IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT BRAAMFONTEIN)

CASE NO:

J5388/00

In the matter between:

Applicant

and

ERVICES Respondent

(PTY) LTD

JUDGMENT

LANDMAN J:

1. Mr Schoeman has filed an application for relief following an alleged unfair dismissal. The application is 10 months late. An application for condonation serves before me. It is opposed by the respondent, IT

Management Advisory Services (ITMAS). Mr Schoeman filed a replying affidavit.

2. The replying affidavit was filed some 5 days late. Mr Schoeman's attorney was aware that it would be late. He asked ITMAS's attorney for consent to file it later than required. This was refused. In his replying affidavit Mr Schoeman states that a formal application would be made. The affidavit was signed on 25 September 2001. Mr Harrison, who appeared for ITMAS, had warned Mr Schoeman's attorney in his heads that his reply was not properly before court. In his heads dated 26 February 2002 Mr Dormand, who appeared for Mr Schoeman, mentions the need for condonation. To date, 3 May 2002, no substantive application has been filed.

3. However, Mr Dormand applied from the bar for the condonation of the late filing of the replying affidavit. The application was opposed. Mr Dormand, was unfortunately not briefed with sufficient information to deal with the failure to bring a substantive application. In the circumstances I declined to condone the late filing of this

document.

I will decide the matter on the founding affidavit and the answering affidavit.

5. This matter was argued as an application for condonation and during the course of the argument submissions were made regarding the status of Mr Schoeman ie was he an employee. It seems to me that the application for condonation itself requires Mr Schoeman to show that he is an employee. If he is not, this court has no jurisdiction to entertain even his application for condonation.

6. Ms Jacobs, managing director of ITMAS, and Mr Schoeman met and discussed an employment relationship. Their discussions are important for the purposes of this case.

7. Mr Schoeman says:

"Prior to my commencing employment with the respondent, I was advised by Rene (sic) Jacobs ("Jacobs"), the managing director of the respondent, that I would be required to sign a Confidentiality and Non-Disclosure Agreement. This document

was not given to me at the time I commenced employment with the respondent on 1 February 2000."

8. Ms Jacobs says:

"Towards the end of January 2000, Applicant approached Respondent and initiated discussions in relation to the possibility of establishing a working relationship. At the time, Applicant had started his own business, which he called IT Technology Consulting Services, which he had started in December 1999 after he had taken a severance package and terminated his employment with the Iscor Group, where he had been the Divisional Manager- Technical Architecture and had apparently also been acting as General Manager - Business Information for Iscor Mining.

On 3 February 2000, I met with Applicant and discussed the possibility of Respondent employing him. During the discussion, I referred to the fact that an agreement dealing with

the protection of the confidential information and proprietary interests of Respondent and Gartner (which I refer to more fully below) would be required to be signed by him for there to be any employment relationship and he indicated

that he would be prepared to sign such an agreement.

On 8 February 2000, I e-mailed a draft letter detailing employment terms and conditions for consideration by Applicant. The letter in question is annexure "**AS1"** to Applicant's affidavit under reply. The letter was not signed by me and it referred, in the 1st paragraph of the 2nd page, to the requirement that a 'confidentiality and non-disclosure agreement' would be required to be signed by him. This is how the standard agreement dealing with confidentiality, non-disclosure and non-competition (i.e. restraint of trade) is commonly referred to in Respondent (and Gartner's) organisation.

The following day, 9 February 2000, Applicant returned to me an adapted letter in which the nature of the proposed relationship between the parties was not to be one of employment but one as between client and independent contractor, with Respondent contracting with Applicant's business, IT Technology Consulting Services. A copy of this document is annexed hereto marked "**RJ1'**. Applicant's proposal in this regard was not acceptable to Respondent. Applicant thereafter signed the original draft letter that had been sent to him for his consideration, but this letter was not signed or accepted by me, however, because Applicant still

needed to subject himself to the confidentiality, non-disclosure and non-compete obligations that Respondent required.

At the time of the above exchanges during February 2000, Applicant was already informally involved in consulting assignments with some of Respondent's clients. This was not because any employment relationship had been agreed upon,

but because it was anticipated that such an agreement would be entered into imminently.

I also indicated to Applicant that if no mutually acceptable agreement had been reached by 20 March 2000 in relation to a relationship, all materials, equipment, information, etc belonging to Respondent or Gartner would have to be returned by him until such time as an agreement was reached, particularly in relation to non-disclosure, confidentiality and non-compete undertakings. I made this stipulation due to my concern about Respondent's and Gartner's interests not being protected on an ongoing basis given Applicant's access to the confidential information.

9. Have Mr Schoeman and ITMAS concluded a contract of employment? The onus of showing this lies upon Mr Schoeman. Mr Schoeman’s modified letter of 9 February

constituted a rejection of the offer of employment. Mr Schoeman's subsequent signature of the letter of 8 February constitutes in law his offer to enter into a contract

of employment. ITMAS was prepared to accept this and sign the letter of 8 February once a written contract relating to "confidentiality and non-disclosure" had been signed.

11. A dispute arose about the presence of a "non-compete" clause (restraint of trade clause) in the document headed "Agreement regarding certain conditions of employment". At first a document applicable to the United Kingdom was sent to Mr Schoeman. He would not sign it. When this was discovered ITMAS's HR manager "... amended it appropriate to South Africa".

12. The terms of the second document were also not accepted by Mr Schoeman. He was not happy with some of the clauses and rejected the non-compete clause. I may mention that the confidentiality clause itself contains a restraint of trade but it does not feature in this matter.

13. Mr Schoeman says that the non-compete clause was not mentioned when the parties initially negotiated his employment. This appears to

be so. Ms Jacobs, the managing director of ITMAS, did not refer to it by name. She says that the confidentiality and non-disclosure document is how her company and Gartner (ITMAS is the sole distributor for Gartner Group products and services in the territory of Sub-Saharan Africa and Indian Ocean Islands) refers to the document. She says she had this in mind when she met Mr Schoeman.

15. Generally no formalities are required for the conclusion of a contract of employment. But where the parties have stipulated that the contract must be in writing this formality must be completed. "The question is in each case one of construction" said Innes CJ in **Goldblatt v Freemantle** 1920 AD 123 at 129. See also Van der Merwe et al **Contract General - Principles** 116. In **Woods v Walters** 1921 AD 303 at 305 Innes CJ opined:

"It follows of course that where the parties are shown to have been *ad idem* as to the material conditions of the contract, the

onus of proving an agreement that legal validity should be postponed until the due execution of a written document, lies upon the party who alleges it."

See also Christie **The Law of Contract In South Africa** 3rd ed 116.

16. The letter of 8 February may possibly be regarded as an instance of the second type i.e. the reduction of the oral agreement to writing. In any event its contents are not disputed. The confidentiality and non-disclosure agreement is an example of the first type. There were no discussions of the details of the confidentiality and non-disclosure obligations or what Ms Jacobs calls "an agreement dealing with the protection of confidential information and proprietary interests of Respondent and Gartner". But it was agreed that a document would be signed and that its signature was a condition for the conclusion of a contract of employment.

17. Two issues arise. The one of substance. The other relating to a formality in its technical legal sense.

18. Was there a meeting of the minds? On the papers there was no consensus on the terms or the document envisaged by Ms Jacobs. This being so it could be said that no contract of employment came into existence. The temporary arrangement, referred to earlier, then came to an end. In the result Mr Schoeman is not an employee and is not entitled to the relief which he seeks.

19. However, if the matter were to be decided on oral evidence then it may be that Mr Schoeman's version would be accepted. What then? Initially Mr Schoeman even refused to agree to the confidentiality and non-disclosure terms proposed by ITMAS. Now he says, in his affidavit, but not in his statement of case, that he is prepared to accept those terms but not the terms regarding the non-compete clause. All this goes to show that even the terms of the non-disclosure and confidentiality agreement had to be negotiated. I have set out the instances of Mr Schoeman rejecting and then accepting

(after making a counter offer) the letter of 8 February. I am of the opinion that even on his own version Mr Schoeman has not shown that he concluded a contract of employment.

21. In his statement of case Mr Schoeman alleges he is an employee as contemplated in terms of s 213 of the Labour Relations Act 66 of 1995. I am of the opinion that Mr Schoeman was an employee in the sense he assisted ITMAS pending the resolution or conclusion of his contract. But his cause of action is not founded on this. None of the complex matrix of facts which needs to be in place in order to constitute a contract of employment in this instance have pleaded in the statement of case. Moreover it is common cause that ITMAS did not dismiss him. Presumably Mr Schoeman is relying on constructive dismissal. This is not pleaded.

22. If Mr Schoeman is an employee there is the difficulty that he has not signed the confidentiality and non-disclosure agreement or, if he has, it has not been signed by ITMAS. He would have to bring an

action to compel ITMAS to sign. The contract of service does not come into operation until this has been done.

23. In the premises the application is dismissed with costs.

SIGNED AND DATED AT BRAAMFONTEIN THIS 14TH DAY OF

MAY 2002.

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AA Landman

Judge of the Labour Court of South Africa

Adv B Dormand instructed by Sampson Okes & Higgins Inc.

nt: Mr S Harrison of Sonnenberg Hoffmann Galombik Attorneys.

3 May 2002.

: 14 May 2002.