IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

Case No.: JA 14/07

AMAZWI POWER PRODUCTS (PTY) LTD **Appellant**

and

SHELLY TURNBULL **Respondent**

JUDGMENT:

DAVIS JA:

Introduction

[1] Respondent was employed by appellant in June 1979 as an internal accountant. In 1994 she was promoted to the position of accountant. On 1 November 2003 appellant was bought by a new owner as a going concern. During the early part of 2004 (the exact date is not apparent from the record) respondent was appointed to the board of directors of appellant as its financial director.

[2] On 10 January 2005 respondent wrote to the managing director of appellant tendering her resignation as a director of the appellant, stating: "I will continue to give 100% on behalf of the company as an employee". On 31 January 2005 respondent received a letter from appellant's managing director, acknowledging

receipt of the letter of resignation as the financial director and confirming "your offer to continue as an employee (of appellant)". He also informed respondent that the matter would be discussed by the board and thereafter they would consult with her.

[3] She continued performing her duties until 18 February 2005 when she received a letter from appellant's managing director, accepting her resignation of 10 January 2005 from the employ of appellant and tendering to pay her until 31 March 2005. Respondent objected, claiming that she had only resigned as the director and not as an employee.

[4] The dispute was then heard by an arbitrator, Mr DG Levy, who found that respondent had been unfairly dismissed and awarded an amount of compensation equivalent to six months of respondent's salary, prior to her appointment to the board.

[5] This decision was then taken on review before Sangoni AJ. The learned judge dismissed the application to set aside the award but upheld a cross review and ordered the appellant to pay the sum of R 247 800,00, being the equivalent of six months salary, based on respondents salary as at the date of dismissal 18 February 2005. This award was larger than that of the arbitrator's award calculation had been made on the basis of respondent's monthly salary, prior to her appointment as a director.

[6] It is against these findings that appellant, with leave of the court *a quo,* has

approached this court on appeal.

Appellants Case

[7] Mr Mahon, who appeared on behalf of appellant, raised two arguments, the first being a principle set of submissions and another, an alternative argument on the award of compensation. The principle set of submissions was predicated on the contention that respondent held one position; that is, she was employed as financial director of appellant and when she tendered her resignation as the financial director, she resigned her employment from appellant *in toto*. In the alternative, Mr Mahon submitted that, were this court to find that the resignation letter constituted her resignation as a director of appellant only, then the correct amount of compensation due to respondent would be based on her salary prior to the increases that had been granted to her, pursuant to her elevation to the board of appellant.

[8] Mr Mahon submitted that respondent was employed in a single post; that is the financial director of appellant, and that this employment had replaced her previous post as an accountant. In support thereof, Mr Mahon referred to a letter of Mr Martin, the managing director of appellant, dated 19 March 2004:

> "Dear Shelley
>
> We are pleased to advise that you have been granted an increase in salary as from 1st March 2004

The increase amounts to R7 000. 00 per month and your adjusted salary will amount to

R32 000.00 per month. In addition the Company will pay your portion of the pension fund.

Your employment contract will be ready within the next two weeks".

[9] Mr Mahon submitted that this letter clearly envisaged that a new employment contract would be drafted which would encapsulate the new employment relationship created between the parties, pursuant to respondent's appointment as the financial director. Although it is common cause that no contract was produced in writing, Mr Mahon submitted that the intention of the parties was clearly to regulate the directorship of respondent in a contract. Respondent had received no directors' fees. The salary which she received as an accountant was increased significantly to be commensurate with her new, more onerous set of obligations as the financial director. As she was employed as a director, her resignation meant that there was no other legal basis to justify the continuation of her employment in appellant's organization.

[10] Respondent's 'resignation' letter to appellant, in so far as it has a bearing upon the submissions of Mr Mahon reads:

> 'After much soul searching and careful consideration, I hereby tender my resignation as Director of Amazwi… I assure you that I shall continue to give 100% on behalf of the company, as an employee, however, require express instruction about what and who is to be paid, bearing in mind that there are certain items that must be paid i.e. Medical Aids, PAYE and Pension (the outstanding Pension needs to be paid as soon as possible).

> (sic)
>
> I am also not prepared to misrepresent the true financial position of the company to creditors (especially given regard to the fact that I have worked closely with many of them for many years) and require express instructions about what to tell them regarding the non-payment of their accounts and the payment thereof.

Over the past 20 years I have been a loyal member of the company and shall continue to act in the best interests of the company with your support and guidance.'

[11] Mr Mahon conceded that the wording of this letter was indicative that respondent had intended to resign from the board of appellant but to continue as an employee. However he argued that given the legal position that respondent occupied one position, appellant was entitled to accept her resignation from its organization.

The applicable law

[12] In general it, can be stated that a director stands in a fiduciary relationship to a company and is subject, essentially, to the same fiduciary duties and responsibilities as do other fiduciaries who are in a similar relationship of confidence and trust to one another. When a person accepts the office of a director and no contract had been expressly concluded, the contract between the director and the company will be implied, the effect being that the position is regulated by the company's articles of association. A director is thus not an employee of a company, although he or she can be an employee in addition to holding the independent office as a director. See The Law of South Africa (First

Reissue (1996)) Volume 4 Part 2 at para52; Anderson v James Sutherland (Peterhead) Ltd 1941 SC 203 at 217.

[13] Applying these principles to the office of a managing director, Prof Blackman writes that the managing director constitutes a composite office. Not all of his actions in relation to company business are to be attributed to the powers as a director. As a manager, the managing director is a party to a contract of employment with the company. Accordingly, his or her position as a director must be distinguished from that of a manager. The Law of South Africa, Volume 4. Part 2 at para102. See also the instructive article by Professor Larkin "Distinctions and Differences: A Company Lawyers Look at Executive Dismissal" 1986 (7) ILJ 248.

[14] Notwithstanding the clear position of the managing director or, for that matter a financial director in terms of company law, Mr Mahon contended that labour law viewed the position differently. He referred to the decision of Friedman J in Oak Industries (SA) (Pty) Ltd v John NO and another 1987 (4)SA 702 (N) in which the court held that it did not follow that, because a managing director is a holder of an office, he cannot be nor was he capable of being an employee of a company. The determination of whether a managing director fell within a definition of employee had to be ascertained by reference to the definition of an employee in the Labour Relations Act (in that case the Labour Relations of 28 of 1956 and by analogy the current legislation, The Labour Relations Act 66 of 1995 ('The Act').

[15] I can find no fault in the approach adopted by Friedman J as to whether the Act affords protection to a managing director or a financial director dismissed by a company. But this case is not concerned with such a dismissal; it is concerned with whether the respondent terminated the employment relationship that existed between appellant and respondent, pursuant to her letter of resignation. Hence, this case must be determined on a different basis, that is whether a financial director is truly a composite of two posts or whether there are two separate posts.

[16] However, this case can be decided on a different, albeit related, basis. When the departure from an organization is at the initiative of the employee by way of a voluntary resignation which is accepted, by the employer the termination of the contract it then takes place by mutual and voluntary agreement between the parties. As Mr van der Merwe, who appeared on behalf of the respondent, correctly submitted, a termination of a contract, particularly a contract of employment has important consequences for the reciprocal rights and duties of the parties. To be legally effective, a notice of intention to resign from employment and therefore to terminate the contract must be clear and unequivocal. See <u>Kragga Kamma Estates CC and another v Flanagan</u> 1995 (2) SA 367 (A) at 375 C.

[17] It was clear from the testimony of respondent that she never intended to resign

from her employment relationship with appellant. To the extent that she laboured under any legal misapprehension (regarding the conflation of the duties the financial director and employee) there was, as I have set out, an understandable basis for her adopting this approach. Her testimony is instructive: "I honestly did not expect them to say take your things and go I ….. maybe they will come back and say ok you are still a valuable person to the company you can decide so you have the solidarity duty so whatever. I honestly did not expect them to say cheers."

[18] To the question as to whether she approached the managing director regarding her letter she said: "On the Monday I just went to Mike and I said to him is there no other solution. And he said to me it is a board decision."

[19] Respondent was clear in her testimony that, upon her appointment to the board, very little had changed in so far as her employment obligations were concerned. To return to her evidence: "Can you explain to us what was different in these duties for when after you were director to prior to being a director? I think the only difference was that I went to board meetings but other than that all the functions that I had done before."

[20] In my view, it is clear that respondent tendered her resignation from the board without any intention of resigning from the employ of the company. The very least she expected was that appellant would honour its obligations as set out in its letter of 31 January 2005 and consult with her regarding her ongoing employment relationship with appellant. This was not done.

[21] Mr van der Merwe correctly classified the actions of the appellant as "opportunistic" in seeking to invoke the respondent's letter of 10 January 2005 as a resignation of her employment when it was clear, on a fair and reasonable reading of that letter, that she never held to that intention. Indeed, as already noted, Mr Mahon conceded that respondent's letter indicated that her intention was to resign only from the

board. Had there been any doubt in the mind of the appellant as to the intention of the respondent, it could have availed itself of the consultation process which it promised would take place. In my view, there is no basis to interfere with the finding of either the arbitrator or the court *a quo,* namely that the dismissal of the respondent from the employ of appellant was substantively unfair.

Compensation

[22] It is common cause that, at the date of the termination of respondent's employment, her remuneration amounted to R 41 300.00 per month. Section 194 of the Act provides that the relevant remuneration must be calculated at the employee's rate of remuneration on the date of dismissal. Furthermore, there was no evidence that the respondent received any director's fees. There was no evidence provided to the arbitrator to reveal what portion of the respondent's remuneration was allocated to her appointment as a director of appellant.

[23] The absence of any evidence to gainsay respondent's contentions, as well as the finding of the court *a quo,* was illustrated in the submission of Mr Mahon that the salary which formed the basis of the relevant calculation was R 25 000.00 per month. Mr Mahon located this figure in a letter of 13 December 2002 when respondent was informed by the then managing director of appellant that her salary would be increased to R25 000.00 per month. That was a salary which applied more than two years prior to dismissal. On 19 March 2004 her salary was increased to R32 000.00 per month, together with an obligation that appellant would pay respondent's portion of the Pension fund. Whether it was this latter contribution, which added to the R32 000.00 amounted to the figure of R41 300.00 per month is not clear. By contrast, appellant produced no evidence to contradict respondent's evidence that her remuneration as at the date of termination of employment was R41 300.00 per month. On this basis therefore, the court *a quo* adopted the correct computation, as it was obliged to do in terms of section 194 of the Act.

[24] For these reasons, the appeal is dismissed with costs.

DAVIS JA

I agree

LEEUW JA

I agree

TLALETSI AJA

Date of Judgment: **20 June 2008**

Date of Hearing: **27 May 2008**

Appearances

For the appellant	**Advocate Mahon**
Instructed by	**Fairbridges Attorneys**
For the respondent	**Advocate van der Merwe**
Instructed by	**Senekal Simmonds Inc**