IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO.: 8679/2008
DATE: 26/03/2008

In the matter between

JOHN CHRISTOPHER WILSON
APPLICANT

And

THE JOHN SNOW PUBLIC HEALTH GROUP INCORPORATED IN MASSACHUSETTS USA RESPONDENT

JUDGMENT

WEBSTER J

1. The applicant seeks an order:

(i) that his renewal as the sole director of the respondent on 27 January 2008 is null and void and unlawful;

(ii) for his re-instatement as a director of the respondent;

(iii) for his re-instatement in the respondent's employ as a sole director, representative, officer and manager of the respondent in the Republic of South Africa;

(iv) directing the respondent to restore to the applicant possession of the office which he occupied in the capacities referred to in (iii) supra, and (v) costs on the attorney and client scale which costs are to include the costs of two counsel. In the alternative to prayers (i), (ii), (iii), (iv) and (v) he seeks an order in the following terms:

(vi) That pending the finalisation of an action to be instituted by the applicant against the respondent for final and/or ancillary relief, on such terms as the applicant may be advised, it is ordered:

i. That it be hereby declared that the Respondent's removal of the applicant on 27 January 2008 as sole director of the respondent is null and void and unlawful;

ii. That the respondent is directed and ordered to reinstate the applicant as director of the respondent;

iii. That the respondent is directed and ordered to reinstate the applicant in his employment position with the respondent, being the sole director, representative, officer and manager of the respondent in the Republic of South Africa;

iv. That the respondent is directed and ordered to restore to the applicant possession of the office situated at 257 Brooklyn Road, Equity Park, Block D, First Floor, Brooklyn, Pretoria, together with the keys thereto, and all equipment necessary for the running of such office;

v. That the respondent is ordered to pay the costs of this application on the attorney and client scale, which costs are to include the costs of two counsel;

vi. That this order shall operate as an interim order with immediate effect until the finalisation of the action to be instituted by the applicant;

vii. That the applicant is directed to institute the aforesaid action within one month of the grant of this order.

(vii) That should the respondent fail and/or refuse to comply with this order, the sheriff of the above Honourable Court be authorised and instructed to take all such steps as are necessary to give effect to this order.

The application was brought as an urgent one.

BACKGROUND

2.In June, 2000, the applicant who had been in the employ of the respondent from 22 April 1991, was selected by USAID, Pretoria as a Resident Logistics Advisor to the South African

National Department of Health.

3.By letter dated 27 August, 2000, (Annexure "C" to the respondent's answering affidavit), the applicant was appointed "Technical Advisor within the International Division for the TASC Project in South Africa". The letter reads further as follows:

"This letter confirms your appointment as a full-time "as will" employee with an annual salary of $97,202 equivalent to a monthly amount of $8,085 for each full month that you were employed, commencing August 1 , 2000..."

The author of the letter was "ABDUL HASHEM, the Project Director", the "...supervisor of record..." of the applicant.

4. A document under a seal of Joanne B McDade, a Notary Public of the State of Massachusetts County of Suffolk, on a letter head of the respondent recorded as follows:

"Letter of Authorization for Mr. John Wilson, Representative of John Snow, Inc., in South Africa

January 9, 2001

I, Joel Lamstein, President of John Snow, Incorporated (JSI), authorize the establishment of a JSI office in South Africa in order to implement and carry out the TASC Project, a USAID funded project. I authorize and empower Mr. John Wilson, Long Term Technical Advisor to the JSI/TASC/South Africa project, as legal representative for John Snow, Inc. This authority includes all business transacted in South Africa in the name of John Snow, Inc. and its commonly-known acronym JSI, the TASC Project, and JSI/TASC Mr. John Wilson is authorised to sign financial and business documents; sign all checks, drafts, or other orders of payment of money; manage all actions in coordination with John Snow, Inc. corporate offices in Boston, Massachusetts and Washington, DC USA. Mr. Wilson Goes this in compliance with his authority and any instructions from John Snow, Inc.

Joel H. Lamstein
President
John Snow, Inc."

5.The applicant avers that it was in his capacity as the sole director of the respondent that the respondent was registered in the Republic of South Africa on 24 August, 2001, as an external

company in accordance with the provisions of the Companies Act, Act 61 of 1973.

6.It is admitted by the respondent that the applicant was indeed a director of the respondent.

7.From March 2007, leading to 15 January, 2008, the relationship between the applicant and one John Stanton "... of the Arlington Office..." in the USA complicated. Initially it involved the performance of "...a designated official of the USAID ..." and other staff members in the local office of the respondent. It is not necessary to go into any detail regarding the nature and content of these issues. It is common cause, however, that the respondent, by memorandum dated 15 January, 2008, informed the applicant that"... In our judgment therefore, we do not feel that you are the right person for the position you hold as Country Director in South Africa".

8.Further communication followed between the applicant and the Arlington office. Consequent thereupon the Arlington team arrived in South Africa and conferred with the respondent's "clients", viz. the National Department of Health and USAID on 23 January, 2008. On 27 January, 2008, the applicant picked up the Arlington team from where they were accommodated and conveyed them to the local office of the respondent. In a meeting with the "Arlington team" he was informed that the respondent had terminated his services with immediate affect. He was handed a letter dated 27 January, 2008. This letter reads as follows:

"John C. Wilson Pretoria. South Africa

Dear John,

After completion and review of the Performance Improvement Plan undertaken regarding concerns surrounding your performance, and based on the fact that acceptable results on this plan were not achieved, John Snow, Inc. had determined that your skills and performance do not meet the needs of the company. After careful consideration and evaluation it is our decision, therefore, to terminate your services effective February 29, 2008. JSI is electing to pay you in lieu of notice and does not require any additional services beyond this meeting.

The payment of your salary through January 31. 200S and 30 days payment in lieu of notice through February 29, 2008 will be made to you now. Any adjustments for negative accrued balances will be

adjusted within these. Payments for all unused accrued vacation time through January 31, 2008 as well vacation accrual through February 29, 2008 will also be paid to you now. Allowances have also been paid through February 29, 2008. Should there be any additional accrued compensation, it will be forwarded to you at the next payroll cycle following the date of your termination of employment. (Please see addendum memorandum for alternative option explanation.)

Please be advised that you may be eligible to receive unemployment benefits if you return to the US. You should contact the Unemployment Agency in your area with regard to filing a claim, on or after February 29, 2008.

Should you have questions with regard to any information given you, or any other inquiries, please feel free to contact Raymond Pelletier, Director, Human Resources in Boston. Arrangements for the return of company property or collection of any personal items may be scheduled with me.
Sincerely,

Richard C. Owens, Jr.
IQC Manager, SCMS Project

Cc: Raymond Pelletier Employee Files"

On 29 January, 2008 the doors to the offices were locked and the applicant effectively prevented from gaining entry into them. He avers that the termination of his services as the respondent's director is unlawful for the following reasons:

"36.1 No resolution has been passed by the respondent to terminate my appointment as director as envisaged in section 220 of the Act;

362 No shareholders meeting has been convened for this purpose;

363 No pre-dismissal hearing has been held;

364 No notice has been lodged by the respondent; and

365 I have not been given an opportunity to make representations in this regard."

The respondent opposes the application on the grounds that:

91 the applicant failed to justify the hearing of the application on a basis of urgency;

92 the relationship between the applicant and the respondent is based on an agreement of employment;

93the applicant was dismissed as an employee of the respondent and not in his capacity as a director of the respondent;

94this court does not have the jurisdiction to determine labour or employment disputes. In the alternative the respondent avers that if this court's finding is that the applicant was dismissed as a director and in contravention of section 220 of the Companies Act, the full terms of his appointment have not been disclosed and consequently the court cannot make a definitive finding on the relationship of the parties. Finally, it is the respondent's case that the applicant was dismissed as an employee for poor work performance and it was not necessary to hold an incapacity enquiry.

10.Both counsel prepared heads of argument. I have found them useful and I thank them for their diligence and industry. Regrettably and because of time constraints it is not possible to deal with all the issues they have raised. This does not mean that I have not considered their submissions, however. I have done so. No offence is intended by not acknowledging their arguments.

11.URGENCY

The primary relief sought by the applicant is his re-instatement in his position as the sole director, representative, officer and manager of the respondent, having beer, summarily dismissed without any inquiry whatsoever. The applicant will be financially prejudiced if the matter is not resolved quickly. He has a family in South Africa. He has obligations. He avers that without a source of income he will be placed in an invidious position. If the matter had been brought in accordance with the rules of court and without abridgement of time limits he would certainly be prejudiced. (See Luna Meubel Vervaardigers v Makin & Another 1977(4) SA 135 WLD at 137 A-E; I.L. & B. Marcow Carerers (Pty) **Ltd** v Gratemans 1981(4) SA 108 (CPD) at 112H- 113A).

12. It is my considered view that from the factual background set out above the victim of a summary dismissal from his post or employment is entitled to an audience before a court as a matter of urgency. The applicant avers that there are various projects that he was responsible

for. These impact on the "...lives of millions of people..." as they may not receive benefits that are to accrue to them. He further avers that if brought in the ordinary way the probabilities are that the application may only be heard in July, 2008.

13.It is my considered view that the matter is, by its very nature, urgent and consequently the applicant was entitled to bring it as such.

14.THE RELATIONSHIP BETWEEN THE APPLICANT AND THE RESPONDENT

The respondent relied considerably on the letter dated 27 August, 2000, Annexure "C" to the answering affidavit. Mr. Tsatsawane submitted that the relationship between the parties was based on this letter. He submitted further that even after his appointment as a director the applicant remained under the supervision of Abdul Hashem. Mr. Tsatsawane dangled and waved the decision of Petronella Nellie Nelisiwe Chirwa v Transnet Ltd, Transnet Pension Fund & Patrick Ian Smith NO, a recent decision of the Constitutional Court, Case no. CCT78/06, yet unreported, ("the Chirwa case"), before the court urging the court to find that the relationship between the parties was that of employer and employee and consequently that this court is the incorrect forum for challenging an action based on an unfair labour dispute. Mr. Tsatsawane's submissions are untenable.

15. There were two separate and independent appointments of the applicant The first (Annexure "C") was definitely one of employment. It will be noted that the person who appointed him was a "project director". The second appointment of 9 January, 2001, differs materially from Annexure "C". Firstly, the applicant was appointed by the president of the respondent, a person definitely the most senior in the respondent's hierarchy. Further, the applicant was appointed the Long Term Technical Advisor, the legal representative of the respondent in South Africa - he literally ran the respondent's office in South Africa. There is no reference to Annexure "C" in the second appointment and any supervision by Hasham was clearly superseded by the second appointment. In my view none could have been made for the second appointment was unquestionably the most senior position in the respondent's South African Office. The functions and duties of the applicant were clearly not of an employee but

clearly those of a director. The quarrel with the applicant even in the **respondent's** own version, related to managerial issues. **My** understanding **of the Faces is that** the applicant reported to the respondent not **as an** employee **who** was under the supervision of any person but as the respondent's director and sole representative in this country. The applicant could therefore not have been dismissed as an employee. The objection to the jurisdiction of this court is clearly unfounded. The applicant was dismissed from his office as a director of the respondent. It has been conceded that the respondent did not even make an attempt to comply with the provisions of section 220 of the Companies Act or any procedure to accord the applicant the fundamental right of a hearing to challenge the accusations against him. The respondent's conduct was clearly unlawful and capricious. It cannot be overlooked or **condoned.** Further, **the** Chirwa case is of no application.

It is indeed correct that the full terms of the applicant's terms of appointment were not disclosed. That, however, begs the question. The applicant was a director. If he had been an employee the respondent was duty bound to set out the terms of his employment - nothing barred it from doing so. In fact, the respondent was obliged to place such evidence before this court. It failed to do so. The only inference to be drawn from this is that the respondent does not have such evidence. The argument that the applicant was an employee is an opportunistic, superficial and tactical ploy to cause as much confusion as could in order to create some doubt about the relationship between itself and the applicant so as to frustrate the applicant. It is nothing more than a smokescreen. This was a subterfuge and a ploy.

This court **is** convinced that it was the applicant's appointment as **a** director of the respondent that was terminated. Whatever doubt that may exist is dispelled by the first paragraph of Annexure "FA16", quoted above. This letter is a unequivocal severance of all ties between the applicant and the respondent: it allows for no further contact in any capacity between the applicant and the respondent. From the advertisement for the position of Country Director, the position that the applicant held, it is dear, if clarity were needed, that the applicant was ana could never have been an employee: the buck for the respondent's operations, responsibilities and vision stopped at his door - as a "Country Director". The applicant was not a director who

merely attended meetings. **In** his capacity **as** the respondent's sole director he ran the affairs of the respondent.

The applicant has succeeded in establishing chat he is entitled to relief he seeks. The only question that arises is whether it should be the main order of the alternative form. I can see no reason to involve the applicant in further litigation as contemplated in the alternative order. The re-instatement of the applicant as envisaged **in** the order sought is the restoration of the *status quo ante*. That leaves the parties to follow whatever legal action they may desire to or be advised to embark upon.

19.The last issue is the question of costs. It was submitted by Mr Da Silva that the court should award costs consequent upon the employment of two counsel, such costs to be on an attorney and client scale. Whilst this case is certainly of great importance *to* the applicant the legal principles involved are :ertain!y not novel nor complicated justifying the use of two counsel.

20.The respondent's conduct in going about dismissing the applicant was most high-handed, smacks of arrogance and manifests a total disregard of the rights of the applicant and the legal requirements and procedure in the dismissal of a company director. Those who dismissed the applicant were clearly arrogant, callous, insensitive and blatantly unlawful. Such conduct may neither be tolerated nor condoned. This court has to express its displeasure at such conduct. One of the effective and, in this case, most appropriate ways of doing so is by granting a punitive costs order.

21.**It is accordingly** ordered as **follows:**

20.1 That the normal rules pertaining to the service, times and filing of applications be dispensed with and this application be determined on an urgent basis in terms of the provisions of Rule 6(12)(a) and (b) of the Rules of the above Honourable Court;

20.2 That the respondent's removal of the applicant on 27 January 2008 as sole director of the respondent is declared null and void and unlawful;

20.3 That the respondent be and is hereby directed and ordered to reinstate the applicant as director of the respondent;

20.4 That the respondent be ana is hereby directed ana ordered to reinstate the applicant in his position with the respondent, as the sole director, representative, officer and manager of the respondent in the Republic of South Africa;

20.5 That the respondent be and is hereby directed and ordered to restore to the applicant possession of the office situated at 257 Brooklyn Road, Equity Park, Block D, First Floor, Brooklyn, Pretoria, together with the keys thereto, and all equipment necessary for the running of such office;

20.6 That the respondent pay the costs of this application on the attorney and client scale

G. WEBSTER
JUDGE IN THE HIGH COURT

Date of hearing: 03/03/2008
Counsel for the Applicant: Adv. C A Da Silva (SC); Adv. Woodrow
Instructing Attorney : Schoeman & Associates
Counsel for the Respondent: Adv. Tsatsawane
Instructing Attorney: Rooth, Wessels & Maluleke Attorneys