

-----LABOUR NEWS-----

4 March 2010

Compiled by: Adv J Delpont
Delpont Labour Consultants



Chilibush v Johnston and Other [2010] ZALC 3

JUDGEMENT: BASSON AC

Introduction

The Applicant applied to this Court for an order setting aside the ruling of the CCMA holding that the employee was dismissed by Applicant. In the alternative the applicant requested that the dispute be heard *de novo* by a different commissioner of the CCMA. During argument both parties were, however, *ad idem* that this Court should, in the event of setting aside the ruling, substitute the decision of the 1st respondent. It must also be pointed out that the parties were *ad idem* that the ruling of the commissioner should be reviewed and set aside.

The proceedings before the CCMA

The Employee was previously the managing creative director of the applicant. He referred an unfair dismissal claim to the CCMA. At the commencement of the proceedings the applicant raised a point *in limine* that the CCMA did not have jurisdiction to deal with the unfair dismissal dispute referred to it because the

-----LABOUR NEWS-----

respondent was not an employee. The (first) commissioner who presided over the proceedings upheld the point. That decision was, however, set aside on review and the matter was referred back to the CCMA.

Commissioner Stone (the second commissioner) thereafter ruled that the respondent was indeed an employee of the applicant and that the CCMA therefore did have jurisdiction to hear the matter.

The matter was set down for arbitration before Commissioner Johnston. The parties agreed that Commissioner Johnston would only determine the first two issues namely whether or not the respondent was “an employee” of the applicant and, in the event of it being held that he was, whether or not the respondent was “dismissed” by the applicant.

The hearing commenced. It appears from the record that the commissioner was uncertain as to how the proceedings should continue. She adjourned the matter so that she could consult with a senior commissioner. She was apparently advised that evidence should be led on the questions of employment and dismissal and, if she required further information, she would ask for it. This approached caused some concern for the parties because it was unclear to the parties what the nature of the proceedings would be. The commissioner responded to the concerns and indicated that



-----LABOUR NEWS-----

she could write a ruling and if the ruling “finds that the employee wasn’t an employee and that there was no dismissal then it will end there, the matter will be dismissed”. If the ruling answered the two questions in the positive, it would then be necessary for the parties to lead evidence on the question of the fairness at a later stage.

The parties then proceeded to lead extensive evidence about whether or not the respondent had been employed and if so, whether he had been dismissed. Towards the end of the proceedings, Commissioner Johnston once again stood the matter down to consult with a senior commissioner. In her consultations with the senior commissioner, the latter presumably brought the existence of Commissioner Stone's ruling (dismissing the *in limine* objection to jurisdiction) to Commissioner Johnston's attention. Commissioner Johnston accused the parties' legal representatives of unethical conduct for failing to draw the ruling to her attention.

Both legal representatives explained that, because Commissioner Stone's ruling had been made even prior to conciliation and before any evidence had been led, it was by no means clear that Commissioner Johnston was bound by the finding that the respondent was an employee of the applicant. Rather than waste time having that debate, it had been decided that the quickest and cheapest way to proceed was to continue as agreed in the pre-arbitration meeting and described above. Since the



-----LABOUR NEWS-----

evidence on the questions whether the respondent was an employee and whether he was dismissed would necessarily be similar, there would be no prejudice or delay caused by proceeding in the way agreed upon in the pre-arbitration meeting.

Commissioner Johnston made a ruling in terms of which she concluded that, since no evidence had been presented to the arbitration that the ruling (of Commissioner Stone) had been set aside and unless this was done by the Labour Court, Commissioner Stone's ruling that the respondent was an employee, still stood. Commissioner Johnston then ordered that the matter should be set down for arbitration before another commissioner solely to determine whether a "dismissal" occurred and, if so, whether such a dismissal was substantively and procedurally fair.

Is this a reviewable ruling?

Apart from the fact that the parties are *ad idem* that the commissioner's ruling should be reviewed and set aside and that the Court should decide whether or not the respondent was dismissed by the applicant, it was submitted that the decision is, in any event, patently reviewable. It was argued that even if commissioner Johnson was of the view that she was bound by Commissioner Stone's ruling, she ignored the second question that was before her namely, whether or not the applicant was "dismissed".

Common cause facts



-----LABOUR NEWS-----

It is common cause that the respondent employee was appointed as managing creative director of the applicant and that he was responsible for the management of the business affairs of the applicant. He was also a 20% shareholder of the applicant in terms of the shareholders agreement. **Paragraph 8.7** of the shareholders agreement states that –

“Should any shareholder:

8.7.1 cease to be a director of the company; or

8.7.2 have his or her employment with the company terminated by his or her resignation or by the remaining shareholders, with the approval of the chairperson of the board of directors, on two months’ written notice, then, in either event, such shareholder shall be obliged to resign as director and to offer to sell his or her shares and loan account in the company.”

a Mr. Dlamini and Mr. Hefer caused a notice of a shareholders meeting to be delivered to the respondent calling for a meeting of the shareholders. Prior to the commencement of the shareholders’ meeting, the respondent caused a letter to be delivered to the applicants’ representatives (Matjila Hertzberg & Dewy) in terms whereof the respondent cancelled the shareholders’ agreement; tendered the return of his 20% shareholding in the company; indicated that he did not regard the agreement as binding on him; tendered to resign as director of the applicant (because he was of the view that the applicant had repudiated the shareholders’ agreement in various respects); indicated



-----LABOUR NEWS-----

that he will not be attending the shareholders' meeting and indicated that he remained an employee of the applicant and tendered to perform such obligations.

In the absence of the respondent, the shareholders of the applicant resolved that the respondent be removed as a director of the company and from his post as managing creative director with immediate effect.

It was common cause that the applicant complied with the provisions of section 220 of the Companies Act in removing the respondent as a director.

The applicant's attorneys then wrote to the respondent's attorneys stating the following: That the applicant was of the view that, because the respondent's appointment as managing creative director ended with his removal as a director, there was no further position for him at the applicant. The applicant was further of the view that the shareholders' agreement superseded any previous employment contract of the applicant. The applicant therefore disputed that the respondent remained an employee of the applicant and that he was entitled to any remuneration. Despite stating emphatically that there was no position for the respondent to fulfil at the applicant, the



-----LABOUR NEWS-----

latter invited the respondent to suggest on what basis he could remain employed by the applicant.

The respondent referred the dispute to the CCMA. The aforementioned invitation to the respondent was declined because the respondent was of the view that he had already made it clear in the letter sent on 7 December that he still believed he could continue to serve as managing creative director.

The applicant's case

It is the applicant's case that the respondent was not dismissed and that any employment relationship with the respondent terminated automatically when the respondent resigned as a director of the applicant and/or when he cancelled the shareholders agreement. In support of this argument the applicant referred to English law and to section 62 of the applicant's Articles of Association. This section reads as follows:

“MANAGING DIRECTOR

62. The directors may from time to time appoint one or more of their body to the office of managing director or manager for such term and at such remuneration (whether by way of salary or commission or participation in profits or partly in one way or partly in another) as they may think fit and may revoke such appointment subject to the terms of any agreement entered into in any particular



-----LABOUR NEWS-----

case But his appointment shall determine if he ceases for any reason to be a director.”

The respondent’s case

On behalf of the respondent it was submitted that he was indeed an employee of the applicant and that he was dismissed as contemplated by the Labour Relations Act (hereinafter referred to as “the LRA”). In support of this argument the Court was referred to case law which supports the notion that a director will ordinarily also be an employee of the company (see further the discussion below).

Questions before the court

- Firstly, was the respondent an employee of the applicant? and
- Secondly, in the event it is held that the respondent was an employee of the applicant, was the respondent dismissed by the applicant?

Was the respondent an employee of the applicant?

The court held that it was in agreement with the submission on behalf of the respondent that the applicant has not, either in the affidavits filed in this court or in the heads of argument, advanced any arguments to the effect that the respondent was not an employee. On this basis alone, the court was of the view that the respondent was an employee.



-----LABOUR NEWS-----

However, irrespective of the fact that this conclusion can be drawn purely in light of the papers, the fact that the respondent was an employee can be substantiated in any event with reference to the law and the evidence that was placed before the commissioner.

At the outset it should be pointed out that there is persuasive authority for the notion that a director may, and will ordinarily also be an employee of a company. A director who is also an employee will effectively therefore hold **two positions and will act in two different capacities**. Different laws will also govern the two positions held by the same individual: As a director of a company he/she will be governed by the provisions of the Companies Act and as an employee, he/she will be governed by the LRA. Strong support for this notion is to be found in PG Group (Pty) Ltd v Mmambo NO & Others 2004 25 ILJ 2366 (LC) The court referred to section 213 of the LRA and held that the definition of an employee would apply to most, if not all, directors:

"Neither the Labour Relations Act, nor the Companies Act nor, in this case, the applicant's articles, specifically precludes a director from enjoying the protection of the Labour Relations Act. More importantly, section 220 of the Companies Act, which allows a company to make short shrift of a director's career, expressly requires a right to a hearing (section 220(2)). The Constitution which requires fair administrative action, demands that such a hearing must be fair. Whether that hearing was fair or not, should not be finally determined by the shareholders or



-----LABOUR NEWS-----

the company's board of directors. It is inconceivable that in such an enquiry the ordinary principles of employment law would not be relevant. It follows that the obvious remedy available to an unfairly dismissed director would lie in the provisions of the Labour Relations Act. However, in the light of the dual capacities in which a director holds office, it is questionable if directors are entitled to reinstatement.”

See also PG Group where the Court held as follows:

“A director may act in certain capacities and perform the kind of work which appears to disqualify him or her from having the status of an employee. On the other hand, a director may also perform duties as an employee of the company. The office and duties of a director are separate. The type of work done by a director is not a dependable criterion as the nature of a director’s actual day to day work may vary greatly.

The court held that directors are the holders of an office within the company. Rights and duties attach to that office and flow from statutory and common law of companies. A contractual relationship between a company and a director may not be necessary. Yet more often than not, contracts of employment are concluded between directors and companies, as was indeed done in this matter. The third respondent’s letter of appointment by the applicant contains the standard terms which are normally expected



-----LABOUR NEWS-----

to be found in a contract of employment. Both parties regarded the third respondent as an employee.”

Henochsberg on the Companies Act by Meskin: Vol 1 issue 1 at page 1041 in his discussion of article 61 (which provides for the appointment of a managing director or manager from their body) also states that a manager so appointed in terms of article 61 may also be an employee of the company.

The court was of the view that it is clear from the PG group-case that where a director holds two positions (one as director and one as an employee) his/her rights as an “employee” will not be affected by the fact that he/she is also a director. There is also clear authority for the view that an employee’s rights in terms of the LRA will not be limited by the Company’s Act: See *Whitcutt v Computer Diagnostics & Engineering (Pty) Ltd* (1987) 8 ILJ 356 (IC)

The court held that the evidence points to the conclusion that the respondent was (apart from being a director) appointed as an employee. There are also indications in the shareholders’ agreement that governed the relationship between the respondent and



-----LABOUR NEWS-----

the other shareholders, that directors could also, and would in fact also ordinarily be an employee of the applicant.

“Automatic termination” of the employment contract

The further question the court dealt with was whether an employer and an employee can contractually agree (either in a contract of employment or in the articles of association of a company of which the employee is also a director) that the employment relationship shall automatically terminate in the event of the termination of the employee’s directorship. It is necessary to consider this question in light of the letter to the respondent in which the applicant suggested that the respondent’s contract of employment was superseded by the shareholders’ agreement and that the respondent’s employment was simultaneously terminated on the termination of his directorship.

Firstly, the court said it was not persuaded by the submission that the shareholders’ agreement superseded the contract of employment. Firstly, the text of the relevant resolution of the board clearly supports the conclusion that there were two “acts of termination”. The one is the respondent’s removal as a director and the other is his removal from his post as managing creative director. Secondly, there are persuasive policy reasons why it should not be accepted that parties may contractually provide for the automatic termination of an employment relationship upon the occurrence of a



-----LABOUR NEWS-----

certain event such as for example, where a person is removed as a director from a company.

By allowing an employer to contractually negotiate the terms of a dismissal in advance was in the court's view, not permissible in the labour law context: Firstly, providing for an automatic termination in a contract of employment (or as in the present case the articles of association) will be in contravention of the provisions of sections 5(2)(b) and 5(4)12 of the LRA which prohibit an employer and an employee from agreeing to limit an employee's statutory rights. A shareholders' agreement can likewise not, in the court's view, limit the statutory rights against unfair dismissal which an employee enjoys in terms of the LRA.

Secondly, such a limitation of an employee's right against unfair dismissal is in conflict with applicable case law and more importantly, falls foul of the constitutional right of every employee to fair labour practices (see the next paragraph). See *Denel (Pty) Ltd v Gerber* [2005] 9 BLLR 849 (LAC) See also *SA Post Office Ltd V Mampeule* (2009) 30 ILJ 664 (LC) where the Court unequivocally stated that a contract cannot provide for the automatic termination of a contract of employment.

Was the respondent dismissed?



-----LABOUR NEWS-----

The court held that it was patently clear from the resolution of the company shareholders that the respondent was dismissed. The respondent's evidence also supports this conclusion.

As already pointed out in the foregoing discussion, the mere fact that that the respondent was lawfully removed as director (in terms of section 220 of the Company's Act) does not mean that the respondent is now deprived as an employee from the right to claim that he was dismissed and/or that his dismissal was unfair. Apart from the policy considerations referred to above, it is also clear from a long line of cases that there is a distinction to be drawn between the lawfulness and the fairness of a dismissal and the mere fact that a dismissal is lawful does not mean that the dismissal is also fair. See NUMSA v Vetsak Co-operative Ltd (1996) 17 ILJ 455 (A).

It also appears from the PG Group- case that labour law and company law essentially operate in their own spheres (although at time they have consequences for one another). The most striking example is the fact that detailed rules are contained in the Company's Act that deal with the termination of the directorship of directors. In the case where the director is also the managing director, specific rules must be followed. From a company law point of view it is thus clear that the shareholders are



-----LABOUR NEWS-----

entitled to terminate the directorship of any of the directors and that their discretion is unfettered.

Different rules, however, apply when dismissing an employee in terms of the LRA. Firstly, the discretion in terms of labour law is not as unfettered as it is when removing a director and secondly, the procedures that need to be followed are far more comprehensive. Lastly, fairness and not lawfulness is the overriding principle in labour law. It then follows that the fact that a company is entitled to remove a director in terms of company law does not mean that the decision is immune from scrutiny in terms of labour law. Furthermore, as already pointed out, the fact that a director has been lawfully removed as a director does not mean that this decision will also result in a fair dismissal (as an employee). The fairness of a decision to dismiss is subject to the determination of either the CCMA or the Labour Court.

The court was therefore satisfied that that the respondent was an employee of the applicant and that he was dismissed. The applicant is ordered to pay the costs.

