

CASE NO. 222/98

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

LSA UK Ltd (formerly Curtainz Ltd)
Western Platinum Ltd
Lonrho Management Services (Pty) Ltd

First Appellant
Second Appellant
Third Appellant

and

Impala Platinum Holdings Ltd
Gazelle Platinum Ltd
Impala Platinum Ltd
Messina Holdings Ltd
Gencor Ltd Fifth Respondent

First Respondent
Second Respondent
Third Respondent
Fourth Respondent

BEFORE: SMALBERGER, MARAIS, SCHUTZ, ZULMAN JJA AND
MTHIYANE AJA

HEARD: 9 MARCH 2000
DELIVERED: 28 MARCH 2000

Company law - respective competencies of organs of company - interpretation
of shareholders' agreement and articles of association.

W P SCHUTZ

J U D G M E N T

SCHUTZ JA:

This appeal is concerned with which of three organs or instruments of a company, Western Platinum Ltd (“WPL”), was entitled to instruct the institution of particular legal proceedings: whether the board of directors or the general meeting of shareholders or another company appointed as manager.

WPL is the second appellant. The management company is the third appellant Lonrho Management Services (Pty) Ltd (“LMS”). The first appellant LSA UK Ltd (“LSA UK” - formerly Curtainz Ltd) controls 72.6% of WPL’s ordinary shares. Together with it, it forms part of the Lonrho Group.

The first four respondents form part of the Implats Group. It is not necessary to specify their identities further, save to say that the second respondent Gazelle Platinum Ltd (“Gazelle”) owns slightly more than 25% of the ordinary shares in WPL. By virtue of that holding it is able to block a special resolution moved at a general meeting of WPL and thus an amendment of the articles of association. This excess over 25% is no accident.

The circumstances in which the two groups (to which I shall refer simply as “Lonrho” and “Implats”) came to be associated in WPL are these. Each owned platinum and ancillary rights on the Merensky reef. In order to constitute a workable mining proposition, so as to enable WPL to apply for a

mining lease, it was agreed that Implats would sell its Karee Mine on the farm Rooikoppies to WPL. The purchase price was about R367,5 million. In addition Implats was to subscribe in cash for its slightly over 25% holding in WPL. The agreement in terms of which this was done was concluded in January 1990 and is known as “the main agreement.”

One of the conditions precedent contained in this agreement was that a shareholders’ agreement, known as “the principals’ agreement” should be concluded. This was done in the same month. In terms of that agreement the parties were to procure that an annexed management agreement between WPL and LMS should be concluded. This also was done in January 1990. The principals’ agreement further provided that in the event of an inconsistency between its terms and those of the articles, the former would prevail as between the parties and the directors appointed by them (cl 12.1). The parties were to hold 99.44% of the shares. An obligation was cast upon them to amend the articles to reflect the provisions of the principals’ agreement (cl 12.2). This took place only in September 1992, but that did not derogate from the operation of cl 12.1, just mentioned.

The detailed provisions of these contracts will have to be set out later, but it is convenient to mention at this point that, notwithstanding their unequal

shareholdings, an equality at board level was stipulated. The two groups were to have equal representation and voting powers on the board. The chairman was not to have a casting vote and, in the event of deadlock, it was (unusually) provided that this would not constitute a ground for winding up. The mechanism provided for resolution of a deadlock was a reference to a committee consisting of the chief executives of Lonrho PLC (of the Lonrho Group - a respondent below but not a party to the appeal) and Gencor Ltd (the ultimate controller of the Implats Group - an applicant below and the fifth respondent on appeal). The argument was largely concerned with what the powers of the board were. The answer to this question would define the extent of the equality protection given to Implats as a minority shareholder and determine the issue in the case, to which I shall now proceed.

During 1994 a dispute arose between the two groups. Lonrho complained that part of the ore body on Rooikoppies was affected by ultramafic pegmatoid intrusions having an adverse bearing on metal yields. Implats was accused of having known this fact and having failed to disclose it, notwithstanding that this information would have been relevant to the calculation of the price to be paid for the Karee Mine. Payment of damages in the sum of R203 million was sought. Implats has disclaimed liability, denying

particularly that it misled anyone. The merits of this dispute are not before us.

What is before us are the consequences of what happened next. On 31 May 1995 a resolution was successfully moved before the WPL board that arbitration proceedings claiming the damages mentioned be instituted against four companies in the Implats Group, being the first four respondents on appeal. The reason why there was not an equality of voting when this resolution was put to the vote was that one of the Implats appointed directors, Mr McMahon, considered that he was not sufficiently informed of the facts to be able to cast a vote. Consequently he did not vote against the resolution. At a later meeting, on 10 September 1996, McMahon raised the matter again, saying that he was now better informed and was of the view that the claim had no merit. He accordingly moved a resolution that the proceedings (which for various reasons had not yet been instituted) not be proceeded with. This time the voting was three all and, the chairman not having a casting vote, deadlock ensued. At the suggestion of McMahon the board then referred the matter to the committee consisting of the two chief executives. They were Mr D Bock of Lonrho PLC and Mr B P Gilbertson of Gencor Ltd. Their decision was that proceedings should not be instituted. Implats says that that is the end of the matter. Subsequently to the decision Lonrho adopted the stance that the deadlocked

resolution was not within the board's competence, so that the later decision of Messrs Bock and Gilbertson was a nullity. The correct body to decide on the institution of proceedings, says Lonrho, is the management company, LMS, and, failing that, the general meeting of WPL.

Upon Lonrho's intimating late in 1996 that it would not recognise the decision of the deadlock committee and would propose a resolution at a general meeting of WPL to ratify the original decision of the WPL board on 31 May 1995 to institute proceedings, members of Implats launched an urgent application, which came before Stegmann J in the Witwatersrand Local Division. The learned judge found in favour of Implats, declaring that the decision of Bock and Gilbertson was binding, interdicting the passing of the abovementioned resolution at a general meeting and ordering Curtin Ltd (as it then was), WPL and LMS to pay the costs jointly and severally, including the costs of two counsel. Subsequently Stegmann J granted leave to appeal to this court.

Particularly because of their unusual nature and because of the close scrutiny that they must bear, it is necessary to set out some of the contractual provisions in detail. It would be ill-judged to commence the enquiry in this appeal with company law generalisations about the respective powers and

provinces of the various organs and instruments through which a company may function.

First, there is the *principals' agreement*. To deal with its more detailed terms: I have already referred to the equal rights of representation and voting power (cl 6.1). The party having the right to nominate a director also had the right to remove and replace him (cl 6.2). While Lonrho continued to hold more than 50% of the shares, Lonrho South Africa Ltd ("LSA") could appoint the chairman and managing director (cl 6.3). But as already mentioned the chairman did not have a casting vote (cl 7.6). However, cl 11.6.2 provided that if a change of control should occur, Implats could compel Lonrho to sell sufficient shares to it to raise the Gencor Group's holding to 51% and give it voting control. A mechanism was provided for determining the price. In such a case Implats would be entitled to appoint an additional director, thus giving it voting control also on the board, and would be entitled to take over the management of WPL and the marketing of its products in an orderly manner and over a reasonable period of time. (Clause 4.1. of the management agreement and the new article 6 (b) also dealt with what would happen should Lonrho lose control of WPL. These provisions will be mentioned below.)

Reverting to the case where Lonrho held more than 50% of the shares, as has

been the case at all times relevant to this appeal, clauses 7.6 to 8.4 of the

principals' agreement need to be quoted extensively:

“7.6 Resolutions of the board shall be passed by majority vote of those present and in the case of an equality of votes, the chairman shall not have a second or casting vote. Should the voting at any board meeting *on any matter* result in an equality of votes such matter shall be resolved in terms of 8.1. The failure to reach a decision on any matter before the board or before such committee shall not constitute grounds for the winding up of the company concerned.

8 MANAGEMENT AND CONTROL OF THE BUSINESS OF THE COMPANIES

8.1 The parties recognise that the equal voting powers established in terms of 6.1 *for the control of the companies* might lead to a deadlock on *important issues*. Should the voting at any board meeting *on any matter* result in an equality of votes, either LSA or Implats shall be entitled to require that such matter be referred for decision to a committee comprising the chief executive of Lonrho for the time being and the chief executive of Gencor Limited for the time being. The decision of such committee shall constitute the decision of the board in respect of the matter in question and the parties shall procure that the board passes the necessary resolution to give effect to such decision.

8.2 *The ordinary and day to day management and control of the business, undertaking and affairs of each of the companies will vest in LMS in terms of the management agreements* and the parties shall procure that on the signature date, the companies will conclude the management agreements with LMS pursuant to which such management of the affairs of the companies will be carried out by LMS. *LSA shall procure that LMS shall inform the board of each of the companies regularly and fully regarding all material aspects of the business of each of the companies by means of (inter alia) monthly management accounts.*

- 8.3 Any further major investment above the already approved programme in relation to the business of any of the companies including the financing thereof and major divestment decisions will be a matter for agreement between the shareholders. Should the shareholders fail to agree on any such matter, the shareholders will seek the views of a mutually acceptable independent expert whose views will be taken into account.
- 8.4 *Notwithstanding anything contained in the articles of association of each of the companies, the powers and functions of the board of each of the companies shall be the consideration and, as appropriate, approval of the following:*
- 8.4.1 Diversification investment;
 - 8.4.2 The level of dividend to be declared in respect of each financial year of the company after taking into account, inter alia, redemption of loans and interest thereon, capital expenditure including replacement costs and cash flow requirements; provided that should the board fail to reach agreement in respect of any dividend to be declared, the board shall declare a dividend of not less than 50% of the profits available for distribution . . . ;
 - 8.4.3 The annual strategic plan and budget for each of the companies;
 - 8.4.4 The annual financial statements of each company;
 - 8.4.5 Changes to the levels of fees payable to shareholders in respect of the management agreements and to WMS, the marketing/sales agents.” (Emphasis added.)

Clauses 12 and 13 also need to be quoted:

“12 **ARTICLES OF ASSOCIATION**

- 12.1 *Notwithstanding anything herein implied or contained to the contrary, in the event of there being any inconsistency between the rights and obligations of the shareholders under the memorandum and articles of association of any of the companies for the time being and this agreement, the*

provisions of this agreement shall prevail as between the shareholders and as between their respective appointees as directors of the company concerned.

- 12.2 The parties shall procure that the articles of association of the companies are forthwith after the commencement date amended to give effect to and reflect the relevant provisions of this agreement.

13 **VOTING SUPPORT**

The shareholders mutually undertake in favour of each other to exercise their respective voting rights in the companies to implement and maintain the provisions of this agreement.”
(Emphasis added.)

Clause 17 provided that the relationship of the shareholders between themselves would be governed by the terms of the agreement, and nothing contained therein would be deemed to constitute a partnership, joint venture or the like. Clause 23.1 provided that no party would be bound by any express or implied term, representation, warranty, promise or the like, not recorded therein.

Clause 2.4 stated that the annexed *management agreement* between WPL and LMS formed an integral part of the principals’ agreement. According to cl 2.1 of the management agreement, headnotes to its clauses were inserted for reference purposes only and would not govern or affect its interpretation.

Clause 4.1 provided that the agreement would come to an end should Lonrho cease to hold more than 50% of the shares in WPL. Clauses 5 and 6 read in part:

“5 **APPOINTMENT AS MANAGER**

WPL hereby appoints LMS *to manage and control the ordinary and day to day business, undertakings and affairs of WPL.*

6 **APPOINTMENT AS (ADVISERS AND CONSULTANTS)**

6.1 *WPL hereby appoints* LMS to be its secretaries, transfer secretaries, head office accountants and technical, financial, legal and administrative *advisers and consultants.*

6.2 LMS undertakes that it shall:

6.2.1 carry out and perform the said functions, services and duties for and on behalf of WPL;

6.2.2 place at the disposal of WPL and maintain at LMS's offices (at which the registered office of WPL will continue to be situate) a board room . . . ;

6.2.3 *when so required by WPL* or when it deems it necessary in order to carry out its duties hereunder, to *appoint* and engage at the expense of WPL *professional, technical, commercial and industrial experts and advisers* on behalf of WPL for or in connection with the business, affairs and undertaking of WPL;

6.2.4 make available to WPL an organisation capable of providing the following services, namely:

6.2.4.1 an administration and secretarial service which shall execute and perform all work of a secretarial nature, . . . ;

6.2.4.2 a service of providing all work of a head office accounting nature for WPL, including the keeping of certain records, the preparation and distribution of interim and annual financial statements and *which shall advise WPL on all matters relating to the investment of its funds, the handling of its finances and taxation as it relates to WPL;*

6.2.4.3 *technical services* which shall make available to WPL the services of LMS's consulting mining engineers, geologist and consulting metallurgist which shall

be

so made available *whenever requested by WPL*, provided that services referred to herein shall exclude any work required to be done for development or research which work shall be undertaken on a separate basis to be agreed upon between WPL and LMS;

6.2.4.4 *legal services* which shall include the preparation and scrutinising of all agreements in respect of which it shall be intended that WPL shall be a party and *which shall represent or cause WPL to be represented in all legal or other proceedings and advise WPL upon all matters relating to its holding and ownership of its movable property including mining rights;*

and generally to provide WPL *with such advice and services as may reasonably be necessary for the proper carrying on of the business and affairs of WPL or as may be requested by WPL including and without detracting from the generality of the foregoing matters relating to management services and personnel.*" (Emphasis added.)

Clause 8 read:

"8 MANAGEMENT INFORMATION

LMS shall inform the board regularly and fully regarding all material aspects of the company's business, inter alia, via the medium of the monthly management accounts." (Emphasis added.)

Clauses 12.1 and 2 provided that the agreement constituted the sole record of what had been agreed with regard to its subject matter and that neither

party would be bound by any express or implied term etc as in the case of the principals' agreement.

The *Articles*, it will be recalled, were subordinated to the latter agreement in terms of cl 12.1. Article 2 again stated that headnotes did not affect construction. The original (pre 1992) article 6 needs to be quoted:

“BUSINESS

- 6 (a) *Any branch or kind of business which the Company is either expressly or by implication authorised to undertake may be undertaken by the directors at such time or times as they shall think fit, and further may be suffered by them to be in abeyance, whether such branch or kind of business may have been actually commenced or not, so long as the directors may deem it expedient not to commence or proceed with the same.*
- (b) *The management and control of any business of the Company shall be vested in the directors who in addition to the powers and authorities by these articles expressly conferred upon them, may exercise all such powers and do all such acts and things as may be exercised or done by the Company, and are not hereby or by the Statutes expressly directed or required to be exercised or done by the Company in general meeting, but subject nevertheless to such management and control not being inconsistent with these articles nor with any resolution passed by the Company in general meeting; but so that no such resolution shall invalidate any prior act of the directors which would have been valid if such resolution had not been passed. The general powers given by this article shall not be limited or restricted by any special authority or power given to the directors by any other article.*
- (c) The directors may arrange that any branch of the business carried on by the Company or any other business in which the Company may be interested, shall be carried on by or

through one or more Company Controlled Companies or subsidiaries of the Company and they may on behalf of the Company make such arrangements as they think advisable for taking the profits or bearing the losses of any branch or business so carried on, or for financing, assisting or subsidising any such Company Controlled Company or subsidiary or guaranteeing its contracts, obligations or liabilities.”

The amendment in 1992 entailed the deletion of article 6 (b) and the substitution in its place of the following:

“6(b) For so long as the Lonrho Group owns 50% or more of the issued share capital of the Company, *the ordinary and day to day management and control of the business, undertaking and affairs of the Company shall vest in Lonrho Management Services (Proprietary) Limited.*”

Articles 6 (d) and (e) were added.

“6(d) *Notwithstanding anything to the contrary contained in these articles, the powers and functions of the board shall be the consideration and, as appropriate, approval of the following:*

- (i) Diversification investment;
- (ii) The level of dividend to be declared in respect of each financial year of the Company . . . ;
- (iii) The annual strategic plan and budget for the Company;
- (iv) The annual financial statements of the Company;
- (v) Changes to the levels of fees payable to members in respect of management and to Western Metals Sales Limited, the marketing/sales agents;
- (vi) *The determination of the Company’s marketing and selling policy with respect to its mining*

- production from time to time;*
- (vii) The repayment of all loans to the Company by or procured by the shareholders of the Company from time to time; provided that no shareholder's loan with the Company shall be repaid in whole or in part unless the other shareholders' loans are simultaneously repaid proportionately;
 - (viii) *Such other matters as may be agreed upon between the members of the Company from time to time as requiring board consideration and, where appropriate, approval.*
- 6(e) Any further major investment above an approved programme in relation to the business of the Company including the financing thereof and major divestment decisions will be a matter for agreement between the members of the Company.” (All emphases in article 6 added.)

Provision for equal representation and voting powers and for the appointment of the chairman and managing director by LSA was made in a new article 75. The original article 77(d) remained. It allowed for the removal of a director by resolution of the company (that is by ordinary resolution) pursuant to s 220 of the Companies Act 61 of 1973 (“the Act”). The original article 96 remained. It read:

“LOCAL BOARDS, AGENTS AND COMMITTEES OF THE BOARD

96 *The directors may establish any local boards or agencies in South Africa or elsewhere for managing any of the affairs of the Company and may appoint any persons to be members of such local boards, or any managers or agents and may fix their remuneration, and may delegate [to] any local board, manager or agent any of the powers, authorities and discretions vested in the*

directors with power to sub-delegate, and may authorise the members of any local board or any of them to fill any vacancies therein and to act notwithstanding vacancies, and any such appointment or delegation may be made upon such terms and subject to such conditions as the directors may think fit, and the directors may remove any person so appointed and may annul or vary any such delegation, but no person dealing in good faith and without notice of any such annulment or variation shall be affected thereby.” (Emphasis added.)

Article 103 was replaced. The new article 103(g) provided that the chairman of the board would not have a casting vote and that in the event of there being an equality of votes the matter would be determined in terms of article 103(h). It also repeated that a deadlock would not be a ground for winding up. The new article 103(h) repeated the procedure for the resolution of a deadlock by the deadlock committee.

What the Lonrho argument comes to is this. The one body that does *not* have ultimate authority to initiate proceedings by WPL is the board of WPL. Lonrho’s first choice for the one who does have the authority is the manager, LMS, which is not subject to the WPL board in this respect. Lonrho’s second choice is the general meeting of WPL, which also is not subject to the wishes or decision of the WPL board. The general meeting would make its decision by means of an ordinary resolution. Because Lonrho controls the majority of the ordinary shares, its will would prevail and the equal control conferred on

Implats at board level would effectively be as nothing.

Our law recognises what has been called “the doctrine of ‘supremacy of the articles of association’ ” (see du Plessis *Beskikkingsvryheid oor interne bestuursorganisasie, interne bevoegdheidsverdeling en die prominensie van die statute in die maatskappyereg* 1992 TSAR 94 at 99). What it amounts to is that the founding members, and also a later body of members by special resolution, may order the internal affairs of their company in the way that suits them best, subject to such prohibitions as may exist in the Act or any other law, statutory or common. This dispensation is unsurprising when one statute governs many diverse forms of company. Some examples of the range of possible ways of arranging the management of a company may be gathered from the speech of Lord Reid in *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 (HL) at 171 C -

H. (See also Pennington’s *Company Law* (7 ed) p 765.) One of them is that “[The] board of directors may delegate some part of their functions of management giving their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation he can act as the company.”

Apart from the articles there is another institution which is frequently used to regulate the exercise of powers within a company. It is the shareholders’ agreement, of which the principals’ agreement in this case is an

example. Of course, such an agreement binds only such persons as are parties to it. Unlike the articles it is not a public document and the *Turquand* rule does not apply to it. Here again the parties are free to contract as they will. The object is frequently to vary the operation of the articles, and in most instances, at least, it is permissible to do so. Again, common and statutory law in their general terms may place limits on what may be agreed. More specifically the Act may forbid certain forms of agreement. However, in each case the particular conduct and the particular statutory provision will have to be examined in order to ascertain whether what is sought to be done is indeed forbidden (see Beuthin *A director firmly in the saddle* (1969) 86 SALJ 489 esp at 491 - 2). Some examples of shareholders agreements in our reports are *Flegg v McCarthy & Flegg* 1942 CPD 109 at 116 - 7, *Stewart v Schwab and Others* 1956 (4) SA 791 (T) at 793 G and *Bellairs v Hodnett and Another* 1978 (1) SA 1109 (A) at 1130 E - 1132 *in fine*.

From what has been said it flows that the answers to the issues raised must be sought in the correct interpretation of the contractual documents, but in construing them it should be remembered that in case of inconsistency the principals' agreement has primacy over the articles.

Stegmann J resolved the question of where the power to sue lay in a

simple way, in favour of Implats. The broad terms of the unamended article 6(a) “Any branch or kind of business which the Company is . . . authorised to undertake may be undertaken by the directors . . .” he held, conferred the necessary authority on the board. Would that the matter were so simple. But in my opinion it is not. Before the 1992 amendments article 6(a) had a meaning and there is no reason to suppose that its meaning changed and expanded just because article 6 (b) was drastically altered. Before the amendments it had to be read together with 6(b) and it was 6(b) which in plain terms conferred defined powers of management and control on the board. The role of 6(a) was different. It conferred on the directors the right to decide which branches or kinds of business would be undertaken, proceeded with or terminated, out of those which fell within their competence. Article 6(a) does not purport to specify what powers of management the board would have in the course of so doing. Article 6(b) fulfilled that function.

So the solution must be sought elsewhere. What strikes one immediately is the gap between the original broad management powers conferred on the WPL board under the old article 6(b) on the one hand and the much more circumscribed “ordinary and day to day management and control” conferred on LMS by cl 8.2 of the principals’ agreement and the new article 6(b). To some

extent the gap has been filled by the powers expressly conferred on the board by cl 8.4 of that agreement and 6(d) of the amended articles. But there is still a gap and the question arises, how did the parties intend that it should be filled?

Implats stresses clauses 8.2 of the principals' agreement and 8 of the management agreement, which require LMS to inform the board fully regarding all material aspects of the business of WPL by means, *inter alia*, of monthly management accounts; and the numerous clauses in the management agreement, which clauses I have italicised above, that require LMS to provide a range of services and advice to WPL. This demonstrates, argues Implats, that the board is, in the last resort, the master of LMS and a board of directors in the normal sense, exercising ultimate management control. The difficulty with this argument is that the advice and services might in any event be required for the board to exercise its undisputed powers set out in cl 8.4 and article 6 (d), such as the consideration and approval of the annual strategic plan and budget. Nor do expressions such as "on behalf of WPL for or in connection with the business, affairs and undertaking of WPL", contained in cl 6.2.3 of the management agreement, take the matter further, because the question is begged whether the company WPL will be acting through its board as the ultimate manager or through LMS as its day to day manager. Accordingly I think that

the provisions relied upon are ambiguous and do not advance Implats's case.

Lonrho places emphasis on the similarly inspired and worded cl 8.4 and article 6 (d). They contain, so it is argued, a restricted number of powers conferred on the board. Emphasis is placed on the words "the powers and functions of the board . . . *shall be* . . .". Why such a construction might have been intended is not difficult to imagine. Lonrho was by far the larger shareholder. It might have been prepared to give a limited minority protection to Implats by granting it equal authority on certain matters of common interest, without surrendering overall management control, to which its majority holding would ordinarily have entitled it. So this is something that the parties might be thought to have intended. Nor do I think that a particular argument advanced by *Mr Slomowitz*, for Implats, decisively demonstrates that this was not the intention. The argument is that cl 8.4 and article 6 (d) were not intended to provide a demarcation line between the board and the manager, LMS, but between the board and the general meeting. This is so, it is argued, because of their content and because of the need to define the boards' powers as against the general meeting, now that the power vested in the latter to override the board by a mere ordinary resolution, contained in the old article 6 (b), was to be taken away, whilst the new 6 (b) did not deal with the relationship of the board and

the general meeting at all. Undermining this argument is the power numbered (vi) in article 6 (d) which reads “The determination of the Company’s marketing and selling policy with respect to its mining production from time to time”.

This looks more like a demarcation between the board and the manager, than the board and the general meeting, and, if that is so, the argument falls to the ground. But Implats has a simpler argument. It is that expressions such as “only” or “shall be limited to” were not used, to show clearly that this board was quite unlike other boards, in particular in that it had no control over its manager. This was something that might, if intended, have been thought to call for emphasis.

Nor do I think that article 6 (d) (viii) takes the matter further. This article lists as one of the powers of the board “such other matters as may be agreed upon between the members . . . as requiring board consideration and, where appropriate, approval.” The wording is not such as to suggest that the board is limited to the powers set out in articles 6 (d) (i) to (vii) if there is no agreement between members. Rather does the wording suggest an intention that the members may increase the powers reserved exclusively to the board. It should also be noticed that this article is not to be found in the principals’ agreement, so that if it contradicts that agreement it is to be ignored.

If cl 8.4 and article 6 (d) (further I shall refer only to 8.4) are not to be interpreted in the manner contended for by Lonrho, important consequences would follow. Lonrho seeks to counter the impact of cl 8.1 of the principals' agreement and the unamended article 96 by arguing that the procedure laid down in the former and the powers conferred on the board by the latter must be read as confined in their application to those board powers expressly conferred on the board by cl 8.4. Let me explain.

Clause 8.1 commences "the parties recognize that the equal voting powers established in terms of 6.1 *for the control of the* [WPL] might lead to a deadlock on *important issues*. Should the voting at any board meeting *on any matter* result in an equality of votes . . .". Then follows a setting out of the deadlock-breaking procedure. The amended article 103 (g) also uses the phrase "on any matter". As has been said so often, "any" is a word of wide and unqualified generality - see eg *R v Hugo* 1926 AD 268 at 271. If the phrase "any matter" be given its natural meaning, then not only cl 8.4 matters but also other matters may be referred to the deadlock committee, which pre-supposes that the board has dealt with and become deadlocked on matters that go beyond cl 8.4. For Lonrho to succeed the phrase would have to read something like "matters with which the board may deal by virtue of cl 8.4." I can see no

compelling reason, whether contextual, verbal or purposive for doing so.

Purpose does not help, because although a purpose to protect the minority is made manifest, the extent of that purpose, whether wide or narrow, is the issue, and can only be resolved by a contextual and verbal treatment. And it should be remembered that the context is “equal voting powers . . . *for the control*” of WPL. The matter is compounded by the use of the expression “important issues.” These words also are not limited, and on the face of them bear a general meaning. And the context, again, is the same. So for the second time Lonrho’s counsel, *Mr Beckerling*, was driven to argue that words appropriate to the conclusion for which he contended have to be read in.

A similar difficulty is presented by the unamended article 96. *Mr Beckerling* does not argue that it is in conflict with the other provisions of the articles or with the principals’ agreement. He contends that it must be read in conformity with them, that is, so as to introduce an 8.4/6(d) qualification. The expressions “any of the affairs of the Company” and “any of the powers . . . of the directors” are again, of the widest generality. As in the former case there is no compelling reason for reading in qualifying words. In addition, one is again driven to ask, if the board’s powers were to be so unusually limited as against its manager as is involved in Lonrho’s contention, why this article also was not

amended so as to make this intention clear.

What has been said and what has not been said in clauses 8.1 and 8.4 and article 96, in the sense discussed above, contain sufficiently clear indications, when looked at separately or together, which indications, in my opinion, show that Implats's argument is correct and Lonrho's is not. This is a case rather like *Capnorizas v Webber Road Mansions (Pty) Ltd* 1967 (2) SA 425 (A) at 433, where, even though the intention of the parties may not be expressed in clear words, their intention may nonetheless be inferred from the general pattern and context of the contract.

Further, when viewing the much debated competition for power between the board and the manager, there is the striking change in wording compared with the old articles when the manager's powers are expressly limited to "ordinary and day to day management", suggesting that other aspects of management and control are left to another organ of the company. And although ordinary and day to day management and control is "vested" in LMS, it is nowhere expressly said that in the exercise of its functions it will in no way be subject to the board, i.e. that it has exclusive powers in the sphere allocated to it. Again, such an unusual situation might have been expected to be expressed.

What Lonrho's main argument finally comes down to is that LMS is not a

mere manager or agent or instrument of the company, WPL, but one of its organs, having original and exclusive powers which may not be exercised or supervised by the usual organs of the company, the board and the general meeting (save, of course, where the general meeting alters the articles by special resolution). If Lonrho's argument be correct it would go well beyond what was contemplated by Lord Reid in the *Tesco* case (above), as the "super-manager" there postulated would have gained his powers merely from an extended delegation of its powers by the board.

In an alternative argument, Implats has contended that a third organ of this kind is simply not possible, either because LMS would become a "director" as defined in s 1 of the Act, whereas, Implats submits, s 218 (1) disqualifies a company from being a director; or because, having regard to the structure of the Act as a whole, a third organ of this sort simply is not contemplated, competent nor allowed. As I have concluded, for the reasons already expressed, that as a matter of construction the agreements and articles do not purport to create such an organ, it is unnecessary to pursue this alternative argument further.

Lonrho's case is not, however, at an end. In the further alternative it contends that if powers of general management and control are not vested in LMS, then they are vested in the general meeting, which is dominated by

Lonrho. Two alternative bases are advanced for this conclusion, the first based on construction of the agreements and articles, the second on some supposed inherent power of the general meeting to decide on litigation, notwithstanding the wishes of the board (the latter basis was hardly pressed on appeal).

As far as construction is concerned, what is conspicuously absent from the restructured article 6 (b), or any other article, is a provision, such as the old article 6 (b) contained, giving the general meeting the power to override the board by means of an ordinary resolution. Nor was it expressly agreed that the powers conferred on the board by cl 8.4 and article 6 (d) were to be limited to those powers. I have discussed this above. Given these facts and the structure of the principals' agreement and articles I can see no reason for introducing or implying powers of management and control in favour of the general meeting which would leave Implats at the mercy of the Lonrho majority.

The exercise in construction for which I am responsible may be an arid labour in verbalism. But the reason does not, I hope, lie in me. The contractual documents give an impression of those negotiating on behalf of the parties behaving like two pugilists circling one another, wary, but with neither ready to venture the first blow. A proposal for the inclusion of a few unambiguous and decisive words would either have led to disagreement or

would have avoided the torrent of words that has followed.

Turning to the inherent powers of the general meeting, it was at one stage argued that the meeting has a power to assume control when the board is unable to function. This falls away, because of the fact that the board was able to function, that is, in conjunction with the deadlock committee, which resolved the deadlock. As to the principle upon which the argument was based, it has been recognised that where a company lacks an effective board, for instance where all the directors have resigned or are deadlocked, or a quorum of them cannot be obtained, the general meeting may step in: see eg Henochsberg *On The Companies Act* (5 ed) Vol 1 p 327, Cilliers et al *Corporate Law* (2 ed) p 83 and Pennington (op cit) pp 771-775. One of the reasons why meetings of directors may be rendered inquorate is that some of them are disqualified from participating because doing so would clash with their fiduciary duties. In this case it has not been suggested that any of the directors were so disqualified.

That leaves Lonrho's final argument, hardly persisted in, that the general meeting always has the inherent power to institute proceedings, even when the board is not unable to do so. In the course of a careful and lengthy judgment Stegmann J rejected this contention, correctly in my view. The reasons for my concurring view can be quite briefly stated. The board of directors and the

general meeting are both organs of the company, each having its own original powers. The directors do not receive their powers as agents of the company, so that in the absence of a contrary provision in the memorandum or articles, even a unanimous general meeting may not supersede the directors' powers. (The general meeting may ultimately be able to remove or not re-elect directors, or alter the articles, but those are other matters.) However, it is possible for a board and the general meeting to have concurrent powers. But courts are disinclined to treat managerial and executive powers as concurrent and, unless the articles otherwise provide, they are exercisable exclusively by the directors. For these broad propositions see Pennington (op cit) pp 765-768 and Cilliers et al paras 7.05 and 7.06 pp 80-82. The reasoning of Neville J in *Marshall's Valve Gear Co Ltd v Manning, Wardle & Co Ltd* [1909] 1 Ch 267, to the extent that it is inconsistent with the above, is to be regarded as an aberration. The correct position is as stated by Greer LJ in *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113 (CA) at 134:

“A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles,

or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders.”

See also *Scott v Scott* [1943] 1 All ER 582 (Ch) at 584 B-585 E, *Wessels & Smith v Vanugo Construction (Pty) Ltd* 1964 (1) SA 635 (O) at 637 F - G and *van Tonder v Pienaar and Others* 1982 (2) SA 336 (SEC) at 341 E-G.

The appeal is dismissed with costs including the costs consequent upon the employment of two counsel, the costs to be paid jointly and severally by

the three appellants.

W P SCHUTZ
JUDGE OF APPEAL

CONCUR
SMALBERGER JA
ZULMAN JA
MTHIYANE AJA

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 overthe 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

