

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN**

CASE NO D225/98

In the matter between

ANTHONY GRENVILLE PETER PEARSON

Applicant

and

SHEERBONNET SOUTH AFRICA (PTY) LTD

Respondent

JUDGMENT

JAMMY, AJ

- [1] The applicant in this matter seeks compensation for what he contends was the unfair termination of his employment by the respondent as contemplated in sections 188(1) (a)(ii) and (b) of the Labour Relations Act 1995 ("the Act"), together with certain ancillary relief.
- [2] Three issues directly material to those claims emerge from the documentation tabled and evidence presented by the parties. They are the following:
- 2.1 By whom the applicant was employed;
- 2.2 By whom he was dismissed;

2.4 Whether such claims as he may have had against his employer, whoever it may have been, were compromised and accordingly settled.

[3] On 1 September 1993, the applicant concluded a contract of employment in London with Sheerbonnet Machinery Ltd, a company registered in the United Kingdom, his "job title" thereunder being defined as "overseas marketing co-ordinator."

[4] It is common cause that that contract was superseded by a subsequent letter of appointment, on the letterhead of the same company - Sheerbonnet Machinery Ltd - dated 5 September 1995 in terms of which the "title of position" which he was to hold is stated in the following terms:

"Managing Director-Sheerbonnet South Africa (Pty) Ltd, South Africa. There may be a requirement to visit and assist other offices from time to time."

The letter is signed by:

RAAD F. AL-ZAHAWI
Managing Director

[5] Two of the "Terms and Conditions of Employment", as the letter expressly describes them, relate to the applicant's remuneration:

Remuneration: 40 000.00 pounds per annum - paid monthly in arrears in your designated offshore account."

Advance: This will be paid in South Africa from the local company to cover your expenses in the form of monthly salary."

[6] The letter also provided that -

"Company will reimburse any relocation expenses to South Africa and also when repatriated to U.K. or posted elsewhere"

and that:

"Company will pay for all your medical expenses" which might however, it recorded, be covered by Medical Insurance Scheme using present insurance company."

- [7] It is of relevance to note at this stage that the two companies thus far referred to, Sheerbonnet Machinery Ltd and Sheerbonnet South Africa (Pty) Ltd, whilst both were components of what the applicant described as "the Sheerbonnet group" - a group of associated but legally independent companies operating internationally and controlled by Mr Al-Zahawi, were not otherwise commercially linked in the sense of any portion of the equity in one of them being held by the other. No holding company in that context existed, the applicant testified, but Mr Al-Zahawi was the authoritative force throughout the group. With regard to the two companies now referred to, he was the managing director of the U.K. company, Sheerbonnet Machinery Ltd, and the chairman of Sheerbonnet South Africa (Pty) Ltd.
- [8] It is common cause, and evidenced by a considerable volume of correspondence and documentation in the intervening period, that by 1996, the fortunes of the South African company had, for numerous reasons described by the applicant but which I do not consider it necessary to canvass in any detail, declined dramatically. In June 1996, the applicant's projected loss in the company, as at March 1997, was R8 million. The necessity to address the situation urgently was again emphasised in May 1997.
- [9] In the interim, the applicant had in January 1997 received a letter, on this occasion under the letterhead of Sheerbonnet South Africa (Pty) Ltd, confirming his "continued permanent appointment as the Managing Director of Sheerbonnet South Africa, which you took up in June of 1995." He was to be

permanently based in South Africa and -

"You will have a local salary of 12 000 rand per month, subject to annual review, with a Company profit related bonus, full medical cover and vehicle expenses. You will have leave of 30 days per annum and three return tickets to London, U.K., or equivalent, and these should be timed to coincide with senior management meetings in London, whenever possible.

RAAD F. AL-ZAHAWI

CHAIRMAN"

[10] The financial woes of the company continued and eventually Mr C A Robins, the "Director-Overseas Marketing Development" in the employ of another entity in the group, Sheerbonnet Projects Ltd, was despatched to South Africa on a fact-finding mission.

[11] Considerable correspondence then ensued between the applicant and Robins following the latter's return to London, with proposals, counter-proposals and directives regarding the future conduct of the Company's business. Eventually, in August 1997, the applicant was notified by letter from Mr Al-Zahawi, again under the letterhead of Sheerbonnet South Africa (Pty) Ltd, that Sheerbonnet Projects Ltd, which had now acquired the majority shareholding in the South African company, had appointed Robins as its "Chief Representative whereupon Mr Robins has been given full power and authority to organise South African company" (sic). Robins would "seek fundamental changes to remedy this situation and salvage the company" and, to all intents and purposes, was now in control of all of its affairs and operations.

[12] Simultaneously with that notification, the applicant received a further letter from Mr Al-Zahawi, written in this instance under the letterhead of Sheerbonnet Machinery Ltd and signed by him as Managing Director. It read as follows:

"Dear Tony

Re: Restructuring

As discussed with Mr Gerald Robins the restructuring of the Company in South Africa will change the set up of the organisation and your full co-operation in this task is requested.

With the restructure there is a place for you within the new structure of the Company in South Africa but if you feel that you do not wish to participate fully in the new set up or that you disagree with the way forward then you can be transferred back to London.

I believe that you will understand and appreciate the situation with change of ownership.

Yours sincerely

Raad Al Zahawi
Managing Director

[13] Mr Robins, in the meantime, in anticipation of his new function in South Africa and its objectives, had prepared, and had received London approval for, a radical restructuring plan for the South African company, which he discussed with the applicant on his arrival. The company would henceforth operate in three divisions, each under the control of Departmental Manager, and under the overall authority of a General Manager. One of these divisions, he proposed, which would be designated as "Finance and Administration", would be headed by the applicant, who, in Mr Robins' assessment, was eminently qualified to do so and whose role in that context he considered to be pivotal.

[14] The applicant, Mr Robins testified, was "initially non-committal, silent and absorbing", but in due course, on 12 September 1997, reverted to him in a lengthy written counter-proposal in which, inter alia, he stated the following:

2. Sheerbonnet Machinery gives me notice on the 1st October!

Sheerbonnet Machinery will pay out all dues at the end of December for leave and contractual obligations.

- 3. Platino will offer me a contract from January 1st 1998, on half of my current Sheerbonnet Machinery contract, as a UK payment. However, my local salary will be increased to equal other local Directors.**

The position from Platino would be as Commercial Director, posted to South Africa.

- 6. Locally a letter from Mr Zahawi to all dealers and staff, once the re-structure is formalised which would indicate that I have completed my original function.**

From a personal point of view I would also like a letter from Mr Zahawi thanking me for the efforts for setting up Sheerbonnet South Africa and offering me the new contract with Platino, and giving me notice at the same time from Machinery.

- b. Mr Zahawi would be rid of the Machinery expense as I would pass to Platino."**

[15] Platino, Mr Robins testified, is a company in the group which distributes electrical products. It is based in the United Kingdom and, at the time of the applicant's proposal, had no South African connection.

[16] A written report from Mr Robins to his London principals dated 17 September 1997, following further discussions in South Africa, is relevant. In it, he stated, inter alia, the following:

"The position of Tony Pearson within the company has been discussed

with him and he accepts the need to change. He also accepts a proposed role within the new company even though it reduces his current position. However, whilst I can handle the new position with Sheerbonnet South Africa (Pty) Ltd Tony's current employment is Sheerbonnet Machinery and obviously I have no jurisdiction in this area. Tony is also asking for certain conditions to be met, which I will outline below.

I have tried to discover why he needs the contract in the UK and he says that the money would go to support his family and the contract allows him to return to the UK should anything force him to do so. As for the change from Machinery to Platino Projects I can only guess that he believes he would have access to the other directors."

[17] The next development, said Mr Robins, was the critical one. A letter addressed under the Sheerbonnet Machinery Ltd letterhead to Mr Pearson on 18 September 1997 and signed by Mr Al-Zahawi as Managing Director, was delivered to Mr Pearson on 22 September and read as follows:

"Dear Tony

Further to various discussions held with you over a period of time as regards Company's performance in South Africa, it is with regret I have to give you three months notice to terminate employment as per terms of the contract. This effectively means that your last day of work will be 31st December 1997.

This decision has been taken with serious thoughts considering massive losses incurred by the South African company under your management which tabulates as follows:

i) Losses up to 31st March 1997	R10 206,307
ii) Loss 1st April - 31st July 1997	R1 611,918

When converted at an average rate for US Dollars, this amounts to a thumping loss in excess of US Dollars 2.5 Million and mounting.

In view of this and losses still mounting and continuing, it has been decided to cut/reduce the costs in all sectors including management in order to safeguard Company's standing and future.

This letter will not come as a shock or surprise to you as understandably when the Company does not perform, the resultant onus falls on the Management.

**Yours sincerely,
RAAD F. AL-ZAHAWI
Managing Director"**

[18] On receipt of that letter Mr Pearson apprised him of its contents, Mr Robins testified. Mr Pearson was upset and "felt that everyone should be made aware of it." At his, Mr Robins', request therefore, Mr Pearson drafted a letter to the suppliers, dealers and staff of the company on 22 September in the following terms:

entention: All Suppliers

All Dealers

All Staff

: 22nd September 1997

ect: Mr Pearson

I am sure most of you will have been made aware of the re-structuring the Company here is going through, to ensure the longevity of Zahow in this market.

Mr Pearson was asked to come here in 1993 and has managed the

local operation since that time. Mr Pearson will, however, be leaving us at the end of this year.

[19] In a letter to Mr Al-Zahawi dated 2 October 1997, the applicant expressed his shock and surprise at what had occurred, more particularly as his own proposals for the future management of the company's business had not been responded to. What is of significance in that regard however, is that no question, query or comment was raised or made by him regarding its corporate source or the validity of the notice which it contained. In fact, in that regard, he commented as follows:

"I had hoped by yesterday, when the notice would take effect, that some additional thought may have been made to the situation, but alas, the respect I had was perhaps miss-placed." (sic)

The letter then proceeded to seek clarification regarding "the full contractual obligations" and a commitment that they would be met, with full details of what the applicant considered as due to him.

[20] Considerable correspondence ensued on the subject of the amounts which the applicant was claiming and the company's assessment of what it considered to be due to him. The question of whether or not the amount ultimately tendered and paid to the applicant and which purportedly constituted a full and final settlement of all obligations to him had the effect, when it was accepted, of compromising his claims, was one examined in detail both in the course of evidence and argument in this hearing. For the reasons which follow, I do not consider it necessary for me to determine that issue.

[21] The applicant, as is apparent from the *personae* in this litigation, contends that his employer was the respondent. The letter of appointment of 5 September 1995, notwithstanding the letterhead of Sheerbonnet Machinery Ltd on which it was written, was not, he said, and was not intended to be, a contract of

employment with that company but was confirmation from Mr Al-Zahawi, in his capacity as the controlling authority within the group as a whole, of what was now his formal employment by the South African company, Sheerbonnet South Africa (Pty) Ltd. His salary of 40 000 pounds sterling per annum was remuneration payable by the South African company but which, until it was financially in a position to absorb that cost itself, was financed by Sheerbonnet Machinery Ltd, which had a commercial relationship with the South African company for the supply of machinery, and was reimbursed by way of inflated invoices to absorb the cost involved. It was in that context, he testified, that he proceeded to apply for and was eventually granted permanent residence in South Africa and that his application in that regard incorporated a "work offer made to prospective immigrant" by Sheerbonnet South Africa (Pty) Ltd as the proposed employer. His registration as a South African taxpayer also reflected his employer as that company.

[22] The termination of his employment, of which, without prior discussion or consultation of any nature, he was informed in the letter of 18 September 1997 from Mr Al-Zahawi, led him to seek legal advice with regard to his rights in the matter thereafter and in his ensuing correspondence with London, he was guided both as to form, substance and terminology by his advisers. He had no idea, he testified, "why the company dismissed me."

[23] Asked by Mr M Pillemer, at the outset of his cross-examination, by whom he was employed, the applicant was, to my mind, evasive. His employer, he said, was, and since 1988 had been, Mr Al-Zahawi. He had "always been responsible to him." His response to a further question whether, notwithstanding that his formal contract of employment was with Sheerbonnet Machinery Ltd, his contention was that his true employer was Mr Al-Zahawi, the applicant answered affirmatively. In the face of persistent further questioning as to how he perceived the difference between Mr Al-Zahawi and the corporate entities which he represented, the applicant now responded that his contracted employment from June 1995 was with Sheerbonnet South Africa (Pty) Ltd,

which was therefore his employer. It was correct, he conceded, that he was being paid "by both companies and in both the United Kingdom and South Africa." Asked whether this meant that he was employed by both, he responded without further elaboration, that Sheerbonnet Machinery (Pty) Ltd did not employ him after June 1995.

[24] The ensuing exchange between the applicant and Mr Pillemer is significant.

"Who dismissed you?", he was asked.

"Mr Zahawi"!

"On a Sheerbonnet Machinery Ltd letterhead?"

The June 1995 contract was with Sheerbonnet Machinery Ltd.

So are you not then in fact employed by Sheerbonnet Machinery Ltd?

No!"

[25] Asked whether any employment contract existed between the South African company and himself, the applicant then replied that this was not the case but that he was appointed as Managing Director of Sheerbonnet South Africa (Pty) Ltd in terms of his contract with Sheerbonnet Machinery Ltd of 5 September 1995. He did not know, he said, why that contract had not been recorded under the letterhead of the South African company but all references therein to "company" were references to Sheerbonnet South Africa (Pty) Ltd.

[26] Asked whether he could explain why, if he was employed by the South African company, the notice of termination of his employment had been addressed to him from Sheerbonnet Machinery Ltd, the applicant's response was again evasive. His employment contract, incorporating the notice provisions now purportedly relied upon, was, he conceded, with the London company, but his

"understanding", was that he was employed by the South African company.

[27] Re-examined by his Counsel, Mr Winchester, the applicant in reference to Mr Al-Zahawi, stated that "he is the boss - no one outranks him." The letterheads used by Mr Al-Zahawi at any given time were of "no significance - he would use whatever letterhead his secretary chose. The letterhead was of no importance in relation to the signatory of the letter."

[28] It is trite law, now formally legislated by Section 192 of the Act, that the onus in any proceedings concerning dismissal, of establishing the existence of that dismissal, rests with the employee. It is a truism that hardly needs stating, that in order to establish such dismissal the employee must first prove that he was employed by the employer alleged to have dismissed him.

[29] That employer is consistently alleged by the applicant, since his initial reference of his dispute to the Commission for Conciliation Mediation and Arbitration on 2 February 1998, to have been the respondent. Whilst that was a necessary allegation if he was to succeed in obtaining relief under South African law and in a South African jurisdiction, for what he perceives as his unfair dismissal, it is an allegation which does not bear scrutiny when tested against the *conspectus* of evidence and the undisputed documentation presented in this matter.

[30] In that regard, there is no doubt in my mind that the applicant's factual employer was, and was at all times material to this matter up to and including 2 October 1997, recognised, understood and accepted by the applicant as being the United Kingdom company, Sheerbonnet Machinery Ltd. A significant number of factors support this conclusion and whilst not necessarily exhaustive, they are the following:

30.1 His employment contract dated 5 September 1995 is recorded under the letterhead of Sheerbonnet Machinery Ltd, signed by Mr Al-Zahawi as Managing Director of that company, is concluded in the United Kingdom and is expressed

to supersede an earlier contract, concluded in September 1993, with the same company.

30.2 The applicant's annual remuneration in terms of that contract is 40 000 pounds sterling to be paid into a "designated offshore account." The "overseas salary allowance" in an amount subsequently determined, was to be "paid in South Africa from the local company to cover your expenses in the form of monthly salary." That is the only occasion upon which the term "local company" is used. References thereafter to "Company" providing "three return trips to UK per annum or equivalent in Business Class"; reimbursing "any relocation expenses to South Africa and also when repatriated to UK or posted elsewhere"; and paying all medical expenses not covered by a medical insurance scheme sited in the United Kingdom, can on any reasonable and objective interpretation, be references only to the United Kingdom company and not, as the applicant contended in his testimony, to Sheerbonnet South Africa (Pty) Ltd.

30.3 The letter in January 1997 which the applicant received from Sheerbonnet South Africa (Pty) Ltd confirmed his continued permanent appointment as the "Managing Director" of that company. It is, in my opinion, significant that no reference is made in that letter to his **employment** by that company.

30.4 That letter moreover refers once again to "a local salary of R12 000 per month" and trips to the United Kingdom which "should be timed to coincide with senior management meetings in London."

30.5 The letter in August 1997 which the applicant received from Mr Al-Zahawi informing him of the restructuring of the South African company under Mr Gerald Robins, with a "place for you within the new structure", if he wished it and a "transfer back to London" if he did not, was, in my view, a clear and unambiguous notification from his employer of the impending termination of the function in South Africa to which he had been assigned and allocated in terms of his contract of employment.

30.6 The applicant's response to that advice and to the proposed restructuring formulated by Mr Robins signifies to my mind the death-knell to any suggestion that his employer was any entity other than Sheerbonnet Machinery Ltd. In his counter-proposal of 12 September 1997 the applicant proposes, inter alia, that "Sheerbonnet Machinery gives me notice on 1st October" and that "Sheerbonnet Machinery will pay out all dues at the end of December and leave and contractual obligations." His "local salary", he furthermore proposes, "will be increased to equal other local directors." He would now be re-allocated as the Commercial Director of Platino and dealers and staff would be informed that he had "completed my original function." He would like a letter from Mr Zahawi thanking him for his efforts in "setting up Sheerbonnet South Africa and giving me notice at the same time from Machinery." The appeal of this proposal to Mr Zahawi would be that he would "be rid of the Machinery expense as I would pass to Platino."

30.7 As late as September 1997, Mr Robins was in no doubt regarding the identity of the applicant's employer. In his report to his London principals he states, inter alia, that "whilst I can handle the new position with Sheerbonnet South Africa (Pty) Ltd, Tony's current employment is Sheerbonnet Machinery and obviously I have no jurisdiction in this area." Reference is also made to Mr Pearson's contention that "the contract allows him to return to the UK should anything force him to do so."

30.8 Finally and most significantly, three months notice of termination of his employment "as per terms of the contract" is given to him by Sheerbonnet Machinery Ltd and not by the South African company. The applicant's response involves no challenge to the corporate identity of the employer by whom he is being dismissed. Instead he seeks to ensure that suppliers and dealers of the company are informed of the reason for it, namely the restructuring of the company. In his expression, in his letter to Mr Al-Zahawi of 2 October 1997, of shock and surprise at this action, the identity of his employer is again not questioned or queried in any respect and in fact, he

acknowledges that "the notice would take effect" the previous day.

[31] What is, in my view, the irresistible conclusion to be drawn from these factors, - that the applicant, as I have stated, was employed by Sheerbonnet Machinery Ltd and did not himself doubt that fact, - is cemented by his responses to the direct questions posed to him in that regard by Mr Pillemer. His employer, he said initially, was Mr Al-Zahawi and it was Mr Al-Zahawi who dismissed him. It was not necessary for him to have had an employment contract with the South African company because his London contract appointed him as Managing Director in South Africa. Sheerbonnet Machinery Ltd was paying him because "part of my employment contract was with them - they were paying the 40 000 pound portion." He had never, he conceded, received notice of termination of his employment from the South African company. His proposal that "Sheerbonnet Machinery gives me notice on 1st October!" was intended to mean that he would prepared to end his term as Managing Director of the South African company.

[32] I am unable to agree with Mr Winchester's submission that Section 213 of the Act, read with the description of the applicant's employer in his application for permanent residence and his registration as a South African taxpayer, are definitive of the respondent as his true employer. That section defines, inter alia, an "employee" as meaning:

- "(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration, and**
- (b) any other person who in any manner assists in carrying on or conducting the business of an employer."**

[33] Whatever the basis of the inter-relationship of Mr Al-Zahawi's companies may have been, it is apparent that, certainly at the time that the applicant's employment contract was entered into, the overseas interests of the group

were being administered and directed through the medium of Sheerbonnet Machinery Ltd. The applicant's initial contract with that company in September 1993, designated him as "overseas marketing co-ordinator" and that, on his evidence, was precisely the function he performed - "directing all business including South Africa." Sheerbonnet South Africa (Pty) Ltd was clearly deemed to constitute one such overseas business operation and the applicant's function, in the context of his subsequent appointment as managing director of that company, was patently, in the words of the section, to "assist in carrying on or conducting" that business on behalf of his London employer.

[34] The permanent residence and tax aspects do not, in my opinion, take the matter further. They were clearly accommodation processes designed to support the applicant's objective to remain permanently in South Africa. His resignation as a director of the South African company following his dismissal cannot be seen as anything other than a statutory requirement as a consequence of the termination of his employment.

[35] In all of the circumstances which I have reviewed in what has seemed to me to be necessary detail in reaching this conclusion, I find that the applicant has emphatically failed to discharge the onus upon him to establish, in the first instance, that he was employed by the respondent and, *a fortiori*, that the respondent dismissed him. In the light of that conclusion, no determination is required with regard to the third of the issues initially raised by the parties and relating to the question of the possible compromise of his claims.

[36] I accordingly make the following order:

The application is dismissed with costs.

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B M JAMMY

ACTING JUDGE OF THE LABOUR COURT

22, 23, 24 February 1999

5 March 1999

Adv L C A Winchester

T: Adv M Pillemer SC