

REPORTABLE**IN THE LABOUR COURT OF SOUTH AFRICA****(HELD AT CAPE TOWN)**

CASE NO: C704/99

DATE: 10 MAY 2000

In the matter between:

DAVID BRICKMAN

Applicant

and

COMMUNITY GROWTH ASSET MANAGEMENT

Respondent

J U D G M E N T DELIVERED ON 11 MAY 2000

REVELAS, J:

1. The applicant has brought an application in terms of section 77(3) of the Basic Conditions of Employment Act, No. 75 of 1997 (the "BECA") in which he claims that the respondent had breached and repudiated the employment contract between the parties. He seeks compensation in the following terms:

US \$41 666,64 being his salary for the period 1 June 1999 to 30 September 1999 payable in Lichtenstein.

t of his employment and in Lichtenstein.

3. *Applicant's profit share of 15% of the after tax profits of CGAM Global Funds and 2.5% of CGAM's pre-tax profits nett of Global Funds for the relevant period and payable in Lichtenstein.* In this regard the applicant required respondent to furnish him with the necessary financial information and documentation in

order to enable the applicant to quantify his aforesaid settlement, which was not done. It was conceded that the applicant is not entitled to this part of the compensation which he seeks.

4. *US \$4 009,05 being the applicant's pro rata leave pay for the relevant period which is the period 1 June 1999 to 30 September 1999.*
5. *US \$85 000 in damages suffered by the applicant as a result of the respondent's various material breaches and its repudiation of the applicant's contract of employment.*
6. *Interest on all the aforesaid outstanding monies."*

2. The applicant is the erstwhile employee of the respondent whose contract of employment commenced on 1 June 1999 and was terminated by the applicant at the end of September 1999, pursuant to the applicant's election to cancel the contract in the face of the breach and repudiation thereof by the respondent. The applicant raised various issues.

3. Firstly, the question of jurisdiction and powers to entertain this matter was raised. Section 77(3) of the BCEA 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 condition of employment constitutes a term of that contract."

The aforesaid provision came into operation on 1 December 1998 and was promulgated in Proclamation No. 112 of 1998, Government Gazette No. 19453 dated 13 November 1998.

4. Section 151(2) of the Labour Relations Act, No. 66 of 1995 (the "LRA") provides that:

"The Labour Court is a superior court and has authority, inherent powers and standing in relation to

matters under its jurisdiction."

Furthermore, section 158(1)(a) of the LRA gives the Labour Court the power to make any appropriate order, including a declaratory order and an order for costs. Section 158(1)(j) of the LRA gives the Labour Court the power to deal with all matters necessary or incidental to performing its functions in terms of the LRA or any other law (my emphasis) and that would include the BCEA. This dispute concerns a contract of employment and consequently I have the jurisdiction to hear and determine the matter.

5. The facts giving rise to this matter are that in or during 1999 the respondent, also referred to as CGAM, was seeking to establish the Global and Asset Fund Management part of its business. In April 1999 its representatives approached the applicant to take up employment with it as its principal senior manager Global Funds. The applicant and the respondent entered into a written agreement of employment. In terms thereof, the applicant's employment was to commence on 1 June 1999. His salary was US \$125 000 per annum payable offshore in Lichtenstein in monthly instalments and structured as tax efficiently as possible. He was entitled to a signing-on bonus of US \$50 000 which was similarly to be paid offshore in Lichtenstein. This bonus was described as a "cash restraint" which implied that should the applicant resign within the first two years of service with the respondent, he would be subject to a restraint period equivalent to the remaining part of the two years or repayment of the cash on a pro rata basis.
6. The applicant was further entitled to a profit share of 15% of the after tax profits of CGAM Global Funds, once again payable offshore in Lichtenstein and 2.5% of CGAM's overall pre-tax profits nett of Global Funds. If respondent were to be listed the applicant would be entitled to a share restraint

worth R2,5 million, subject to various forfeiture terms and conditions which would apply if he resigned within three years. He was also further entitled to 25 working days paid leave per annum.

7. The applicant was not a South African citizen, when he entered into the agreement with the respondent. He required a work permit in order to work in South Africa. Of this fact the respondent was fully aware when it offered the applicant employment. In Cape Town the parties concluded the contract of employment. The respondent had agreed to do whatever was necessary to assist the applicant in obtaining a work permit. The respondent was also aware that the applicant had to return to the United States of America for the purposes of obtaining the necessary work permit. The work permit was only obtained during the first week of August 1999. The applicant still commenced working as an employee though he was stationed in the United States of America. He rendered services to CGAM as an employee by making himself available to CGAM to work in the USA and internationally towards establishing and progressing CGAM's Global Funds. He assisted with the business of respondent in this period, inter alia, by consulting and conferring with the respondent's employees based in South Africa, particularly Daryl Collins who was employed to work with the applicant to establish CGAM's Global Fund, on an almost daily basis providing them with directions, service, advice and guidance in relation to the marketing planning and the conduct of the business and performing other functions.
8. When the applicant obtained a work permit he returned to South Africa and tendered his services here. According to the applicant it had always been understood between the parties that the respondent would fly the applicant, out at its expense as soon as he had obtained the necessary work permit, which he did. Despite these undertakings, the respondent failed to furnish the applicant with an air ticket or to pay therefor in order to fly him out to South Africa.

9. The respondent therefore reneged on the contract of employment and did not renegotiate the contractual relationship as it was obliged to do. The applicant continued to tender his services in terms of the existing contract of employment. Even though the respondent's representatives continued to give the applicant undertakings that they would furnish him with an air ticket in order for him to come out to South Africa, this undertaking was not met.
10. The respondent further failed to pay the applicant his salary or any other monies and benefits owing to him in terms of the employment contract, despite the applicant having tendered and in fact rendered services to the respondent in terms of the employment relationship. The applicant viewed the respondent's conduct as a breach of the material terms of the contract of employment and he accepted that the respondent did not intend to be bound by the contract of employment. This was the situation until the end of September 1999 and by then the applicant says he gave up hope that the respondent would ever remedy any of the breaches binding it to the contract of employment. The applicant then elected to cancel the contract and advised the respondent's representatives accordingly.
11. The applicant was unemployed for one month after his contract with the respondent was terminated, in October 1999. During this month he spent his time looking for alternative employment. He was not remunerated for this period. The applicant became employed by a company in the United States of America, namely STP, with effect from November 1999. His starting salary being US \$100 000 per annum, considerably less than he would have earned with the respondent. The applicant states that his current salary with STP will be reviewed in January 2000 only and at that stage it may be that the increase in salary will bring his salary to that which he would have been earning had he been in the employ of the respondent.

12. Both of the applicant's remuneration packages with CGAM and now with STP contained portions thereof that are not guaranteed which are based on factors that are difficult to predict, such as the amount of funds brought in for management in his area of business and the performance of the funds managed by the applicant. The proportion of the remuneration that these variable parts comprise is reasonably equal, according to the applicant. The applicant demanded payment from the respondent, through his attorneys of the amounts owing in terms of the contract, but these demands were not met and hence the matter came before the Labour Court in its current form. The applicant filed a statement of case. The respondent filed no intention to oppose and filed no affidavits in this matter. Since the matter has proceeded on an unopposed basis I accept the evidence as set out by the applicant in his affidavit dated 4 May 2000, which was signed in New York in the presence of the Vice-Consul at the Consulate General of the Republic of South Africa in New York.
13. On 9 May 2000 when the matter was set down for hearing, one of the respondent's directors appeared seeking to informally interdict the hearing from taking place since he brought to my attention that on 11 May 2000 an application would be brought in the High Court for the liquidation of the respondent. For reasons I have already set out in a judgment delivered by me yesterday, I refused a postponement of the matter or any order which prevented the matter from proceeding on the day, and I heard argument from the applicant.
14. I have considered the question of damages arising from the breach of contract and, in my view, section 158(1)(j) of the LRA read together with section 77(3) of the BCEA entitles the Labour Court to make an order in respect of such damages. The applicant is consequently entitled to the relief he

seeks, save for the profit shares as these cannot be predicted and need to be quantified, which was not done.

15. That brings me to a further question and that is whether this Court is entitled to give orders sounding in foreign currency. In Standard Chartered Bank of Canada v Nedperm Bank (Ltd) 1994(4) SA 747 (A) at 7741 and Elgin Brown & Harner (Pty) Ltd v Damp Skibsselskabet Torm Ltd 1988(4) SA 671 (N) 674I-J this question was dealt with. I was also referred to other authorities but these, I believe, are the two most relevant authorities. According to the Standard Chartered Bank judgment (*supra*), there is no longer any doubt in the law that South African Courts are empowered to grant judgments in foreign currency. In that particular matter a distinction was drawn between monetary awards and orders ad factum praestandum. The latter is are relevant for purposes of this application.

16. What was established in these cases, is that the Courts may grant claims in foreign currency where specific performance on a contract (in which the indebtedness is expressed in a foreign currency) forms the basis of the claim.

17. The respondent also has the choice of paying the judgment debt in South Africa in rands or in foreign currency. If it elects to pay the claim in South African rands the conversion from the foreign currency to rands takes place at the time of the judgment (See Standard Chartered Bank *supra* at 777C-E). None of the relevant amounts in the contract were expressed in South African rands, but were all expressed in US dollars. However, I do not believe that it prohibits the respondent from paying in rands if he elects to do so.

18. The damages or the actual loss suffered by the applicant, was formulated and demonstrated in foreign currency and the only way that the applicant can be compensated properly

for its loss is for me to grant judgment in foreign currency.

19. The applicant has demonstrated that he is entitled as damages to the amount of R24 925 which represents the relocation costs that he incurred to move to America in anticipation of returning to South Africa, for which he was not compensated by the respondent who was obliged to do so. Even if it was not proved that the respondent was so obliged, these were expenses nevertheless incurred by the applicant as a result of the respondent's breach of the agreement between them.

20. In the circumstances the following order is granted:

“1. The Respondent is ordered to pay the Applicant the following amounts:

- 1.1 In respect of the Applicant's salary for the four month period between June and September 1999 (annual salary US\$ 125 000.00 divided by 12: monthly salary US\$ 10 416.66):-

- 1.1.1 US\$ 10 416.66 with interest thereon at the prescribed rate of interest of 15.5% per annum from 1 July 1999 to date of payment;
- 1.1.2 US\$ 10 416.66 with interest thereon at the prescribed rate of interest of 15.5% per annum from 1 August 1999 to date of payment;
- 1.1.3 US\$ 10 416.66 with interest thereon at the prescribed rate of interest of 15.5% per annum from 1 September 1999 to date of payment;
- 1.1.4 US\$ 10 416.66 with interest thereon at the prescribed rate of interest of 15.5% per annum from 1 October 1999 to date of payment.

- 1.2 US\$ 50 000.00 with interest thereon at the prescribed rate of interest of 15.5% from 1 June 1999 to the date of payment (signing on bonus);

- 1.3 US\$ 4 009.50 with interest thereon at the prescribed rate of interest of 15.5% from 1 October 1999 to the date of payment (pro-rata leave for the period between June and September 1999);
- 1.4 US\$ 10 416.66 with interest thereon at the prescribed rate of interest of 15.5% from date of judgment to the date of payment (salary for October 1999 when Applicant was unemployed);
- 1.5 US\$ 14 583.31 with interest thereon at the prescribed rate of interest of 15.5% from the date of judgment to date of payment (difference between current salary and salary Applicant would have earned had he been employed by Respondent, namely US\$ 2 083.33 less per month for the period 1 November 1999 to end April 2000);
- 1.6 US\$ 16 664.64 with interest thereon at the prescribed rate of interest of 15.5% from date of judgment to the date of payment (difference between current salary and salary Applicant would have earned had he been employed by the Respondent, namely US\$ 2 083.33 for the eight month period 1 May 2000 to end January 2001, at which stage his current salary was likely to increase to that which he would have been earning with the Respondent);
- 1.7 R24 925.00 with interest thereon at the prescribed rate of interest from date of judgment until the date of payment (being relocation costs incurred by the Applicant).

2. The Respondent is to pay the Applicant's costs."

REVELAS, J

JUDGE OF THE LABOUR COURT

For the Applicant: Mr S Harrison
 of Sonnenberg Hoffmann & Galombik Inc

For the Respondent: No appearance