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IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 222/98

In the matter between

LSA UK Ltd (formerly Curtainz Ltd)	**First Appellant**
Western Platinum Ltd	**Second Appellant**
Lonrho Management Services (Pty) Ltd	**Third Appellant**

and

Impala Platinum Holdings Ltd	**First Respondent**
Gazelle Platinum Ltd	**Second Respondent**
Impala Platinum Ltd	**Third Respondent**
Messina Holdings Ltd	**Fourth Respondent**
Gencor Ltd	**Fifth Respondent**

Coram: SMALBERGER, MARAIS, SCHUTZ, ZULMAN JJA *et* MTHIYANE AJA

Date Heard: 9 March 2000

Delivered: 28 March 2000

J U D G M E N T

MARAIS JA/

MARAIS JA : [1] I find this to be a very difficult case. Despite the benefit of having read the judgment of my brother Schutz I remained doubtful about the right answer. In the course of setting out my concerns my doubts have hardened into a conviction that, regrettably and with respect, I cannot share in the conclusion reached. Let me say why. I agree with what has been said about Stegmann J's reliance upon article 6(a) and Mr Slomowitz's submission that article 6(d) was intended to provide a demarcation line, not between the board and LMS, but between the board and the general meeting. I agree too that the deadlock provision is not confined to those matters listed in article 6(d) but extends to any matter *subject to the proviso that the matter is properly within the powers of the board.* *If* a particular power has been vested in a board of directors by the articles, I agree that the shareholders in general meeting cannot usurp that power. I turn to my concerns.

[2] Lord Reid's remarks in *Tesco Supermarkets* are not, in my view, *in pari*

materia. He was stating the obvious. But that is not what happened here. This is not a case of a delegation by a board of powers to a manager; it is a case of the articles empowering the manager. No question of delegation by the board arises. Lord Reid's remarks were not attuned to the latter situation. The fact that Lonrho's argument goes beyond what Lord Reid contemplated seems to me to be of no significance. He was not purporting to demarcate the outer limits or boundaries beyond which a distribution of powers in a company's articles could not go.

[3] Whatever rights arising from a shareholders' agreement between some of the members of a company regarding an allocation of power may be contractually enforceable *inter se*, unless the articles are in fact and in law altered to conform to it, the allocation of power for which the articles provide remains what it was.

[4] I have difficulty with the notion that an agreement between most, but not all, of the shareholders of a company as to how and by whom the company's powers are to be exercised can have any effect upon the objective location in law of those

powers according to the articles. Unless and until the articles are amended to mirror accurately their agreement, the disposition of power for which they provide prevails. Where such amendments purport to have been made, I have the same difficulty in seeing how the interpretation of the amended articles can be influenced by what was in the agreement. The shareholders who are not party to the agreement or who may become such only after the making of the amendments cannot have thrust upon them a construction of the amended articles different from that which would have been appropriate if there had been no such agreement. The articles cannot mean different things to different shareholders. Their meaning must be taken to be constant.

[5] A provision in the agreement that, in the event of conflict, the agreement is to prevail is, so it seems to me, legally ineffective in so far as it purports to disturb the distribution of power for which the articles, objectively interpreted, provide. There can be no "subordination of the articles to the agreement". I think that one

must confine oneself therefore to an interpretation of the amended articles without regard to the provisions of the principals' agreement. Such a provision may of course oblige the parties to the agreement to use their combined voting power to amend the articles until there is no such conflict and interdictory relief may be available pending enforcement of the obligation, but that is beside the point.

[6] The fact that, if Lonrho is right, it could use its dominant voting power at a general meeting to outvote Implats on the question of whether or not proceedings should be instituted, or could cause LMS to institute proceedings, does not necessarily mean that "the equal control conferred on Implats at board level would be as nothing". It would exist in relation to all matters which *are* within the board's competence and upon which the chief executives reach agreement in the case of deadlock. I think it is fallacious to answer the question whether a decision to institute legal proceedings is within the board's competence by pointing to the consequences of it not being within its competence unless of course they result in

absurdity which could never have been intended. Whether or not there was to be equality of control in respect of the exercise of this particular power is the very matter in issue. If it was not so intended, then the reference to the loss of "equal control" has no significance.

[7] In any event, on any view of the matter, it is plain that the articles as amended do leave Lonrho with the upper hand in circumstances which can easily be imagined. Assume that the chief executives fail to reach an agreed decision and deadlock persists. That is not a remote possibility. If in a given case Lonrho's chief executive was convinced that it was not in the company's interests to do what his counterpart wished to do, he would have to decline to agree to it. There would then be no deemed resolution of the board. A resort to a general meeting would be the only way in which the impasse could be resolved and Lonrho would triumph. I am therefore sceptical of the strength of arguments resting upon the *petitio principii* that Lonrho's case is subversive of protection which Implats was plainly

intended to have. Whether it was indeed intended to have it in this particular respect and to the extent contended for is the issue.

[8] For the reasons I have given earlier I do not think that article 6(d) (viii) can be ignored because it is not to be found in the principals' agreement. I am unpersuaded that its wording actually advances Implats's case. At best for Implats it is neutral; at worst it tends to militate against Implats's case. When read with the opening words of article 6(d) ("notwithstanding anything to the contrary contained in these articles, the powers and functions of the board shall be"), its wording, to my mind, is more consistent with 6 (d) being a *numerus clausus* of powers for the board capable of enlargement only by agreement "between the members of the Company".

[9] Article 96 does not seem to me to help one way or another. Its meaning both before and after the amendment of the articles is the same. The directors have the powers therein specified. Their power to delegate their own directorial powers is

obviously limited to, at most, those which are vested in them by the articles from time to time. What these are must be found in other provisions; article 96 is not definitive of their directorial powers. Where they agree upon a course mentioned in article 96 the position is as it always was. The only change wrought by the amendment is that if there is disagreement in that regard and a deadlock ensues, the deadlock breaking mechanism may be invoked. The power of members in general meeting to overrule or give directions to the board in that regard was also removed. However, if the chief executives are unable to agree then a resort to a general meeting will be necessary and again Lonrho's superior voting power will ensure its dominance. The *interpretation* of the articles cannot be influenced by an assessment of the risk of the chief executives not reaching agreement actually eventuating. As long as it is inherent in the scheme of things that it *could* happen and the contingency is not fanciful or remote that will have to be borne in mind when interpreting the articles.

[10] This shows that an all pervasive equality of power with the concomitant inability of either Implats or Lonrho to enforce its will, whatever the circumstances and whatever the issue, has not been provided for in the articles. Nor, I may add, (and for the same reason) can it be said to have been provided for in the agreement (if the agreement is indeed relevant). I should perhaps make it clear that even if, contrary to my view, the agreement is admissible in interpretation of the articles, I find nothing in it which is of any real assistance.

[11] Articles 151(f) (ii) and (h) (ii) (b) speak of the Implats Group being entitled to a majority on the board in the circumstances there postulated and it "shall be entitled to *take over .....the management of the company* and the marketing of its products". If the circumstances contemplated in (h) (i) arise and the provisions of (h) (ii) (a) are not followed, there has to be a "transfer of *management control* (if applicable) as set out in (f)" which is to apply *mutatis mutandis.* (Emphases in quotations supplied.) The use of this wide and unqualified expression tends to

show that what was vested in LMS , and would have to be transferred to Implats, was management control in the fullest sense (minus of course the powers specifically vested in the board by 6(d), 96 and any other article expressly empowering the board) and not management in the narrower sense which the use of the expression "ordinary and day to day management and control" in 6(b) might superficially suggest. If that be so, the latter expression must be regarded as having been used as a catch-all phrase to encompass all those powers of management which had not been specifically conferred upon the board in 6(d) or in other articles. I elaborate on this in the next paragraph.

[12] I am not sure that the "gap" referred to in the judgment of Schutz JA can be said to be immediately apparent. There is only a gap if one gives a restrictive interpretation to the words "ordinary and day to day management and control" in article 6(b). If one takes the view that the amendments to the articles were intended to distribute power between LMS and the board comprehensively in a manner

which left no gaps (which seems a reasonable assumption), then it is difficult to see how it can be said that 6(d) covers what would otherwise have been a gap, but that 6(b) does not. Of the two provisions 6(b) is at least capable of covering such a gap. Article 6(d) is not. And if one takes the view that neither covers the gap, what justification is there for selecting the board as the repository of the powers which are the subject of the gap? Why not the members? They are in law the repository of all residual powers which have not been specifically allocated by the articles or the Companies Act. If there was intended to be a gap and if it was intended that the board should have the powers which are the subject of the gap, why was that not said? It would have been a simple matter to use the well-worn phraseology previously used in article 6(b), namely, "in addition to the powers and authorities by these articles expressly conferred upon them, [the directors] may exercise all such powers and do all such acts and things as may be exercised or done by the Company". Far from there being such a provision there is 6(d) (viii) which

postulates that there are powers which the board does not have but may be given by the members at some time in the future.

[13] The absence in 6(d) of words such as "only" or "shall be limited to" has little persuasive force in my opinion. The very fact that this highly unusual distribution of power and enshrinement in the articles of the status and powers of a Lonrho management company has been resorted to, and that the wide powers originally entrusted to the board by 6(b) were brought to an end by its total elimination, is a potent indication that none of the usual easy assumptions as to the powers and functions of a board of directors can be made or were intended to be made. After all, even prior to amendment of the articles, all the powers of the board were, most unusually, subordinated to the decisions of the members in general meeting. While not in a permanent sense a eunuch the board could have been emasculated *ad hoc* whenever the shareholders so chose. Was it really intended to transform it into a fully autonomous organ with power to overrule the

management company whenever it so chose, with power to do whatever the company itself could do, and without there being any resort to the members in general meeting? I doubt it. In the end the powers of the board must be found in the articles as amended or not at all. If no article can be found which empowers the board to take a decision of the kind under consideration there is no justification for concluding that it has such power. The use in 6(d) of words such as "only" or "shall be limited to" would be otiose. Indeed, they could not have been used because that would have created a conflict with other articles conferring other specific powers upon the board.

[14] The articles do not empower the board to do anything other than that which is spelt out in the articles or that which is reasonably incidental to the exercise of those powers. None of the powers so spelt out would include the power to commit the company to institute or defend legal proceedings of the kind involved here. Nor is such a power reasonably incidental to the exercise of the expressly conferred

powers.

[15] The width of the words "on any matter" in the amended article 103(g) cannot be taken too literally. For example, they obviously cannot justify an assumption of power by the board in respect of a matter which is indisputably not within the province of the board. In fact the words do not purport to be and are not determinative or definitive of what the board's powers are. They postulate that the matter in respect of which deadlock exists is a matter within the board's powers of decision. Whether or not that is indeed so must be determined by reference to the *other* provisions in the articles.

[16] The position of LMS is unique. Its managerial status and powers are conferred by the articles and not by the board. Its powers may not be terminated by the board. Only the members in general meeting may do that and then only by amending the articles appropriately. Lonrho, by virtue of its large shareholding, is in a position to block any attempt to remove LMS or to curtail or terminate its

powers. One's point of departure can therefore not be that the board's ordinary function is to manage and that therefore it may oversee and regulate the manner in which anyone upon whom the articles have conferred powers of management exercises those powers.

[17] The suggestion that LMS would then be functioning as a director and that the interpretation of the articles should be such as to prevent such a result appears to be unsound. If that is indeed the clear result of what has been done then "interpretations" which purport to avoid that result are simply not justifiable. The consequences in law of that may be that the amendments are *ultra vires* or otherwise unlawful but they would not extend to conferring upon the board powers which are nowhere to be found elsewhere in the articles or in regularising what was done under the deadlock provision. If, on the other hand, it is not clear that LMS is to function as a director, then there is no reason to approach the interpretation of the articles with any particular bias in accordance with the *ut res magis valeat*

quam pereat maxim.

[18] In any event it seems clear that, unless forbidden to do so by the articles, directors may lawfully delegate their managerial functions. (Article 98 specifically empowers them to delegate "any of their powers" to an executive or other committee whether or not it consists of any of them.) In so doing they do not slough off their responsibility and potential liability as directors. I have never heard it suggested ere now that a management company to which managerial powers have been delegated by a board, *ipso facto* functions as a director in contravention of the law. Why should it be different because the source of its authority is not the board but the articles? If anything, it is an *a fortiori* case because no delegation is involved.

[19] These are the things which cause me concern. The question is whether, if the points I have made are not demonstrably invalid or unsound or irrelevant, there are sufficient remaining countervailing factors or considerations to show that the

conclusion favoured by Schutz JA is the correct one.

[20] The most potentially persuasive factor is the use of the expression "ordinary and day to day management and control" in 6(b). I can well see that this may suggest a relatively modest role for LMS when viewed in isolation. However, when seen in the context of all that I have drawn attention to, I think that its impact is greatly diminished. One does not lightly conclude that there is a substantial *lacuna* in the disposition of power in a company's articles. If, as I believe to be the case, no *lacuna* was intended, then I think that there are only two possible interpretations of the articles.

[21] One is that 6(b) was intended to vest all residual powers of management not specifically conferred upon the board by 6(d) or other articles in LMS and that it has the power to decide the issue in question. The other is that it was not so intended and that there were powers which were not to be exercised by either the board or LMS, but by the members of the company. That is of course where

residual power would reside as a matter of law in the absence of its allocation to either the board or to LMS. On either view appellant would be entitled to succeed.

[22] A third possibility, that 6(d) was intended to vest the board with a panoply of unspecified powers to do what the company itself could do (including deciding whether or not to litigate), seems to me to be untenable. It is linguistically incapable of serving that purpose. Not only is the language incompatible with the notion but it would amount to reinvesting the board with the same powers which 6(b) in its unamended form had given it, but without it being ultimately subject to the wishes of members expressed at a general meeting. In my view, the deliberate deletion of 6(b) in its original form and the decision not to re-enact it or any part of it in any recognizable shape or form make it very difficult to justify the conclusion that 6(d) was intended to fulfil substantially the same role i e to confer the widest of powers upon the board.

[23] Thus, whatever the answer may be to whether it is LMS or the members in

general meeting who have the power to decide whether or not to litigate in the particular matter, I am persuaded that the board does not have that power. The fact that the Lonhro directors and its chief executive have participated in the board's assumption of power in that regard cannot convert the decision not to go to arbitration into an *intra vires* decision if, objectively regarded, it was *ultra vires*. Nor can the fact that both Lonhro and Implats behaved as they did influence the interpretation to be given to the articles. I would allow the appeal and make the usual order as to costs in both courts.

R M MARAIS
JUDGE OF APPEAL