REPUBLIC OF SOUTH AFRICA

Of Interest to Other Judges

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

CASE NO: JS 786/11 A

In the matter between:

CHARLES ACHIREKO-ASUBONTEN **Applicant**

and

PALABORA MINING COMPANY LTD **Respondent**

Heard: 28 February & 1 March 2013

Delivered: 21 August 2014

Summary: (Contract – alleged joint employers – single written contract identifying one party as the employer – applicant seconded – unnecessary to decide if joint employment existed in light of merits).

JUDGMENT

LAGRANGE, J

Introduction

[1] On 8 June 2006, the applicant, Mr C Asubonten, and the respondent Palabora Mining Company Ltd ('PMC') entered into written agreement in terms of which the applicant was appointed Chief Financial Officer of PMC. It is common cause the applicant rendered services to PMC from July 2006 until 31 December 2009, but there is a dispute as to whether he was an employee of PMC during this time.

[2] The applicant claims that he was short-paid a bonus under a so-called Short Term Incentive Plan ('STIP') due to him in terms of the contract in the amount of US$41,508. He also claims that he was not paid travel and removal costs for himself, his wife and five minor children from South Africa to the United States in terms of a resettlement provision in the contract. The applicant further claims interest due on these amounts from date of judgement.

[3] Before the substance of the applicant's claim can be addressed certain other factual issues have to be determined, which are fundamental to the applicant's ability to proceed with his claim against PMC. Firstly, the applicant's very employment by the respondent is in dispute, as it is contended that he was merely seconded to work for the respondent by his employer, Rio Tinto services Inc ('Rio Tinto') a company based in the United States of America. Determination of this issue might also raise the question whether this court has jurisdiction, if Rio Tinto is a peregrine company in respect of which no steps have been taken to establish jurisdiction. Further, if the applicant was not employed by the respondent, then the question arises whether PMC was liable to him for the performance of any of the employer's obligations in terms of the agreement. Lastly, the respondent contends that the bonus and resettlement obligations due to the applicant in terms of the agreement have been met in any event.

[4] The applicant argues that when the contract was concluded on 8 June 2006 with the managing director and CEO of the respondent, Mr K

Marshall, the latter was acting in a dual capacity on behalf of the respondent and on behalf of Rio Tinto. In consequence, the contract of employment concluded "with Rio Tinto" (as stated in paragraph 5.1 of the applicant's statement of claim), was equally enforceable against the respondent as the applicant's joint employer.

Evidence

[5] The applicant gave evidence himself and evidence for the respondent was given by Mr P McCall, PMC's General Manager of Human Resources. Their evidence may be summarised as set out below. At the end of the hearing both parties' counsel presented oral argument.

The written agreement

[6] Before setting out the main features of the oral evidence, it is important to set out some of the main provisions of the written agreement on which both parties rely.

[7] The offer of employment to the applicant was recorded in a letter dated 8 June 2006 on a PMC letterhead and signed by Marshall as Managing Director and CEO of PMC, at the time. Pertinent provisions of the letter state:

> *"I am pleased few appointment to the role of Chief Financial Officer- Palabora Mining Company reporting to me as the MD & CEO Palabora Mining Company.*
>
> *...*
>
> *Your contract of employment will be with Rio Tinto Services Inc. And you will be seconded to Palabora Mining Company.*
>
> *The remuneration and other terms and conditions for this role recorded in the attached Schedule of Remuneration & Benefits and Employment Conditions. We suggest that you obtain independent advice on the content of this offer to ensure that you understand all of its parts.*

To accept this offer, please sign where indicated on the last page of the accompanying schedule and return a copy of this letter and the sign scheduled to Jodi P. Holt, Principal Adviser Remuneration, Rio Tinto, PO Box 6333, Magna, UT84044, USA."

[8] The heading of the attached Schedule of Remuneration & Benefits and Employment Conditions (' the schedule') identifies the applicant's role as "Chief Financial Officer" and states:

*"**Seconded To**: Palabora Mining Company*

***Contractual Employer**: Rio Tinto Services Inc. ("the Company")"*

Throughout the rest of the schedule there is no further reference to PMC, but only references to 'the Company' and to 'Rio Tinto', save for the excerpts mentioned below .

[9] The STIP bonus formulation was stated thus in the schedule:

*"**Short Term Incentive Plan (STIP)***

You will be eligible to participate in the company's STIP with a target award of 40% of base salary. The maximum award is 80% of base salary for exceptional performance against all criteria. The award is determined by a combination of corporate and personal performance. The award will be prorated the first you based on the number of months in the position.

STIP awards are based on the following calculation: STIP Target % x Business Performance Factor (0%-133%) × Personal Performance Factor (0%-150%)."

[10] The schedule also provided for relocation assistance. The pertinent parts of that provision read:

*"**Relocation Assistance***

The Company will provide assistance to minimise the impact of your relocation from America to South Africa consistent with the enclosed Rio Tinto international assignment conditions. This includes, but is not limited to:

Travel

Palabora Mining Company will provide Business class airfares to South Africa for you and your family, at the beginning of this assignment and to the next work location or home country at the end of the assignment. You will also be reimbursed for reasonable expenses incurred while en route.

...

Relocation Allowance

Palabora Mining Company will pay you a relocation allowance equal to 1 ½ month's (1 1/2 months) of your US base salary and will meet any tax liability on this allowance.

(Emphasis added)

[11] Under a section entitled 'Employment Conditions' which deals inter alia with the respective notice periods each party had to give the other on termination of the contract, the following clause appears:

Resettlement

Should your employment be terminated by the Company for any reason other than for summary dismissal as a result of a breach of the code of conduct, or you retire, the Company will meet the travel and removal costs to return you to your home base, and any tax liability arising thereon. You will also receive a resettlement allowance equal to one month of your base salary, and the Company will bear any tax liability. The Company will exercise discretion in applying these conditions in the event that you need to return to home base on health or compassionate grounds.

In the event of termination of employment at your instigation (other than as described above) or as a result of summary dismissal you will be only responsible for your own repatriation expenses and no resettlement allowance will be paid."

(Emphasis added)

[12] The applicant was required to be a non-contributory participant in the Rio Tinto America Inc. Retirement Plan, and was also eligible to participate in

the Rio Tinto America, Inc. Health & Welfare Plan and to receive an International Assignment Allowance equivalent to 20% of his base salary. Further, he was eligible to participate in the 401(k) plan known as the Rio Tinto America Inc. Savings Plan, and was entitled to participate in certain executive benefits due under Rio Tinto America Inc. Deferred Compensation Plan and Supplemental Retirement Plan.

[13] In terms of the provision relating to termination of employment, the applicant was obliged to give one month's notice in writing and the employer was obliged to give him six months' notice or pay him an equivalent amount of salary *in lieu* of notice, save that it was entitled to terminate his employment without notice or payment in the event of misconduct, fraud, dishonesty or other serious breach of his 'obligations as an employee of the Rio Tinto Group'.

Applicant's version

[14] The applicant said he received and signed the agreement in the USA having been recruited by the respondent. Marshall had advised him that the contract would be with a US entity for the sake of tax convenience. In the Respondent's Directors' report at the end of 31 December 2009, the applicant, Mr M Gili (the MD at the time) and Marshall were all reflected as being 'remunerated by Rio Tinto Group and charged to Palabora'. These salary expenses were reflected in the Consolidated Income Statement as pre-tax deductions and he was issued with an income tax certificate by PMC reflecting PAYE which PMC had paid without making any deduction from his salary.

[15] The applicant said he had not joined the Rio Tinto health plan and all his health benefits in South Africa were provided by Discovery for which PMC paid the entire contribution. Under cross-examination he conceded that in terms of the written agreement he was not obliged to belong to the Rio Tinto plan and that there was nothing inconsistent about him being a member of Discovery Health. PMC had also paid his children's school fees up until the end of March 2010. The applicant's remuneration review at the end of 2007 and 2008 for the purposes of the STIP bonus was issued to him on a PMC letterhead signed by the MD.

[16] In 2008 he got an indication from Gili that his contract would be terminating in 2009 and this was confirmed in July 2009. He claimed he never had any indication there was anything lacking in his performance which was assessed at the year end. In particular, Mr G Elliot the Finance Officer for Rio Tinto whom the applicant had contact with, gave no indication that his performance was unsatisfactory.

[17] The applicant was insistent that despite the reference to him being seconded and even though Rio Tinto was designated as the employer in the contract, once he had been seconded he also became an employee of PMC. As far as he was concerned the offer of appointment emanated from PMC represented by Marshall. He considered them one and the same. Even though his salary band 'D' in the contract was identified as a Rio Tinto salary band, and his remuneration was in dollars, he was paid in rands by the Respondent. This he regarded as also indicative of his status as an employee of the Respondent, but agreed under cross-examination that Rio Tinto reimbursed the respondent for the remuneration the latter paid to him. The applicant was referred to a document issued by Rio Tinto entitled "International Assignment Conditions", in terms of which it is stipulated that "Employees seconded on host country terms will participate in host business unit short and long term incentive plans and relinquish eligibility for home base plans". It was put to him that this showed that he was seconded to the respondent and was eligible for the STIP bonus calculated with reference to the respondent as the host business unit, but the applicant insisted that, in what he described as 'the living out' of the contract, PMC was equally an employer party to the agreement.

[18] It was also put to the applicant that he had not cited Rio Tinto as a respondent in this claim because he had reached a settlement with it described as a Separation Agreement. He conceded he had settled with Rio Tinto in January 2010, though the document itself was signed by him on 26 February 2010, but he was still expecting his STIP bonus payment in March and claimed this was not covered by the agreement despite it being stated in clause 4 of the document that he waived any right to make any claims against Rio Tinto or its 'subsidiaries, affiliates, agents, employees, representatives, and foreign based subsidiaries of the parent

companies to whom the employee may have been assigned' (collectively referred to as 'Related Parties' in the Separation Agreement). It appears that this bonus, which was based on the financial year ending on 31 December each year, was only calculated around March the following year, presumably because of delays in finalising the annual financial reports.

[19] A letter on 5 January 2010 from the Rio Tinto Vice President People and Organization Support – Americas set out the detail of payments and benefits he was entitled to by virtue of his termination on 31 December 2009 namely, his final pay check, STIP entitlement, share scheme benefits, repatriation assistance (to be used within three months of his termination), career transition counselling and severance payments. While admitting this letter had been issued after consultations with him, the applicant was insistent that the whole termination process had emanated and been initiated by PMC. He could not give a satisfactory explanation why he did not respond to this letter by stating that Rio Tinto was not his employer. All he could say was that he had 'gone through a lot of legal processes' and could not say at that stage who the employer was. He agreed he had accepted the separation agreement willingly as he was willing to 'move on at that point' at least as far as Rio Tinto was concerned. Why his attitude to the respondent would have been any different was not explained.

[20] The applicant was asked whether he accepted the business unit performance score of 91.5% in 2009, which the respondent had eventually provided in explaining the calculation of his STIP bonus, but he said he could not unless it was proven. According to the calculation of the bonus provided by the respondent, the applicant's personal performance was rated at 55% resulting in a bonus of just over 20% of his annual salary being awarded. The documentation recording his previous STIP awards for the financial year as ending 2007 and 2008 showed that he received approximately 54% and 22 % of his annual salary for those two years respectively as an STIP bonus. The amount claimed by the applicant in respect of the alleged shortfall in his STIP payment of US$41,508, would imply that he was entitled to a bonus equivalent to 40% of his annual

salary. Assuming that the business unit performance score of 91.5% is correct, the only way the applicant could have achieved a bonus of 40% of his annual salary, would be if his own performance score was close to 110%. The applicant appeared to arrive at a bonus of 40% by insisting that the business unit performance as well as his own performance should have both been rated at 100% in the 2009 financial year. The only basis for this calculation which he provided in evidence was to claim that a 100% rating was a base rate for assessing both the performance of the business unit and himself, and hinted that if there was a difficulty in arriving at a performance figure, this default rating would apply. Later he argued that he deserved this rating on the basis of what he had done for PMC in terms of pushing up its share price and negotiating BEE participation. He denied that he had lost focus after he had been told the contract would be terminated. The only other basis he advanced for claiming an entitlement based on a 100 % rating of his own performance was that during 2009 nobody had raised issues of poor performance with him.

[21] The preface of the termination letter sent to the applicant by Rio Tinto on 17 September 2009, reads:

> *"Further to our discussions, I am writing to confirm that your assignment to South Africa and your employment with Rio Tinto was extended to and will end on 31 December 2009. As you are aware, you were originally informed by Matt Gili on December 2008, and again by letter dated March 3, 2009 that your assignment would end on June 30, 2009. A copy of the March 3, 2009 letter is enclosed for your convenience. In addition, a revised letter reflecting the new (December 31, 2009) date is also attached.*
>
> *The following describes the repatriation assistance Rio Tinto is offering to provide you. You will only be eligible for this repatriation assistance during the three months following your termination date of 31 December 2009. If you do not repatriate within this three*

month period, Rio Tinto will not thereafter offer you any assistance or reimbursement for your repatriation to the United States."

[22] Apart from confirming the termination of his assignment and employment with Rio Tinto on 31 December 2009, the repatriation assistance provided by the Rio Tinto as set out in the letter included:

> *"**Repatriation Airfare***
>
> *Rio Tinto will provide a business class airfare for you and your accompanying family members from South Africa to the US and will reimburse you for the value of up to 25 kg excess baggage per family member to take personal items directly back to Dearborn, MI, US. In addition, the company will reimburse reasonable airport transportation costs."*

[23] Rio Tinto further extended this offer until the end of June 2010. When asked how long he thought it was reasonable for the offer to remain open, the applicant indicated that he thought it would be reasonable for tickets to be made available for at least a year. Under re-examination, he said it had never been within his mind when he signed the employment contract that both parties intended that the repatriation entitlement had to be taken up within a reasonable time.

[24] There was considerable correspondence between the applicant and various decision-makers in Rio Tinto in London and the US about the extension of the repatriation benefit. When it was pointed out to him that all of this discussion took place between himself and Rio Tinto, the applicant claimed that the correspondence was always circulated to Mr. McCullum as well, although it is interesting to note that even though this is true of the correspondence emanating from Rio Tinto representatives, it does not appear to be true of the emails sent by the applicant to them. Nonetheless, the applicant insisted that PMC and Rio Tinto were one and the same, and were playing a game of 'good cop, bad cop' with him. He was suing PMC because he was based in South Africa. When asked why he had not sued both companies his response was that the STIP bonus and the tickets were the responsibility of PMC.

[25] In this regard it is clear that the extension of the timing of his repatriation until 30 June 2010 was something specifically requested by the applicant and he confirmed Rio Tinto's acceptance thereof in an email to McCallum dated 9 March 2010, in which he requested an extension of his accommodation and tuition expenses of his children for the same period. Despite appearing to accept that any extension of his eligibility for the air fares had to be negotiated, he still sought to assert that since the written agreement did not contain a deadline for eligibility for the repatriation benefits in the written contract, he was not bound to accept it.

[26] In a letter written by the applicant's attorneys on his instructions on 30 June, the only issue he raised was a plea to extend his accommodation because he was currently negotiating with another potential employer and if successful would probably not return to the United States, but would relocate elsewhere. No mention was made that he contested the deadline for repatriation. From an email sent to Hugo Bague at Rio Tinto HQ on 20 June 2010, the applicant appeals for an extension of his repatriation and laid no claim to a contractual entitlement to a longer period for exercising his rights in this regard. This omission he tried to explain on the basis that he was trying to settle the matter on an amicable basis.

[27] There was also some debate about the authenticity of letters on which previous STIP awards appeared. Some were on a PMC letterhead and others on a Rio Tinto one and, in one case, bore both companies' names. The applicant insisted that he did not accept that there could have been an innocent explanation for two letters from Marshall dated 1 March 2008 setting out the STIP bonus for the previous year, one of which was signed and one not, and containing slightly different final awards differing by about 0,6 %. The one with the higher figure was signed the other not. However, there was no evidence that the applicant had received the lower award or had somehow been prejudiced on account of the existence of two letters, nor did he advance any other basis for concluding that there was something untoward about the discrepancy, other than his own suspicions.

[28] It must be said that a lot of the applicant's evidence of his alleged dual employment situation consisted of him reaffirming his view that the respondent was the real employer, but occasionally emphasising that they were indistinguishable. He tried hard at times to insist that PMC was the active party in the employment relationship rather than Rio Tinto. His evidence did not add much to what is in the written agreement apart from confirming that some of the communication between him and his 'dual' employers was with PMC.

Respondent's version

[29] McCullum was the General Manager of Human Resources of the respondent from 2009 to 2010. He said that, like the applicant and the former MD, Gili, he was also a Rio Tinto secondee to the respondent.

[30] He confirmed that the business unit score in the applicant's STIP bonus calculation was derived from the product group score and the individual business unit and was approved by Rio Tinto executive committee members responsible for the relevant product division and then the chief executive officer of the executive committee of that division. Under cross-examination, McCullum said that the product division was an organisational, not a corporate, entity which resorted under Rio Tinto PLC based in London. The respondent was a subsidiary of Rio Tinto and, even though PMC had its own structure, it was part of the Rio Tinto' family'. Although it had been said to the applicant under cross-examination that the use of the description of the respondent as Rio Tinto Palabora Mining Company was inaccurate because no such company existed, McCullum conceded that as part of Rio Tinto's desire to publicise its brand, the name Rio Tinto was added to all operations in which it had a majority shareholding. An illustration of this was the letter from Gili dated 11 March 2010 confirming payment of $US 42,082 into the applicant's account for the STIP bonus award. PMC's letterhead appears horizontally across the top of the page but the name 'Rio Tinto' written vertically appears in the left hand margin of the page. McCullum stated that even if it could be said that an ordinary member of the public might think that Rio Tinto Palabora Mining Company was a distinct entity, the applicant could not have been

confused on account of this branding stratagem. Likewise in correspondence, the respondent's attorneys used this compendium title for the respondent.

[31] It was put to McCullum that even though Rio Tinto and the respondent was separate corporate entities in law, in reality they were one conglomerate and acting as a single entity for practical purposes. McCullum's response was that the respondent was one of Rio Tinto's operations.

[32] The scores of individual STIP bonus beneficiaries would be determined by that individual's direct superior, which in the applicant's case was Gili. This would be moderated by the chief executive officer for the copper division of Rio Tinto. He commented on some of the reasons for the applicant's performance rating in 2009, one of which was the' lack of traction' on a BEE transaction that the applicant was driving. In fairness to the applicant however even though McCullum detailed a fairly extensive litany of shortcomings in the applicant's performance, these issues were not put in any detail to him during his cross-examination, as was the case with much of McCullum's testimony. He further confirmed that the STIP bonus was paid in US dollars in the US by Rio Tinto and that the resettlement provisions in the agreement relating to termination of the contract by the employer were costs that were born and payable by Rio Tinto.

[33] McCullum agreed that in terms of the relocation assistance when an assignment came to an end PMC would pay the applicant's air travel to his next work location or home country, Rio Tinto would reimburse PMC. In the applicant's case when his termination came up it was made clear that Rio Tinto would be responsible for it. He asserted that this was a matter between Rio Tinto and the applicant, in much the same way that the applicant had sought to establish his case based on emphatic assertion of the conclusion he wanted the court to reach.

[34] When McCallum communicated with the applicant about his repatriation he was merely communicating with him in his capacity at PMC, but the ultimate decisions on these matters lay with Rio Tinto. The standard procedure when a contract of employment ended for an assigned

employee was that the assignee would either relocate to another country or the retrenchment procedure applicable in their home country would apply. Rio Tinto was responsible for the costs incurred in this process.

[35] When the applicant's stay was initially extended until the end of March 2010 Rio Tinto continued paying his schooling fees and medical benefit. He confirmed that the applicant never queried why Rio Tinto terminated the contract and why PMC did not play a role in that regard. In his view, six months after the termination of the contract was a reasonable period within which repatriation should take place.

[36] Under cross-examination, McCullum was tested on the affidavit he deposed to in order to support the respondent's application for the eviction of the applicant from the house it had accommodated him in until the end of June 2010. In the affidavit, McCullum referred to the applicant as a former employee of the respondent and stated that it was the respondent's policy to supply housing to its employees, by virtue of which it had provided accommodation to the applicant. In attempting to explain this description of the applicant as the respondent's employee McCullum said that subjectively the applicant was viewed as an employee, who was providing a service to PMC, even though PMC did not pay a cent to him which was not reimbursed by Rio Tinto.

[37] While conceding that the achievement of an unqualified financial audit would have undoubtedly been one of the applicant's key performance indicators ('KPIs') in evaluating his performance in 2009, McCallum could not provide any detail on how the personal assessment of a 55 % was arrived at. He was adamant that this ought to have been discussed with the applicant. However, he could not explain the respondent's inability to produce the written record of the applicant's personal score that ought to have been drawn up by Gili and moderated by the panel of executives in the product division mentioned above.

[38] In a letter from the respondent's attorneys dated 16 January 2013, it was claimed that no written appraisal was prepared in respect of the applicant's poor performance rating for 2009. McCallum claimed to have obtained the final document showing the calculation of the applicant's

STIP bonus only in around February 2014, in response to a request for 'information' on the award from the respondent's attorneys. He could not recall telling them that no written appraisal was available at that time. He knew that the applicant's individual score would have been captured in the 'Workscape' programme that was used to calculate the STIP awards, but it was only a few days before trial that he was asked to obtain the basis of the applicant's personal performance assessment. Despite this, McCullum was adamant that the applicant would not have received his STIP bonus without the process for determining it being followed and without a document being produced. However, the document he had in mind was the final calculation of the bonus and not a document showing how the applicant's personal score was derived in the course of the process. McCallum said it was only a few days before the trial that he was asked to obtain documentation on the applicant's personal score from the US, by the respondent's lawyers. He could not understand why the applicant himself would not have been in possession of a document explaining his personal assessment.

[39] When pressed on whether fraud could have been committed in the determination of the applicant's personal assessment, he stated that the integrity of Rio Tinto's payment system, which covered 100, 000 employees worldwide, was vital and neither he nor Gili could have manipulated data on the system. The data on the 'Workscape' system could not be altered and the applicant would not have received the STIP award he did, unless his 55 % performance rating had been entered in the system at that time.

Submissions

[40] In argument, applicant's counsel, *Mr Beaton SC,* submitted that the respondent as the joint employer was liable in its own right for the obligations of Rio Tinto contained in the contract. During the applicant's cross-examination, he had expressly confirmed that the reason the applicant had not sued Rio Tinto was because the applicant was non-suited by the separation agreement he had concluded with it.

[41] It was emphasised that it was not the applicant's claim that the 55 % personal performance score was an ex post facto fabrication by the applicant, but that when it was originally determined it was not done so on an objective basis. The applicant was asking the court to determine his entitlement based on his previous performance. However, *Mr Beaton* conceded that even though the respondent had not provided any explanation of how Gili had arrived at the figure it was difficult for the court to establish what the correct figure ought to have been.

[42] On the question of the air fares, the applicant submitted that the respondent was liable under the clause headed 'Travel' under the provisions in the contract dealing with Relocation Assistance[1], rather than the 'Resettlement' provision[2] dealing with circumstances in which his employment was terminated. *Mr Beaton* argued that the fact that the termination letter referred to the ending of the assignment, which was a situation addressed under the first mentioned provision. Consequently PMC was responsible for providing the air tickets for the applicant and his family. In any event, he submitted that the two provisions could be reconciled by understanding them to mean that either Rio Tinto or the respondent was liable for this expense. He did concede that the right is one that must be exercised within a reasonable period and that Rio Tinto might have been able to raise this defence to the obligation under the resettlement provision (presumably because it had warned the applicant that it would not make this available indefinitely), but the same could not be said of the respondent's obligation to provide air tickets under the 'Travel' provision.

[43] Arguing for the respondent, *Mr Cook* asserted that, on a plain reading of the contract relied on by the applicant, there was no basis for the respondent stepping into the shoes of Rio Tinto, which was identified as the employer in the document, bearing in mind the so called parole evidence rule. However, he did concede that the respondent was

[1] Quoted in para [10] supra

[2] Quoted in para [11] supra

obligated to the applicant where this was specifically stipulated in the contract, which the 'Travel' provision does. Nevertheless, he argued that the 'Travel' provision was inapplicable *in casu* because that only applied if the termination was by mutual assent. That was not the case here where it was terminated by Rio Tinto in which case the Resettlement provision applied in terms of which Rio Tinto acquired the obligation.

[44] Further, the respondent argued that there was a fundamental conceptual hurdle the applicant had to overcome. The applicant had referred to the authority of ***August Läpple (South Africa) v Jarrett & others***[3] as indirect support for the proposition that the respondent was also the applicant's employer and was jointly responsible for the employer obligations in the contract. In that case, the employee had been employed by the foreign company which had a wholly owned local subsidiary but had been appointed as MD of the local subsidiary. The court found that notwithstanding that the contract of employment was with the foreign holding company that did not mean the employee could not also be an employee of the subsidiary.

[45] The respondent argued that the case in that matter concerned an unfair dismissal claim, whereas this matter only concerns a purely contractual dispute and accordingly an interpretation based on the definition of an employee in the Labour Relations Act had no application here because the applicant's employment status could not be determined with reference to the LRA. It is true that the ***Jarrett*** case in part rests on an interpretation of the LRA and that a case like ***Board of Executors Ltd v McCafferty***[4], in which it was concluded it was possible for an employee to be jointly employed by more than one employer, also concerned the interpretation of employment under the previous pre 1995 LRA. However, conceptually that does not mean an employment relationship entailing joint employers is an inconceivable possibility under the common law of contract.

[3] [2003] 12 BLLR 1194 (LC) at 1204, paras [47] – [48].

[4] (1997) 18 ILJ 949 (LAC)

[46] Be that as it may, I have assumed in the applicant's favour that he was jointly employed by Rio Tinto and the Respondent, even though it equally likely he could be construed only as an employee of Rio Tinto seconded to the business of the respondent. It is not necessary for the judgment to determine this, firstly because the respondent conceded it had obligations towards the applicant where that was specifically identified in the contract of employment, even though the contract was concluded between the applicant and Rio Tinto. Secondly, in view of my findings on the STIP bonus claim it is of no moment who is the real employer.

Evaluation

The applicant's entitlement to a particular STIP bonus

[47] It must be said that it seems incomprehensible that a company like Rio Tinto or its subsidiary could be so incapable of producing any record of the basis of the applicant's personal assessment that which was fundamental to determine such a substantial part of his final remuneration. It does raise a concern that there has been no serious effort made to find it or worse, that there has been a deliberate attempt not to discover it.

[48] On 12 December 2012, the applicant had successfully obtained an order compelling the respondent to furnish him *inter alia* with copies of "the performance rating..., together with all documents on which such rating was based." Obviously no supporting documents were forthcoming, but the applicant did not pursue contempt proceedings against the respondent which he might have.

[49] That said however, the court has no real evidentiary basis for knowing whether the figure of 54 % was the correct one or, if it was not, what it ought to have been. The applicant's own estimation of what his score ought to have been is based on the most sketchy evidence, which does not allow the court to reach any conclusion on the correct figure with any confidence, even based on a balance of probabilities. Moreover, he did not

do much better in 2008 when his STIP bonus was 22 % of his annual salary.

[50] Thus, even if the respondent could be held liable in its own right for payment of the 2009 bonus, the applicant still falls at the hurdle of proof of his eligibility for the level of bonus he claimed.

The return airfares

[51] Regarding the applicant's entitlement to airfares, the question arises whether the respondent was liable for them under the Travel provision of Relocation Assistance or whether Rio Tinto was liable for them under the Resettlement provision. The Travel provision states that the entitlement arose 'at the end of the assignment', whereas the Resettlement provision could be invoked if the applicant's employment was terminated by Rio Tinto for any reason other than summary dismissal. In his statement of claim the applicant said that his employment with both Rio Tinto and the respondent ended 'at their instance'. It might be argued on this basis that only the Resettlement provision is applicable to his situation, but on the other hand the Travel provision merely states that PMC will provide the airfares at the end of the assignment. However there is nothing inconsistent in arguing that the Travel clause could be relied on whatever the cause of the assignment ending was, even if it was termination at the instance of the employer party. When the applicant's employment ended so did his assignment.

[52] Consequently, I do not think the applicant was precluded from relying on the Travel provision, just because the Resettlement provision could also have been invoked, provided he did not try and claim the entitlement under both provisions with the intention of duplicating the benefit, as it could never have been the intention he would be covered for the same costs of relocation twice over.

[53] Assuming then that the applicant could enforce a claim for airfares under the Travel provision on which he sought to rely, was that an open – ended entitlement which the applicant could call upon at any time within a year of the assignment ending? If one has regard to the nature of the benefit

under either the Travel or Resettlement provisions, both were clearly intended to ensure that on the conclusion of the assignment, the employee would not be in a position where he would be out of pocket as a result of returning home with his family or being relocated to take up another assignment. The obligation to meet the applicant's airfare costs was due to him under either of the two provisions in the contract, but if met by either Rio Tinto or the respondent, then that would also discharge the equivalent obligation of the other.

[54] The applicant argued that, unlike the air travel offered by Rio Tinto in the September 2009 letter, the Travel provision carried no time restriction. It was put to the applicant that in the absence of a stipulated time period for claiming the benefit he was obliged to exercise his right within a reasonable time. He agreed, but thought a reasonable period within which to claim the benefit was twelve months.

[55] The Travel provision, on which the applicant relied, states that the airfares would be provided by PMC 'at the end' of the assignment. On one reading of the clause the airfares had be provided to the applicant as soon as the assignment ended. On the other hand the preposition 'at' can also be interpreted to mean 'after'.[5] In either event, on either interpretation the end of the assignment clearly triggered the entitlement to claim the airfares and the obligation to provide them within a reasonable period after he stopped working.

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[56] The applicant did seek an extension of time for the provision of airfares from Rio Tinto to which the company agreed, but there was no evidence that he took any steps in 2010 to enforce a separate claim for airfares against the respondent, even when it was clear Rio Tinto was not willing to extend the airfare provision beyond June 2010.

[5] See e.g ***Brown Appellant v Dickinson's Estate and Others Respondents*** **1919 AD 457** at Page 469 and ***Ex Parte Smith*** **1982 (1) SA 601 (C)** at 604B-F

[57] Having regard to the purpose of the Travel provision providing for the benefit, in my view it was not intended to create an open ended entitlement which the applicant could claim at any date in the future. Rather it was intended to cover the cost of the applicant in relocating once his assignment had come to an end and that the relocation would take place once a reasonable time had elapsed for the applicant to wind up his affairs make arrangements for his relocation. Six months ought to have been more than enough to do this and seems a reasonable period for the applicant to claim the entitlement. Even if a year was a reasonable period, the applicant did not direct any request for payment of the airfares to the respondent within that time.

Conclusion

In the circumstances, even if I accept that both the respondent and Rio Tinto were jointly and severally liable for the employer's obligations to the applicant, the applicant has failed to prove on a balance of probabilities what STIP bonus he ought to have received for the 2009 financial year. Secondly, the applicant had dismissed a valid tender to perform, within a reasonable time, the obligation to cover the air travel costs of himself and his family on repatriation following the end of his appointment. The travel provision on which he now relies clearly intended that the benefit would be utilised reasonably soon after the assignment ended and certainly not more than a year later, which even on his own reckoning would have been unreasonable. Accordingly, I believe he failed to exercise his right to claim the benefit timeously and could no longer invoke it by the time he did.

Costs

[58] Although the applicant failed in his claim, I am of the view that the respondent did not fulfil its discovery obligations nor did it provide a coherent justification for the paucity of discovery of documents pertaining to the derivation of the applicant's 2009 STIP bonus. In the absence of such documents being provided it remains a possibility that the outcome of the dispute about that bonus might have been materially affected by the

absence of such records. As a mark of the court's disapproval I do not think it should be entitled to its costs.

Order

[59] The applicant's claims for payment of an alleged shortfall in his 2009 STIP bonus and for a declarator that the respondent is liable for the travel and removal costs of himself and his family to return to Dearhorn, Michigan, USA are dismissed.

[60] No order is made as to costs.

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R LAGRANGE, J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: R G Beaton SC instructed by Erasmus-Scheepers

RESPONDENT: A L Cook instructed by Tabacks Inc.