view that this Court must respect the fact that MECS-SA and MECS-DRC have separate legal identities. I have seen no evidence that justifies interference with this principle. Even the *Footwear* decision (*supra*) only goes so far as to endorse the concept of co-employment and joint and several liability of distinct entities without claiming to merge the separate entities into one entity. I am, therefore, of the view that Pauw was employed by both MECS-SA and MECS-DRC at the time that he received the termination notice.

[65] In his heads of argument, Mr Hutchinson for the first time argues that MECS-SA actually concluded the MECS-SA contract in its capacity as agent for MECS-DRC. I am not certain that Mr Hutchinson was entitled to raise this line of argument without it having been foreshadowed in MECS-

SA's founding affidavit.[12] However, I do not need to make this determination because the argument fails in any event.

[66] No evidence was led that MECS-SA was contracting as an agent on behalf of a disclosed or undisclosed principal. And nowhere does MECS-SA refer to the authority that empowered it to do so.[13] If MECS-SA was indeed acting as an agent, then there would have been no need to enter into the MECS-DRC Contract. The inescapable conclusion is that MECS-SA was not acting as an agent.

[67] Finally, it was revealed in MEC-SA's heads of argument that MECS-SA owns a 1% share in MECS-DRC. If this were true, it would mean that, where the Termination Notice says that Pauw's employment with MECS-SA and its subsidiaries has come to an end, Pauw's employment with MECS-DRC also came to an end (because MECS-DRC is technically a subsidiary of MECS-SA).

[68] However, this evidence has not been made under oath and there is no reason to allow such evidence from the Bar. In any event, even if the allegation is true, the only purpose it would serve is to confirm that Pauw's employment with MECS-DRC came to an end at the same time as it came to an end with MECS-SA. Whether or not the respective companies were lawfully entitled to terminate Pauw's employment is a question for the relevant *fora* having jurisdiction over those two distinct disputes.

Application of the Law to the Facts

[69] MECS-SA argued that the Commissioner was clearly wrong in finding that MECS-SA did not have a presence in the DRC. This argument is based on the questionable premise that MECS-SA and MECS-DRC are essentially the same entity because they are associated companies within the same group of companies. Accordingly, the argument is that Pauw was working at MECS-SA's operations in the DRC through MECS-DRC. I have indicated above why I find that this Court must treat MECS-DRC and MECS-SA as

[12] See *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO and Others* [2009] 4 BLLR 299 (LAC).
[13] See *Serfontein v Balmoral Central Contracts SA (Pty) Ltd* [2000] 3 BALR 317 (CCMA).

two distinct legal entities and, if that is the case, then this argument must fail because MECS-SA does not itself have operations in the DRC.

[70] Furthermore, Mr Helwick claimed, in his founding affidavit, that MECS-SA was not acting as a TES and that it was in fact MECS-DRC who was acting as the TES because it had a SLA with TFM. In light of the conclusions reached elsewhere in this judgment, I cannot agree with this submission. The terms of the MECS-SA contract unequivocally indicate that MECS-SA was acting as a TES and, what is more, both MECS-SA and Pauw performed in terms of that agreement.

[71] I am also of the opinion that Pauw concluded a separate contract with MECS-DRC which was also acting as a TES. Indeed, it appears to have been the intention that both contracts exist at the same time.

[72] Mr Campanella, on behalf of Pauw, argued that a correct interpretation of the *Astral* case reveals that the CCMA has jurisdiction to hear disputes referred to it by employees of a South African TES, even if those employees were placed with clients outside of South Africa's borders. I am inclined to agree with Mr Campanella.

[73] The Commissioner reached the same conclusion and I find her reasons compelling. As a TES, MECS-SA's business is to provide its clients with individuals who will provide their services to those clients. Section 198 of the LRA stipulates that in such cases the employee is employed by the TES and not by the client of the TES.

[74] In the *Astral* case (which I am bound to follow), the test for CCMA territorial jurisdiction is "where is the locality of the employer's undertaking in which the employee works?" If the locality of that undertaking is within South African borders then the CCMA has jurisdiction.[14]

[75] So where does a TES conduct its labour broking business? The logical answer must be "the place where it recruits and procures labour" and not the place where its clients have operations. By way of example, if a mining company were a client of TES, it would be wrong to say that the TES

[14] See also *Global Outdoor Systems* above n4.

conducts a mining business simply because it provides the mining company with externally sourced labour. The TES does not have mining assets and does not share in the profits derived from mining operations.

[76] Therefore, in the present case we must ask the question "where does MECS-SA conduct its operations?" Where does MECS-SA procure the services of individuals for the benefit of its clients? The answer must be South Africa because MECS-SA, as a distinct legal entity, has no presence in the DRC. Conversely, one could ask, did Pauw go to work at MECS-SA's operations in the DRC? No, he went to work at MECS-SA's client's operations.

[77] In light of the above, I find that the locality of MECS-SA's undertaking in which Pauw performed in terms of his contract was in South Africa and, therefore, the CCMA has jurisdiction to hear Pauw's dispute.

[78] I am also satisfied that my interpretation of the *Astral* test is consistent with the purpose of the LRA and, in particular, section 198 thereof.

Order

[79] I therefore make the following order:

79.1 The application is dismissed with costs.

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Leppan, AJ

Acting Judge of the Labour Court

APPEARANCES

For the Applicant:	Advocate W Hutchinson
Instructed by:	Kirchmanns Incorporated
For the Third Respondent:	Advocate J Campanella
Instructed by:	Bornman & Mostert Incorporated