

SOUTH AFRICA / JUDGMENT

Communicare and Another v Hardie (A107/12) [2012] ZAWCHC 187 (12 November 2012)

[2012] ZAWCHC 187

COURT

Western Cape High Court, Cape Town

BEFORE

Hlophe, Traverso, Samela

CASE / FILE NUMBER

A107/12

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REPORTABLE

IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE HIGH COURT, CAPE TOWN)

CASE

NO.: A107/12

In

the matter between

COMMUNICARE

.....First

Appellant

(Association

incorporated under Section 21)

(Reg

No. 1929/001590/08)

(First

Respondent in the Court of first instance)

COMMUNICARE

CONSTRUCTION

.....Second

Appellant

(Reg

No. 1945/019203/08)

(Second
Respondent in the Court of first instance)
and
ALLAN
THEODORE HARDIE

.....Respondent
(Applicant
in the Court of first instance)

Coram: HLOPHE JP et TRAVERSO DJP et SAMELA J
Judgment
by: SAMELA, J
Adv.
for Plaintiff: Adv. Hodes SC, Ad. Brusser SC

Attorney: Instructed by Cliffe Dekker Hofmyr Inc.
021
481 6396
Adv.
for Respondent: Adv. Duminy SC, Adv. Janisch

Attorney: Instructed by Kritzenger Attorneys
021
426 0600
Date/s
of hearing: Commenced 3/10/2011, 14/9/2012
Ended
12/11/2012
Date
of Judgment: 12 November 2012
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COMMUNICARE
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JUDGMENT

DELIVERED ON 12 NOVEMBER 2012 SAMELA, J

Introduction.

[1] This is an appeal from the judgment of Desai J in the court a quo delivered on 3 October 2011. It is an appeal to the Full Bench of this court. Desai J's decision was to the effect that the Respondent continue to be a director and a member of the Appellants, and that the Appellants were jointly and severally ordered to pay the Respondent's costs. Mr Hodes SC together with Mr Brusser SC appeared for the Appellants, and Mr Duminy SC together with Mr Janisch appeared for the Respondent. [2] The Appellants grounds of appeal are the following:

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO.: A107/12

In the matter between

COMMUNICAREFirst Appellant

(Association incorporated under Section 21)

(Reg No. 1929/001590/08)

(First Respondent in the Court of first instance)

COMMUNICARE CONSTRUCTIONSecond Appellant

(Reg No. 1945/019203/08)

(Second Respondent in the Court of first instance) and

ALLAN THEODORE HARDIERespondent

(Applicant in the Court of first instance)

JUDGMENT

DELIVERED ON 12 NOVEMBER 2012

SAMELA, J

Introduction.

[1] This is an appeal from the judgment of Desai J in the court a quo delivered on 3 October 2011. It is an appeal to the Full Bench of this court. Desai J's decision was to the effect that the Respondent continue to be a director and a member of the Appellants, and that the Appellants were jointly and severally ordered to pay the Respondent's costs. Mr Hodes SC together with Mr Brusser SC appeared for the Appellants, and Mr Duminy SC together with Mr Janisch appeared for the Respondent.

[2] The Appellants grounds of appeal are the following:

2.1. That at the 2008 AGM, the Respondent was re-elected as a director "in terms of and pursuant to and in terms of a resolution (paragraph 3.1 of the 25 November 2008 minutes...) passed thereat," the terms of which are that he was re-elected as a director "for a period of one year ending at the Annual General Meeting of the members in 2009, at the request of [the Respondent]". 2.2. That the 2008 minutes were confirmed at the 2009 AGM. [3] The Respondent opposed the application on the basis that paragraph 3.1. of the 2008 draft minutes which the Appellants relied on, which was approved in its draft form, was erroneous. On the contrary the 2009 meeting agreed with the Respondent's contention that he had been elected for three years.

Issues

to be decided [4] This court is required to make a finding whether the court a quo was correct in deciding: (a) that the Respondent continue as the Appellants' director and a member; and (b) that the Appellants pay the Respondent's costs which included the costs of two counsel. Factual

Background

[5] The following facts are common cause: The Respondent served as a director since 2002 for the First and Second Appellants ("Appellants" both associations incorporated under Section 21 of the Companies Act 61 of 1973). On 25 November 2008,

the Respondent retired by rotation as a Director of the Appellants, and simultaneously availed himself for re-election to the

Appellants. He was re-elected together with Messrs Khan and Justus at the 2008 Annual General Meeting ("the AGM"). The disputes between the parties are the following: (i) on 25 November 2008 AGM, the Respondent was re-elected as a Director of the Appellants in terms of and pursuant to and in terms of a resolution (paragraph 3.1 of the minutes - "the 25 November 2008

minutes”) passed thereat; (ii) paragraph 3.1 of the 25 November 2008 minutes correctly records that the members present (including the Respondent) unanimously resolved that: “AT Hardie be re-elected as a Director of the company for a period of one year ending at the Annual General Meeting of the members in 2009, at the request of AT Hardie”; and (iii) the 25 November 2008 minutes were confirmed at the 27 October 2009 Annual General Meeting. [6] Mr Hodes SC who appeared together with Mr Brusser SC on behalf of the Appellants conceded that the key question was whether the 25 November 2008 minutes which clearly set out the terms, [as they were submitted], did relate to the period of appointments of Messrs Justus, Khan and Hardie who sought to be re-elected. The relevant part is item 3 which dealt with election of directors, it provided: “The chairperson explained that in accordance with the provisions of the Company’s Articles of Association A.T. Hardie, C.R. Justus and B.L.E. Khan retired by rotation, at the meeting as Directors of the Company. 3.1. Being eligible thereto, AT Hardie, CR Justus and BLE Khan had made themselves available for re-election. The chairperson proposed Item 3.1 as set out in the Notice and the motion was opened for discussion. It was proposed that the possible re- election of the above-mentioned persons as Directors be considered conjointly” There being no objections against the procedure and no further discussion on the item, unanimously RESOLVED that. C.R. Justus and B.L.E. Khan be re-elected as Directors of the Company for a period of three years ending at the Annual General Meeting of the Members in 2011 and that AT Hardie be re-elected as a Director of the Company for a period of one year ending at the Annual General Meeting of the Members in 2009, at the request of A.T. Hardie”. Absent the above interpretation of the 25 November 2008 minutes, it was unnecessary for the court to decide on the balance of the issues, and the Appellants application must fail. Applicable Legal Principles. [7] In terms of Section 65 (2) of the Companies Act 61 of 1973 (“the Act”) the memorandum and articles bind the company and the members to observe all their provisions as if they had been respectively signed by each member, subject only to the provisions

of the Act. [8] Clause 14 of the Appellants Articles of Association provides: The office of the director shall be vacated if the director- (a) resigns his office by notice in writing to the Company and the Registrar; [9] Whereas Clause 15 of the Appellants Articles provides: “At the first annual general meeting of the company, all the directors shall retire from office, and at the annual general meeting in every subsequent year one third of the directors for the time being, or if their number is not three or a multiple of three, the number nearest to one third, shall retire from office, provided that the Director appointed by the Regional Government, shall not retire from office by reason of effluxion of time. 15.1. The directors to retire in every year shall be those who have been longest in office since their last election, but as between persons who became directors on the same day, those to retire shall, unless they otherwise agree among themselves, be determined by lot. 15.2. A retiring director shall be eligible for re-election”. [10] The company’s memorandum and articles bind its members to the same extent as if they have been signed by each member see *Ross & Co v Coleman* 1920 AD 408 at 418. The articles of association in a company can be described as contractual in nature as discussed in *Ross* above at 423 where the court said the following: “—the plaintiff had no express agreement with the company: his contract is one which arises from the fact that he accepted office as a director, and that

necessarily implies that the contractual relations of the parties are to be gathered from the Articles of Association as a whole”. [11] Articles of a company are not per se absolutely binding on the company’s members as was stated in *Gohlke and Schneider and Another v Westies Minerale (Edms) BPK and Another* 1970 (2) SA 685 (A) at 692 E-H where the court held that: “As to the articles, it will be immediately apparent that the section does not render them absolutely binding on the company and its members as though they were statutory enactments,— The articles, therefore, merely have the same force as a contract

between the company and each and every member as such to observe their provisions...Consequently I can see no reason why, as with any other contract, it cannot be departed from by a bona fide agreement concluded between the company and all its members to do something intra vires of the company’s memorandum but in a manner contrary to the articles, and why that agreement should not bind them”. Single Joint Resolution. [12] The Appellants submitted that the court a quo erred in finding that the Respondent was re-elected as a director of the Appellants on the same basis as the other two directors. They argued that the resolution was clearly passed in circumstances where before it was voted on, the members’ attention had been drawn by the chairperson to the fact that more than one person were proposed for re-election (that is three different and identified persons) in the single resolution and also that each person was to be re-elected for a different period of office. [13] The Respondent, countered the Appellants’ argument by pointing out that it was common cause on papers that there was a valid joint resolution to re-elect the directors. The only issue was its terms. They pointed out that since it was common cause that the other two directors were re-elected on an open-ended basis that is, three year appointment, and the court a quo was correct that the same terms of appointment were applied to the Respondent’s appointment under the same resolution. They argued further that the approval of the amendment at the 2009 AGM took the matter beyond doubt. [14] It seems to me that the members’ decision to deal with all three directors simultaneously clearly indicated that their

appointments were similar. There was nothing that indicated to the contrary. I am of the view that the court a quo was correct in finding that the three re-elected directors were re-appointed by way of single resolution, because they were appointed under the same resolution. The Appointment of the Respondent not for an indefinite period. [15] The Appellants submitted that the court a quo erred in finding that the Respondent was re-elected for an indefinite period until required to retire by rotation. The Appellants based their arguments in terms of paragraph 3.1 of the 2008 minutes in which they submitted that it clearly indicated that the Respondent was elected as the Appellants’ director for a period of one year ending at the AGM of the Appellants in 2009. [16] The Respondent submitted that he did not make himself available for re-election for a fixed one year period only. When he had received the 2008 AGM draft minutes which in paragraph 3.1 purported to record a one year appointment, he e-mailed the company’s

secretary saying: “I notice that the minutes of last year’s Communicare AGM record that I was elected for a one year term retiring at this year’s AGM. That is not correct. I was elected for three years but indicated that I would not serve my full term and would aim to leave at the December

meeting. My intention at the time was to ensure that I had completed everything I had taken on in connection with the 80th Anniversary. This is still my intention and I will move to have the minutes correctly reflect what I tried to convey to the meeting at the time”. [17] The company secretary replied by stating that although the draft minutes reflected his recollection, it could be rectified at the next AGM. [18] When the approval of the 2008 draft minutes was discussed on the 27 October 2009 at the AGM, the Respondent sought to amend the draft minute by saying the following: “Sorry, Mr Chairman, I just had one correction which I—eh—was looking for quickly—eh— in regard to my own—uhm—election last year, it was actually I was appointed for a three-year term— [Mr Fourie: “Yes”]...like anyone else. It says here though— only appointed for one term, cause technically - [inaudible] - I am not a member of this meeting, or the meeting that follows the meeting I should say, and that was not the intention. It said that I would I was elected for three years and [inaudible] indicated I would be leaving before my term came to a complete end—uhm—and indicated—[inaudible]—[Mr Fourie: “At the end of this year?”] Ja, so I just want to record that, cause otherwise technically—uh- at the next meeting I have no place”. [Mr Fourie: “Is that in order—[inaudible] Ja?”] The meeting proceeded to item 2 on the agenda. [19] Without any dissent, I am of the view that the 2009 AGM accepted the 2008 draft minutes. It was recorded as follows: “AT Hardie stated at this time that the resolution regarding his tenure, item 3.1 of the previous minutes, should actually read that he was re-elected as a Director of the company for a period of three years ending at the Annual General Meeting of Members in 2011, but that he would retire before expiration of this term. In response to a question from the Chairperson, AT Hardie confirmed his retirement from the Board of Directors at the end of the 2009 calendar year”. [20] The above indicates that paragraph 3.1 of the 2008 draft minutes was not approved in its draft form. It seems to me that the 2009 AGM meeting agreed with the Respondent’s argument that he had been elected for a three year period and not for one year as the Appellants’ understanding. I am of the view that the court a quo was correct in concluding that, had the appointment been for a period of one year, it was most unlikely that the members at the meeting would have agreed and endorsed the change to the 2008 AGM minutes as proposed by the Respondent. It could also have been imperative that the Respondent had to be appointed for few months until the end of December 2009 as the AGM was held on 27 October

2009. The meeting did not take that route, and it seems to me that they corrected the error, agreed and endorsed the Respondent’s contention that he was appointed for three years. [21] It is incorrect, in my view, to rely and place too much emphasis on paragraph 3.1 of the 2008 AGM draft minutes, as the same was corrected at the 2009 AGM. At that meeting it seemed a unanimous decision was taken and adopted to accept the corrected version of the 2008 AGM draft minutes, which endorses the Respondent’s version and understanding of the corrected 2008 AGM minutes. 2008 AGM minutes confirmed at 2009 AGM. [22] The Appellants submitted that as it appeared from paragraph 1 of the minutes of the 2009 AGM of the Appellants (“the 2009 minutes”) the members unanimously confirmed the 2008 minutes, and the Respondent was one of the members present at the 2009 AGM, as he was also present at the 2008 AGM. [23] The Respondent countered the Appellant’s submission by pointing out that the members confirmed the 2008 minutes inclusive

of the Respondent's correction, that is, paragraph 3.1 having been corrected in the manner the Respondent had requested. [24] I agree with the Respondent's submission because it is clear from the 2009 AGM transcript that the Respondent's request for correction was unanimously approved by all the members present at the 27 October 2009 AGM. No one was opposed to the correction and the meeting proceeded to the next item on the agenda. The Contract of 25 November 2008. [25] The Appellants argued that the Respondent's re-election in 2008 was pursuant to a contract dealing with and delineating the duration of the Respondent's term of office. They submitted further that the terms of that contract was contained in and evidenced by paragraph 3.1 of the 2008 minutes and not in the Appellants's articles of association. [26] The Respondent countered the Appellants' submissions by pointing out three issues: (a) paragraph 3.1 of the draft 2008 minutes was incorrect and was duly corrected; (b) there was no evidence of a separate fixed term of contract as a basis for the Respondent's re-election; and (c) even if there was such an agreement, in the absence of the unanimous approval of all the members no such restriction could have been imposed without an amendment to the articles. [27] I agree with the Respondent's submissions for the following

reasons:

- (i) from the facts of this matter paragraph 3.1 of the 2008 draft minutes was incorrect and was duly corrected at the 27 October 2009 AGM; (ii) the Respondent was not appointed for a fixed term of one year; (iii) the Respondent was re-elected on the same basis as the other two directors namely for a period of three years; (iv) the fact that the Respondent intended to resign did not in itself amounted to resignation. The Respondent never wrote a notice of resignation to the Appellants and to the Registrar as required under articles (see Article 14 (c) para 8 above); and (v) it was common cause that the Respondent had changed his mind about the resignation and I am of the view that there was nothing illegal with that. The Contract of 27 October 2009. [28] The Appellants submitted that the Respondent's appointment as a director of Appellants (pursuant to his re-election at Appellants' 2008 AGM) was in terms of the contract concluded between the parties at the time and whose essential terms appear in paragraph 3.1 of the 2008 minutes, especially the following: "AT Hardie confirmed his retirement from the Board of Directors at the end of the 2009 calendar year". [29] The Respondent countered the Appellants submission by pointing out that the above mentioned statement relied upon by the Appellants was recorded in the draft minutes which have not yet been confirmed as accurate in any subsequent AGM, and which were entirely inconsistent with the transcript of what occurred at the 2009 meeting. The Respondent's intention to retire at the end of 2009 did not amount to a new fixed contract. [30] The Respondent is correct in his submission for the following

reasons:

- (a) the 2008 draft minutes were duly corrected at the 2009 AGM; (b) from the corrected minutes it is clear that the Respondent was re-elected for three years like other directors; (c) consequently the Respondent's intention to retire did not amount to a new contract because

the Respondent did not write a notice to the Appellants and to the Registrar advising them of the same in accordance with clause 14 (c) of the Appellants Articles of Association; (d) the 2009 AGM minutes have not yet been confirmed as accurate in any subsequent AGM; and (e) the Appellants cannot rely in their submissions on the uncorrected version of the 2008 draft minutes. [31] In the light of the documents tendered at the appeal (various transcripts, e-mails, correspondence, AGMs minutes) and submissions

made in this matter, the following findings are made: 31.1. in the Appellants' articles there is no provision prescribing the term of office of a director. Only the retirement of directors is discussed, namely, that one third of the directors must retire at each AGM. The practical result seemed that directors were required to retire after three years of service; 31.2. company's memorandum and articles bind the company and its members to the same extent as if they each respectively had signed, subject only to the Act. Consequently it was not competent for the Appellants' members, under the binding articles to appoint a director for a fixed period (such as one year in this case) without the amendment to the articles; 31.3. the Respondent made himself available for re-election as a director of the Appellants at the Annual General Meeting held on the 25 November 2008 and was re-elected; 31.4. the Respondent was appointed like the other two co-directors for the same period; 31.5. when the Respondent received the 2008 draft minutes he contacted the company chairman pointing out the incorrect recordal of his re-election. He was informed that the error could be corrected at the forthcoming AGM; 31.6. at the 2009 AGM (i.e. 27 October 2009) the corrections were duly accepted and corrected with no member dissenting; 31.7. it is of significance to note that all the three returning directors were re-appointed by way of a single joint resolution. This is a clear indication to me that their basis of appointment was similar; 31.8. the Respondent was not appointed for a fixed term of one year. He was re-elected like the other two directors for an indefinite period until required to retire by rotation. As mentioned above the practical result was to retire after serving for three years; 31.9. clause 14 (c) of the Appellants Articles of Association requires a written notice to the Appellants and the Registrar before

resignation. In this matter none of the above formalities were made by the Respondent; and 31.10. the fact that he had informed the company's chairman informally about his intended resignation, did not amount to

resignation. [32] In the result, I would make the following order: The appeal is dismissed with costs, such costs to include the costs of two counsel. Samela, J Traverso, DJP I agree Hlophe, JP I agree and it is so ordered

2.1. That at the 2008 AGM, the Respondent was re-elected as a director "in terms of and pursuant to and in terms of a resolution (paragraph 3.1 of the 25 November 2008 minutes...) passed thereat," the terms of which are that he was re-elected as a director "for a period of one year ending at the Annual General Meeting of the members in 2009, at the request of [the Respondent]".

2.2. That the 2008 minutes were confirmed at the 2009 AGM.

[3] The Respondent opposed the application on the basis that paragraph 3.1. of the 2008 draft minutes which the Appellants relied on, which was approved in its draft form, was erroneous. On the contrary the 2009 meeting agreed with the Respondent's contention that he had been elected for three years.

Issues

to be decided

[4] This court is required to make a finding whether the court a quo was correct in deciding:

- (a) that the Respondent continue as the Appellants' director and a member; and
- (b) that the Appellants pay the Respondent's costs which included the costs of two counsel.

Factual

Background

[5] The following facts are common cause: The Respondent served as a director since 2002 for the First and Second Appellants ("Appellants" both associations incorporated under Section 21 of the Companies Act 61 of 1973). On 25 November 2008,

the Respondent retired by rotation as a Director of the Appellants, and simultaneously availed himself for re-election to the

Appellants. He was re-elected together with Messrs Khan and Justus at the 2008 Annual General Meeting ("the AGM").

The disputes between the parties are the following:

- (i) on 25 November 2008 AGM, the Respondent was re-elected as a Director of the Appellants in terms of and pursuant to and in terms of a resolution (paragraph 3.1 of the minutes - "the 25 November 2008 minutes") passed thereat;
- (ii) paragraph 3.1 of the 25 November 2008 minutes correctly records that the members present (including the Respondent) unanimously resolved that:

"AT Hardie be re-elected as a Director of the company for a period of one year ending at the Annual General Meeting of the members in 2009, at the request of AT Hardie"; and

- (iii) the 25 November 2008 minutes were confirmed at the 27 October 2009 Annual General Meeting.

- [6] Mr Hodes SC who appeared together with Mr Brusser SC on behalf of the Appellants conceded that the key question was whether the 25 November 2008 minutes which clearly set out the terms, [as they were submitted], did relate to the period of appointments of Messrs Justus, Khan and Hardie who sought to be re-elected. The relevant part is item 3 which dealt with election of directors, it provided:

“The chairperson explained that in accordance with the provisions of the Company’s Articles of Association A.T. Hardie, C.R. Justus and B.L.E. Khan retired by rotation, at the meeting as Directors of the Company.

3.1. Being eligible thereto, AT Hardie, CR Justus and BLE Khan had made themselves available for re-election. The chairperson proposed Item 3.1 as set out in the Notice and the motion was opened for discussion. It was proposed that the possible re- election of the above-mentioned persons as Directors be considered conjointly”

There being no objections against the procedure and no further discussion on the item, unanimously RESOLVED that.

C.R. Justus and B.L.E. Khan be re-elected as Directors of the Company for a period of three years ending at the Annual General Meeting of the Members in 2011 and that AT Hardie be re-elected as a Director of the Company for a period of one year ending at the Annual General Meeting of the Members in 2009, at the request of A.T. Hardie”.

Absent the above interpretation of the 25 November 2008 minutes, it was unnecessary for the court to decide on the balance of the issues, and the Appellants application must fail.

Applicable Legal Principles.

- [7] In terms of Section 65 (2) of the Companies Act 61 of 1973 (“the Act”) the memorandum and articles bind the company and the members to observe all their provisions as if they had been respectively signed by each member, subject only to the provisions of the Act.

- [8] Clause 14 of the Appellants Articles of Association provides:

The office of the director shall be vacated if the director-

- (a) resigns his office by notice in writing to the Company and the Registrar;

- [9] Whereas Clause 15 of the Appellants Articles provides:

“At the first annual general meeting of the company, all the directors shall retire from office, and at the annual general meeting in every subsequent year one third of the directors for the time being, or if their number is not three or a multiple of three, the number nearest to one third, shall retire from office, provided that the Director appointed by the Regional Government, shall not retire from office by reason of effluxion of time.

15.1. The directors to retire in every year shall be those who have been longest in office since their last election, but as between persons who became directors on the same day, those to retire shall, unless they otherwise agree among themselves, be determined by lot.

15.2. A retiring director shall be eligible for re-election”.

[10] The company’s memorandum and articles bind its members to the same extent as if they have been signed by each member see *Ross & Co v Coleman* 1920 AD 408 at 418. The articles of association in a company can be described as contractual in nature as discussed in *Ross* above at 423 where the court said the following:

“—the plaintiff had no express agreement with the company: his contract is one which arises from the fact that he accepted office as a director, and that necessarily implies that the contractual relations of the parties are to be gathered from the Articles of Association as a whole”.

[11] Articles of a company are not per se absolutely binding on the company’s members as was stated in *Gohlke and Schneider and Another v Westies Minerale (Edms) BPK and Another* 1970 (2) SA 685 (A) at 692 E-H where the court held that:

“As to the articles, it will be immediately apparent that the section does not render them absolutely binding on the company and its members as though they were statutory enactments,— The articles, therefore, merely have the same force as a contract

between the company and each and every member as such to observe their provisions...Consequently I can see no reason why, as with any other contract, it cannot be departed from by a bona fide agreement concluded between the company and all its members to do something intra vires of the company’s memorandum but in a manner contrary to the articles, and why that agreement should not bind them”.

Single Joint Resolution.

[12] The Appellants submitted that the court a quo erred in finding that the Respondent was re-elected as a director of the Appellants on the same basis as the other two directors. They argued that the resolution was clearly passed in circumstances where before it was voted on, the members’ attention had been drawn by the chairperson to the fact that more than one person were proposed for re-election (that is three different and identified persons) in the single resolution and also that each person was to be re-elected for a different period of office.

[13] The Respondent, countered the Appellants’ argument by pointing out that it was common cause on papers that there was a valid joint resolution to re-elect the directors. The only issue was its terms. They pointed out that since it was common cause that the other two directors were re-elected on an open-ended basis that is, three year appointment, and the court a quo was correct that the same terms of appointment were applied to the Respondent’s appointment under the same resolution. They argued further that the approval of the amendment at the 2009 AGM took the matter beyond doubt.

[14] It seems to me that the members' decision to deal with all three directors simultaneously clearly indicated that their

appointments were similar. There was nothing that indicated to the contrary. I am of the view that the court a quo was correct in finding that the three re-elected directors were re-appointed by way of single resolution, because they were appointed under the same resolution.

The Appointment of the Respondent not for an indefinite period.

[15] The Appellants submitted that the court a quo erred in finding that the Respondent was re-elected for an indefinite period until required to retire by rotation. The Appellants based their arguments in terms of paragraph 3.1 of the 2008 minutes in which they submitted that it clearly indicated that the Respondent was elected as the Appellants' director for a period of one year ending at the AGM of the Appellants in 2009.

[16] The Respondent submitted that he did not make himself available for re-election for a fixed one year period only. When he had received the 2008 AGM draft minutes which in paragraph 3.1 purported to record a one year appointment, he e-mailed the company's

secretary saying:

"I notice that the minutes of last year's Communicare AGM record that I was elected for a one year term retiring at this year's AGM. That is not correct. I was elected for three years but indicated that I would not serve my full term and would aim to leave at the December meeting. My intention at the time was to ensure that I had completed everything I had taken on in connection with the 80th Anniversary. This is still my intention and I will move to have the minutes correctly reflect what I tried to convey to the meeting at the time".

[17] The company secretary replied by stating that although the draft minutes reflected his recollection, it could be rectified at the next AGM.

[18] When the approval of the 2008 draft minutes was discussed on the 27 October 2009 at the AGM, the Respondent sought to amend the draft minute by saying the following:

"Sorry, Mr Chairman, I just had one correction which I--eh--was looking for quickly--eh-- in regard to my own--uhm--election last year, it was actually I was appointed for a three-year term— [Mr Fourie: "Yes"]...like anyone else. It says here though— only appointed for one term, cause technically - [inaudible] - I am not a member of this meeting, or the meeting that follows the meeting I should say, and that was not the intention. It said that

I would I was elected for three years and [inaudible]

indicated I would be leaving before my term came to a complete end--uhm--and indicated--inaudible]—[Mr Fourie: "At the end of this year?"] Ja, so I just want to record that, cause otherwise technically--uh- at the next meeting I have no place". [Mr Fourie: "Is that in order— [inaudible] Ja?" The meeting proceeded to item 2 on the agenda.

[19] Without any dissent, I am of the view that the 2009 AGM accepted the 2008 draft minutes. It was recorded as follows:

“AT Hardie stated at this time that the resolution regarding his tenure, item 3.1 of the previous minutes, should actually read that he was re-elected as a Director of the company for a period of three years ending at the Annual General Meeting of Members in 2011, but that he would retire before expiration of this term. In response to a question from the Chairperson, AT Hardie confirmed his retirement from the Board of Directors at the end of the 2009 calendar year”.

[20] The above indicates that paragraph 3.1 of the 2008 draft minutes was not approved in its draft form. It seems to me that the 2009 AGM meeting agreed with the Respondent’s argument that he had been elected for a three year period and not for one year as the Appellants’ understanding. I am of the view that the court a quo was correct in concluding that, had the appointment been for a period of one year, it was most unlikely that the members at the meeting would have agreed and endorsed the change to the 2008 AGM minutes as proposed by the Respondent. It could also have been imperative that the Respondent had to be appointed for few months until the end of December 2009 as the AGM was held on 27 October

2009. The meeting did not take that route, and it seems to me that they corrected the error, agreed and endorsed the Respondent’s contention that he was appointed for three years.

[21] It is incorrect, in my view, to rely and place too much emphasis on paragraph 3.1 of the 2008 AGM draft minutes, as the same was corrected at the 2009 AGM. At that meeting it seemed a unanimous decision was taken and adopted to accept the corrected version of the 2008 AGM draft minutes, which endorses the Respondent’s version and understanding of the corrected 2008 AGM minutes.

2008 AGM minutes confirmed at 2009 AGM.

[22] The Appellants submitted that as it appeared from paragraph 1 of the minutes of the 2009 AGM of the Appellants (“the 2009 minutes”) the members unanimously confirmed the 2008 minutes, and the Respondent was one of the members present at the 2009 AGM, as he was also present at the 2008 AGM.

[23] The Respondent countered the Appellant’s submission by pointing out that the members confirmed the 2008 minutes inclusive

of the Respondent’s correction, that is, paragraph 3.1 having been corrected in the manner the Respondent had requested.

[24] I agree with the Respondent’s submission because it is clear from the 2009 AGM transcript that the Respondent’s request for correction was unanimously approved by all the members present at the 27 October 2009 AGM. No one was opposed to the correction and the meeting proceeded to the next item on the agenda.

The Contract of 25 November 2008.

[25] The Appellants argued that the Respondent's re-election in 2008 was pursuant to a contract dealing with and delineating the duration of the Respondent's term of office. They submitted further that the terms of that contract was contained in and evidenced by paragraph 3.1 of the 2008 minutes and not in the Appellants's articles of association.

[26] The Respondent countered the Appellants' submissions by pointing out three issues:

- (a) paragraph 3.1 of the draft 2008 minutes was incorrect and was duly corrected;
- (b) there was no evidence of a separate fixed term of contract as a basis for the Respondent's re-election; and
- (c) even if there was such an agreement, in the absence of the unanimous approval of all the members no such restriction could have been imposed without an amendment to the articles.

[27] I agree with the Respondent's submissions for the following

reasons:

- (i) from the facts of this matter paragraph 3.1 of the 2008 draft minutes was incorrect and was duly corrected at the 27 October 2009 AGM;
- (ii) the Respondent was not appointed for a fixed term of one year;
- (iii) the Respondent was re-elected on the same basis as the other two directors namely for a period of three years;
- (iv) the fact that the Respondent intended to resign did not in itself amounted to resignation. The Respondent never wrote a notice of resignation to the Appellants and to the Registrar as required under articles (see Article 14 (c) para 8 above); and
- (v) it was common cause that the Respondent had changed his mind about the resignation and I am of the view that there was nothing illegal with that.

The Contract of 27 October 2009.

[28] The Appellants submitted that the Respondent's appointment as a director of Appellants (pursuant to his re-election at Appellants' 2008 AGM) was in terms of the contract concluded between the parties at the time and whose essential terms appear in paragraph 3.1 of the 2008 minutes, especially the following:

"AT Hardie confirmed his retirement from the Board of Directors at the end of the 2009 calendar year".

[29] The Respondent countered the Appellants submission by pointing out that the above mentioned statement relied upon by the Appellants was recorded in the draft minutes which have not yet been confirmed as accurate in any subsequent AGM, and which were entirely inconsistent with the transcript of what occurred at the 2009 meeting. The Respondent's intention to retire at the end of 2009 did not amount to a new fixed contract.

[30] The Respondent is correct in his submission for the following

reasons:

- (a) the 2008 draft minutes were duly corrected at the 2009 AGM;
- (b) from the corrected minutes it is clear that the Respondent was re-elected for three years like other directors;
- (c) consequently the Respondent's intention to retire did not amount to a new contract because the Respondent did not write a notice to the Appellants and to the Registrar advising them of the same in accordance with clause 14 (c) of the Appellants Articles of Association;
- (d) the 2009 AGM minutes have not yet been confirmed as accurate in any subsequent AGM; and
- (e) the Appellants cannot rely in their submissions on the uncorrected version of the 2008 draft minutes.

[31] In the light of the documents tendered at the appeal (various transcripts, e-mails, correspondence, AGMs minutes) and submissions

made in this matter, the following findings are made:

31.1. in the Appellants' articles there is no provision prescribing the term of office of a director. Only the retirement of directors is discussed, namely, that one third of the directors must retire at each AGM. The practical result seemed that directors were required to retire after three years of service;

31.2. company's memorandum and articles bind the company and its members to the same extent as if they each respectively had signed, subject only to the Act. Consequently it was not competent for the Appellants' members, under the binding articles to appoint a director for a fixed period (such as one year in this case) without the amendment to the articles;

31.3. the Respondent made himself available for re-election as a director of the Appellants at the Annual General Meeting held on the 25 November 2008 and was re-elected;

31.4. the Respondent was appointed like the other two co-directors for the same period;

31.5. when the Respondent received the 2008 draft minutes he contacted the company chairman pointing out the incorrect recordal of his re- election. He was informed that the error could be corrected at the forthcoming AGM;

31.6. at the 2009 AGM (i.e. 27 October 2009) the corrections were duly accepted and corrected with no member dissenting;

31.7. it is of significance to note that all the three returning directors were re-appointed by way of a single joint resolution. This is a clear indication to me that their basis of appointment was similar;

31.8. the Respondent was not appointed for a fixed term of one year. He was re-elected like the other two directors for an indefinite period until required to retire by rotation. As mentioned above the practical result was to retire after serving for three years;

31.9. clause 14 (c) of the Appellants Articles of Association requires a written notice to the Appellants and the Registrar before

resignation. In this matter none of the above formalities were made by the Respondent; and

31.10. the fact that he had informed the company's chairman informally about his intended resignation, did not amount to

resignation.

[32] In the result, I would make the following order:

The appeal is dismissed with costs, such costs to include the costs of two counsel.

Samela, J

Traverso, DJP

I agree

Hlophe, JP

I agree and it is so ordered

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