REPORTABLE

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No. 442/97

In the matter between:

BOARD OF EXECUTORS LTD **Appellant**

and

NEIL McCAFFERTY **Respondent**

Coram: MAHOMED CJ, GROSSKOPF, ZULMAN, STREICHER JJA and FARLAM AJA
Heard: 16 November 1999
Delivered: 29 November 1999

LABOUR - EMPLOYER - WHO IS

JUDGMENT

STREICHER JA/

STREICHER JA:

[1] The respondent applied to the Industrial Court for the determination of a dispute between himself and The Board of Executors Merchant Bank Limited ("BOE MB"). He sought an order declaring that his retrenchment from the employ of BOE MB constituted an unfair labour practice and claimed compensation from it. BOE MB admitted that it had employed and retrenched the respondent but denied the alleged unfairness of the retrenchment. However, before any evidence was led in the Industrial Court, that court, of its own motion, ordered that the appellant, being Board of Executors Limited, be substituted for BOE MB. Neither the respondent nor the appellant challenged the order. The appellant thereupon filed a "statement of case" in which it denied that the respondent was at any material time employed by it and that it had dismissed the respondent. The matter proceeded on the basis that the

respondent was seeking an order declaring that his retrenchment from the employ of the appellant constituted an unfair labour practice and that he was entitled to certain compensation. By agreement between the parties the issues were separated and the Industrial Court initially only determined that the respondent had, at the relevant time, been employed by the appellant. The Labour Appeal Court ("the LAC") dismissed an appeal to it but granted the appellant leave to appeal to this court. The only issue to be decided in this appeal is therefore whether the respondent was at the relevant time employed by the appellant.

[2] In terms of s 17C(1)(a) of the Labour Relations Act 28 of 1956 ("the Act") there is no appeal against the LAC's decisions of fact. In *National Union of Metalworkers of SA v Vetsak Co-operative Ltd* 1996 (4) SA 577 (A) at 583J-584A it was held that findings of fact comprise:

> "(1) actual findings of fact made by the LAC and (2) any factual findings of the Industrial Court which have either expressly or tacitly been approved by the LAC and consequently been incorporated in its judgment."

In addition this Court may also have regard to facts which appear from the record of the Industrial Court proceedings in so far as they are not inconsistent with facts found by the LAC (see *Performing Arts Council of the Transvaal v Paper Printing Wood & Allied Workers Union* 1994 (2) SA 204 (A) at 214F). The LAC based its determination on the following facts.

[3] The appellant was incorporated in 1987 and at the relevant time owned all the issued shares in the Board of Executors ("BOE 1838") and BOE MB. BOE 1838 had been established by an Act of the Cape Parliament. The money market operations as well as other banking operations such as the corporate finance division of BOE 1838 were taken over by BOE MB after the name of an existing company had been changed to "Board of Executors Merchant Bank

Ltd". All these companies fall within what is referred to as the BOE group of companies ("the group"). The group has an executive committee consisting of the managing director, deputy managing director and financial director of the appellant and the managing directors of the separate operating companies within the group such as BOE 1838 and BOE MB.

[4] The respondent was initially, with effect from February 1990, employed by BOE 1838. According to the salary slip issued to him his employer was "The Board of Executors" and the date of his engagement was 15 February 1990. The employees' tax certificates issued to him similarly indicated that his employer was "The Board of Executors".

[5] On 17 May 1991 and in a letter to the respondent, P N Biden wrote to the respondent on the letterhead of BOE MB:

> "I have pleasure in confirming your appointment to the position of Manager - BOE Merchant Bank Limited with effect from 1 January 1991.

The Conditions of Employment, as discussed with you, are set out below:

TOTAL REMUNERATION	R120 312,50 per annum . . .
ACCOMMODATION	You will be entitled to the use of . . .
ENTERTAINMENT ALLOWANCE	BOE shall reimburse you for any disbursements made or expenses incurred on behalf of the Company, which are authorised or ratified by BOE.
MOTOR VEHICLE ALLOWANCE	. . . BOE . . . will pay you a monthly allowance, to be reviewed annually at BOE's sole discretion, to meet this expense. The amount of the allowance will be advised by BOE to you in writing, from time to time. No other

claims for motor vehicle expenses will be entertained by BOE.

PROFIT PARTICIPATION You will participate in the profits of the financial innovation unit. 20% of the profit after one and a half times costs have been achieved will be made available to the staff of the unit. The division of this profit amongst the staff will be done by the Executive Directors of BOE Merchant Bank and the profit participation will be reviewed annually.

. . .

Yours sincerely

P N BIDEN
EXECUTIVE DIRECTOR"

Biden was an executive director of the appellant and the managing director of BOE MB.

[6] The respondent worked in the financial innovation unit, which was a one person unit run by himself. He submitted reports and plans to BOE MB management and he carried out his daily tasks subject to their supervision. The payslips issued to the respondent continued to reflect BOE 1838 as the employer and the date of engagement as 15 February 1990. His salary was in fact paid to him by BOE 1838 who, on behalf of BOE MB, attended to all administrative matters relating to his employment and who recovered the amount paid from BOE MB.

[7] On 3 December 1991 W J McAdam, in his capacity as managing director of the appellant, on the letterhead of the appellant, wrote to the respondent:

> "**BOE EXECUTIVE SHARE OPTION SCHEME**
>
> As you are aware the company has established an Executive Share Option Scheme for the purpose of providing an incentive to selected employees to promote the continued growth of the company.

> In accordance with this intention, it is my pleasure to offer you 10 000 share options in the company, at a price of 1250 cents per share.
>
> . . .”

The offer was accepted by the respondent.

[8] In a letter dated 11 August 1992 M A Thomson wrote to the respondent that he saw no alternative but to close the financial innovation unit, that he did not believe that there was any other area within the Merchant Bank where the respondent’s skills could gainfully be employed and that he recommended the acceptance of a retrenchment package by the respondent. Thomson was the managing director of BOE MB and a group regional director of the appellant.

[9] The respondent’s employment was terminated on 15 September 1992 with effect from 30 September 1992 by a letter on the letterhead of the appellant signed by Thomson in his capacity as group regional director. The letter read:

> “**TERMINATION OF EMPLOYMENT FOR OPERATIONAL**

REQUIREMENTS

I refer to the discussions you have had with Richard Derman and myself and to my letter dated 11 August 1992. Both the letter and discussions dealt with the Transnet deal which has not materialised.

I confirm that the operational requirements of the organisation are such that we are compelled to close the Financial Innovation Unit with effect from 30 September 1992 and that as a result of this, we will not be in a position to employ you beyond that date.

Barry Masureik's letter of 28 August 1992 sets out the retrenchment package we offer."

Barry Masureik was the personnel manager of the group. The letter was written after lengthy negotiations with the respondent during which reference was made to cases decided in the Industrial Court.

[10] According to the evidence of Mr Hyslop, the general manager of BOE MB, the executive committee of the group, which reported to the appellant, controlled the running of the operating companies within the group, such as

BOE 1838 and BOE MB. It could decide who should be employed and dismissed by the operating companies and had "virtually full power" over the operating companies.

[11] Masureik testified that the appellant was not registered as an employer, that the respondent was not registered as an employee of BOE MB and that everyone in the group was employed by BOE 1838.

[12] The LAC concluded:

> "69. At the time of termination of respondent's employment, BOE 1838 bore administrative responsibility for payment of salary and benefits; BOE-MB recorded his employment as situate with BOE-MB and the terms and conditions thereof; these conditions were administered by 1838: BOE-MB exercised direct powers of supervision and control over the minutiae of his daily tasks; BOE Ltd continued to record ongoing employment since 15 Feb 1990; it was BOE Ltd which facilitated a share incentive scheme for this employee. Ultimately it was BOE Ltd which determined whether respondent should remain a party to the bilateral interchange of employment between employer and employee and decided to terminate his position as an employee.

> 70. I must conclude that respondent had three employers; BOE 1838 paid for the use of respondent's productive capacity, BOE-MB supervised the exercise of respondent's productive capacity, BOE Ltd encouraged the development of his capacity for its purpose and then terminated acceptance of respondent's productive capacity."

[13] In terms of s 1 of the Act "employer" "means any person whomsoever who employs or provides work for any person and remunerates or expressly or tacitly undertakes to remunerate him or who . . . permits any person whomsoever in any manner to assist him in the carrying on or conducting of his business; and 'employ' and 'employment' have corresponding meanings".

[14] The respondent's employment was terminated by means of the letter dated 15 September 1992, written on the letterhead of the appellant and signed by M A Thomson in his capacity as group regional director. Interpreted in the light of the letterhead used, the respondent was advised that his employment had been terminated by the appellant; that the operational requirements of the

organisation i.e. the group were such that the appellant was compelled to close the financial innovation unit with effect from 30 September 1992; that as a result of this, the appellant would not be in a position to employ the respondent beyond that date; and that details of the retrenchment package offered by the appellant were set out in a letter by Barry Masureik. Counsel for the appellant submitted that one should not attach much importance to the use of the appellant's letterhead, especially not in the light of the fact that Thomson was also the managing director of BOE MB. He submitted that in the group, letterheads were used indiscriminately. In this regard he referred to the letter of 11 August 1992 which was written on a BOE MB letterhead and which was also signed by Thomson. He submitted that by reading the two letters together it was BOE MB and not the appellant who terminated the respondent's employment. The letter of 11 August does not purport to terminate the respondent's

employment. All it does is to recommend to the respondent that he accepts a retrenchment package. In my view there is no evidence to support the contention that letterheads were used indiscriminately. In the absence of evidence to the contrary, the use of another letterhead, when it came to the actual termination of the respondent's employment, creates the impression that deliberate use was made of the appellant's letterhead. Moreover, there is no evidence that in this particular instance the wrong letterhead was used or that Thomson did not have authority to write the letter of dismissal on behalf of the appellant. As one would expect in the light of the negotiations that preceded the writing of the letter, the content thereof would seem to have been carefully drafted. In these circumstances it is rather unlikely that the same care would not have been taken in the selection of the letterhead. I am therefore satisfied that it was the appellant who purported to terminate the respondent's employment;

who stated that it would not be possible to employ the respondent beyond 30 September 1992; and who offered the respondent a retrenchment package.

[15] Letters terminating an employees' employment are normally written by or on behalf of the employer. The appellant tendered no evidence to the effect that there was an explanation for the letter of termination of employment other than that the appellant considered itself to be the employer of the respondent and as such entitled to terminate the respondent’s employment. The respondent accepted that his employment had been terminated by this letter but contended that his retrenchment and the retrenchment package offered to him were unfair. On the basis of these facts and in the absence of an express agreement to that effect, the inference can be drawn that the appellant and the respondent tacitly agreed that the appellant could terminate the respondent’s employment within the group. If the appellant could terminate the respondent’s employment within

the group the appellant had ultimate direct control over the respondent's activities within the group. Counsel for the appellant conceded that if that was the case, the appeal had to be dismissed. In my view that concession was correctly made. If the appellant had direct ultimate control over the respondent's activities within the group the appellant was at least a co-employer of the respondent. Counsel for the appellant, however, contended that in the light of other facts, it should nevertheless be found that the appellant did not have ultimate and direct control over the respondent's activities within the group and that it was in fact not an employer of the respondent. In this regard he relied on the letter dated 17 May 1991 on the letterhead of BOE MB confirming the respondent's appointment to the position of manager - BOE MB with effect from 1 January 1991. He also relied on the allegation in the respondent's original statement of case against BOE MB in which the

respondent stated that he was employed by and dismissed by BOE MB. However, both the letter and the original statement of case are not inconsistent with the appellant having been a co-employer of the respondent. Moreover, the allegation in the respondent's original statement of case was that he had been employed by BOE MB from about February 1990. That statement was clearly wrong. He only started working in BOE MB during 1991. The respondent testified that there was confusion in his mind as to who his true employer was. He was obviously trying to identify one employer. Having regard to the fact that the duties he was being paid to perform at the time of his dismissal fell under the umbrella of BOE MB; that his salary was being paid by BOE 1838; that his IRP 5 forms and salary slips indicated that BOE 1838 was his employer; that his employment was terminated by the appellant; and that a retrenchment package was offered to him by the appellant, it is hardly

surprising that the respondent was confused as to who his employer was. Eventually he decided that the appellant, in whom ultimate responsibility vested, was his employer.

[16] On 3 December 1991 the appellant offered 10 000 shares in the appellant to the respondent as a selected employee as an incentive to promote the continued growth of the appellant. Counsel for the appellant submitted that this was a neutral factor. However, the offer was not made on behalf of BOE MB and it made no reference to employees of subsidiaries. In my view the offer affords an additional indication that as far as the appellant was concerned the respondent was considered to be an employee of the appellant.

[17] Counsel for the appellant submitted that the appellant had structured the affairs of the group in such a manner that it had no employees and that effect should be given to its intention not to have employees. The appellant may have

purported to so structure its affairs but for the aforegoing reasons I am of the view that the true relationship between the respondent and the companies within the group did not accord with that structure.

[18] I conclude that the most probable inference to be drawn from all the aforesaid facts is that the appellant was an employer of the respondent and that the appeal should be dismissed.

[19] The appeal is therefore dismissed with costs.

_____

P E STREICHER
JUDGE OF APPEAL

AGREE:

MAHOMED CJ
GROSSKOPF JA
ZULMAN JA
FARLAM AJA