IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case No: JS 526/03

In the matter between:

DOUW KRUGER Applicant

and

JIGSAW HOLDINGS LIMITED First Respondent

YELLOW BUTTON PROPOERTY MANAGEMENT (PTY) LTD Second Respondent

YELLOW BUTTON PROPERTY MANAGEMENT (PRETORIA) (PTY) LTD Third Respondent

MIDCITY PROPERTY SERVICES (PTY) LTD Fourth Respondent

JUDGMENT

REVELAS, J

[1] This case concerns the alleged unfair dismissal of the applicant, and one of the main issues to be decided was, the identity of his employer. The applicant's case, as pleaded by him is that he was employed by the first, second and third respondents as primary and composite employers. His contract of employment was then

transferred to the fourth respondent, in terms of a sale of the second and third respondents' businesses to the fourth respondent. As such, the fourth respondent became liable, as a "new" employer. Since his services were terminated by the first to third respondents, as a result of the sale of business, he was automatically unfairly dismissed. The applicant contended that the fourth respondent's liability arises from the provisions of section 197 of the Act.

[2] In the alternative, he contends that he was dismissed for operational reasons in contravention of the provisions of section 189 of the Labour Relations Act, 66 of 1995, as amended ("the Act"), by the first respondent, who controlled the second and third respondent, of whom he was the director. According to him he was simply advised on 18 December 2002, by the chief executive officer of the first respondent, that his services were terminated because his position had become redundant.

[3] He seeks the following relief against the four respondents, jointly and severally:

"**1. Payment of the Amount of R158 610. 48 in respect of severance pay;**

2. Payment of the Amount of R49 093, 75 in respect of one month's notice pay;

3. Payment of the Amount of R34 554, 44 in respect of accrued leave pay;

4. Interest on the Amounts in 1, 2 and 3, calculated at 15, 5 % pa

from 1 April 2003 to date of payment.

5. Compensation equal to 20 months remuneration, alternatively compensation equal to 12 months remuneration, calculated at R49 093, 75 per month.

6. Costs, including the reserved costs of 3 and 4 May 2005."

[4] The applicant's relevant career history is that he was employed as a financial controller by the EC Chapman Group in 1988 and was promoted to managing director of EG Chapman Property Management Services (Pty) Ltd in 1999. The applicant pleaded that during 1999, EG Chapman Property Management Services was sold as a going concern to the second respondent. The applicant was appointed as chief executive officer of the second respondent and managing director of the third respondent, in March 2001. The applicant alleged in his statement of case, that at all relevant times he was employed by the second and third respondent and assisted in conducting the business of the first to third respondents and received remuneration therefore.

[5] On 10 February 2003 an agreement was entered into, in terms of which the fourth respondent (also "Midcity"), acquired the businesses of the third respondent, Yellow Button Property Management (Cape Town) (Pty) Ltd, and Ascendant Financial Services (Pty) Ltd. The latter two companies are not parties to the litigation. In this acquisition of business agreement, the fourth respondent is described as the "purchaser", and the "seller" is described collectively as the third respondent and the other two parties mentioned above. The "Businesses" to be acquired in terms of the agreement are described as the Property Management

Business and the Financial Services Business. The sale of these businesses were *inter alia* subject to a due diligence test and the approval of the shareholders of the respective parties. The business was sold for R2, 4 million.

[6] A list of the employees and pay roll of the third respondent was attached to the agreement as annexure "H". The agreement also contains a provision (paragraph 3.4.4) in annexure "A" (warranties") that the "seller" will not without consent of the purchaser, vary the terms and conditions of employment of any of its employees. The applicant's name is not on the list.

[7] The applicant claims that in terms of section 197 (2) of the Act, the fourth respondent is liable to either reinstate him or compensate him, for its failure to employ him, because he was an employee of the second and third respondents.

[8] He pleaded further, that on 10 December 2002, the first respondent's chief executive officer told him that there was no future in the Yellow Button Group and he was requested to propose a retrenchment package. On 12 December 2002, the applicant suggested a severance package of 12 months' remuneration of which 3 months' notice would be rendered. After several telephonic discussions the applicant was informed on 18 December 2002, of his dismissal on 3 months' notice and no package.

[9] On 20 December 2002 the applicant said he informed the first

respondent that he was unfairly treated and invited the first respondent to consult with him in terms of s 189 of the Labour Relations Act, 66 of 1995 (as amended). He pleaded that when he received no response he referred a dispute about an unfair dismissal to the Commission for Conciliation, Mediation and Arbitration ("the CCMA"), on 22 January 2003. In that referral he cited the second respondent as his employer. At the end of March 2003, being the third month of the notice period the applicant received no salary which he alleges was R49 093. 00 and neither was he paid his accrued leave pay for 15, 25 days, which he alleged was R34 554, 44.

[10] The first respondent raised a point *in limine,* namely that the first respondent should not have cited it in the absence of an application for joinder. It contended that it never, on any facts pleaded, employed the applicant or acted as a party to the sale of the third respondent's business to the fourth respondent. One of its main arguments was that the applicant referred his dismissal dispute only against the second respondent *qua* employer only. None of the other respondents were mentioned and the dispute which was conciliated and which ultimately remained unresolved was only conciliated between the applicant and the second respondent.

[11] The point *in limine* and later application for absolution from the instance, were dismissed chiefly because the persons who participated in the conciliation proceedings were employees of the first respondent and the letter answering the applicant's

appointment and his dismissal was written on the first respondent's letterhead, by the executive management of the first respondent. The absence of any testimony presented by the first respondent, at that stage, to refute the oral evidence of the applicant, was a further consideration in dismissing the point *in limine*. The companies were all interlinked. If the applicant was employed by the third respondent, the fourth respondent may have incurred an obligation in respect of him. At this point I wish to emphasise the fact that the second respondent was the holding company of all the Yellow Button Property Management companies, of which the applicant was the director. It is also of note that after the applicant is dismissed (purportedly by the first respondent) and referred a dispute against the second respondent (only). It is the first respondent who sent its directors to conciliate the dismissal dispute. The first and fourth respondents had a case to meet.

[12] The first to third respondents and the applicant are all intricately involved. The second respondent was the holding company of the property management companies, and it was the property management component which was to be sold off. The third respondent was a property management company. It was evident that the relevant companies were vitally connected.

[13] The first respondent's case is that it held 100% shares in the second respondent and the latter held 100% shares in the third respondent. Since the applicant was a director of the third respondent and an employee and chief executive director of the second respondent, he

held no position in the first respondent, and therefore he was not employed by it. Even though it is common cause that the chief executive officer of the first respondent, Advocate Lance Brogden, advised the applicant of his retrenchment, that did not mean that the first respondent was the applicant's employer, as the second respondent was the applicant's only employer. According to the first respondent, Advocate Brogden, in his capacity as a representative of the sole shareholder of the second respondent, consulted with the applicant concerning his proposed dismissal for operational reasons, by the second respondent. The first respondent also, in the same pleadings, admitted that it did not consult with the applicant, but denied that it was obliged to do so.

[14] The fourth respondent's case was a denial that it bought the second and third respondent's business from the first respondent, and contended that it bought only the business of the third respondent, from the third respondent, with effect from 28 February 2003. Since the third respondent did not employ the applicant, the fourth respondent, had therefore incurred no obligations towards the applicant in terms of section 197 of the Act. It was also never made aware of the applicant's desire to be employed by it.

[15] The second respondent admitted that the applicant was its employee. This contention is also borne out by several documents relating to the applicant's salary and documents submitted to the South African Revenue Services. As far as the third respondent is concerned, it was a wholly owned subsidiary of the second

respondent, and the applicant was its director, but only on paper.

[16] The second respondent admitted that it had retrenched the applicant for operational reasons, because the third respondent's business was sold to the fourth respondent, which meant that the applicant's position as managing director of the second respondent had become redundant. The second respondent had been specifically created in order to act as the holding company of the companies which had been sold by the second respondent (as mentioned above).

[17] The second respondent tendered payment to the applicant of one month's salary (less PAYE and UIF) and accrued leave pay being R27 932, 00, and R19 65984 respectively, and severance pay of R19 337, 55 (three weeks remuneration for three years' completed service) as it was conceded that these payments were due, but not paid to the applicant. Three months' compensation was also offered.

[18] Insofar as the applicant has pleaded that during March 2001, the businesses of both the second and third respondents were sold by the first respondent as a going concern to the fourth respondent, that is factually incorrect. The first respondent, as dominant shareholder of the Yellow Button Group, was not party to the sale. The third respondent sold its own business. The second respondent was also not a party to the agreement.

[19] The second respondent denied in its pleadings (paragraph 34) that its business was transferred as a going concern to the fourth respondent. The terms of the acquisition of business agreement, support this allegation, as the second respondent is not mentioned therein.

[20] To decide who the employer of the applicant was, on the facts of this case, no easy task. Even though the first respondent distanced itself from any employment relationship with the applicant, there are several indicators that the relationship between the applicant and the first respondent was not a distant one. For instance, the first respondent for some period assisted in paying his salary, but this happened indirectly, through debit transfers. The applicant has no letter of appointment signed by any employer. However, the first respondent, through Mr Gian Sdoya, announced on 26 February 2001, in a memorandum to the Aida National Franchise, that the applicant had been appointed as Chief Executive Officer of the property management group (Yellow Button) with effect from 1 March 2001, at the time when the activities of the group were being merged. In the same memorandum it was conveyed to the readers thereof that the applicant would be responsible for the combined operations of the Johannesburg, Pretoria and Cape Town Yellow Button companies. Reference was also made to his (the applicant's) "significant contributions to the Jigsaw Group in the future".

[21] The first respondent also wrote to the applicant on 16 April 2002

announcing an adjustment to his annual remuneration package based on his own performance, and that of the first respondent and Yellow Button. The aforesaid conduct does suggest that the first respondent was the dominant decision maker, as far as Yellow Button was concerned.

[22] On 23 August 2002 the applicant wrote to the first respondent regarding the dire financial straits of Yellow Button Property Management (Johannesburg) Pty Ltd. He mentioned a trust fund shortage in the company and its technical insolvency. He warned that if the first respondent did not intend "recapitalizing" into its insolvency situation, it will cease to operate. Later in his e-mail (letter) to advocate Lance Brogden, the chief executive officer of the first respondent, the applicant makes suggestions as to how to improve the financial viability of all the Yellow Button companies. These suggestions were made in the context of the "future of Yellow Button". These were the discussions which preceded the applicant's dismissal.

[23] According to the first respondent, since there was no need to manage companies which no longer existed, therefore there was no purpose for the second respondent to exist, and in that context, the applicant's position had become redundant. The applicant's redundancy was not discussed with him in the precise terms foreseen by section 189 of the Act. The financial problems were definitely discussed. The applicant himself proposed solutions. He advised that the Pretoria operation continued as "a profitable

contributing entity" and that the Johannesburg office be restructured "to become profitable", and that the first respondent contributes financially to achieve this. He also suggested that the Cape Town operations also be bolstered in this way. In the alternative, the applicant suggested the sale of the third respondent and that the Cape Town and Nelspruit offices be replaced. This was all set out in an e-mail letter to Advocate Brogden.

[24] In a later letter (dated 12 December 2002), obviously following discussions with advocate Brogden, the applicant expressed his sadness to leave " The Group" after fourteen years but that he would do what was beneficial for the "Company" (the third respondent) and the first respondent. In his letter he states clearly that he is "employed by Yellow Button (Pta) (Pty) Ltd" (the third respondent) and that his arrangement with the first respondent was that he will serve a three months notice period prior to his departure. The proposed severance package of twelve months' remuneration was also made in this communication. Advocate Brogden's evidence was that he found the severance package proposed by the applicant "offensive", in view of the severe losses suffered by the Yellow Button Company in Johannesburg, which was effectively run by the applicant. The losses were approximately R1 million per month for the preceding three months. He approached the applicant as shareholder representative of the second respondent.

[25] The fourth respondent accepted that, should I find that the third

respondent was a composite employer, section 197 would apply and, on that basis the fourth respondent would incur liability. That was also the crux of an amendment sought by the fourth respondent. The fourth respondent initially pleaded that the fourth respondent bought the business from both the second and the third respondent. In terms of the amended pleadings, the fourth respondent's case is that it bought only the third respondent's business from the third respondent, as a going concern.

[26] The fourth respondent pleaded that the reasons for the applicant's dismissal were (paragraph 15.2.1 at page 43 of Bundle D) that "[T]he second respondent had sold other Yellow Button property management companies, including the Cape Town and Johannesburg Companies, which meant that the applicant's position as the managing director of the second respondent had become redundant because the first respondent had been specifically created in order to act as the holding company of the aforementioned companies which had been sold by the second respondent".

[27] Practically what happened was, that the first respondent, converted Executive Realty Management (Pty) Ltd (according to the first respondent it was a dormant company) into the second respondent or Yellow Button Property Management (Pty) Ltd, to manage the properties of its several other operational companies. This is apparently a common practice in the corporate world. The officials who perform the actual management functions are stationed with

the management company, in this case the second respondent.

[28] The combined management operations of Yellow Button in Cape Town, Johannesburg and Pretoria, fell under the applicant as chief executive officer of the second respondent. According to the first respondent, the Johannesburg Company, where the applicant worked from, was a "financial distaster" not without little help apparently, from the applicant. The Cape Town office was also in financial trouble.

[29] Mr Brogden (the chief executive officer of the first respondent) was tasked to resolve the financial losses of millions of rands which were being suffered in the Yellow Button Group. His recommendation to the board was that the companies in question should either be winded up or sold off. The latter occurred. The third respondent (the Pretoria Company) was sold to the fourth respondent. An attempt to sell the Johannesburg Company was unsuccessful.

[30] Even though it is doubtful that a strictly procedural approach was adopted by Mr Brogden acting as the second respondent), in consulting with the applicant about his own position, it is highly unlikely that the applicant could not foresee that his position would become redundant. He expressed no concern in this regard. He was the chief executive officer of the company suffering the losses. He had previously raised his own concerns about this with the first respondent. Instead of discussing his redundancy he embarked

straight onto a discussion about his severance package with Mr Brogden, a topic which he (the applicant) introduced into the discussions, not Mr Brogden. The only point which caused conflict and unhappiness, was Mr Brogden's refusal to agree to a severance package equal to twelve months' remuneration. What is strange is that at the outset of these discussions, in one of the e-mails sent, the applicant stated that he was employed by the third respondent (the Pretoria Company). It was argued by the fourth respondent, that the applicant, a chartered accountant, knew full well that he left E G Chapman which later became the third respondent, and knew that he was formally employed by the second respondent. I will return to this aspect later herein.

[31] In my endeavour to determine who actually employed the applicant, I will commence with the third respondent.

[32] The applicant was a director of the third respondent (The Yellow Button Company based in Pretoria). He contended that because he performed work for the third respondent, was its director and it paid him his salary at times, he was its employee. He also stated that he was its employee in his letter to Advocate Brogden.

[33] Evidence was led that the third respondent paid his salary through debit transfers, when there were cash flow problems within the Group. However, all the documentation relating to tax returns, payslips and the applicant's IRP 5 forms, indicate that he was employed by the second respondent. On the evidence of the third

respondent's human resources manager, which I accept as truthful, the applicant and Mr Hewer (the managing director of the second respondent) were initially employed by EG Chapman Property Management Services (Pty) Ltd, before they went over as employees to the second respondent. Thereafter Mr de Beer and Ms Steyn also went over to the second respondent. According to her records, none of the aforesaid four persons were employees of the third respondent. She also testified that the applicant never came to the premises of the third respondent, although he claimed that he visited clients in Pretoria, apparently at night. The point is, he never worked there. When the third respondent's business was sold to the fourth respondent, she assisted with the transfer agreements. None of the second respondent's employees were included; also not the applicant.

[34] Ms Steyn also testified. She said the applicant explained the restructuring to her. She understood him to be employed by the second respondent only. The applicant denied any knowledge of the restructuring of the second respondent, but admitted that he explained an organogram setting out the new structure within the Yellow Button Group to its employees. He denied however, that he intended to reflect the employees in question under the heading of the second respondent, as it indeed and curiously enough, did appear. This evidence of the applicant is improbable.

[35] Mr Hewer testified about his involvement in the formation of the second respondent. He said that although both he and the applicant

were against it initially, they accepted the new structure because the first respondent, it was explained to them, required that structure for its subsidiaries. Once again, an example of the first respondent's control over the Yellow Button Companies. He also relied on an organogram to illustrate that the applicant must have known that the second respondent was their employer. During 2001 he (Mr Hewer) took *de facto* control of the third respondent in Pretoria. He was also appointed as its executive director. He did the day to day running of that office, as an employee of the second respondent, whereas the applicant worked from Johannesburg.

[36] I have no reason to disbelieve the evidence of the above mentioned witnesses. The paper trail of income tax records and salary variance reports, relating to the applicant, support their version. What is more, the applicant's own conduct creates the impression that he was employed by the second respondent, which was common cause. He was not an employee of the third respondent, even if these Yellow Button Companies were interlinked. They all had their separate legal identities. There is no corporate veil that could be lifted here.

[37] If the applicant was not an employee of the third respondent, which is what I have found, then the fourth respondent is not in any way liable in this case. The business of the third respondent, and not that of the second respondent, was sold to the fourth respondent, even though the applicant pleaded that it was.

[38] I now turn to the first respondent, who exercised almost all control over the Yellow Button Companies. It was effectively the first respondent's decision to create the second respondent and it announced the applicant's position therein. The applicant says the first respondent is his employer because it appointed him, paid him his salary, and dismissed him.

[39] The first respondent argued that there is no employment relationship between the applicant and it. The first respondent is a holding company that makes its money from the dividends of its subsidiaries. It is an investment company that owns a 100% of the shares in the second respondent. As such, it argued, the applicant is not its employee, even though Manco meetings were held regularly between its management and the directors of the subsidiaries. Advocate Brogden was only called in as a "consultant", by the first respondent, to resolve the financial difficulties within the Yellow Button Companies, and more particularly the Johannesburg Company. Apart from the control the first respondent exercised over the second respondent, and therefore the applicant, there are other important factors I have to consider.

[40] It was Advocate Brogden's discussion with the applicant which ultimately led to his dismissal. It was he who rejected the proposal regarding the retrenchment package.

[41] On all the evidence before me, the first respondent, even though the applicant was employed by the second respondent, made the

decision to dismiss the applicant as it made virtually all the decisions regarding the Yellow Button companies. It exercised control over the second respondent. It decided that the Yellow Button property management arm must be sold off. The applicant would hardly have been appointed by the second respondent, if the first respondent did not approve of it. The probabilities on the facts support this proposition. Advocate Brogden said that he had acted only in his capacity as a representative of the shareholder of the second respondent. That is the sole shareholder, who was the first respondent. If shareholders may dismiss their chief executive officer, then the first respondent dismissed the applicant.

[42] On paper, there is no employment relationship between the applicant and the first respondent. Yet the first respondent, (more so than the second respondent), determined the fate of the applicant with the second respondent. It was the appropriate party to dismiss the applicant. The main reason therefore may be because the applicant held the highest position in the second respondent, and could not dismiss or retrench himself. It was not as if the first respondent was an overseas company, refusing to further invest if its subsidiary in South Africa shows a loss, and recommends them to retrench certain employees as a result. The first respondent exercised day to day control of the second respondent and thus the applicant.

[43] It was the first respondent's concern about the financial performance of Yellow Button, which had resulted in the applicant

becoming redundant. Advocate Brogden acted on behalf of both the first and second respondents. On these facts, I have to accept that both the first and the second respondent were the applicant's co-employers.

[44] The next question is whether the termination of the applicant's services was fair.

[45] The applicant's case was that he was dismissed because the first respondent was aware of the acquisition of business sale to the fourth respondent. There is, however, no evidence to support this proposition. The sale occurred two months after the dismissal. The first respondent also did not regard the applicant as an employee of the third respondent. All correspondence from Advocate Brogden to him, was addressed to him as the chief executive officer of the second respondent. No buyer had been found for the business at the time dismissal was effected. The Johannesburg Company eventually became liquidated. There is no basis to hold that the applicant was dismissed so as to avoid him being transferred to the fourth respondent.

[46] The next question is whether there was a fair consultation process with the applicant as envisaged by section 189 of the Act. In this regard it is of note that the applicant was no ordinary employee. He was the chief executive officer of the second respondent. He had concerns about the Johannesburg Company's financial position, and wrote to the first respondent and complained that it had

inherited a trust fund shortage from the first respondent. (This was of course a separate issue, from the monthly losses). The first respondent also had concerns. Both the applicant and Advocate Brogden knew that matters could not continue as they had been. Therefore, the two had discussions around the future of the Yellow Button companies. That is evident from the e-mails referred to earlier herein.

[48] The applicant was asked for suggestions and he himself suggested, amongst other things, a solution which would result in the demise of the second respondent, of which he was the chief executive officer. The applicant accepted this situation in an e-mail stating that he would not stand in Advocate Brogden's (the first respondent's) way. He did not suggest that he should be given an alternative position. He just proposed his retrenchment package. In these circumstances the applicant may not complain that he was not properly consulted with about his position in the sense envisaged by section 189 of the Act. He chose to rather introduce the subject of a severance package, than to discuss his redundancy. In such circumstances, an employee, particularly a very senior one, cannot be heard to complain that he was not consulted with. However, he was not treated fairly, once he introduced the subject of a severance package.

[49] The first respondent had a duty, in terms of section 189 of the Act, to consult with him about his severance package. To answer his first proposal thereon, with a dismissal notice and *fait accompli* as

far as the package goes, (one week's remuneration for every year of service, being three years) does not constitute consultation.

[50] Advocate Brogden may have had reason to regard the proposal of one year's salary as excessive, but he responded in anger. Counsel for the first and second respondent reminded me that the Act does not require tact and finesse in these matters. That is true, but it does require consultation. Advocate Brogden simply did not consult on the severance package. In this regard, the Act was not complied with and the applicant is to be compensated over and above being paid his salary for one month, his leave pay, and his severance package, in accordance with the statutory minimum.

[51] The next question is how much compensation he should receive. In my view, the applicant is not entitled to 12 months' remuneration as compensation for the failure to consult on his severance package. Consultation on that aspect may have had the result that he would have received a bigger package, but its absence had no impact on his employment position. In my view, compensation equal to four months' remuneration, would be a fair amount to redress such a breach.

[52] The exact amount which constituted the applicant's salary is in dispute. The first and second respondents contended that he earned R27 932, 00 per month, the salary reflected on his payslip. The applicant says he earned R49 093, 75 per month. According to the applicant, Mr Sdoya and Mr Grieveson of the first respondent were

aware that he could structure his salary package by submitting invoices for consulting work, in addition to the salary reflected on his payslip. It is common cause that these invoices were fictitious. This was done, obviously, for taxation purposes. For purposes of this case, I do not accept the fictitious invoices as part of the applicant's actual remuneration. As far as I am concerned, he earned R27 932, 00 per month.

[53] The service record of the applicant is also in dispute. The applicant contended that at the time of his dismissal, his service record with his employer, or composite employers, was fourteen continuous years. The applicant argues that his employment with the EG Chapman Group from 1988 until 1999, should be taken into account as part of his service record, in addition to the three years after EG Chapman Property Management Services (Pty) Ltd was sold to the second respondent, as it was sold as a going concern. The respondents argued that only those last three years should constitute the service period. The first respondent argued that the second respondent only acquired the shareholding in EG Chapman and there was no sale of it as a "going concern" as foreseen by section 197 of the Act.

[54] The applicant contended that the third respondent was previously known as EG Chapman Property Management Services and the change was really a change in name and a movement in companies, but the actual work performed by the applicant, and the beneficiaries thereof, remained the same.

[55] In the documentation before me, where the various restructuring and shareholdings were reflected, it became apparent that during March 2001, the first respondent sold its 100% shareholding in the third respondent, (which was previously EG Chapman Property Management Services (Pty) Ltd), to the second respondent, which was the wholly owned subsidiary of the first respondent. These companies were all interlinked and it would appear that the applicant worked with and for them in various capacities.

[56] During March 2001, the applicant became the chief executive officer of the second respondent. Therefore his service period with EG Chapman Services (Pty) Ltd of three years, would count as service with the second respondent. Since the latter bought shares in one company in the EG Group, it would not mean that the applicant's preceding years of service in the Group should count as service vis-à-vis the second respondent. There should be some cut-off point where the "new" employer will not be burdened by the entire service record of an employee, taken over from the old employer, apart from those he had with the latter. If there was no such point, the ambit of section 197 of the Act will be extended with very unfair results. Section 197(7) specifically makes provision for a fixed severance package to be agreed upon by the "old" and the "new" employer in the event of retrenchment. If the service history of the employee, prior to employment with the "old" employer was to be visited on the "new" employer, it would be very onerous for the "new" employer.

[57] Insofar as costs are concerned, counsel for the fourth respondent argued for costs on an attorney and client scale, because of the applicant's insistence that parties who were not his employers should be parties to this litigation which he instituted, whereas he knew that the second respondent was his only employer.

[58] In my view, the Yellow Button companies were so involved, that a person or attorney may reasonably have come to the conclusion that the third respondent was an employer. The applicant was its director. It also assisted in paying his salary at times. The fourth respondent had a case to answer. The applicant did however fail to discharge the onus to prove the employment relationship with them. Therefore he is responsible for the fourth respondent's costs, but not on the attorney and client scale.

[59] Insofar as the first and second respondents are concerned, costs should follow the result, even though a tender was made by the second respondent (a now dormant or non-existing company). The applicant proved that the first respondent was a co-employer with the second respondent. That was disputed by them and the applicant had to litigate to prove it. Therefore, he is entitled to his costs from them. These would include the costs reserved on 3 and 4 May 2005.

[60] A copy of this judgment should be served on the South African Revenue Services, by the Registrar.

[61] In the circumstances, I make the following order:

1. The dismissal of the applicant by the first and second respondents, as co-employers of the applicant, was procedurally unfair.

2. The first and second respondents are to make payment to the applicant as follows:

2.1 Compensation in the amount of **R111728,** being the amount equal to 4 months' remuneration (R27 932, 00 per month);

2.2 One month's remuneration for March, being **R31 333, 01** (aforesaid gross salary and medical aid being R3401, 01);

2.3 Leave pay accrued, in the amount of **R19 659, 84;**

2.4 Severance pay, at **R19 337, 55** being one week's remuneration for each completed year of service, being three years (R27 932, 00 x 12/52 x 3).

2.5 Interest is to be calculated on the above amount at the rate of 15, 5 percent, per annum, from 1 April 2003 to the date of judgment.

3. The first and second respondents are liable for the applicant's costs of suit, including the reserved costs of 3 and 4 May 2005.

4. The first and second respondents are liable, jointly and severally, for the payments set out in paragraphs 2 and 3 above, the one paying the other to be absolved.

5. The applicant is to pay the fourth respondent's costs of suit.

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Judge E. Revelas

Judge of the Labour Court

Date of Hearing: 17 June 2005

Date of Judgment: 30 January 2006

Appearances

On behalf of the applicant:

Adv. AM Heystek instructed by Anderson & Kloppers Attorneys

On behalf of the first respondent:

Adv. MS van As instructed by Van Der Merwe Ferreira Van Wyk Attorneys

On behalf of the fourth respondent:

Adv. G.J. Scheepers instructed by Erasmus and Ferreira Attorneys