CONSTITUTIONAL COURT OF SOUTH AFRICA

Muyiwa Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Limited and Another

CCT 41/16

Date of judgment: 15 September 2016

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court handed down judgment in an application for leave to appeal from the Labour Appeal Court concerning the constitutional validity of a term in a mutual separation providing for a waiver of the applicant's right to access to courts.

In June 2013 the applicant, Mr Muyiwa Gbenga-Oluwatoye, concluded an employment agreement with the first respondent, Reckitt Benckiser South Africa (Pty) Limited (Reckitt). He began his employment as Reckitt's regional human resources manager on 22 July 2013. During negotiations, Mr Gbenga-Oluwatoye told Reckitt he was working for Unilever. On this basis, Reckitt paid Mr Gbenga-Oluwatoye a US$40 000 sign-on bonus. In fact, Mr Gbenga-Oluwatoye was working at that stage for Standard Charted Bank. In February 2014 Reckitt discovered that his claim to it was false and suspended him. Following an investigation that confirmed the misrepresentation, Reckitt dismissed Mr Gbenga-Oluwatoye on 3 March 2014.

Mr Gbenga-Oluwatoye disputed the procedural fairness of his dismissal. He contended that Reckitt had violated his right to be heard because it did not afford him a pre-dismissal hearing. Reckitt denied that Mr Gbenga-Oluwatoye had been dismissed without a hearing. But before the dispute was taken any further, the parties concluded a mutual separation agreement. The agreement was in full and final settlement of all claims between them. In the agreement, Mr Gbenga-Oluwatoye unconditionally waived his right to approach the Commission for Conciliation, Mediation and Arbitration and/or any court for any relief against Reckitt in any dispute arising from his employment or from the separation agreement (waiver provision).

Despite this clause, Mr Gbenga-Oluwatoye urgently approached the Labour Court. He challenged the lawfulness of the separation agreement. He alleged that Reckitt forced him to sign the agreement. Alternatively, he said that because the waiver provision restricted his right to seek judicial redress, it was against public policy and therefore invalid.

The Labour Court dismissed the application with costs. It noted that the application was not based on provisions of the Labour Relations Act but on the common law of contract. The Court found that the dismissal was not procedurally unfair. Further, the facts did not support Mr Gbenga-Oluwatoye's claim of duress. The Court also found that the separation agreement reflected a valid compromise between the parties. It was in full and final settlement of any disputes arising from their employment relationship.

Aggrieved by this decision, Mr Gbenga-Oluwatoye first applied directly to the Constitutional Court. The Court dismissed his application because it was not in the interests of justice to hear it at that stage. He then appealed to the Labour Appeal Court. That Court endorsed the Labour Court's findings. It found that this sort of agreement should be treated the same as any other agreement between an employee and an employer. So it could be void, should it be shown that improper influence was present. Mr Gbenga-Oluwatoye, however, failed to show this.

On the alleged infringement of his constitutional rights, the Labour Appeal Court held that the applicant's bargaining power at managerial level was such that he was aware of the consequences of the separation agreement, and its limitation on his rights was reasonable. Thus the waiver provision was not contrary to public policy. It was meant to bring the relationship between the parties to finality.

Then Mr Gbenga-Oluwatoye approached the Constitutional Court again. He maintained that his employment contract expressly or tacitly included the right to a pre-dismissal hearing. More so, he argued that South African law recognises an implied term in all contracts of employment to the effect that employees are entitled to a pre-dismissal hearing. Alternatively, if this Court finds that there was no right to a pre-dismissal hearing, it ought to develop the common law to include it.

The respondents (the second respondent was joined to the proceedings in his capacity as Reckitt's regional human resources manager) urged that the application be dismissed with costs. They supported the reasoning of the Labour Appeal Court.

The Constitutional Court decided the application in a short judgment without written submissions or oral argument from the parties.

In a unanimous judgment, written by Moseneke DCJ and Cameron J, the Court found that it had jurisdiction to decide the application because it raises the right to access courts, and the development of the common law in accordance with the Bill of Rights. The Court considered all the grounds advanced by Mr Gbenga-Oluwatoye to be without merit, bar

one. This was the lawfulness of the waiver provision: it was the only ground of appeal that had prospects of success.

The Court noted that Mr Gbenga-Oluwatoye was a senior manager with prior work experience at a senior level. And nothing indicated that his bargaining power was unequal or that he did not understand the agreed waiver provision. Applying *Barkhuizen v Napier*, the Court found that in determining the lawfulness of the waiver provision, it was important to give effect to agreements, solemnly concluded, by parties operating from approximately equal bargaining power. This was a question of public policy – the need for parties to settle their disputes on terms agreeable to them. That need arises in their own interests, and the interests of the public and the courts.

The Constitutional Court noted that Mr Gbenga-Oluwatoye had confessed that he had no defence to the charge of misrepresentation. It was after this that he had entered into the separation agreement to put a present dispute to bed. He did so knowingly and with his eyes open to his own future interests. The public policy considerations may have been different if he had agreed to abjure recourse to the courts in future disputes. But he had agreed to settle an existing dispute. That was permissible. He agreed to part ways with Reckitt on terms that were final, and that protected him from further action by his employer – including the possibility of a disciplinary process that could wound his career irremediably.

The Court held that it would be in line with public policy to enforce agreements of this sort. Thus Mr Gbenga-Oluwatoye must be held bound. The waiver provision was constitutionally compliant. The Court noted that even if the clause excluding access to courts was on its own invalid and unenforceable, the application must still fail. This is because Mr Gbenga-Oluwatoye concluded an enforceable agreement that finally settled his dispute with his employer.