

SOUTH AFRICA / JUDGMENT

**Dyasi v Onderstepoort Biological
Products Ltd and Others (J 1780/10) [2010]
ZALC 205; [2011] 7 BLLR 671 (LC); (2011)
32 ILJ 1085 (LC) (16 November 2010)
[2010] ZALC 205**

COURT

Labour Court

BEFORE

Lagrange

CASE / FILE NUMBER

J 1780/10

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IN THE LABOUR COURT OF SOUTH AFRICA (HELD AT JOHANNESBURG) CASE NO:J 1780/10 In the matter between MOFFAT MABHELANDILE DYASI Applicant and ONDERSTEPSPOORT BIOLOGICAL PRODUCTS LTD 1st Respondent THE BOARD OF DIRECTORS OF ONDERSTEPSPOORT BIOLOGICAL PRODUCTS LTD 2nd Respondent MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES 3rd Respondent CHAIRPERSON OF THE DISCIPLINARY ENQUIRY (MR STONE) 4th Respondent

JUDGMENT

LAGRANGE, J

Introduction

The applicant, Dr Dyasi, is the Managing Director of the first respondent, Onderstepoort Biological Product Ltd ('OBP'),

which is a company incorporated by the Onderstepoort Biological Products Incorporation Act No 19 of 1999 ('the Incorporation Act').

On 8 April 2010, the Applicant was suspended by the OBP's board of directors and on 18 May 2010 was issued with disciplinary charges. The third respondent, the Minister of Agriculture, Forestry and Fisheries, was advised of the initiation of disciplinary steps by the board.

The Ministry of Agriculture did not support the board's actions against Dyasi. On 29 June 2010, the Director-General and Head of Legal Services in the ministry instructed the board not to proceed with the disciplinary proceedings and to allow the applicant to return to his duties. Although the ministry opposed the board's actions against the applicant, it has agreed to abide by the outcome of these proceedings.

The board did not accede to the instructions from the ministry. On 15 July 2010, the Minister reiterated the instruction to uplift the applicant's suspension and asked for information including evidence to allow her to make an informed decision on whether to take disciplinary action against the applicant or not.

The applicant sought, inter alia, to set aside the decision of OBP and, or alternatively, the board of OBP to institute a disciplinary enquiry, including the appointment of an independent chairperson of the enquiry, as unlawful. He also sought to set aside the board's decision to suspend him.

The board postponed the enquiry to 13 September 2010. On 1 September 2010, the applicant launched the application on an urgent basis, which came before the honourable Francis J on 9 September 2010. On that date the application was postponed sine die. The matter was re-enrolled on 3 November 2010. By that time matters had progressed beyond what is contained in the affidavits, as the disciplinary enquiry had been concluded and a recommendation made to dismiss the Applicant. Accordingly, some of the urgency arising from a pending enquiry had dissipated.

Nevertheless it is still necessary to determine if the board lawfully initiated and pursued disciplinary proceedings against the Applicant. The parties directly involved in this application are the Applicant and the board, but at the centre of the dispute is a tussle between the Minister and the board of OBP about the scope of their respective authority which they may lawfully exercise in disciplining the managing director.

Before returning to the facts of the dispute, it is useful to set the legislative backdrop to the dispute.

Legislative Framework

The OBP was originally a division of the Department of Agriculture. In terms of the the Incorporation Act the OBP was incorporated as a public company under section 63(1) of the Companies Act 61 of 1973 ('the Companies Act'). The

sole shareholder of the company at present is the State, but section 5 of the Incorporation Act makes provision for the board

to issue and sell shares in the OBP, subject to the memorandum and Articles of Association of the company and ministerial approval. In the absence of any provision to the contrary in the the Incorporation Act, the provisions of the Companies Act apply to it under Section 10 of the Incorporation Act.

Section 3 of the Incorporation Act provides that, as long as the state remains the sole shareholder, the Minister appoints a board of directors consisting of not less than five and not more than seven members from a short list drawn up by a committee comprising ministerial appointees, which must include the chairperson of the parliamentary committee on Agriculture.

Two provisions in the OBP's Articles of Association are important to the matter at hand–

Article 26 dealing with the powers and duties of directors states:

“The business of the Company shall be managed by the Directors who may exercise all such powers of a Company as are not by the Act, or by these articles required to be exercised by the Company in general meeting, or required to be exercised subject to the provisions in the OBP Act.” (emphasis added)

Article 28, which deals with the Managing Director reads:

“ 28.1 The Minister may from time to time on recommendation of the Board of Directors appoint a Managing Director for such term and at such remuneration (whether by way of salary or in profits or in any other way) as the Minister may deem fit and may revoke such appointment subject to terms of any agreement entered into in any particular case. The Managing Director shall become a member of the Board and his or her appointment shall be done in accordance with the provisions of section 3 of the OBP Act. However, the appointment to the office of Managing Director shall, subject to the applicable labour laws terminate if such person ceases for any reason to be a director.

28.2 The Directors may from time to time entrust to or confer upon the Managing Director or a Manager, for the time being, such of the powers and authorities vested in them as they may think fit, and may confer such powers and authorities for such time and to be exercised for such objects and purposes and upon such terms and conditions and with such restrictions as they may think expedient, and they may confer such powers and authorize either collaterally or to the exclusion of, or in substitution for, all or any of the powers and authorities of such directors and may from time to time revoke or vary all or any of such powers and authorities.”

(emphasis added)

Article 33 provides that the terms of office of ‘Executive Directors (such as the Managing Director)’ of the company shall be determined ‘in the contract of employment of the said directors with the company’ (emphasis added).

Another important statute in the regulatory environment affecting state owned enterprises like the OBP, is the Public Finance Management Act 1 of 1999 (‘the PFMA’). In terms of Part B of Schedule 3 of the PFMA the OBP is a public entity for the purposes of that Act.

Section 49 of the PFMA is of relevance in this matter in delineating the responsibilities of the OBP board. The relevant portions of that provision states:

“49 Accounting Authorities – (1) Every public entity must have an authority which must be accountable for the purposes of this Act. (2) If the public entity – (a) has a board or other controlling body, that board or controlling body is the accounting authority for that entity; or (b) does not have a controlling body, the chief executive officer or the other person in charge of the public

entity is the accounting authority for that public authority unless specific legislation applicable to that public entity designates

another person as the accounting authority.”

Other pertinent obligations imposed on a board of a public entity as the accounting authority which bear mention are the following

provisions of Section 51 of the PFMA:

“51(1) An accounting authority for a public entity-

- (a) must ensure that that public entity has and maintains-
 - (i) effective, efficient and transparent systems of financial and risk management and internal control;
 - (ii) a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77; and
 - (iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;
 - (iv) a system for properly evaluating all major capital projects prior to a final decision on the project;
- (b) must take effective and appropriate steps to-
 - (i) collect all revenue due to the public entity concerned; and
 - (ii) prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity; and
 - (iii) manage available working capital efficiently and economically;
- (c) is responsible for the management, including the safeguarding, of the assets and for the management of the revenue, expenditure and liabilities of the public entity;
- (d) must comply with any tax, levy, duty, pension and audit commitments as required by legislation;
- (e) must take effective and appropriate disciplinary steps against any employee of the public entity who-

- (i) contravenes or fails to comply with a provision of this Act;
- (ii) commits an act which undermines the financial management and internal control system of the public entity; or
- (iii) makes or permits an irregular expenditure or a fruitless and wasteful expenditure; ...”

Common Cause Issues

The parties agree that the power to appoint entails the power to dismiss and that power vests with the Minister, but that the

Articles of Association are silent on who has the power to suspend the Managing Director and to institute disciplinary proceedings

against him.

The parties were also agreed that the power to discipline is a managerial prerogative, case authority for which can be found in a number of decisions such as *Atlantis Diesel Engines v Roux NO & Another* (1988) 9 ILJ 45 (C) at 50H, *National Union of Mineworkers & Others v Randfontein Estates Gold Mining Co (Witwatersrand) Ltd* (1988) ILJ 859 (LC) at 870 and *BAWU v Edward Hotel* (1989) 10 ILJ 357 (LC) at 373G.

Issues in Dispute

It is principally the matters on which the Articles of Association are silent which the parties disagree on.

The applicant and the Minister essentially argue that a necessary incident to the Minister’s power to appoint and dismiss is the power to decide whether or not to institute disciplinary proceedings and to suspend the Managing Director in anticipation of a disciplinary enquiry. By contrast, the board argues that even if the Minister must make the ultimate decision to dismiss the Managing Director, the board still can take a decision to suspend him from his duties and institute disciplinary proceedings against him, and make recommendations to the Minister based on those proceedings whether or not dismissal is an appropriate step to take.

On the applicant’s argument the Minister’s power of dismissal includes the associated power to take all the necessary

disciplinary steps leading to such an outcome, to the exclusion of the board. To the extent the board has a role it is confined to putting evidence before the Minister for her consideration to determine if disciplinary proceedings are warranted. The board

position is that just as the Minister acts on the recommendation of the board to appoint the managing director, so too its role is to recommend his dismissal to the Minister.

Analysis

The applicant believes his position is distinguishable from that of other directors of the board because there is a line of executive authority in the company which runs from the Minister to himself, with the board playing primarily a non-executive role. There are a number of strands to this part of the applicant's argument.

One of these is that the MD is appointed as an executive director in terms of section 3 of the OPB Act. However, article 26 of the Articles of Association, cited above, makes it clear that all the Directors of the company are entrusted with the business and management of the company with all the powers normally afforded directors under the Companies Act. Moreover, apart from the fiduciary duties imposed on all directors by virtue of company law, the whole board has further onerous responsibilities imposed on it by virtue of section 51 of the PFMA. It is true that, as the only shareholder, the state may exercise the powers of the sole member in a general meeting, but that does not amount to giving the state an executive role in the management of the company.

Another strand in the argument is that a document emanating from the Treasury entitled 'Governance Oversight Role Over State Owned Entities'¹, which was attached to the respondent's answering affidavit, demonstrates that the Managing Director exercises management and administrative powers over the company as its administrative head and is tasked with the day to day operational and management

responsibilities of the company. Two points need to be made about the document. Firstly, it is a guideline to understanding the governance of state owned entities, which seeks to provide an integrated guide to the respective impact of the PFMA and the Protocol on Corporate Governance adopted by the Treasury on State Owned Institutions ('SOEs'). As such, though it is useful, it is always the particular interplay between the specific provisions of the regulatory statutes applicable to an incorporated SOE with its Articles of Association in the context of the applicable company law principles which will determine the specific rights and obligations of the ministry, the managing director and the board of the SOE.

Secondly, in so far as the Treasury guide does indicate anything specific about the role of a Chief Executive Officer, it repeats an extract dealing with the role of the Chief Executive Officer. The concluding portion of that extract reads:

"The chief executive officer's role should focus mainly on the operations of the SOE, ensuring that the SOE is run efficiently and effectively and in accordance with the strategic decisions of the Board. The chief executive officer is accountable to the board."

It was also argued in support of the applicant's view, that his appointment by the Minister meant he is not an employee of the company. If this were the case, in the absence of any specific disciplinary authority afforded to the board, it would be hard for the latter to argue it had any say in disciplining him as an employee, even if it still exercised some authority over him as any board of directors of a company does over a Managing Director.

The applicant seeks support for his contention that he is in fact working for a division of the ministry in the fact that the OBP is defined in the Incorporation Act as "... the Directorate of Ondersterpoort Biological Products, a division of the Department of Agriculture..." He takes this to mean that the OBP persists as a division of the Department despite its incorporation under that Act.

With respect, this misconstrues the object of the Act which is, inter alia, to establish a company to "manage the institution known as Ondersterpoort Biological Products". In fact, if regard is had to sections 6, 7 and 9 of the Incorporation Act, which deal respectively with the transfer of funds, assets and personnel from the OBP Directorate to the company, it is clear that the company was intended to subsume the business previously carried on by the Directorate. Further, section 8 provides that the company would be the successor in title to all of OBP's assets and liabilities. It is true the company may fulfill the function of the former Directorate, but the Directorate ceased to exist on its incorporation and accordingly the staff of the Directorate also ceased to be employees of a section of the Department.

If there were any doubt about who employs the applicant, article 33.1 of the Articles of Association makes it clear that an executive Director's contract of employment is with the company, not with the department. It may be so that the appointment

is made by the Minister on recommendation of the Board, but the power to appoint alone does not make the applicant an employee of the department. One might also reasonably expect that the applicant would have provided proof of his remuneration by the department. The applicant's silence on this important incident of paid employment should at least have been explained, as the natural inference to draw is that if he were an employee of the department he would have been on the Public Service payroll.

It may be a moot point whether or not the Minister can take independent disciplinary action against the managing director if the

board fails to take any, but for present purposes it is not necessary to determine this. The only issue before the court is whether the board can institute and pursue disciplinary action short of taking a decision to dismiss the managing director.

In summary, the misconduct the applicant was accused of concerned allegations that he:

had a sexual relationship with another staff member which entailed incurring hotel accommodation expenses in respect of that staff member, instructing her on her dress in the workplace, discussing other employees with the staff member;

instructed the staff member to resign her membership of her trade union and making political remarks about the union;

sought to institute disciplinary measures against the former employee when she complained about his improper conduct;

instructed the Chief Financial Officer to pay him for the entire month of May 2009 whereas he only commenced employment with OBP on 18 May 2009;

attempted to amend a remuneration report by a third party which adversely affected relationships with the trade unions;

procured or attempted to procure information which was at variance with what was contained in a 2009 Pay Scale design with a view to advantaging himself and disadvantaging lower serving grades of OBP personnel, and

attempted dishonestly to create the impression that the trade unions had been responsible for delays in finalizing the collective agreement in May 2009.

Moreover, the above actions were a cause of labour unrest at OBP arising from calls for the applicant's dismissal by organized

labour at OBP.

As far as the initiation and pursuit of disciplinary proceedings against the managing director is concerned, this is not a matter which is dealt with in the OBP Act, nor is it something reserved for a decision by a general meeting of the company. As such, it would seem to fall within the business of the company to be managed by the board, as an incident of the board's power to manage the company under Article 27 of the Articles of Association. The charges above are serious and deserve to be the subject matter of disciplinary proceedings.

Moreover, in terms of the obligations imposed by the PFMA on the board it had a statutory duty to take effective disciplinary measures in relation to the charges dealing with the matters under paragraphs 29.1 and 29.4 above under sections 51(1)(b)(ii), (c) and (e) imposes positive obligations on the board of a public entity like OBP in respect of a wide range of misconduct.

Contrary authority to the respondents' case was rightly adverted to by Mr Kennedy who appeared for the respondents. In the case of *Litha v Madonsela NO & others* (2006) 27 ILJ 780 (W), the honourable judge Tsoka J granted an interdict against the board of the Railway Safety Regulator preventing it proceeding with disciplinary steps against the applicant in that matter who was the CEO of the regulator. As in this instance, the Minister appointed the CEO on the recommendation of the board in terms of section 9(1) of the National Railway Safety Regulator Act 16 of 2002 ('the Railway Regulator Act'). The board is not the board of a company, but of the Railway Safety Regulator which is established as a juristic person in terms of section 4 of that Act. The duties of the board are broader and less managerial in character than the duties and powers set out in the OBP's articles of association.² The regulator also reports to the board, but does not appear to be directly accountable to it in the way the applicant is in this

instance.³ In terms of section 9(7) of the Railway Regulator Act the CEO is the accounting officer for the body unlike in the case of the OBP where the board is the accounting authority.⁴

However in the Litha case the court found that the applicant was employed by the Government in terms of an employment contract entered into between her and the Government⁵, and that the board only exercised supervisory capacity over her⁶ and the Minister had exclusive authority to discipline and dismiss the CEO.

Taking these factors into consideration, I believe the relationship between the CEO, the Railway Regulator's board and the Minister of Transport are not on a par with the relationships in this instance, where the board has more managerial authority in terms of the articles of association, greater statutory managerial obligations as an accounting authority and where the institution employs the applicant.

Accordingly, I am satisfied that the board of OBP had both the authority institute disciplinary proceedings against the applicant and in respect of some of the misconduct was under a positive statutory duty to do so. In instituting action the board of directors was acting in a responsible manner in exercising its responsibilities.

As the parties might still have a relationship in the future I am not making an award of costs in this matter.

Order

The application is dismissed.

No order is made as to costs.

ROBERT LAGRANGE

JUDGE OF THE LABOUR COURT

Date of hearing: 3 November 2010

Date of judgment: 16 November 2010

Appearances:

For the applicant: Mr W R Mokhare instructed by Everheds Attorneys

For the first and second respondents: P Kennedy SC with B Makola

1 Compiled by H Du Toit, Director: Corporate Governance, dated 25 November 2005.

2 Thus, e.g Section 8(2) of the Regulator Act describes the duty of the board to: "(a) ensure that the Regulator strives for the achievement of the objects referred to in section 5; and

(b) exercise general control over the performance of the functions of the Regulator."

2 Thus, e.g Section 8(2) of the Regulator Act describes the duty of the board to:

"(a) ensure that the Regulator strives for the achievement of the objects referred to in section 5; and

(b) exercise general control over the performance of the functions of the Regulator."

3 See, e.g. sub-sections 9(5) and 9(6) of the Railway Regulator Act which reads: “The chief executive officer must-

- (a) ensure that the functions of the Regulator in terms of this Act are performed;
 - (b) report to the board on the proper functioning of the Regulator;
 - (c) issue safety permits in accordance with this Act;
 - (d) complete a report on the activities of the Regulator for each financial year in accordance with the Public Finance Management Act, 1999 (Act 1 of 1999), and submit the report to the board for approval; and
 - (e) each financial year, after consultation with the board and with the approval of the Minister, publish and distribute a plan of action for the activities of the Regulator.
- (6) The board must forward the report referred to in subsection (5) (d), approved by it, to the Minister within five months after the end of the financial year concerned.”

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 - (e) each financial year, after consultation with the board and with the approval of the Minister, publish and distribute a plan of action for the activities of the Regulator.
- (6) The board must forward the report referred to in subsection (5) (d), approved by it, to the Minister within five months after the end of the financial year concerned.”

4 Section 9(7) of the Railway Regulator Act.

5 At 783,[13] of the judgment.

6 At 783, [14.1] of the judgment.

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