CASE NO. J121/01

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

17 May 2001

In the matter between:

VINCENT LANGLOIS Applicant

and

D First Respondent

Second Respondent

Third Respondent

REASONS FOR JUDGMENT

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1. These are the reasons for an order granted in favour of the applicant on an urgent basis. The urgent application was heard on 25 January 2001 and the order was granted in favour of the applicant on 26 January 2001. The relief which the applicant sought was that the second and third respondents are interdicted and restrained from interfering with the applicant from having access to the premises and records of the first respondent, of which the applicant was the managing director, and interdicting the second and third respondents from preventing the applicant to perform his duties as an employee of the first respondent, and costs.

2. The second respondent, Mr Hall, was the financial director of the first respondent, and Mr Naude, the third respondent, its sales director.

3. The brief background to this application is that early in 1995, a Mr Hills and a Mr Smart, the two main shareholders in a company called AOldco≅, approached the applicant who was then employed by Standard Corporate and Merchant Bank with a view to sell Oldco.

4. A transaction was concluded. Smart and Hills required funds offshore and wanted to structure the transaction on a basis that would enable them to achieve that goal, and they inflated the purchase price of the business. R2 million was left in the business for working capital. A shelf company called AReal Environment Investment Trust Company (Propietary) Limited≅ was purchased and the business of Oldco was sold to Teraoka (Pty) Limited for R53 million owing by the first respondent for its purchase of Oldco. On liquidation the liability of R53 million was distributed to Smart and Hills as a liquidation dividend and Oldco was finally wound up. The name of the Real Environment Investment Trust Company (Pty) Limited was changed to Teraoka (Pty) Limited, now the first respondent. It is of this company that the applicant is the managing director.

5. The applicant and management had a 35% share in the first respondent, and they constituted the AB≅ shareholders. Mr Smart and Mr Hills were the AA≅ shareholders and influenced the day-to-day running of the first respondent, even though the AA≅ shareholders had sold the business to the first respondent as described above.

6. During 2000, approximately a year before this application was launched, the applicant called a meeting with the AB≅ shareholders with a view to ultimately selling the business of the first respondent to a new company, which could be legitimately financed. Some of the AB≅ shareholders wanted to continue with Mr Smart and Mr Hills at the helm, or remaining involved. This resulted in various financial proposals being made to Smart and Hills, which were not accepted.

7. On 7 January 2001, the applicant was advised by Mr Naude (the third respondent) that a meeting was to be called in relation to the fact that the South African Revenue Services (Athe SARS≅) had instituted an

investigation in respect of the first respondent and an assessment of an unpaid income tax liability of R37 million. The meeting consisted of all the AB= shareholders and Hills, who chaired the meeting wished to know who, besides the applicant, visited the offices of the SARS. Hills suggested that the applicant resign, which he declined to do. Hills (who is not a director of the first respondent) then advised the applicant that he was suspended and that a hearing would take place on Wednesday, 10 January 2001.

8. On 9 January 2001, Mr Hall (the financial director of the first respondent) issued a notice to the applicant, which purported to be a notice of a disciplinary enquiry.

9. The applicant was charged with:

A **1. Gross misconduct in dealing with the company=s affairs.**

2. Malicious damage to the company=s reputation and affects.

3. Acting in bad faith in negotiations with the company=s directors and shareholders.≅

10. The notice indicated that the chairperson of the disciplinary enquiry would be Mr Hall, and he was also the person issuing notice. On the same day the applicant, through his attorneys of record, disputed the validity and lawfulness of the notice, *inter alia*, on the basis that Mr Hall did not have the necessary authority to convene a disciplinary enquiry as no meeting of the directors had been convened to grant him such powers.

11. The applicant did not attend the disciplinary hearing, which was convened and held in the applicant=s absence. On 11 January 2001, the applicant was notified by Mr Hall that his services were terminated with immediate effect, the conduct of which he was found guilty as charged. On the same day, a notice of intention to remove the applicant as director of the

company was signed by four of the shareholders, including the second and third respondents. Notice was also given that a general meeting of the shareholders of the first respondent would be held at the premises of the first respondent to pass a resolution that the applicant is to be removed as a director of the company with immediate effect.

12. The applicant disputed that a meeting or resolution of directors had been held to authorise the actions of Mr Hall, who dismissed the applicant. According to Mr Hall, he was authorised by a decision of the board of directors taken on 8 January 2001 to take the steps against the applicant. The applicant contends that Mr Hall did not have the legal authority to dismiss the applicant.

13. If Mr Hall did not have the authority, the dismissal was invalid, and the applicant should be entitled to the relief he seeks, in that he would then establish a clear right.

14. In the matter of *Van Tonder v Pienaar and others 1982 (2) SA 336 SECLD*, the applicant and the first respondent were sole shareholders of the second respondent. The first respondent was suspended by the applicant. The Court held that the suspension was of no force or effect as none of the powers of the directors were delegated to the first respondent and as these powers, in the absence of delegation, had to be exercised by means of a resolution adopted at a meeting of directors and no meeting was held.

15. In *Engling and another v Bosielo and others 1994 (2) SA 388 (B)*, it was held that a meeting held by the majority of shareholders without notice to the minority of the shareholders, was ineffective.

16. LAWSA First Re-Issue Volume 4 Part 2, paras 93 and 94 provide:

A **93 Unless the company=s articles otherwise provide, and save in the case of a private company with only one director or where all the directors consent to what is done**

directors can act only by means of a properly passed resolution at a properly convened meeting of the board of directors from which no director has been excluded and at which a quorum is present.

94 Where no specific time limits are prescribed in the articles for calling the meeting of directors, fair and reasonable notice must be given of meetings to every director who is within reach, and where such notice is not given the meeting is invalid.≅

See also -

Africa Organic Fertilisers & Associated Industries Limited v Premier Fertilisers Limited 1948 (3) SA 233 (N)

17. The applicant was not given notice of and did not attend any directors= meeting which may have been convened on 8 January 2001 to authorise the institution of disciplinary proceedings against him.

18. A Mr WJ Durrell stated in a supplementary replying affidavit that he was not notified of the relevant meeting, if it was indeed held, and he also did not attend such a meeting.

19. Mr Hall, in his affidavit, does not allege that the meeting which allegedly conferred authority on him was a meeting which was properly held, and of which notice had been given to all directors. It appears, then, that a majority of directors took a decision without notifying the minority. At the very least the applicant should have been notified of the meeting and he was not.

20. Mr Hall was also not appointed by the board to chair the meeting, Mr Hills was. Mr Hall only chaired the meeting because Mr Hills was not available.

21. On the papers, the respondent did not prove that Mr Hall had the necessary authority to take the decision to dismiss the applicant. The respondent in this case had the onus to prove such authority [See: *Tucker=s Land and Development Corporation (Pty) Limited v Perpelief 1978 (2) SA 11 (T)*

at 14B–15H].

22. Insofar as the jurisdiction of this Court is concerned, it had the necessary jurisdiction to give the order in question in terms of Section 773 of the Basic Conditions of Employment Act, 75 of 1997, which confers concurrent jurisdiction of the civil court on this Court.

23. The applicant established a clear right.

24. It is quite apparent from the facts of this matter that if the relief is not granted, the applicant has suffered severe prejudice. He was, after all, the chief director of the company. It may be so that some directors feel that he should not hold this position, but they went about removing him in the wrong way.

25. The Labour Court is reluctant to give *status quo* orders of this nature and has expressed itself in these terms on several occasions. However, in this particular matter, facts are distinguishable from matters where parties seek to conduct trials by virtue of urgent applications, which is the main reason why *status quo* orders are generally not given.

26. This case involves a simple matter of law on the procedure that was followed and is not concerned with the merits of the dismissal. It would have been of little comfort to the applicant to return to this Court two years later in an unfair dismissal case when his dismissal is in fact null and void. The applicant is also a key person in the running of the first respondent, and not an employee in the traditional sense. He has thus established that there was no alternative remedy to him at the time.

27. In my view, the applicant demonstrated that if he was prevented from regaining lawful control of the affairs of the first respondent and to enter into proper arrangement with the SARS, liquidation of the first respondent is a foreseeable probability.

28. For all the aforesaid reasons I granted the order on 26 January 2001.

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E. Revelas

17 May 2001

licant: Brian Bleazard

pondent: Harvey Nossel