IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN BRAAMFONTEIN)

Case number: JR1234-08

In the matter between:

Chilliebush	**APPLICANT**
V	
Commissioner Johnston	**1st RESPONDENT**
CCMA	**2nd RESPONDENT**
Miyeni	**3rd RESPONDENT**

JUDGMENT

AC BASSON, J

[1] The Applicant Chilli Bush Communications (Pty) Ltd (hereinafter referred to as "the applicant") applied to this Court for an order setting aside the ruling of the 1st respondent (Commissioner Johnston - dated 30 May 2008). The applicant sought an order in the following terms: *"Eric Gordon Miyeni was not dismissed by Chilli Bush Communications (Pty) Ltd)".* In the alternative the applicant requested that the dispute be heard *de novo* by a different commissioner of the 2nd Respondent (the Commission for

Conciliation, Mediation and Arbitration – hereinafter referred to as "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. I will return to this point hereinbelow.

Background facts

[2] The 3rd respondent, Mr. Eric Miyeni (hereinafter referred to as "the respondent") was previously the managing creative director of the applicant. He referred an unfair dismissal claim to the CCMA on 3 January 2007.

The proceedings before the CCMA

[3] 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 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.

[4] 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.

Arbitration proceedings before the 2nd Respondent (Commissioner Johnston)

[5] On 25 March 2008 the matter was set down for arbitration before Commissioner Johnson (the 2nd respondent in this application and the third commission seized with the dispute). 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.

[6] The hearing commenced on the 25th of March. 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 she could write a ruling and if the ruling "*finds that [Miyeni] 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.

[7] 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)[1] to Commissioner Johnston's attention. Commissioner Johnston accused the parties' legal representatives of unethical conduct for failing to draw the ruling to her attention.

[8] 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 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.

[9] On 3 June 2008, 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

[1] See paragraph [4] *supra*.

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?

[10] 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*".

[11] I am in agreement that the ruling ought to be reviewed and set aside. Commissioner Johnston acknowledged in her ruling that there were two questions before her: The first was whether or not the respondent was an employee of the applicant and secondly whether or not the applicant was dismissed. By failing to consider the second question she failed to apply her mind to the evidence and material that was placed before her and arrived at a decision that no reasonable commissioner could have arrived at.

[12] Both parties submitted that this Court should substitute the decision and that, in any event, it would be appropriate for this Court to do so for the

following three reasons: (i) Firstly, the dispute was referred to the CCMA almost two years ago. (ii) The parties decided on the approach of separation of issues because, in their view, it lent itself to a speedy resolution of this dispute. After extensive evidence was led on the two issues of employment and dismissal, the parties are entitled to a ruling. It would be costly and time-consuming for the parties to be required to lead all of that evidence again before another commissioner. (iii) There is ample evidence on record before this Court to enable this Court to decide the two issues that were before Commissioner Johnston. (iv) A consideration of whether the respondent was an employee and whether or not he was dismissed raises primarily legal questions. It was submitted that this Court is better equipped than the CCMA to determine such questions. I am in agreement with these submissions and will therefore proceed with deciding the two issues that were before Commissioner Johnston.

Common cause facts

[13] It is common cause that the respondent was appointed as managing creative director of the applicant on 5 April 2006 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."

[14] On 14 November 2006, 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 to be held on Thursday 7 December 2006 at 11H00. Prior to the commencement of the shareholders' meeting on the 7th of December, 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 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.

[15] In the absence of the respondent, the shareholders of the applicant resolved that: -

> *"Eric Miyeni is removed as a director of the company* ***and from his post as managing creative director with immediate effect****.*[2]
>
> *To the extent necessary and ex abundanti cautela the suspension of Eric Miyeni by the company be ratified in view of Mr Miyeni's contention that such suspension is irregular."*

[16] It was common cause that the applicant complied with the provisions of section 220[3] of the Companies Act[4] in removing the respondent as a director.

[17] On 8 December 2006, the applicant's attorneys 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

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[2] My emphasis.

[3] *"220. Removal of directors and procedures in regard thereto*
(1)(a) A company may, notwithstanding anything in its Memorandum of Articles or in any agreement between it and any director, by resolution remove a director before the expiration of his period of office."

[4] Act no 61 of 1973.

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

[18] On 3 January 2007 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

[19] It is the applicant's case that the respondent was not dismissed and that any employment relationship with the respondent terminated when the respondent resigned as a director of the applicant and/or when he cancelled the shareholders agreement. It appears from the heads of argument submitted on behalf of the applicant that it was also the case of the applicant that the employment of the applicant automatically terminated upon his removal as a director. In support of this argument the applicant referred to English law[5] 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*

[5] See paragraph [46] hereunder.

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

The respondent's case

[20] 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[6] (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

[21] Before turning to a discussion of the applicable principles, it is necessary to again restate what is before this court:

(i) Firstly, was the respondent *an employee* of the applicant? and

(ii) Secondly, (and 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?

[22] I am 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

[6] Act 66 of 1995.

heads of argument, advanced any arguments to the effect that the respondent was not an employee. On this basis alone, I am of the view that the respondent was an employee.

[23] 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.

[24] 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*[7] (a review against a decision of an arbitrator of a bargaining council), the arbitrator dismissed an *in limine* application similar to the one initially brought by the applicant in the present case. In the *PG group*–case the respondent was the financial director of the applicant. He was removed from this position by the board of the holding company of the applicant. The applicant argued that the respondent had not been dismissed but that his services had been terminated by notices given to

[7] (2004) 25 *ILJ* 2366 (LC).

him by the board in terms of the company's articles of association. In that case the applicant relied on two clauses of the company's articles of association in support of its contention that the respondent had not been dismissed:

> *"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."*
>
> *"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."*

It was argued on the strength of these two clauses that the respondent had not been dismissed and secondly, as a director of the company, the respondent was not an employee of the company. 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:

> *"[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, s 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 (s 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."*[8]

[25] I am in agreement with the submission that there is no reason why directors cannot fall under the definition of an employee in terms the LRA. Whether or not it is so *de facto* will, of course, depend on the facts. See also *PG Group* where the Court held as follows:

> *"[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*

[8] At paragraph [30].

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."

(I will in the discussion hereinbelow refer to the facts which point to the conclusion that the respondent in the present matter was, in addition to being a director of the applicant, also employed as an employee of the applicant).

[26] Henochsberg[9] 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.

[9] *Henochsberg on the Companies Act* by Meskin: Vol 1 issue 1 at page 1041.

[27] The respondent argued, with reference to the *PG group*-case, that there is thus firstly no reason why directors cannot fall under the definition of an employee and secondly that, even if a particular company's articles of association (or a shareholders' agreement) provides that a director may be removed from office by the board of shareholders of the company, this does not necessarily mean that the director who is also an employee is not protected by the LRA. This, the respondent submitted, will be so even if the articles of association (or the shareholders' agreement) contain an express provision ending a particular director's appointment in a particular post once that person ceases to be a director. I will return to the latter aspect in more detail hereinbelow.

[28] I am therefore 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) where the Court held as follows:

> *'Accordingly he submits that where the relationship of employer and employee is in fact nothing other than the relationship between company and director, the industrial court "simply has no jurisdiction in the matter". He further adds: "Where the termination*

of an employment relationship is no more than the natural and inevitable consequence of the termination of a directorship then the industrial court should not intervene."

This issue as to whether applicant was an employee in terms of the Act was raised once more by the court at the end of the proceedings and Mr Mostert conceded that applicant could be regarded as an 'employee'.

The court is of the view that applicant's position in his capacity as employee can be separated from his capacity as director and prospective shareholder. It could not have been the intention of the legislature that the behests of the Companies Act could have curtailed any rights of employees covered by the Act. Bearing in mind the objects of the Act, i.e. sound labour relations based on the principles of equity and fairness the court fails to see how any employee's rights under the Act could be curtailed" .[10]

[29] Moreover, in so far as it may be argued that there is a conflict between company law and labour law, section 210[11] of the LRA is clear that labour law shall prevail. (I will also point out in paragraph [34] hereinbelow that it was also envisaged in the shareholders' agreement between the applicant and the respondent that he could also be appointed as an employee of the

[10] At 362G-J. See also the judgment in *PG Group (Pty) Ltd v Mbambo NO & others* [2005] 1 BLLR 71 (LC) at paragraph 31 where the court referred to this decision with approval.
[11] Section 210 of the LRA provides as follows*: "If any conflict, relating to any matter dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act shall prevail*."

applicant.)

Does the evidence support the conclusion that the respondent was an employee?

[30] In deciding whether or not an individual is an employee or not, the courts will normally apply the dominant impression test (see, for example, *Denel (Pty) Ltd v Gerber* (2005) 26 ILJ 1256 (LAC). In a recent decision *Hydraulic Engineering Repair Services v Ntshona &* Others (2008) 29 ILJ 163 (LC) the Labour Court held that a 50% shareholder (the respondent) in a company who was also its marketing director was an employee in light of the fact that he received regular monthly salary as a marketing director; monthly pay slips indicated that UIF was deducted; the respondent was involved in the running of the day to day activities of the company. In applying the dominant impression test the Court concluded that the respondent was an employee of the applicant (the company) despite the fact the fact that he held 50% of the company and as such could veto any decisions of the board.

[31] In the present case the respondent argued with reference to the evidence that it is clear that it was from the outset the intention that the respondent would play a crucial part in the running of the business, particularly in light of the fact that the respondent came on board as a consequence of the need to find a BEE partner. The Court was also referred to the letter in which the respondent was notified of his appointment as a managing

creative director. In this letter the respondent was *inter alia* told that *"[i]n order to ensure your remuneration is commensurate with the additional responsibilities of this position, the Board is pleased to advise that a 21% salary increase will apply with effect from1 May 2006*." This, the respondent argued, is indicative of the fact that he was appointed as an employee and that the remuneration was indicative of the fact that he was compensated for his added responsibilities. It was also the evidence of Ms. Hefer (the only witness for the applicant) that the respondent was issued with the standard payslip that was issued to all employees. She also acknowledged that at the time no remuneration was paid to directors in their capacity as directors of the applicant. This, the respondent argued, was clearly indicative of the fact that the respondent was paid for the functions he performed as an employee. The payslip of the respondent further showed that the respondent was subjected to UIF deduction.

[32] It was common cause that the respondent did not have a written contract with the applicant. It was, however, the evidence of the respondent that he at least had an oral contract of employment with the applicant. In the past, however, the respondent had a contract of employment with the applicant when he was previously employed as a creative director. It was, however, the contention on behalf of the applicant that the shareholders' agreement superseded the previous employment contract of the respondent. In respect of this submission, the respondent argued that, if this court does not accept that the shareholders' agreement superseded the employment

contract (as it should according to the respondent), then the Court should accept that a contract of employment did exist as it was effectively conceded that, at least in the past, the respondent had a contract of employment with the applicant. (I will return to this point hereinbelow.)

[33] I am in agreement with the submission on behalf of the respondent that the evidence points to the conclusion that the respondent was (apart from being a director) appointed as an employee.

[34] There are also indications in the shareholders' agreement that governed the relationship between the respondent and the other shareholders, that directors could also, and would in fact also ordinarily be an employee of the applicant. Clause 8.4 of this agreement provides that:

> *"Except with the approval of 80% of the shareholders, the directors shall be in the full employment of the COMPANY…*".

Clause 8.7 further provides that should any shareholder either cease to be a director or have his/her employment with the applicant 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 will be obliged to resign as director and offer his other shares and loan account to the applicant.

[35] I am in agreement with the submission that it is clear (apart from the other facts that point to an employment relationship) that the parties to the

shareholders' agreement also envisaged that directors could be employed by the applicant and that they would fulfil two separate roles: one as a director and the other as an employee.

[36] It is therefore concluded that the respondent was an employee of the applicant. As far as the first question before this court is concerned, it is thus answered in the affirmative.

"Automatic termination" of the employment contract

[37] Before I turn to the question more specifically whether or not the respondent was "*dismissed*" by the applicant, I wish to make a few observations about the question 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 dated 8 December 2006 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.

[38] Firstly, I am 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" (see paragraph [15] *supra*). 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 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 is, in my 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.[13] A

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[12] Sub-sections (2)(b) and (4) thereof provide as follows:
'(*2*) *… no person may do, or threaten to do, any of the following –*
…
*(b) prevent an employee … **from exercising any right conferred by this Act** or from **participating in any proceedings in terms of this Act**;*
…
*(4) A provision in any contract, whether entered into before or after the commencement of this Act, that **directly or indirectly contradicts or limits** any provision of … this section is invalid, unless the contractual provision is permitted by this Act.*" (My emphasis.)

[13] Support for this notion is also to be found in *Igbo v Johnson Matthey Chemicals Ltd* [1986] IRLR 215 (CA) where a contract of service provided that should the employee fail to return to work after his holiday "*your contract of employment will automatically terminate on that date"*. The Court of Appeal concluded that this constitutes a dismissal. The Court held as follows with reference to section 140 of the Employment Protection (Consolidation) Act 1978, which provides that -
"(1[e]Except as provided by the following provisions of this section, any provision in an agreement (whether a contract of employment or not) shall be void in so far as it purports –
(a) to exclude or limit the operation of any provision of this Act; or
(b) *to preclude any person from presenting a complaint to, or bringing any proceedings under this Act before, an industrial tribunal."*
The Court concluded as follows:

shareholders' agreement can likewise not, in my 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 also *Denel (Pty) Ltd v Gerber* [2005] 9 BLLR 849 (LAC) where the Court held in the context of whether parties can effectively contract out of the LRA by styling an employee as an independent contractor as follows:

> *"[24] I am satisfied that the parties can resile from the position which they had deliberately and openly chosen to take up and that to reach any other conclusion would be, in effect, to permit the parties to contract out of the Act and to deprive, in particular, a person who works as an employee within the definition of the Act under a contract of service of the benefits which the statute confers upon him. If I consider the policy of the Act I can see the dangers,*

……
"[19] … it is impossible to avoid the conclusion that the provision for automatic termination had the effect, if valid, of limiting the operation of the sections. It was therefore void by virtue of s 140. In our judgment Ashraf's case was wrongly decided and must now be overruled. We add that, in substance, the effect of the automatic termination provision is the same as if it had said in terms "in the event of failure to return to work on 28 September, termination of the employee's employment on that ground shall not constitute dismissal under s 55", or "shall not give rise to any claim for unfair dismissal". Any such provision would without doubt have been void as limiting the operation of the sections. We can see no ground for saying that a provision which has the like effect does not limit such operation"

…..
"[21] In the final analysis the question to be determined is whether a provision for automatic termination upon failure to report for work on one specified future date, introduced by way of variation of a subsisting contract of employment, has the effect of limiting the operation of ss 54 and 55. To hold that it does not is not in our judgment possible when the effect is to convert a right not to be unfairly dismissed into a conditional right not to be unfairly dismissed."

pointed out by Lord Justice Ackner in the course of the argument, of employers anxious to escape from their statutory liabilities under this legislation of the Factories Act offering this choice to persons to whom they intend to employ, as Mr West was employed, as employees within the definition of the Act and pressing them to take that employment – it may be even insisting upon their taking that employment – on the terms that it shall not be called that employment at all, but shall be called a contract for services with a self-employed person. I, therefore, reject Mr Clifford's submission in its extreme form. To accept it would, I think, be to prefer the minority view of Lord Justice Lawton in Ferguson's case to the view of the majority both in Ferguson's case and in Massey's case; and I do not find anything in Massey's case which clearly indicates that, where the agreement to treat a man as self-employed is made as openly as it was in this case, the person called self-employed is forced to accept that position, whatever the reality of the matter, when he comes to try and persuade an Industrial Tribunal to hear a complaint of unfair dismissal. That seems to me to presuppose some kind of estoppel against invoking the statute equivalent to, or closely analogous to, a power to contract out of the Act; and to give effect to it would, in my judgment be plainly wrong"

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:

> *"[45] The effective cause of termination of the respondent's contract of employment was clearly the minister's removal of him from the applicant's board of directors. The automatic termination clause is impermissible and cannot rightly be invoked to stave off the clear and unambiguous effect of the minister's overt act.*
>
> *[46] In the result, the automatic termination provisions of article 8.3, which regulates the termination of the contract of employment and is thus incorporated by reference therein, are impermissible in their truncation of provisions of chapter 8 of the LRA and, possibly even, the concomitant constitutional right to fair labour practices (cf B Igbo v Johnson Matthey Chemicals Ltd [1986] IRLR 215 (CA)). Provisions of this sort, militating as they do against public policy by which statutory rights conferred on employees are for the benefit of all employees and not just an individual, are incapable of consensual validation between parties to a contract by way of waiver of the rights so conferred."*

[39] Section 23(1) of the Constitution entrenches the right of every employee to fair labour practices. The LRA in section 1(a) gives effect to this right by recognising the right not to be unfairly dismissed in section 185 of the LRA. In *NEHAWU v University of Cape Town & others* (2003) 24 ILJ 95

(CC), the Constitutional Court confirmed that section 185 is an extension of the constitutional right to fair labour practices:

> *"[42] Security of employment is a core value of the LRA and is dealt with in chapter VIII. The chapter is headed "Unfair Dismissals". The opening section, s 185, provides that "[e]very employee has the right not to be unfairly dismissed". This right is essential to the constitutional right to fair labour practices. As pointed out above, it seeks to ensure the continuation of the relationship between the worker and the employer on terms that are fair to both. Section 185 is a foundation upon which the ensuing sections are erected*.

An employee therefore has a constitutional right not to be unfairly dismissed (as this right is an extension of the right to fair labour practices). This is also in line with the purpose of the LRA which is to give effect to the constitution and the rights entrenched therein.[14]

Was the respondent dismissed?

[40] I have already pointed out that the respondent's case is that he was dismissed on 7 December 2006 as a consequence of a resolution passed by the board of directors. I am in agreement with this submission. It is patently clear from the resolution that he was dismissed. The respondent's

[14] See: *University of Cape Town (supra)* at paragraph 41 where the Court held as follows: "*The LRA must therefore be purposively construed in order to give effect to the Constitution".*

evidence also supports this conclusion. It was his evidence that when he arrived at work after the date of the board meeting at which the resolution was passed he was told by security guards that he may not enter the premises. A letter written on behalf of the applicant on 8 December also supports the conclusion that the applicant was also of the view that the respondent was dismissed by the applicant as a consequence of the resolution passed by the board the day before (see paragraph [15] *supra*).

[41] As already pointed out in the afoaregoing 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) where the Appellate Division (as it then was) highlighted this distinction as follows:

> '*There is no sure correspondence between lawfulness and fairness. While an unlawful dismissal would probably always be regarded as unfair (it is difficult to conceive of circumstances in which it would not), a lawful dismissal will not for that reason alone be fair … .*

The ultimate determinant is therefore fairness and not the lawfulness of … the dismissal … .'[15]

[42] It also appears from the *PG Group*- case and *Ntshona* (in which the Court followed 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 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

[15] At 460.

of a decision to dismiss is subject to the determination of either the CCMA or the Labour Court.

[43] For completeness sake I must briefly refer to some of the applicants' submission. The applicant argued that the position in company law suggests that once the board makes a decision to remove the managing director, he does not continue to be an employee of the company. It was also argued that the respondent terminated his employment relationship himself by resigning as a director of the applicant. In support of its argument, the applicant referred to Henochsberg Companies Act (Vol2 with reference to the discussion of article 61 which is similar to section 62 of the applicant's Articles of Association) that:

(i) A managing director's appointment as such terminates automatically if he ceases for any reason to be a director.

(ii) Irrespective of what the Articles or the contract between the company and the managing director provide, the company can always procure the termination of the managing director's appointment by removing him as a director.

(iii) The managing director's removal as a director would be subject to the managing director's claim for damages for any breach of the contract that such termination entails.

[44] I have several difficulties with the applicant's submission. I have already indicated that the labour law and company law operate in two different spheres (apart from some overlaps in certain circumstances). Article 61

deals with the appointment of a managing director or manager from the body of director and its removal. What the applicant relies on is the discussion by Henochsbergs of this procedure. I have no quarrel with that and accept that this is the legal position in respect of the appointment and/or removal of a managing director or manager. It is in any event not the question before this court. Where I do differ from the applicant is that the decision to remove him as an employee is immune from scrutiny in terms of the labour law. In *PG Group (supra)*, the court also rejected the view that the employee who had lost his employment as a consequence of a decision of the company's sole shareholder to remove him as a director (which it was entitled to do) that this could not be attributed to the company, and, consequently, that the company itself had not dismissed the employee in the sense defined in section 186(1)(a) of the LRA:

> *"The decision to remove the [employee] was clearly made in terms of articles 46.6 and 30. The decision was taken by members in a general meeting. Therefore it is a decision of the [company] itself and not a decision of PGSI Limited [the sole shareholder]. 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 [authority citied].*
>
> *The decision to dismiss, taken by PGSI Limited, is in law the [company's] decision and therefore the latter terminated the*

[employee's] appointment as director."[16]

[45] The court was also referred to *Barlows Manufacturing Co Ltd and Others v R N Barry (Pty) Ltd and Others* 1990 (4) SA 608 (C) where the Court held as follows at 611:

> "*If the removal occurs in breach of a contract with the company he may claim damages that is provided in section 220(7). But, and this is the significant point, this is his only remedy. The shareholders may at any time resume effective control."*

[46] I do not read *Barlows* to be authority for the proposition that a director who is also an employee has no remedies in terms of the LRA. There is no indication from the decision in *Barlows* that the court came to this conclusion nor that this case involved a director who was also an employee. On this basis alone the case is wholly distinguishable from the present case. The Court was also referred to *Stevenson v Sterns Jewellers (Ply) Ltd* (supra) as authority for the view that where a director is removed from his position as a director, any employment relationship under a contract of employment terminates. Again, a reading of this judgment does not support his contention at all. In fact, in the *Stevenson* the applicant pursued remedies in terms of the (previous) LRA. No point *in limine* was raised remotely similar to the one raised in this matter. Lastly the applicant, with reference to English law submitted that English law

[16] At paragraphs 19-20.

supports the principle that if a director is removed from his position as a director, any employment relationship terminates (see: *BMK Ltd and BMK Holdings Ltd v JL Loque*[17]). The Court was also referred to the decision of the United Kingdom Employment Appeal Tribunal in *Mountain Springwater Co Ltd v MS I Colsby*[18] for authority that the employment of the applicant terminated automatically upon her removal as director. This does not mean that the individual is deprived of his/ her remedies in respect of a claim for unfair dismissal. This was also specifically recognised by the Employment Appeal Tribunal:

> *"12. This is where the judgment of Mummery LJ is so helpful in clarifying the position. In Cobley, the director who was removed had been employed as chief executive for very many years. There was there no doubt about the construction of the Articles, because, in fact, the matter depended upon an express contract, that the employment of the Applicant terminated automatically upon his removal as director: but nevertheless, even in that situation, which we are satisfied is the same as this case – once we have resolved the issue in favour of the Respondent, whereas the Tribunal would have resolved it against the Respondent - the Tribunal then needs to go on to consider the question of unfair dismissal. Mummery LJ said the following in his judgment at paragraph 20:*

[17] Appeal no EAT/781/92 dated 5 February 1993.
[18] Appeal no UKEAT/0855/04 dated 18 April 2005.

> *"20. I agree with [Counsel for the Applicant], that this does not mean that the reason for the shareholders' resolution removing the director is irrelevant to identifying the reason for his dismissal from employment in proceedings for unfair dismissal or for wrongful dismissal. If, as in this case, removal from the board automatically terminates the contract of employment, it will be difficult to dissociate the reason for the removal resolution from the termination of the employment. One leads to the other. I was not impressed [Counsel for the Respondent's] concern about the possible difficulties in investigating and identifying the reason for the removal of a director at an EGM attended by the many shareholders.""*

[47] Lastly, the applicant has advanced the argument that it would be unfair to continue to employ a director after his directorship (and shareholding) has come to an end. This may be so but this is a question which is relevant in proceedings where the commissioner must consider an appropriate remedy in the event of a finding that the dismissal was substantively unfair.

[48] In conclusion: I am therefore satisfied that that the 3rd respondent was an employee of the applicant and that he was dismissed. In respect of costs I am of view that the 3rd respondent is entitled to his costs.

[49] In the event the following order is made:

(i) The ruling of the second respondent is reviewed and set aside and replaced by an order that the 3rd respondent was an employee of the applicant and was dismissed on 7 December 2006.

(ii) The dispute about the fairness of the dismissal of the 3rd respondent is referred to the 2nd respondent to be determined by a commissioner other than the 1st respondent.

(iii) The applicant is ordered to pay the costs.

……..

AC BASSON, J

Judgment: 26 January 2010

For the applicant:

Adv AJR Booysen. Instructed by Matjila, Hertzberg & Dewey

For the Respondent:

Adv A Friedman. Instructed by Bowman Gilfillan