IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO. 9678/11

In the matter between:

STAMATIS KAPSIMALIS N.O.	First Applicant
LYNDA KAPSIMALIS N.O	Second Applicant
ATHINA ANANIADES N.O	Third Applicant

and

PIERRE VAN TONDER	First Respondent
RONEL VAN DIJK	Second Respondent
JOHN DORY'S FRANCHISE (PTY) LTD	Third Respondent
SPUR GROUP (PTY) LTD	Fourth Respondent

JUDGMENT

CORAM: **GYANDA J**
HEARD: **13 SEPTEMBER 2011**
DELIVERED: **19 SEPTEMBER 2011**

[1] On the 30th August 2011, two urgent applications were brought before me. The first being a case of: *Stamatis Kapsimalis v the Spur Group (Pty) Ltd and 2 others*, under case number 9624/2011 and the second being the present matter.

The first matter was one of spoliation in which the applicant sought to be restored to the use and enjoyment of his offices, from which he had been excluded, as he alleged, by the unlawful conduct of the respondents.

The second being the present application in which he sought to interdict the respondents from holding a meeting of the third respondent in which they sought to suspend him in his capacity as managing director of the third respondent. The spoliation application was disposed of by the taking of a consent order between the parties which effectively allowed the applicant to return to his offices without any admission of liability on the part of the respondents.

The present application was adjourned until today for argument pending the filing of further affidavits and heads of argument as a matter of urgency as the intended meeting in which it was sought to suspend the applicant as managing director of the third respondent was scheduled to be held on the 2nd September 2011, that date being extended by agreement between the parties to the 16th September 2011. The costs in the spoliation application, being reserved for determination by the court disposing of the present application.

[2] When the matter was argued before me on the 13th September 2011, the parties had agreed between themselves that the only issue that I should determine at this stage is the relief sought by the applicant interdicting the respondents from holding a meeting of the third respondent at which they intended to take a decision relating to the suspension of the applicant as managing director of the third respondent.

[3] The argument by the applicant is simple in that the applicant in his capacity as managing director is an officer of the third respondent and in his capacity as such cannot be suspended by decision of the "Company" taken by the receiving two directors.

Whereas the respondents argued that the mere fact that the applicant is the managing director and as such, an officer of the company, does not mean that he cannot at the same time be an employee of the company and be suspended in his capacity as employee. The latter aspect was never in issue before me.

[4] The respondents sought to argue that the notice that was served on the applicant informing him of the intended meeting of the third respondent sought only to suspend him in his capacity as manager and employee of the third respondent and not in his capacity as director. In this regard it was common cause that a managing director per se is an officer of the company and as such cannot be suspended from his

position but that he may be suspended from the terms of his employment as manager if, indeed, he were employed as a manager of the company.

In this regard, reference was made to the decision by *Friedman J,* (in which *Van Heerden J* concurred) in the matter of: *Oak Industries SA (Pty) Ltd v John n.o. and another*[1] where *Friedman J,* said:

> 'In the first case it was held that a director of a company was an officer of the company and that as such, that is to say simply as a director, was not an employee of the company. In the second case the position was taken a stage further with reference to a managing director of a company. In the latter case it was held that the relationship between a managing director and a company was not one of mere employment; that the managing director likewise was the holder of an office in the company. One cannot, in my view, quarrel in any way with the decision in either of these two cases. The decisions appear to me, if I might say so with respect, to be somewhat self-evident but it does not follow that, because a director or a managing director is the holder of an office, he cannot be and is not capable of being an employee of the company. Indeed, neither case went to that extent and there is an abundance of authority referred to by Mr *Magid,* who appeared on behalf of the second respondent, which reveals that a managing director may hold two distinct positions, namely, on the one hand, that of the holder of the office of director and, on the other hand, that of manager, and as manager the managing director may be employed by the company.

1 1987(4) SA 702 at 704 D-J

> It is, however, in the view I take of the matter, unnecessary to enter into a detailed consideration of any of these authorities or to express any final view on them or on precisely what was decided in them. The question in this case is not whether the second respondent held an office with the applicant or was an office-bearer in the applicant. I am prepared, for the purposes of this judgment, to assume that he was such an office-bearer. The question is whether or not at the same time, or in addition, he was an 'employee' within the meaning of that term as defined in the Labour Relations Act. As I conceive the position, there is no absolute rule of law such as that contended for by Mr *Van Deventer*, namely that a managing director of a company cannot be an employee of that company quite apart from and irrespective of any definition of the word 'employee' as might be contained in any particular statute'.

[5] Mr *Van Niekerk* for the respondent argued that the fact that the applicant was also an employee in addition to being managing director is to be found in the fact that there was an employment agreement between him and the third respondent as evidence by annexure "SK2" to the founding papers. Mr *Moosa* for the applicant did not put into issue the fact that there was this employment agreement as evidenced in annexure "SK2" but argued that the terms of the agreement were such that one cannot from that fact alone draw the inference that the "employment contract" was a document which made the applicant an employee of the third respondent.

[6] In his heads of argument Mr *Moosa* drew particular attention to various facets in the "employment agreement" which militated against the inference being drawn that the applicant was employed by the third respondent. These are:

'(a) An employee renders personal services and his work is not directed to a specified result. Clauses 7.4 and 7.5 of the employment agreement provide that the applicant will promote and extend the business interests and welfare of *John Dory's* and that he will conduct, improve, develop, extend and promote the goodwill, growth and prosperity of *John Dory's;*

(b) An employee performs the services personally and does not perform through others. It is clear from the papers that the applicant's relationship with the franchisees is critical to his intended delivery;

(c) An employee is obliged to perform lawful commands and instructions of the employer. It is not disputed that the applicant has never been given instructions. The allegation contained in the email of 31st May 2011 from

the applicant to *Van Tonder,* with particular reference to the third paragraph on page 117, was never disputed. Here the applicant makes it clear that he has never been instructed to do anything as an employee is;

(d) An employment contract terminates on the death of the employee. The so called "employment agreement" provides in clause 2.4 at page 71 of

the papers that the agreement is binding on the estates, the executors, the administrators, the liquidators, the trustees or assigns of the parties.'

[7] I am in agreement with the submissions made by Mr *Moosa* in this regard. However, in the view that I take of the notice "SK19" at page 127 of the indexed papers, it is not necessary for me to decide the question whether or not the applicant was an "employee" of the respondent.

[8] In annexure "SK19" at page 127 of the papers, addressed to the applicant by *Ronel Van Dijk*, a director of the third respondent and the second respondent herein, the first sentence of the letter states:

'This serves to give you notice that the company (my underling) is contemplating suspending you from your employment with John Dory's and your position as managing director (my underlining) on full pay'.

Further, in the said letter in the third paragraph thereof, the second respondent continues:

'It is the company's view that it will be untenable for you to continue to perform your duties as the managing director of *John Dory's* (my underlining) whilst the disciplinary proceedings against you are pending'.

And in the final paragraph of that letter, the second respondent goes on to state:

> 'In the interim pending the board meeting referred to above, you are provisionally suspended from your duties as managing director (my underlining) and you are not to attend at any of the premises of *John Dory's* or *Spur Group* (as the majority shareholder) or any *John Dory's Franchise*, excepting those franchises in which you have a personal equity, or contact any employees of *John Dory's* or *Spur Group,* any franchisee or employee of any franchisee, again with the exception of the franchises in which you have a personal equity, pending the above board meeting and a decision as to whether to suspend you or not, further pending a disciplinary enquiry.'

[9] In the first place, annexure "SK19" makes it clear that the second respondent is informing the applicant of the company's decision suspending the applicant from his employment with *John Dory's* and (my emphasis) his position as managing director on full pay. The clear wording of that first portion of the letter quoted above is unambiguous, and, it is further clear that the writer thereof is well aware of the difference between the applicant's employment with *John Dory's* and his position as managing director. Furthermore, it was the company's contemplation to suspend the applicant, both from his employment with the applicant as well as his position as managing director. What is said by the second respondent in annexure "SK19" is confirmed by the contents of her affidavit at paragraph 165 of the answering affidavit where she says:

> 'Dealing with the first sentence in paragraph 35, I submit that we are entitled to and have validly suspended the first applicant.'

And further at paragraph 31 of the answering affidavit on page 164, she says:

> 'As far as the first applicant's contention that a director cannot in law be suspended from his office as director, I dispute this submission.'

In the light of the decision in *Oak Industries* referred to above, it is quite clear that the contention of the second respondent is wrong and that the third respondent, purported through the offices of the first and second respondents to suspend the applicant in his capacity as "managing director" and therefore an "officer" of the third respondent, which is clearly untenable. Mr *Van Niekerk* for the respondents accepted this and, therefore did not even attempt to submit that the suspension of a director was possible in these circumstances. Nor, has any legal or factual basis been advanced by the respondents justifying that a director may be suspended in these circumstances.

[10] What is more, is that the second respondent purports to act on behalf of the company, namely the third respondent, in acting as she does in conveying to the applicant the decision to suspend him. It is apparent that this conduct on behalf of the first and second respondents acting as the "company" is clearly unlawful. There is no evidence that the company had convened any meeting or taken any resolution in

regard to the proposed suspension. Nor is there any evidence that a company resolution at a duly constituted meeting was taken to the effect that it was untenable for the applicant to continue to perform his duties as managing director. There never was a decision of the Board of Directors to that effect. It is clear that the first and second respondents had acted unlawfully in suspending the applicant provisionally and in preventing him access to his offices and from performing his duties as managing director. It is abundantly clear from clause 8.9 of the shareholders agreement at page 51 of the papers, that any resolution, decision, or act of the board which is passed in breach of any of the provisions of clause 8 shall be of no force or effect.

[11] In my view, therefore, it is abundantly clear that the respondents are not entitled to hold any meeting at which any decision to suspend the applicant as managing director of the third respondent may validly be taken. The applicant is therefore entitled for the interdict that he seeks.

[12] As regards the spoliation application, under case number 9624/2011, Mr *Van Niekerk* in his heads of argument on behalf of the respondents submitted in paragraph 3 thereof:

> 'On Wednesday the 24th August 2011, *Van Tonder* and *Van Dijk* by way of an email at pages 127 to 128, annexure "SK19" gave notice of a meeting of directors of *John Dory's* to be held on Friday the 26th August 2011 for the purpose of considering whether to suspend *Kapsimalis*'. That notice also served as notice of his suspension pending the

holding of that meeting and in accordance with that decision, *Kapsimalis* was prevented from obtaining access to *John Dory's* offices at Westville.'

It is clear therefore that the respondents prevented the applicant from having access to his offices subsequent to the posting of the notice annexure "SK19" to him. That conduct was likewise unlawful in view of the fact that the first and second respondents could not have taken any decision on behalf of the third respondent in the absence of a validly constituted meeting or resolution to suspend him or prevent him from having access to his offices at Westville.

The first, second and fourth respondents are therefore liable to the applicant for the costs incurred in launching the spoliation application under case number 9624/2011. Clearly, the applicant was entitled as managing director of the third respondent to have access to the offices he utilized on behalf of the third respondent in his capacity as managing director and that the first, second and fourth respondents conduct in preventing him access to such offices was unlawful.

[13] In my view it would serve no purpose in granting a provisional order for the interdict relief sought by the applicant in the present application, in as much as it is clear that any meeting that the first and second respondents want to hold of the third respondent, to consider the suspension of the applicant as managing director of the third respondent is unlawful and will remain so.

[14] In my view, it is clear that the first and second respondents by their own conduct have already made up their minds in relation to the suspension of the applicant and that whether or not the applicant attends any meetings of the third respondent intended to be held by the first and second respondents, it would serve no purpose. Nothing fruitful can be achieved thereby in as much as:

(a) It is common cause on the papers before me that the parties are *ad idem* that they should part ways in the light of their differences and that the relationship can no longer continue; and

(b) In the light of the conduct of the respondents hitherto, it is unlikely in the extreme that anything the applicant can say or advance at any meeting will change their minds.

[15] In the light of the common view of the parties that the relationship between them must terminate. They would be best advised to adopt and undertake that process to finality as swiftly as possible.

[16] As the regards the costs of the application, counsel for both parties had argued that in the event I were to hold in favour of them in the present application, I ought to order costs against the unsuccessful party, such costs to include the costs of two counsel, as two counsel were in fact used by both sides. I am in agreement with this

suggestion. In addition, Mr *Van Niekerk* for the respondents argued that in as much as a consent order was taken in the spoliation application, I should order each of the parties to bear their own costs in that matter as there was clearly a rider that undertakings were given without any admission of liability.

[17] However, in the light of the argument in paragraph 3 of the respondent's heads of argument to which I have already referred, it is quite clear that the conduct of the respondents in preventing the applicant access to his offices at *John Dory's* was unlawful, the applicant was entitled to bring the spoliation application, and therefore, the respondents should bear the costs of that application.

The applicants have asked for costs to be awarded on the attorney and client scale. I see no reason why the applicant should bear any costs in a matter such as this where

the first, second and fourth respondents have clearly acted unlawfully and, moreover, have persisted in arguing the correctness of their unlawful action.

In the circumstances, I made an order on 13 September 2011:-

> '(a) Interdicting and restraining the first, second and fourth respondents from purporting to hold a meeting of the Directors of the third respondent at 08h30

on Friday the 2nd September 2011 at 14 Edision Way, Century Gate Business Park, Century City, Cape Town, or at any other future date and time and venue,

for the ostensible purpose of suspending the first applicant in his capacity as managing director of the third respondent; and

(b) Directing the first, second and fourth respondents to pay the costs of this application on an attorney and client scale, such costs to include those costs consequent upon the employment of two counsel and those costs reserved in respect of the spoliation application under case number 9624/2011.'

[18] These are the reasons I had undertaken to provide in support of the order that I made on 13 September 2011.

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S. GYANDA
JUDGE

Counsel for Applicants:	Mr O. A. MOOSA SC (with Ms M. A. Konigkramer/ Mr A.J. Boulle)
Counsel for the Respondents:	Mr G. O. VAN NIEKERK SC (with Mr G. R. Thatcher)