IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Case Number: JR215/2004

In the matter between

P G GROUP (PTY) LTD	**APPLICANT**
and	
COMMISSIONER L MBAMBO N.O.	**1ST RESPONDENT**
THE NATIONAL BARGAINING COUNCIL FOR THE CHEMICAL INDUSTRY	**2ND RESPONDENT**
PHILIP THOMAS PETER CLATWORTHY	**3RD RESPONDENT**

JUDGMENT

REVELAS J

1. This is an application to review and set aside a ruling in respect of jurisdiction made on 18 December 2003 by the first respondent, a Commissioner acting under the auspices of the second respondent, in favour of Mr PTP Clatworthy ("the third respondent").

The founding affidavit deposed to by Mr Stewart Jennings, reflects the following:

2. The third respondent was appointed as Director: Finance at P.G. Glass Holdings Ltd during June 1989. During a restructuring exercise the third respondent was transferred to the applicant in 2001 where he remained the financial director of the applicant.

3. His services as director were terminated on 30 September 2003 by the board of PGSI, the holding company and sole shareholder of the PG Group. The third respondent's services were terminated by giving him notice in terms of Article 46.4 of the applicants' Articles of Association, (requiring that he resign as director) read together with Article 52 of the same Articles of Association.

4. The third respondent referred a dispute about an alleged unfair dismissal to the second respondent on 21 October 2003. He sought reinstatement.

5. On 25 November 2003 the applicant raised an objection against the second respondent having the necessary jurisdiction to conciliate the alleged unfair dismissal because the applicant had not dismissed the third respondent. It was argued that the termination of his appointment as an executive director was occasioned by the notice given to him in terms of the two Articles referred to above.

6. The Commissioner found that the second respondent ("the Bargaining Council") had the necessary jurisdiction to conciliate the dispute. It is this ruling that the applicant wishes to have set aside.

7. The applicant contends that the first respondent failed to apply his mind to the relevant issue in dispute, namely that the second respondent did not have the necessary jurisdiction to conciliate an alleged unfair dismissal dispute between the applicant and the third respondent, since the latter was not dismissed by the former.

8. According to the founding papers' the applicants case appears to be that it was not its wish to dismiss the third respondent and that the decision to dismiss was taken by the its holding company being the sole shareholder. Here I must pause to mention that just some months prior to the termination of the third respondents' services, the applicant made an attempt, (apparently an abortive one), to retrench the third respondent. The correspondence exchanged also suggest rather strained relations with undertones of acrimony between the parties.

9. The applicant argued that the inability of the commissioner to appreciate that it was the holding company, the sole shareholder of the applicant, who dismissed the third respondent, was attributable to his failure to properly consider that unique relationship between an executive director and a company's articles of association.

10. The two articles, already referred to above, relied upon by the applicant provide as follows:

Article 46.6:

"**The office of director shall *ipso facto* be terminated if the director is given notice, signed by members holding in the aggregate more than 50% of the total voting rights of all members then entitled to vote on a poll at a general meeting, requiring that director to resign.**"

Article 52 :

"**The appointment of any executive director or managing director shall, without prejudice to any claim of any nature whatever which any such director may have against the company, cease if for any reason he ceases to be a director.**"

11. The case argued for the applicant was that the articles of association gave the majority shareholders the right to terminate the appointment of a director. The point was made that there is no obligation upon a shareholder to act in the interests of the applicant in which he holds shares, nor do the actions of a shareholder (in the absence of direct authority) bind a company.

12. The articles of association confers the majority shareholder with a particular right. When the shareholder in question became a member of the applicant it acquired the right to remove a director, and in doing so, it did not act as a representative of the company but in its own interests and its acts are not attributable to the applicant. By removing a director in this way, a certain knock-on effect is achieved in respect of the contract. It ends the contract.

13. The argument went further to include the contention that the third respondent was not employed by the shareholder and that the termination of his employment (or "appointment", which is the word the applicant prefers in advancing this particular argument) was effected by the shareholder. The applicant therefore did not dismiss the third respondent in the sense defined in section 186 (a) of the Labour Relations Act, 66 of 1995 ("the Act" or "the Labour Relations Act").

14. The applicant submitted that the actions of the shareholder were imposed on it by virtue of the articles of association and consequently the applicant had no alternative but to treat the appointment of the third respondent as terminated and had no discretion in this regard. His employment, whether at the level of contract or relationship, was terminated by operation of principles of supervening impossibility of performance. Under this principle, supervening

impossibility discharges the contract by operation of law and the discharge of a contract of employment by operation of law, does not fall within the definition of dismissal as envisaged by section 186(a) of the Act.

15. The termination of the third respondent's employment therefore does not constitute a dismissal and therefore no unfair dismissal relief is available to him.

The above submissions amount to essentially two propositions, they are:

1. The applicant did not dismiss the third respondent (as set out in the applicant's founding affidavit) and,
2. The third respondent, being a director of a company, is not an employee, by virtue of the applicant's articles of association which precludes a director's recourse to the Act when his or her appointment is terminated.

Who dismissed the third respondent?

16. A company operates through its various organs (shareholders, directors, managing director and committees of directors). The Companies Act No. 61of 1973, its articles of associations and the common law determines how its powers will be distributed amongst these organs.

17. In terms of Section 220 of the Companies Act the members of a company, in a general meeting, may by extraordinary resolution, remove directors before the expiration of their terms of office. It was argued on behalf of the third respondent that when the members of a company exercise powers in a general meeting and make a decision, that decision is the company's decision which is bound thereby, and is not a decision of the members themselves.

18. In terms of Article 30 of the applicant's articles of association, all members entitled to vote at a general meeting shall be deemed as if it was passed at a general meeting. The resolution to remove the third respondent as director of the applicant pursuant to Article 46.4, was unanimously approved during an extraordinary board meeting of PGSI Limited which was conducted by

telephonic conference. (See page 26 of the record). The notice of dismissal to the third respondent states that:

"PGSI Limited, being the holder of all voting rights entitled to vote on a poll at a general meeting of PG Group, hereby gives you notice in terms of Article 46.4 of the Articles of Association of PG Group requiring that you resign as director of PG Group".

19. The decision to remove the third respondent was clearly made in terms of Article 46.6 and 30. The decision was taken by members in a general meeting. Therefore it is a decision of the applicant itself and not a decision of PGSI Limited. One of a company's primary rules of attribution is that the decision of members in a general meeting constitutes a decision of the company itself. (See **Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 3 All ER 918 (PC) at 922J-923B**).

20. The decision to dismiss, taken by PGSI Limited, is in law the applicant's decision and therefore the latter terminated the third respondent's appointment as director.

Is the third respondent, as a director protected by the Labour Relations Act?

21. Mr Brassey, on behalf of the applicant, has in effect invited me to revisit the question of whether a director of a company is an employee and entitled to protection under the Labour Relations Act. It has been argued (in the 1980's mostly), that this question was not properly considered by the industrial court and insufficient weight had been given to the relevant company law principles dealing with termination of directorships. This is also the approach which the applicant has now adopted (See **M P Larkin "Distinctions and differences: a company lawyer looks at executive dismissals (1986) 7 ILJ 248**).

22. If one has regard to the Labour Relations Act as a whole, it is primarily designed to regulate employment relations between blue collar workers

and their employers. Support for this observation can be found in the many sections and schedules of the Act, pertaining to collective bargaining collective agreements, the status of unions, retrenchments and the like. It may also be observed in the provisions of the Act regarding the informal conciliation and arbitration proceedings. None of these provisions have a direct bearing on the situation where the services of a director, as employee, are terminated. Yet, this court has always treated directors as employees and protected unfairly dismissed directors under the Act. According to the applicant, this approach is incorrect.

23. Larkin in his article (*supra*) at page 252 warns that the company case law which suggests that any contractual remedy a director may have is restricted to damages, had been decided in the absence of the 1956 Labour Relations Act. Under that legislation reinstatement became the appropriate remedy for an unfairly dismissed director.

24. The definition of an employee in section 213 of the Labour Relations Act is a wide one. It reads:

" **'employee' means-**

(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 any employer"

This definition would surely apply to most, if not all, directors.

25. Section 78 of the Act excludes a senior managerial employees from the definition of an employee. However this is done in the context of workplace forums where such a manager is not regarded as an employee if he represents the employer in dealing with the workplace forum; or determine policy and take decisions on behalf of the employer that may be in conflict with the representation of employees in the workplace.

26. 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.

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

28. The argument that the Labour Relations Act does not apply to directors is largely premised on the argument that employment is characterised by an imbalance in bargaining power or in subordination. Therefore, the argument is that, financial, managing, and ordinary directors have no claim to the status of an employee. This imbalance is not capable of being described in such precise terms so as to particularly exclude a director from the definition. It has been held that a director's position is a dual one–a holder of office on the one hand and an employee on the other. (See: **Stevenson v Sterns Jewellers (Pty) Ltd (1986) 7 ILJ 326 IC**). Company law too, is concerned with the disparity in power between ownership and control.

29. 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 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: Stevenson's judgment *supra*).

31 Consistently the courts have rejected the argument that managerial employees should be excluded from protection against unfair dismissal. The fact that a person is a director of a company does not necessarily mean that he or she cannot also be an employee in terms of the Labour Relations Act. The office of director and position of employee are distinct from another but this court has over time investigated whether the dismissal of the director as an employee was fair. (See **Long & another v Chemical Specialists Tvl (Pty) Ltd (1987) 8 ILJ (IC); Oak Industries (SA) (Pty) Ltd v John No & Another (1987) 8 ILJ 756 (N) and Whitcutt v Computer Diagnostics & Engineering (Pty) Ltd (1987) 8 ILJ 356 (IC)**). Yet, the office held by a financial director, one would imagine, would rather be of more concern to the Companies Act than to the Labour Relations Act.

33. The first respondent (the Commissioner) can not be criticised for not deciding the above issue. It was not raised before him. He only had to decide who had dismissed the third respondent. On the facts before him, which included an employment contract and termination of employment, the third respondent was regarded as an employee. This point which is now raised, is indeed a rather novel approach to trite law. If he erred in law, this does not *per se* render his ruling reviewable. This aspect should be raised at the arbitration or adjudication stage and not in this review application.

34. In the circumstances the application must fail.

35 It was argued that a punitive cost order should be made against the applicant. I do not agree that the arguments advanced by the applicant were calculated to cause delay or are vexatious. At a later stage in the development of this dispute such an observation may be correct. At this stage however, I must regard the applicant as a party who wished to test its

case in terms of an approach which is not entirely incompatible with sentiments expressed before in respect of the status of directors *vis-`a-vis* the Labour Relations Act.

36. The application is dismissed with costs.

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REVELAS J

For the applicant:	Adv. M. Brassey SC with Adv. A. M. Redding Instructed by Webber Wentzel Bowens Attorneys
For the third respondent:	Adv. A. Franklin SC Instructed by Deneys Reitz Attorneys
Date of hearing:	15 October 2004
Date of judgment:	26 October 2004