IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: JR 1287/2009

In the matter between:

GIDDINGS, MICHAEL ANTHONY **Applicant**

and

BEIGE HOLDINGS LIMITED **Respondent**

JUDGMENT

LAGRANGE,AJ

Introduction

1. In terms of a judgment handed down on 11 February 2010, I granted the applicant's second and third prayers in his notice of motion, namely:

   1.1. Ordering that clause 15 ("the arbitration clause") of the Executive Service and Restraint Agreement dated 18 October 2006 between the applicant and the respondent shall cease to have effect with reference to the unfair dismissal dispute referred to the Metal Industries and Engineering Bargaining Council under Case no MEGA 23176.

   1.2. Ordering that the respondent to pay the costs of this application.

2. The relief was granted in terms of section 3(2) of the Arbration Act 42 of 1965, read with the provisions of section 157(3) of the Labour Relations Act 66 of 1995 ('the LRA'). Under the last-mentioned provision references to 'the court' in the Arbitation Act, which is the High Court in terms of the Arbitration Act, are deemed to be references to the Labour Court in respect of any dispute which may be referred to arbitration in terms of the LRA. The dispute between the parties is an unfair dismissal dispute, which may be referred to arbitration under section 191(5) of the LRA, and therefore the Labour Court is the forum seized with the application under section 3(2) of the Arbitration Act. My brief reasons for granting the relief sought are set out in below.

Facts

3. The applicant was a director and shareholder of Crystal Pack (Pty) Ltd ('Crystal Pack'). Sometime in mid-October 2006, the applicant sold his shares in the company to the respondent company which is now the majority shareholder in Crystal Pack.

4. After the sale of shares, the applicant and respondent concluded an agreement entitled "An Executive Service and Restraint Agreement" ('the Executive agreement'). It is this agreement which the applicant claims initiated an employment relationship between himself and the respondent. The respondent admits the agreement but denies that it established an employment relationship between them. It maintains the applicant was employed by Crystal Pack. For the purposes of this judgment it is sufficient to note that there is a dispute about the identity of the applicant's true employer.

5. On 10th October 2008, the applicant was suspended from his employment on the strength of a letter issued by the CEO of the respondent on the respondent's

letterhead. On 5th December 2008, his employment was terminated by another letter emanating from the respondent.

6. The applicant referred an unfair dismissal dispute to the Metal and Engineering Industries Bargaining Council, citing the respondent as his employer. At that forum the respondent took an *in limine* point that it was not the applicant's employer. It apparently produced another document purporting to show that Crystal Pack was the applicant's employer. In the alternative, the respondent argued that, if indeed it was the applicant's employer, an arbitration clause in Executive agreement required the applicant to refer his dispute to private arbitration. Clause 15.1 of the Executive agreement states:

   > "Should *any* dispute *of any nature whatever arise from or in connection with this agreement* then either party shall be entitled to refer such dispute to arbitration before a single arbitrator …" (emphasis added).

7. The respondent further argued that the bargaining council did not have jurisdiction over it in any event because it is not a party to the Main Collective Agreement of that body. This is also an issue that is not for the court to decide and is not necessary to determine for the purposes of this application. Disputes over whether or not the respondent falls within the scope of the bargaining council or whether or not it is bound by the bargaining council's Main Agreement are matters to be decided by the CCMA under the provisions of section 62 of the LRA.

8. What the court had to decide is if the provisions of clause 15 of the Executive Agreement compelled the applicant to refer his dispute over his alleged unfair dismissal to private arbitration insofar as it concerns the respondent, instead of referring it to the bargaining council.

9. On a plain reading of clause 15.1 of the Executive agreement, a dispute over whether or not that agreement gave rise to an employment relationship between the applicant and the respondent is a dispute either 'arising from' and, or alternatively, 'in connection with' that agreement. The latter phrase has been described as one that *prima facie* comprises "words of extension" that "may sometimes be used to cover a wide range of association" but in other cases must be limited "to the closer or more direct forms of association indicated by the context".[1] In this instance, the phrases "arising from" and "in connection with" are the only terms qualifying a potentially wide dispute subject matter described expansively as "any dispute of any nature whatever". Using these terms of association in conjunction with the very broadly described dispute subject matter strongly suggests that a wide range of association was intended by these phrases.

10. Also, considering the references in the Executive agreement to the applicant being 'employed' or having his 'employment' terminated, it would be strange if a dispute that concerns his employment status, which he claims is confirmed or established by the agreement, could be described as a dispute that was not one that either 'arose from' or, at the very least, was 'in connection with' that agreement.

11. Accordingly, in terms of clause 15.1 of the Executive agreement, any dispute over the applicant's status as the respondent's employee would fall within the remit of that provision and would have to be determined in private arbitration proceedings. However, the other potential employer or co-employer, Crystal Pack, will not be a party to those proceedings. Correspondingly, if the applicant pursues his unfair dismissal claim in the bargaining council, with Crystal Pack being a party, the bargaining council's jurisdiction over the respondent as the other possible employer

[1] ***Rabinowitz and Another v De Beers Consolidated Mines Ltd and another*** **1958 (3) SA 619 (A)** at 631E-F.

party to that dispute, would be precluded by the operation of clause 15.1, quite apart from any other jurisdictional objections the respondent might raise. This could produce an untenable situation where the applicant would have to proceed in each forum separately against one party at a time.

12. The result of such a truncated arrangement is that in private arbitration proceedings with the respondent, the arbitrator might conclude that the agreement did not give rise to an employment relationship between the applicant and the respondent and accordingly, the respondent is not the applicant's employer, whereas, the arbitrator in the bargaining council proceedings may decide that Crystal Pack and the respondent are the applicant's joint employer, or simply that Crystal Pack is not the applicant's sole employer. Other permutations of different results are also possible.

13. Section 3(2) of the Arbitration Act states that:

> *"The court may at any time on the application of any party to the arbitration agreement, on good cause shown –*
>
> *(a) set aside the arbitration agreement;*
>
> *(b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or*
>
> *(c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred."*

14. The courts have consistently held that a party to an arbitration agreement will not easily be relieved of its obligation to submit a dispute to arbitration and that 'a very strong case' is required for the court to exercise its discretion in favour of such a

party, under section 3(2). The reason for this is easy to understand: the party asking to be relieved of its obligation is, in one sense, seeking to resile from a contractual undertaking. The finality of arbitration proceedings as opposed to court proceedings is another factor.[2]

15. Mr Ascar, for the respondent, argued that the applicant was effectively seeking rectification of the contract, by trying to change his obligation to submit his dispute with the respondent to arbitration. Mr Vetten pointed out, correctly in my view, that the section 3(2) is a *sui generis* remedy provided by the Arbitration Act. As such an applicant need not establish a basis for rectification in order to obtain relief under the provisions of the section.

16. In the *Metallurgical* case, Coleman J identified that a significant factor in determining whether to grant such relief is when there was a possibility of alternative liability arising between two or more parties and that if the relief were not granted there is a possibility that two tribunals might reach different conclusions on vital factual questions, which could result in the plaintiff not being able to obtain relief from any party. Permitting such a possible outcome would not be just. Another important factor, though not decisive on its own, is the "wastefulness involved in having certain of the issues investigated and decided in two tribunals".[3]

17. The important issue for present purposes is that proceeding in two independent forums, apart from the waste of resources entailed, may yield conflicting or inconclusive results as to the identity of the applicant's true employer. Consequently, it may also result in the applicant's unfair dismissal claim not being determined in

[2] ***Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd*** **1971 (2) SA 388 (W)** at 391E-G

[3] At 391A-E of the judgment.

either forum. It is the risk of conflicting outcomes on the same issues, which in my view makes this an instance in which the court should not require the applicant to submit his dispute with the respondent to private arbitration in terms of clause 15.1.

18. The applicant sought as a primary remedy the setting aside of the arbitration agreement contained in clause 15 of the Executive agreement, which the respondent strenuously opposed as it would have the effect of excluding the obligation to refer other disputes to arbitration. Mr Ascar however acceded that in the event that I found the applicant ought to be relieved of an obligation to submit the current dispute to arbitration, the alternative prayer which I eventually granted would be an appropriate one.

ROBERT LAGRANGE

ACTING JUDGE OF THE LABOUR COURT

Date of hearing: 11 February 2010

Date of judgment: 11 February 2010

Appearances:

For the applicant: Mr D Vetten, instructed by Darryl Furman Attorneys

For the respondent: Mr C Ascar, instructed by Fluxmans Incorporated