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Employment Law
ALERT

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The applicant in this case, Mr Maasdorp was employed by the University of the Free State. As part of its attempts to curb the spread of COVID-19, the university issued a vaccination policy in November 2021. This policy did not make vaccination an absolute requirement, but also allowed for employees to apply for an exemption from receiving the vaccine on either medical, religious, or other grounds. Absent a negative COVID-19 test not older than seven days or an exemption, employees were barred from accessing the workplace. Without yet deciding on fairness, the court accepted that this constituted discrimination in the sense that it differentiated between employees.

The university made it clear to Maasdorp that he would not be able to enter the workplace without meeting the above requirements. Despite the university bringing the policy to Maasdorp's attention on various occasions, he remained adamant that he would not be vaccinated. Maasdorp further failed to apply for an exemption. Upon the university instructing all employees to attend the workplace physically, Maasdorp was refused entry multiple times for his failure to adhere to the policy. This conduct led to disciplinary action being taken against him, which culminated in his eventual dismissal on 5 April 2022.

Aggrieved by his dismissal, Maasdorp brought a claim to the Labour Court alleging that his dismissal was automatically unfair in that the reason for his dismissal was unfair discrimination based on an arbitrary ground.

As the court had accepted that the university's policy resulted in discrimination, the issue before the court was whether the discrimination against Maasdorp was unfair on arbitrary grounds, therefore constituting an automatically unfair dismissal.

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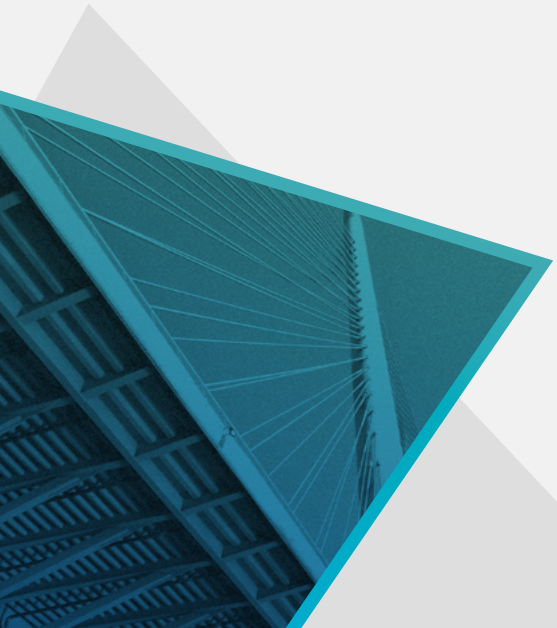
The court found that the vaccination policy was not arbitrary, because the policy was formulated based on the following:

- The general scientific consensus regarding the value of COVID-19 vaccinations.
- The university's obligations under the Occupational Health and Safety Act 85 of 1993 (OHSA). Namely, section 8(1) of the OHSA which specifically stipulates that *"every employer shall provide and maintain, as far as reasonably practicable, a working environment that is safe and without risk to the health of his employees"*.
- The Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces of 11 June 2021, which was a directive published in terms of the National Disaster Regulations. This directive allowed employers to require the vaccination of their employees, subject to certain requirements.

The court held that there had been no unfair discrimination on an arbitrary ground. Accordingly, the court did not have jurisdiction to adjudicate Maasdorp's claim.

The impact of the COVID-19 pandemic on the workplace is undisputed. This case echoes the crystalized law on automatically unfair dismissals. To argue automatically unfair dismissal based on arbitrary discrimination, the discrimination or differentiation must have no reasonable justification. In the case of COVID-19, however, there was a shared rationale amongst employers for the issuing of vaccination policies, supported by legislation and science. This case, therefore, is a useful starting point for employers when faced with similar claims in the COVID-19 realm.

Jean Ewang and Thato Makoaba



South African labour laws: Foreign and remote workers, crossing swords

With the global village having also transformed into a 'global workplace', it is necessary to consider whether remote workers or employees who work for South African employers outside the country may access the Commission for Conciliation, Mediation and Arbitration (CCMA) or Labour Courts. In some instances, an employer may be located in South Africa only to have a part of its workforce spread across other parts of the world.

Alternatively, an employer may be based in another part of the world with a presence in South Africa, or even have little to no actual footprint in South Africa. The location of an employee impacts the territorial jurisdiction of the CCMA and Labour Courts and this is important as an employer needs to understand where an aggrieved employee may file suit.

The proposed Employment Services Amendment Bill, 2021 which flows from a proposed National Labour Migration Policy to deal with the employment of foreign workers who can be hired is not addressed in this Alert.

In *Sorrell v Petroplan Sub-Sahara Africa (Pty) Ltd* [2023] 3 BLLR 271 (LC), decided earlier in 2023, the Labour Court had to determine whether the claims of the employee fell within the court's jurisdiction. The employee after some history eventually became employed by a South African employer, to perform the Mozambique-related services of the employer, in Mozambique. The employee's place of work was important, said the Labour Court, following the decision of the Labour Appeal Court in *Monare v SA Tourism and Others* [2016] 37 ILJ 394 (LAC) which dealt with the principles governing the determination of territorial jurisdiction. In *Monare* the employee rendered services in the UK and was terminated in the UK. The employee was employed by South African Tourism (the company). The employee worked in the UK branch of the company. His contract of employment was concluded outside South Africa and was under the direct management control of the UK branch. Further, the UK branch operated independently of the South African branch?. Territorial jurisdiction is to be determined by the locality of the undertaking being carried out by the employer. The court held that it is not the place where the employer conducts its business which determines the place of employment, but instead the location of the actual workplace where the employee rendered services. To determine its territorial jurisdiction, the CCMA and courts will consider various factors to determine whether there is a link between the employment contract and the country in question. *Sorrell* and *Monare* are recent decisions on this age-old question. Employers should be aware that not all employment disputes may be subject to the jurisdiction of the CCMA or Labour Court.

Employees of foreign states

Added to this complexity is South African employees who render services in South Africa for a foreign state. Here, their workplace is South Africa. Can this form of employee approach the CCMA or Labour Court? The judgments of *Pitja v CCMA and Others* [2023] ZALCJHB 79 (16 March 2023), and *Pitja v United States of America* [2023] 8 BLLR 833 (LC) (23 May 2023) deal with this question under the

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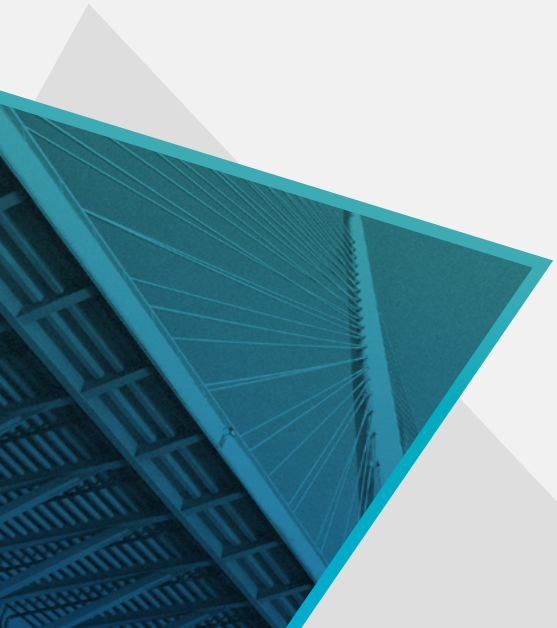
Foreign States Immunities Act 87 of 1981 (Act). Pitja was employed by the US Consulate in Johannesburg as a visa assistant. Following his dismissal, he lodged a claim with the CCMA. It is a well-established principle of public international law that courts of a country will not by their process make a foreign state a party to legal proceedings against its will. The court held that the consulate at which Pitja was employed was part of the US diplomatic mission to South Africa, and a component of the US Department of State.
The Act regulates the immunity that is afforded to foreign states, defined in section 1(2)(b) and (c) to include a *"government of a foreign state"* and *"any department of that government"*.
A foreign state shall be immune from the jurisdiction of South African courts except as provided by the Act. One of the exceptions to the immunity established by section 2 is envisaged in section 5 which provides that a foreign state shall not be immune from the jurisdiction of South African courts in the following circumstances:

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

However, this is not without exception, as the parties are at liberty to agree otherwise.

This case demonstrates that mere presence does not also automatically mean that the employee is subject to South African labour laws. This gets back to the *Monare* principles relating to the link between the employment contract and the country(ies) in question, which may not always point to the application of South African labour laws and factors may point to a foreign legal system. So, employers should give due consideration to these questions when regulating the employment relationship with foreign workers at inception or when deploying South African employees abroad.

Imraan Mahomed and Iva Babayi



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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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