IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

CASE NO:C524/2004

In the matter between:

PETER JEFFREY HOOD **APPLICANT**

And

THE ASSOCIATION OF RETIRED PERSONS & PENSIONERS (ASSOCIATION INCORPORATED NOT FOR GAIN UNDER SECTION 21) **1ST RESPONDENT**

VUYISA MAZWI N.O. **2ND RESPONDENT**

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **3RD RESPONDENT**

JUDGMENT

Murphy, AJ

1. The applicant seeks an order setting aside the award of the second respondent, the arbitrator, consisting of a finding that he was not an employee of the first respondent, the Association of Retired Persons and Pensioners ("the Association").

2. The Association is an association not for gain incorporated as a company limited by guarantee in terms of section 21 of the Companies Act 61 of 1973.

3. During May 2003 the Association felt the need to "rejuvenate" and strengthen its efforts to give effect to its stated purpose of uniting all

retired pensions and pensioners in South Africa in a single organization for their common good in order to enhance and promote their social and material welfare. Accordingly, at a meeting of the board on 22 May 2003 the directors of the Association resolved to appoint the applicant, himself a director of the company, as Chief Executive Officer for two years. The applicant was informed of the appointment and was advised that his salary would be determined after perusal of his curriculum vitae, which he was requested to submit.

4. On 23 June 2003 the Chairman of the Association addressed a circular to all directors regarding the appointment of a CEO which read as follows:

> "**APPOINTMENT OF A CHIEF EXECUTIVE OFFICER**
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> A decision taken at the Exco Meeting in February was to recommend that a re-structuring of the Head Office administration be made effective as from 1 September 2003.

A CEO should be responsible for setting up an administration which would be able to cope with modern procedures and improved communication.

It was agreed that it would be too costly and may even create problems if an outsider or a person who was not interested in the welfare of older persons were appointed.

It was agreed that Head Office should stay domiciled in Cape Town because the majority of members are from the Western Cape.

Mr Hood was prepared to accept the appointment as CEO as from 1 September 2003.

A suggested ARP&P job description had been circulated. A more specific job description to be decided on in due course.

A Curriculum Vitae was requested for information before an agreement could be formalized and the appointment made.

The appointment would be in a temporary capacity for a period of two years as from 1 September 2003.

Mr Hood is willing to commit himself to ARP&P business exclusively in return for an allowance of R5 000 for traveling and a salary of R7 000 per month. The decision to appoint Mr Hood was taken at the Directors Meeting held on Thursday 22 May.

Mr Hood will in the meantime represent us in negotiations with Arcay/Lanson/SI and in the finalizing of a new agreement. Head Office will reimburse him for traveling and accommodation.

I expect members and some Branch committees will object to the spending of R150 000 a year on the employment of a CEO as we are as yet not benefiting financially from the new ventures. The funds required will have to be funded from Head Office investments.

The CV was posted to all Regional Directors on 18 June 2003.

I will confirm the appointment of Mr Hood on 27 June 2003."

5. On 27 June 2003 the Chairman addressed a letter to the applicant confirming the decision of the board which read:

> ‘‘I have pleasure in confirming the decision of the Board of Directors taken in Cape Town on 22/23 May 2003, to appoint you as Chief Executive Officer of the ARP&P. The appointment is for the period of two years as from 1 September 2003.

Head Office is to remain domiciled in Cape Town as the majority of members are resident in the Western Cape.

The Board of Directors accept that you are not able to relocate to Cape Town and that you will have to exercise your office as CEO by using the Southern Regional facilities.

The Board of Directors agreed to the remuneration you have requested, ie. an allowance of R5 000 per month for traveling and a salary of R7 000 per month.

The implications of your executive role in the Association will become clearer once you have been able to familiarise yourself with the duties of the present Head Office staff and current procedures.

Thank you for keeping me informed of your fact-finding visit to Arcay Systems in Johannesburg.

I trust you will have a safe and comfortable return trip home."

6. The applicant replied to the Chairman on 2 July 2003 as follows:

> "I thank you for your letter dated 27 June confirming the Board's decision to offer me the position of Chief Executive Officer of the ARP&P.
>
> It is with pleasure and much anticipation of playing a constructive role in the months to come that I am pleased to accept the position of CEO.
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> Thank you for your support on this matter which I appreciate has not been easy when implementing a major change in the Association."

7. On 3 July 2003 the applicant resigned his position as an estate agent in order to take up the post of CEO of the Association.

8. At a meeting of the board of directors on 7 August 2003 it was decided after some debate to withdraw the applicant's letter of appointment. Apparently the decision to withdraw the appointment flowed from dissatisfaction among some members of the Association about the procedures followed in making the appointment.

9. Sometime later the applicant referred a dispute of unfair dismissal to the CCMA where arbitration proceedings took place on 25 February 2004. At the commencement of the arbitration hearing the Association raised a point *in limine* claiming that the applicant was not an employee.

10. The Association placed reliance upon what it describes to be an established principle of company law that directors cannot appoint one of themselves to any office of profit unless accorded the power to do so by the articles of association. In the absence of such powers being vested in the directors, the Association argued, the appointment of a managing director or manager may only be made by the company in a

general meeting. From the arbitrator's award it appears that the contention was made on behalf of the Association that the articles of association do not provide for the appointment of a CEO by the board and that such authority therefore rested exclusively with the members acting in a general meeting, and because the general meeting had not approved the applicant's employment as CEO, the appointment was invalid. It was also contended that the chairperson did not have the necessary mandate when appointing the applicant.

11. The arbitrator's finding in this regard, to say the least, was cryptic, and made no attempt whatsoever to discuss or explain the applicable law or to provide any exposition of the facts or the application of the law to them. In the final analysis he held that he had no jurisdiction to arbitrate the dismissal because the applicant was not an employee. His entire reasoning of the point reads as follows:

> ''Firstly, the articles of association do not authorize the appointment of a CEO and as such the applicant's appointment was not *intra vires.* Secondly, the appointment also seems not to have been in accordance with the articles, as Mr Visser did not have the requisite mandate to appoint the applicant. The applicant was a director and as such knew or ought to have known what the respondent's constitution provided. He could not be a party to a process that is not authorized by the constitution and then try to hold the company to the same illegitimate process. On the contrary he should be the custodian of the respondent's constitution. The employment contract between the parties was accordingly not a valid one as it was not compatible with the articles of association or the constitution."

12. It is noteworthy that in his award the arbitrator makes no reference at all to the actual provisions of the articles of association. In his founding affidavit the applicant submits that the articles do indeed authorize the

appointment of a CEO. Article 19 is the relevant provision which states:

> **POWERS AND DUTIES OF DIRECTORS**
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> The business of The Association shall be managed by the Directors who may pay on behalf of The Association, all expenses incurred in promoting and incorporating The Association, *and may exercise all such powers of The Association as are not required by The Act, or these Articles, to be exercised by The Association in General Meeting.* Without in any way derogating from the generality of the aforegoing, the Directors shall be entitled to exercise on behalf of The Association all and any of the Common Powers of Companies itemised in Schedule 2 of The Act, subject only to any contrary stipulation contained from time to time in the Memorandum or Articles of The Association (emphasis supplied).

13. On the face of it Article 19 provides that the business of the Association shall be managed by the directors who may exercise all powers of the Association except those which the Companies Act and the articles require to be exercised by the Association in General Meeting. Because neither the Act nor the articles require the appointment of a CEO to be exercised by the Association in general meeting, according to the applicant, the board had the necessary authority to make the appointment in terms of Article 19.

14. The applicant further submits that the evidence (including the minutes of the meeting of 22 May 2003) clearly show that the board did indeed mandate the chairman of the Association to finalise his appointment.

15. On these bases the applicant contends that the arbitrator did not apply his mind to the terms of the articles of association or the material placed before him and that there is accordingly no rational connection

between the material before the arbitrator and his findings.

16. The Association asserts that the award is rational and justifiable and although no specific reference is made in the award to the articles of association, it maintains that it is apparent that the arbitrator had them in mind and properly considered them.

17. The power of the directors of a company to appoint one or more of their body to the office of managing director or manager is routinely bestowed upon them in terms of the articles of association. Thus the standard form articles of association for a public company having a share capital contained in Table A of the First Schedule to the Companies Act provides in Article 61:

> 'The directors may from time to time appoint one or more of their body to the office of managing director or manager for such terms and at such remuneration… or they may think fit and may revoke such appointment subject to the terms of any agreement entered into in any particular case…"

18. The first paragraph of the Association's articles of association provide:

> ''The Standard Articles of Association as contained in Table "A" or "B" of Schedule 1 of the Act shall not be applicable to this Company; whose articles of Association shall be as set out hereunder."

19. From this the Association seeks to argue that in the absence of it having adopted the standard form articles in Schedule 1 the directors were not empowered to appoint the applicant as CEO since without an article such as that in Article 61 of Table A the power to appoint remained vested in the general meeting. The applicant, so it says, was

aware of this. And, moreover, in its view, Article 19 of its articles is restricted to a general power to bind the Association commercially in respect of its promotion and incorporation.

20. Although I am not entirely sure it does much to advance the Association's case, Mr Elliot, who appeared for the Association, referred me to the celebrated judgement of Bristowe J in *Robinson v Randfontein Central Gold Mining Co Ltd* 1917 WLD 78. The facts and issues in that matter are in critical respects different from those in the present. Nevertheless, it might assist to re-state certain of the principles that applied. Robinson had served as a director and manager in the defendant company. His position underwent transformation as a result of a restructuring of the company. In early January 1917 the board re-confirmed his employment as its Supervisor of Stores and then a few days later the general meeting confirmed his appointment as a director on the board. On 16 January 1917 the new board met and discussed at length "the whole question of the appointment of officials with the dual office of director." Subsequent to this, and while Robinson was away on holiday, another person was instructed to take over as manager of the stores. On his return from leave Robinson addressed a letter to the board objecting to their action. The board resolved: " that the Company's attitude be that Mr Robinson's appointment as Supervisor of Stores is nullified by the later acceptance of the office of director." Robinson sued for "the alleged wrongful determination of his office as Supervisor." The company pleaded that the offices of director and supervisor were incompatible and that the acceptance of the former *ipso facto* vacated the latter.

Bristowe J accepted that there was indeed a principle of English law that the acceptance by a public or corporate official of an office inconsistent with one which he already holds involves the vacation of

the first office. However, the possession of the one office is not a disqualification for election to the other, but if the second position is accepted it *prima facie* terminates the terms of the first. In other words, the effect of the incompatibility is to bring about a surrender of the first office and not to create a disqualification for the second. Although no Roman-Dutch authority was cited in support of the principle, the learned judge held that the broad principle is one of such obvious common sense that "it seems impossible to doubt that it would be accepted by our courts."

21. Although this aspect of the *Robinson* judgment was not canvassed by either counsel in argument before me, it strikes me that if anything it assists the applicant. The principle enunciated is basically this: should it be shown that the office of CEO is incompatible with that of a director of the board (a question of considerable doubt in this instance), the effect of the appointment of the applicant as CEO would not be to disqualify him as an employee, it would merely bring about an implied vacation or surrender of his office as a director. As Bristowe J also pointed out, there is no substantive rule of law disqualifying a director from becoming an employee. It is a matter of contract between the parties. Much also depends on the nature and extent of any incompatibility. In this regard the learned judge stated:

> "There is in the first place the wide range which incompatibility within the meaning of these authorities covers. Where the duties of the two offices involve the holder being in two different places at the same time, it is physically impossible for him to discharge the duties of both. In such a case the inference of surrender may be a necessary inference. But where the incompatibility depends on the relationship of master and servant, particularly where (as in the case of a company) the so-called mastership is only membership of a board or body of persons who exercise the functions of master by the majority of a

> quorum at meetings formally convened, or where… it is a mere question of possible bias in the discharge of the duties of one of the offices, the mischief likely to result from the legal incompatibility may vary from very considerable interference with the due discharge of the duties of the office to an obstruction so slight as to be unworthy of practical consideration… *Prima facie* if a man enters into two contracts with the same person he is liable on both; and it would be no defence to an action for specific performance or damages that the duties overlapped or that the appointee's interest under one contract was in some degree repugnant to his duty under the other. The answer would be that the appointer was a free agent and should have thought of that before he committed himself."

22. Thus, far from advancing the Associations case these *dicta*, with which I respectfully agree, are authority for the proposition that there is no principle of company law precluding directors from appointing one of their own to an office of profit within the company. When there is a measure of incompatibility, such must be resolved in accordance with the principles of the interpretation of contracts to determine whether the inference of surrender or vacation is the necessary inference. It is trite therefore, and I do not understand counsel to have argued otherwise, that the mere appointment of a director to the position of CEO does not constitute an invalid appointment or result in an invalid contract of employment. In the final analysis it all depends upon the powers of appointment reserved to the various organs of the company. In making this point Bristowe J made reference to *Eales v The Cumberland Blacklead Mining Co Ltd* (30 LJ Ex 141) where it was said:

> " It is argued that for the directors to appoint one of their own body to an office at a high salary is inexpedient and bad for the interests of the association…but the parties who associate themselves in undertakings of this kind have their remedy, they may make provision to restrain the powers of the directors in this respect…"

Bristowe J concluded as follows:

> "Having regard to these authorities it must I think be admitted that without the authorisation of the articles no power to appoint a director to another office of profit under the company resides with the Board; for the powers of the Board are defined by the articles and everything not permitted by the articles is beyond their authority."

23. The Association's argument that the express exclusion of the standard articles in Schedule 1 was intended to exclude the director's powers to appoint one of their own to an office of profit seems to me to be far-fetched. I agree rather with Mr. Engela, who appeared for the applicant, that the reason Schedule 1 was not adopted was merely because it is expressly intended to apply companies (both public and private) having a share capital. The Association is a company incorporated under section 21 and is limited by guarantee. It does not have a share capital. The failure to adopt the articles in Schedule 1, including Article 61 of the standard articles in its explicit terms, cannot alone lead to the conclusion that the intention was to reserve for the general meeting the power to appoint directors to positions of employment in the company. As I see it, by not adopting the articles set out in the Schedule the promoters intended rather to adopt articles of association they considered more appropriate to an association not for gain. The standard articles in Schedule 1 are appropriate for companies with share capital. For that reason the promoters fashioned articles of association that suited them and included wide and general powers for the directors to enter into contracts in Article 19 and 20 (the latter dealing specifically with borrowing powers).

24. Article 19 in clear and unambiguous terms grants the directors "all such powers of the Association as are not required by the Act, or by these Articles,

to be exercised by the Association in General Meeting." The Act does not require that directors be appointed to employment in any specific manner, nor do the articles reserve the power to make such appointments to the general meeting. Nor is there any justification for constraining the director's contractual capacity to an authority to bind the Association "commercially" (whatever that might mean). Moreover, as I have already indicated, no powers of the directors have been excluded by the decision not to adopt Schedule 1. In the premises, Article 19 accords the directors of the Association the power to appoint one of themselves as CEO and the Applicant's appointment as such cannot be regarded as *ultra vires.* All else being equal, the contract of employment would be valid and the applicant an employee in terms of the Labour Relations Act. In the result the arbitrator made a reviewable jurisdictional error.

25. Lastly, because I accept the contract was not concluded *ultra vires* and especially since neither counsel canvassed the question, it is unnecessary to consider whether section 36 of the Companies Act might have operated to avoid the consequence of any invalidity, though as I understand the arguments presented, there has been no suggestion that the contract of employment was beyond the objects of the company.

26. As for the alleged lack of mandate on the part of the chairman, the arbitrator found that the appointment was not in accordance with the articles, as the chairman did not have the required mandate. There is no evidence to support this finding. None of the directors testified as to the events and resolutions of the meetings of 22 May 2003 and 7 August 2003. In fact no evidence at all was led in this regard. Without this evidence the arbitrator was unable to arrive rationally at the conclusion he did. Nor was he in a position to give proper consideration to the application of the doctrine of constructive notice or the Turquand

rule. In view of the lack of evidence I am regrettably in no position to substitute any decision in this regard.

27. In the premises the award falls to be set-aside in its entirety. This is an instance when costs should follow the result.

28. In the premises I make the following order:

    28.1. The award of the second respondent under case numbers WE 9621-03 dated 25 February 2004 is set aside.

    28.2. The matter is remitted to the third respondent for fresh consideration by a Senior Commissioner other than the second respondent within 21 days of this order or such other period as the parties may agree.

    28.3. The first respondent is ordered to pay the applicant's costs.

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Murphy AJ

Date of hearing: 21 November 2005
Date of judgment: 17 December 2005
Applicant's Representative: Adv RB Engela instructed by Millers Attorneys
Respondent's Representative: Adv G Elliott instructed by GJ Cassells Attorneys