IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

REPORTABLE

CASE NO: 10155/2008

In the matter between

IAN WICKS	Applicant
and	
SA INDEPENDENT SERVICES (PTY) LTD	First Respondent
LONRHO AFRICA (HOLDINGS) LIMITED	Second Respondent

CORAM	**:**	**D H ZONDI J**
JUDGMENT BY	**:**	**D H ZONDI J**
FOR THE APPLICANT	**:**	**ADV. N F RAUTENBACH**
INSTRUCTED BY	**:**	**WEBBER WENTZEL**
FOR THE RESPONDENTS	**:**	**ADV. S KIRK-COHEN (SC)** **ADV. H RABKIN-NAICKER**
INSTRUCTED BY	**:**	**CLIFFE DEKKER HOFMEYR INC**
DATE OF HEARINGS	**:**	**16 FEBRUARY 2010**
DATE OF JUDGMENT	**:**	**30 APRIL 2010**

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JUDGMENT DELIVERED ON 30 APRIL 2010

ZONDI, J

Introduction

[1] On 03 July 2008 the applicant launched an urgent application in this Court for an order declaring that his suspension from the employment of the first respondent was void, and of no force and effect; setting aside his suspension and reinstating him as managing director.

[2] The Court (per Desai J) granted an interim order which was returnable on 06 August 2008. In terms of the interim order the applicant's suspension was declared null and void, set aside and the applicant was reinstated as managing director with full benefits.

[3] On 06 August 2008 the application was further postponed to 16 February 2010. In the meantime the first respondent has been liquidated thereby rendering the dispute between the parties academic as the applicant's reinstatement order cannot be given effect to.

[4] The only issue which is before the Court is that of costs, in other words which of the parties should be liable for costs.

[5] In dealing with this issue I shall adopt the approach as set out in **Gamlan Investments (Pty) Ltd and Another v Trilion Cape (Pty) Ltd and Another** 1996 (3) SA 692 (C) at 700G which is to the effect that where a disputed application is settled on a basis which disposes of the merits except insofar as the costs are concerned, the Court should not have to hear evidence to decide the disputed facts in order to decide who is liable for costs, but should with the material at its disposal, make a proper allocation as to costs.

[6] The applicant seeks costs on the basis that on the merits of the application, he would have succeeded on the return day. On the other hand the respondents contend that the interim order should be discharged with costs on the grounds that the urgent application was misconceived and bad in law and that this Court lacks jurisdiction to determine it as it essentially involves a labour dispute. The respondents point out that the applicant should have followed the mechanisms of the Labour Relations Act.

Factual Background

[7] The applicant was appointed as managing director of the first respondent in terms of a contract of employment. The second respondent became a shareholder of the first respondent pursuant to the subscription and shareholders agreement ("the subscription agreement").

[8] Initially, the second respondent subscribed for a minority shareholding but, over a period of time and as it advanced more loan finance, it became a majority shareholder. The subscription agreement provided for the appointment of three directors to the board of directors of the first respondent by the second respondent; and the other three directors to be appointed by the existing members of the first respondent.

[9] Pursuant to these rights the second respondent appointed Mr David Lenigas, Mr Lorenz Werndel and Mr Geoffrey White as directors while the existing members appointed the applicant, Mr Christian Kindersley and Mr Randal Gregg as directors. The latter resigned in April 2008 and has not yet been replaced.

[10] It is common cause that a board meeting of the first respondent was held on 24 April 2008, during which a decision was taken to the effect that:

> *"Management, including the chief operating officer, the managing director and the chief financial officer of the company report to PA (Albeck) and PA*

reports back to the Lonrho board. GW (Geoffrey White, a director of Sails and MD of Lonrho) seconded the resolution and put a caveat on the resolution that the resolution would be in force until such time as the company demonstrates to the board that it is operating on a balanced commercial basis".

[11] The applicant was in support of this resolution and expressed his willingness to co-operate with Albeck.

[12] On 02 June 2008 the applicant was requested to attend a meeting at the Cape Grace Hotel for discussion relating to a management meeting to be held on 03 June 2008. He attended as well as Albeck, Scott and Kindersley.

[13] At the conclusion of the meeting the applicant was requested to leave the room briefly, after which he was asked to return and requested to consider taking leave of absence of two months due to exhaustion and stress, during which time the second respondent would manage the business. He was given time up until 09h00 on 03 June 2008 to respond.

[14] On 03 June 2008 the applicant requested written reasons for his required leave of absence and conditions relative to his return.

[15] On 04 June 2008 he was told by email that he was placed on suspension pending the finalisation of an investigation.

[16] The applicant referred to various clauses in the employment contract and shareholders' agreement as bases for his contention that his suspension was unlawful. In particular he referred to clause 18.20 of the shareholders' agreement which provides that:

"*A written resolution which is signed by the directors will be valid*"

[17] The applicant contends that as a director he never signed any such resolution relating to his suspension nor was he involved in or attended any board meeting at which a decision to suspend him was taken.

[18] Geoffrey White, who deposed to the answering affidavit on behalf of the second respondent, alleges that although the meeting of 03 June 2008 was not a formal board meeting with provision of the required notice period, it was a meeting called following a detailed discussion between all the directors of the first respondent and was fully sanctioned as an urgent meeting by all directors.

[19] He further alleges that the purpose of the meeting was to enable the applicant to persuade the first respondent's major shareholder (the second respondent) and the board of directors that all was well, and that the first respondent was operating on a balanced commercial basis. He says the applicant was unable to answer pertinent questions and declined to give direct answers on a wide range of issues.

[20] He points out that the applicant was asked to leave the room briefly because of the respondents' directors' concern at the attitude evidenced by the applicant at the meeting and the ongoing losses being made by the first respondent.

[21] In describing the further conduct of the meeting during applicant's absence Geoffrey White has this to say in paragraph 21 of the answering affidavit:

> *"I made contact with Lenigas, and we discussed the matter in his absence. It stands to be emphasised that all directors (apart from Applicant, who had just been asked to leave the room) were present, either in person, per telephone or authorised by those present. We agreed that there was an urgent necessity for the financial affairs of SAILS to be investigated further, without interference from Applicant. We also agreed that he should not be present during this process, and resolved to offer him temporary leave (on full benefits) to overcome this difficulty."*

[22] Geoffrey White further alleges that when the applicant contacted him and Scott the following day he informed the applicant that the board of directors had decided to suspend him.

Statement of the issues

[23] For the purposes of determining liability for costs the question is whether the applicant would have succeeded had the matter proceeded on a return day.

[24] When the matter was argued on the return day the question of urgency was no longer an issue and the main focus was on the issue of jurisdiction.

The Applicant's Case

[25] The applicant seeks an order declaring null and void and of no force and effect his purported suspension by the respondents as a managing director and an order setting it aside and reinstating him as a managing director.

[26] The applicant advanced various causes of action in challenging his suspension. Firstly, he contends that the effect of his purported suspension is to undermine his reputation as an employee in the shipping industry, with devastating effect. He is afraid that his career will be permanently destroyed and he will not be able to find work in the industry again or finance to start a new business.

[27] Secondly, he alleges that he was not afforded any opportunity to state his case in respect of the reasons for his suspension and proposed replacement by the respondents. He states that on a number of occasions the representatives of the second respondent have threatened to terminate his services or require his resignation despite the fact that he was never informed of the respects in which

his services or suitability as an employee fell short of the standards required by the first respondent.

[28] Thirdly, the applicant contends that the notice of his suspension was invalid in that it was issued without any board decision. The applicant blames the board of the first respondent which he contends should by rights have been the organ to take a decision about his suspension for not doing so by way of properly constituted board decisions as required by the articles of association and the agreements between the parties.

[29] Fourthly, he alleges that in terms of the shareholders' agreement, the parties undertook to observe in its application the principles of good faith and that in suspending him the respondents acted in breach of the obligation of good faith.

[30] Fifthly, the applicant contends that his contract of employment created a relationship of trust between him and the first respondent and by suspending him the first respondent breached that trust relationship.

[31] Finally, he alleges that his employment contract imposed a contractual duty on the part of the first respondent to extend to him the benefit of fair labour practices inclusive of procedural fairness.

The Second Respondent's Case

[32] The second respondent denies that the applicant's suspension was unlawful. It alleges that the applicant was suspended as managing director in the wake of a duly constituted management meeting and after consultation and approval of all other directors of the first respondent.

[33] The second respondent further contends since the issues between the parties involve the employment dispute, the applicant should have resorted to mechanisms of the Labour Relations Act.

Legal Principles

[34] The only question with regard to jurisdiction is whether this Court had jurisdiction to determine the issue whether the applicant's purported suspension was null and void by reason of the respondents' failure to call a properly constituted board meeting to effect such suspension. Section 157 of the Labour Relations Act, 66 of 1995 governs the jurisdiction of the Labour Court.

[35] Section 157(1) provides as follows:

> *"(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court."*

And section 157(2) stipulates:

> *"2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from-*
>
> *(a) employment and from labour relations;*
>
> *(b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and*
>
> *(c) the application of any law for the administration of which the Minister is responsible."*

[36] Section 157(1) makes it clear that the Labour Court has exclusive jurisdiction in respect of all matters that in terms of the Labour Relations Act or in terms of any other law are to be determined by the Labour Court.

[37] The question is whether for the purposes of section 157 the applicant's cause of action is the type of a matter which in terms of the Labour Relations Act or in terms of any other law is to be determined by the Labour Court.

[38] In an attempt to remove the claim from the purview of the labour law and the exclusive jurisdiction of the Labour Court and place it within the concurrent jurisdiction of the Labour Court and the High Court, *Mr Rautenbach,* who appeared for the applicant, in his heads and in argument disavowed any reliance on the employment contract provisions and in particular the Labour Relations Act and relied instead on the contention that the purported suspension of the applicant was null and void and of no force and effect on the basis of the first respondent's failure to take a board resolution to effect it ("*ultra vires* argument"). He submitted that the applicant's claim was based on company law and being so the Labour Relations Act does not exclude the jurisdiction of this Court to hear the matter. He pointed out that only the cause of action based on *ultra vires* was pursued when the interim order was granted. He stated that the other causes of action are irrelevant for purposes of the present dispute.

[39] *Mr Rautenbach* pointed out that in the instant matter the applicant's cause of action is based on the alleged violation by the respondents of the provisions of the shareholders' agreement relating to valid board decisions. He submitted that the applicant's suspension is null and void in that the first respondent failed to convene a properly constituted board meeting at which a decision to suspend him should have been taken.

[40] *Mr Rautenbach* further submitted with reference to sections 186 and 191 of the Labour Relations Act that there is no provision in the Act which enables an employee such as the applicant to complain about non-compliance with the

company law in respect of any decision affecting him, whether a suspension, dismissal or any other decision.

[41] He argued that the Labour Relations Act creates no remedy for an employee who complains that a purported suspension is null and void. He pointed out that either the CCMA or the Labour Court would not have jurisdiction to entertain a dispute unless it is about the fairness of the suspension. He submitted that in the instant case it is the lawfulness as opposed to unfairness of the purported suspension which is an issue and for which the Labour Relations Act does not exclude the High Court jurisdiction, namely whether there was in fact, as a matter of law, any suspension at all, or whether the purported suspension of the applicant was null and void.

[42] He argued that the Labour Relations Act does not provide for remedies for claims founded on company law such as in the instant case. In support of his contention he referred to **Gcaba v Minister for Safety and Security and Others** 2010 (1) SA 238 (CC). At paragraph 73 Van Der Westhuizen J held:

> *"[73] Furthermore, the LRA does not intend to destroy causes of action or remedies and s 157 should not be interpreted to do so. Where a remedy lies in the High Court, s 157(2) cannot be read to mean that it no longer lies there and should not be read to mean as much. Where the judgment of Ngcobo J in Chirwa speaks of a court for labour and employment disputes, it refers to labour- and employment-related disputes for which the LRA*

creates specific remedies. It does not mean that all other remedies which might lie in other courts, like the High Court and Equality Court, can no longer be adjudicated by those courts. If only the Labour Court could deal with disputes arising out of all employment relations, remedies would be wiped out, because the Labour Court (being a creature of statute with only selected remedies and powers) does not have the power to deal with the common-law or other statutory remedies."

[43] On the other hand *Mr Kirk-Cohen* who appeared with *Ms Rabkin-Naiker* for the respondents argued for the discharge of the Rule Nisi inter alia on the basis that this Court had no jurisdiction to hear the matter. He pointed out that the applicant should have approached the CCMA with an alleged "*unfair labour practice*" in terms of the Labour Relations Act.

[44] I disagree with *Mr Rautenbach's* contention. The basis upon which the applicant alleges that his suspension was unlawful, is that the board of the first respondent, which should by rights have been the organ to take a decision about his proposed suspension and any investigation during such suspension had not acted to do so by way of properly constituted board decision as required by the articles of association and the service and shareholders agreement.

[45] The unlawfulness of the purported suspension does not deprive the applicant of the remedies provided for by the Labour Relations Act and in

particular section 193 which deals with remedies for unfair dismissal and unfair labour practices. In my view the label or characterisation of the conduct complained of may not be used as a basis to establish the High Court jurisdiction for matters which essentially fall within the exclusive jurisdiction of the Labour Court or statutory agencies created under the Labour Relations Act.

[46] The effect of a suspension is that while on suspension the applicant is prohibited temporarily from rendering his services to the first respondent pending an investigation. His suspension thus affects employer-employee relationship.

[47] The question is whether the Labour Relations Act provides for a remedy to an employee such as the applicant who by reason of an unlawful suspension is temporarily prohibited from rendering his services to his employer.

[48] In my view suspension of an employee by an employer based upon an unlawful conduct which is violative of either the company law or common law constitutes an unfair suspension for which the Labour Relations Act fully provides for remedies under section 193. It is therefore incorrect to contend that an employee whose suspension is unlawful has no remedies under the Labour Relations Act.

[49] By characterising the manner in which his suspension was obtained, as unlawful the applicant could have his claim heard in the High Court but yet if he characterises the same conduct as unfair he could have it heard in the Labour

Court. This approach clearly defeats the object which the Legislature intended to achieve through the enactment of the Labour Relations Act.

[50] In my view it also places emphasis on the form of conduct and not on its substance. The real intention of the applicant is to obtain reinstatement as managing director by having his purported suspension declared null and void.

[51] The approach contended for by the applicant also encourages the multiplicity of laws governing labour-related matters and the overlapping and competing jurisdictions of different Courts referred to by Ngcobo J in **Chirwa v Transnet Limited & Others** 2008 (3) BCLR 251 (CC) supra, at paragraph 98 which were the problems which the legislature intended to address in enacting the Labour Relations Act. (See also the remarks of Chaskalson CJ in **Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others** 2000 (2) SA 674 (CC) at paragraph 44.)

[52] It is apposite in this regard to refer to the remarks made by Ngcobo J (as he then was) in **Chirwa** supra, at paragraph 92:

> *"[92] In United National Public Servants Association of SA v Digomo NO and Others the Supreme Court of Appeal held that provided the employee's claim, as formulated, does not purport to be one that falls within the exclusive jurisdiction of the Labour Court, the High Court has*

jurisdiction even if the claim could have been formulated as an unfair labour practice. The difficulty with this view is that it leaves it to the employee to decide in which court the dispute is to be heard. By characterising the manner in which the disciplinary hearing was conducted as unfair dismissal, the employee could have the dispute heard in the Labour Court. Yet by characterising the same dispute as constituting a violation of a constitutional right to just administrative action, the employee could have the same dispute heard in the High Court. It could not have been the intention of the Legislature to bring about this consequence."

[53] I am in agreement with the views expressed by Ngcobo J in **Chirwa**. The dispute between the parties is a labour related one although the rights which the applicant seeks to assert may be protected by the company law. The Labour Relations Act, however, provides for a remedy for violation of the rights which the applicant seeks to assert. He must therefore seek the remedy in the Labour Relations Act.

[54] The reliance by *Mr Rautenbach* on **Boxer Superstores Mthatha and Another v Mbenya** 2007 (5) 450 (SCA); **Tsika v Buffalo City Municipality** 2009 (2) SA 628 (E) and **Fredericks and Others v MEC for Education and Training, Eastern Cape, and Others** 2002 (2) SA 693 (CC) cannot help the applicant as the applicant has disavowed any reliance on a cause of action based on contract.

[55] In **Boxer Superstores** the issue was whether an employee may sue in the High Court for relief on the basis that the disciplinary proceedings and the dismissal were "*unlawful*" without alleging any loss apart from salary. The Supreme Court of Appeal answered that question in the affirmative and at 453H held:

> "*This means that every employee now has a common law contractual claim – not merely a statutory unfair labour practice right – to a pre-dismissal hearing. Contractual claims are cognisable in the High Court. The fact that they may also be cognisable in the Labour Court through that Court's unfair labour practice jurisdiction does not detract from the High Court's jurisdiction*".

[56] **Boxer Superstores** is distinguishable from the present case, in that the SCA in that case had to deal with a claim founded on contract whereas in the instant matter Counsel for the applicant disavowed any reliance on a contractual claim.

[57] **Tsika** is also distinguishable from the instant matter. In Tsika the plaintiff, a former manager of the defendant, who had been dismissed for misconduct, claimed payment from the defendant of a sum of R2 017 359-23 part of which he claimed was unlawfully deducted by the defendant from two preservation-fund policies into which part of his salary had been paid and the rest he claimed was owing to him pursuant to his contract of employment.

[58] In **Tsika** the Court rejected the contention that the plaintiff's claims were essentially labour related matters which fall to be determined under the Labour Relations Act and at paragraph 33 the Court went on to say:

> *"[33] The difficulty I have with this submission is that, unlike in Ms Chirwa's case, there is no express provision in the LRA which would give either the plaintiff or the defendant direct access to the Labour Court to pursue their respective claims and counterclaim, or which expressly empowers the Labour Court to grant the relief sought.*

[59] In explaining why the Labour Relations Act was not applicable to the matter before it, the Court had this to say at paragraph 35:

> *"In this matter the plaintiff does not dispute the fairness of his dismissal. He merely claims a sum of money he alleges is owing to him as a consequence of the termination of his employment or to put it in contractual terms, in consequence of the breach by the defendant of an obligation arising from his contract, and a further sum he claims to have been unlawfully deducted from his policies"*

[60] **Fredericks** concerned the refusal by the Eastern Cape Department of Education to approve application for voluntary retrenchment determined in terms of a collective bargaining agreement. The applicants approached the High Court

to have the decision reviewed and set aside and they based their claim upon the alleged infringement of their rights under sections 9 and 33 of the Constitution.

[61] The High Court held that on the proper construction of the Labour Relations Act it did not have jurisdiction to consider the matter.

[62] In reversing the High Court's finding the Constitutional Court held at paragraph 33:

> *"[33] The applicants raise a constitutional matter. Section 24 does not oust the jurisdiction of the High Court to determine that dispute because the institution responsible for the resolution of disputes in terms of s 24 is not a Court of similar status to the High Court. The effect of these conclusions is not however that a person who has a constitutional complaint arising out of the interpretation or application of a collective agreement may not take that matter to the CCMA. Nor does it mean that the CCMA should not consider the provisions of the Constitution in the exercise of its powers. Indeed, like all organs of State, it is obliged to seek to give effect to constitutional commitments. What we do conclude, however, is that the Legislature may not oust the jurisdiction of the High Court to consider constitutional matters unless it assigns that jurisdiction to a Court of similar status, even if at the same time, it confers a similar, though not exclusive, jurisdiction upon another tribunal or forum. The High Court therefore erred in concluding that*

the dispute in this matter concerned the interpretation or application of a collective agreement as contemplated by s 24.

[63] It further went on to hold at paragraph 40:

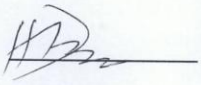
"[40] As there is no general jurisdiction afforded to the Labour Court in employment matters, the jurisdiction of the High Court is not ousted by s 157(1) simply because a dispute is one that falls within the overall sphere of employment relations. The High Court's jurisdiction will only be ousted in respect of matters that 'are to be determined' by the Labour Court in terms of the Act. The Concise Oxford English Dictionary (1990 edition) defines 'determine' so as to include 'to settle', 'to decide', and 'to fix'. Adopting this definition, a matter to be determined by the Labour Court as contemplated by s 157(1) means a matter that in terms of the Act is to be decided or settled by the Labour Court"

Conclusion

[64] In conclusion I therefore find that this Court does not have a concurrent jurisdiction with the Labour Court to entertain the applicant's claim. It follows therefore that the Rule Nisi must be discharged. Two Counsel were employed by the respondents in this matter and it is not suggested by the applicant that the employment of two Counsel was not justified. In the circumstances costs of two Counsel will be awarded.

The Order

[65] In result the Rule Nisi is discharged with costs including costs of two Counsel.



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