REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE Nos. A3006/2010

(Appeal case number)

39246/09

(Motion Court case number)

DATE: 17/11/2010

In the matter of the appeal of:

CHRISTINE SUSAN STOCKER First Appellant

and

JEFFERY EDWARD GIDDINGS Second Appellant

and

THE WORKFORCE GROUP (PTY) LTD Respondent

JUDGMENT

WILLIS J:

[1] In the court below (*per* van Eeden AJ), summary judgment was granted against the appellants, jointly and severally, the one paying, the other to be absolved. The appellants, who were the defendants in

the court below, were ordered to pay the plaintiff (who is now the respondent) the sum of R1 881 307.47 (one million, eight hundred and eighty one thousand, three hundred and seven rands and forty-seven cents), together with interest and costs. The appellants now appeal to the full court with the leave of the court below. The judgment of the court below was delivered on 10 December, 2009.

[2] The judgment was granted against the appellants on the basis that they were sureties for a debt owed by Crystal Pack (Pty) Ltd, the principal debtor.

[3] In the plaintiff's particulars of claim, it was alleged that the debt arose from services which the plaintiff, as a duly registered private employment agency, had rendered to the principal debtor in procuring and providing the services of employees who were mainly general workers, electricians and code 10B drivers. These services were provided in terms of four separate written agreements concluded between the plaintiff and the principal debtor. The plaintiff also alleged in its particulars of claim that the principal debtor acknowledged its indebtedness in the sum of R 1 881 307.47, in writing, on 17 June, 2009 and also acknowledged that "the amount is due and payable and not disputed". In its particulars of claim the plaintiff furthermore alleged and relied upon a clause in the deeds of suretyship in terms of which the sureties agreed that "all acknowledgements of indebtedness and admissions by the debtor shall be binding on me". In their affidavits resisting summary judgment, the appellants do not dispute these allegations.

[4] It would appear that the principal debtor paid an amount of R14 896 923.53 to the plaintiff out of a total of R16 778 231.00 due to the plaintiff in terms of invoices for the services rendered by the plaintiff. This is how the amount claimed from the sureties is derived: it is for the balance on an account. It appears that the principal debtor

continues to do business with the plaintiff. It seems that a change in the directorship of the principal debtor explains, at least in part, why the plaintiff is proceeding against the appellants rather than the principal debtor, although the reasons are somewhat murky. Both of the appellants are former employees of the principal debtor. The first appellant was its financial director at the time of signing the deed of suretyship. As is so often the case with claims based on suretyship, one cannot escape a sense of sympathy with the appellants.

[5] The appellants have resisted judgment on the following bases:

(i) The plaintiff had overcharged the principal debtor in an amount of "at least" R208 908,30 and had also applied incorrect charge rates;

(ii) The High Court lacked jurisdiction to hear the matter;

(iii) The plaintiff was not duly registered as a person providing employment services in terms of the Skills Development Act, No. 97 of 1998.

[6] Insofar as the defendant's contention that there is a dispute as to whether or not the plaintiff overcharged or charged at excessive rates in an amount of at least R280 908,38 is concerned, it is significant that in paragraph 21 of the plaintiff's particulars of claim, it alleges that on 17 June, 2009, the principal debtor acknowledged in writing that it owed the plaintiff the amount of R1 881 307,47 and that "the amount is due and payable and not disputed". As has already been mentioned, the plaintiff went on to allege that the deeds of suretyship contained a clause in terms of which the sureties agreed that "all acknowledgements of indebtedness and admissions by the debtor shall be binding on me". These allegations as to (a) the acknowledgement by the principal debtor of the amount of the indebtedness, (b) as well as the acknowledgement by the principal debtor's obligation to pay the same and (c) the binding nature of such acknowledgements upon the sureties are not denied by the appellants.

[7] It is trite that sureties are *promissores subsidiarii*, that their obligations are accessory to that of the principal debtor.[1] This entails, *inter alia*, that a surety as the same defences *in rem* as the principal debtor has. In plain English, the Latin in this paragraph may be summarized as meaning that sureties have the same substantive defences as are available to the principal debtor, no more and no less. Apart from the *beneficium ordinis seu excussionis* (the benefit of excussion), the *beneficium divisionis* (the benefit of division) and the *beneficium cedendarum actionum* (the benefit of cession of actions), none of which *beneficia* are relevant to this case, a surety has the same rights as the principal debtor. Put conversely, a surety cannot succeed against a creditor in circumstances where the principal debtor would not be able to do so. As the principal debtor in this case has admitted the amount owing and its liability to pay the same, it is not open to the sureties to dispute these facts with the creditor. To compound the appellants' difficulties, they have both agreed that "acknowledgements of indebtedness" by the principal debtor shall be binding on them. Accordingly, there is no merit in this ground of appeal. The surety's remedy, in such a situation, is to claim, by way of recourse, from the principal debtor.[2] In this particular case, this right of recourse would not seem to be merely hypothetical. The principal debtor appears to be thriving.

[8] The next argument of the appellants is that because the respondent is a private employment services agency, the Labour Court has, in terms of section 31 (1) of the Skills Development Act, No. 97 of 1998, exclusive jurisdiction to hear the matter. The argument went that upon a proper interpretation of the long title of Skills Development Act, read together with sections 2 91) (h), 3 (a), 24 (1),

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[1] See, for example, *Imperial Cold Storage and Supply Company Limited v Julius Weil and Co* 1912 AD 747 at 750 and *Trust Bank of Africa Ltd v Frysch* 1977 (3) SA 562 (A) at 584F-G.

[2] See, for example, *Van der Walt's Trustees v Van Coller* 1911 TPD 1173 at 1175-6.

33(d) and 33 (e) of that Act, the legislature clearly regulates employment services as provided by an agency such as the plaintiff and, as section 31 confers exclusive jurisdiction on the Labour Court "in respect of all matters arising from this Act", the High Court had no jurisdiction in the matter. It is indeed clear enough that Skills Development Act does regulate employment services of the kind provided by the plaintiff. It is also clear that section 31 provides that the Labour Court has exclusive jurisdiction in respect of all matters arising from the Skills Development Act. The question is therefore, simply, whether the plaintiff's claim is one "arising from" the Act by reason of the fact that the Act regulates the business of the plaintiff? There is no need to repeat the sections of the Act *verbatim*.

[9] It seems clear from the decision of the Constitutional Court in *Gcaba v Minister for Safety and Security*[3] that the High Court retains its jurisdiction to determine matters as it has always done in terms of common law or as provided for in other statutory laws. The exception is that, when it comes to remedies that pertain to rights specifically brought into being by the Labour Relations Act, No 66 of 1995 ("the LRA") and certain additional statutes such as the Skills Development Act and the Basic Conditions of Employment Act, No. 75 of 1997, the Labour Court is the court given exclusive jurisdiction to determine whether or not such remedies are legally justifiable in the particular circumstances of any specific case. An obvious example of how such exclusivity operates occurs is to be found in the case of the right, in terms of the LRA, not to be unfairly dismissed.[4] This right not to be unfairly dismissed may be contrasted with the right, at common law, not to be unlawfully dismissed. In the absence of a statutory intervention, an unfair dismissal, unless it was also unlawful at common law, would be without a remedy. The LRA not only enables

[3] 2010 (1) SA 238 (CC) at paragraph [73} as well has the preceding paragraphs leading up to the conclusion contained in paragraph [73]

[4] In terms of section 185 (a) of the LRA every employee has "the right not to be unfairly dismissed".

legal recourse and creates legal remedies for an unfair dismissal which was not also unlawful at common law[5] but, furthermore, determines that the Labour Court is the court which has exclusive jurisdiction to make determinations as to (a) the unfairness of a dismissal and (b) the appropriate remedy in the event that a dismissal is unfair.[6] In general terms, this position is made explicit in the judgment of the Supreme Court of Appeal in the case of *Makhanya v University of Zululand.*[7] By parity of reasoning, the same position must obtain in regard to the conferral of exclusive jurisdiction to the Labour Court in terms of the Skills Development Act. In other words, the jurisdiction of the High Court is not ousted either by the LRA or the Skills Development Act. Rather, the Labour Court is given exclusive jurisdiction in matters which the High Court would never previously have been able to determine. The High Court would not have been able to determine these matters because the rights created by these Acts did not exist at common law. The position may perhaps be illustrated by the following examples: employees owed money by their employers in terms of their contracts of employment may pursue their claims in either the High Court or the Labour Court;[8] on the other hand, employees of private employers who wish to claim reinstatement because they were dismissed on the grounds of their

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[5] An "unfair dismissal" is, of course, an "unfair dismissal" as provided for in the LRA.

[6] As with an "unfair dismissal", the remedy must, of course, fall within the scope provided for in the LRA. Section 157 (1) of the LRA provides that "Subject to the Constitution and section 173 (which relates to the jurisdiction of the Labour Appeal Court) and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court". The remedies for an unfair dismissal are provided for in section 193 of the LRA. Sight must not be lost of the fact that, in terms of section 191 of the LRA, certain disputes may be referred to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") or appropriate councils such as Bargaining Councils for determination by arbitration. Arbitration awards made by the CCMA or certain councils such as Bargaining Councils may be reviewed by the Labour Court in terms of section 145 of the LRA.

[7] 2010 (1) SA 62 (SCA) at paragraphs [94] and [95]

[8] Not only would the employee have had this right at common law but also section 77 (3) of the Basic Conditions of Employment Act provides that: "The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic conditions of employment constitutes a term of the contract. "

employer's operational requirements but without the provisions of sections 189 or 189A of the LRA having been properly complied with would have to pursue their claims in the Labour Court.[9] A critical question in determining whether the Labour Court has exclusive jurisdiction in any matter is, as a first step, whether the litigant seeking to enforce rights would have had such rights at common law. Those litigants seeking to enforce rights which they would, since time immemorial, have been able to enforce in the High Court may still do so, unless, of course, the common law has been specifically abrogated by legislation or disuse. If these rights sought to be enforced concern their contracts of employment, litigants may, however, elect to do so in the Labour Court rather than the High Court. The Labour Court is the court having exclusive jurisdiction only in instances where (a) rights sought to be enforced did not exist at common law and (b) a statute has specifically conferred exclusive jurisdiction upon the Labour Court in respect of such rights. Accordingly, I shall now turn to consider whether the rights which the plaintiff sought to enforce in the court below had a "common law quality".

[10] Apart from the issue raised in general terms in the next paragraph, the appellants do not allege any substantive contravention by the plaintiff of any of the provisions of or regulatory measures that derive from the Skills Development Act. The liability of the appellants was determined on the basis of agreements of suretyship. As has already been observed, the liability of the principal debtor arose from a written agreements in terms of which the principal debtor placed orders with the plaintiff for the procurement and provision, from time to time, mainly of general workers electricians and code 10B drivers. In other words, the plaintiff's claim against the principal debtor arose from services rendered to the principal debtor by the plaintiff at the principal debtor's special instance and request. These claims of the

[9] The reason is that no such right to claim reinstatement for unfair dismissal based procedural defects in matters of retrenchment or redundancy exists in common law: the right is created by the LRA itself.

plaintiff and the remedies which arise therefrom owe nothing to any novel provisions of law introduced either by the LRA or the Skills Development Act. The remedies that arise from the plaintiff's claim have not been abrogated by legislation or by disuse. The legal instrument of suretyship, known in Latin as *fideiussio*, descends to us via Roman Law, is found in the *Digest* and has absorbed the attention of such well known old authorities as *Grotius*, *Voet*, *Van der Linden*, *Van Leeuwen* and *Pothier*.[10] The contract between the plaintiff and the principal debtor was one of *locatio conductio operis* and not *locatio conductio operarum*: *vis-à-vis* the principal debtor, the plaintiff was an independent contractor and not an employee. The remedies as between the *conductor* (the plaintiff) and the *locator* (the principal debtor) are ancient, arising quite independently of any statute. The cause of the plaintiff's action and the remedies which it seeks do not "arise from" the Skills Development Act. There is, in my opinion, no merit in the appellants' "jurisdiction point".

[11] The last ground of appeal is that, despite the fact that the plaintiff, in its particulars of claim, alleged that it is a duly registered private employment agency in terms of section 24 of the Skills Development Act, the appellant denies this and accordingly contends that the plaintiff was operating unlawfully and that for a court to enforce the agreement would condone illegality. In my opinion, the principles set out in *Breitenbach v Fiat SA (Pty) Ltd*[11] must operate in favour of the plaintiff. The appellant has set out this defence in a manner that is far too bald, vague and sketchy to be taken seriously. It would have been a simple matter to put credible supporting evidence in the affidavit resisting summary judgment if it was indeed true that the plaintiff was operating illegally. A mere "say-so" is, in the circumstances, insufficient. This ground of appeal fails as well.

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[10] One need merely glance through Chapter 37 of *Wille's Principles of South African Law*, 9th ed. Juta's, Cape Town, 2007 to confirm that this is indeed the case.
[11] 1976 (2) SA 226 (T) at 227g-228H

[12] I my opinion, the careful and well reasoned judgment of the court below cannot be faulted. Accordingly, I should dismiss the appeal with costs.

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N.P.WILLIS

JUDGE OF THE HIGH COURT

I agree. The appeal is dismissed with costs.

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P. BORUCHOWITZ

JUDGE OF THE HIGH COURT

I agree.

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R.MONAMA

JUDGE OF THE HIGH COURT

Counsel for the Appellants: *D.J. Vetten* .(Heads of argument prepared by *L.Hollander*)
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Date of hearing: 2 November, 2010.
Date of judgment: 17 November, 2010.