

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Held at Johannesburg

Case no.: 11/2/22291

Appeal case no.: JA 36/98

In the matter between:

BUFFALO SIGNS CO LIMITED

First Appellant

SAFETY TECHNOLOGIES LIMITED

Second Appellant

FRANSAF LIMITED

Third Appellant

and

DE CASTRO, A J M S

First Respondent

CROUSE, M M

Second Respondent

JUDGMENT

CONRADIE JA

[1] The first appellant pretended to retrench the respondents on 30 June 1994. The court a quo found that the retrenchments were substantively and procedurally unfair. It ordered the first appellant to compensate the respondents, and imposed joint and several liability on the second and third appellants.

[2] The third appellant was listed on the Johannesburg Stock Exchange on 10 December 1993. Shortly after its conversion from a private to a public company, it made a successful take-over offer for all the shares of the second appellant which were at that time quoted on the Johannesburg Stock Exchange. The take-over was to be effective from 1 July 1993. Pursuant to the take-over, the second appellant was delisted and became a wholly owned subsidiary of the third appellant. At the time of the take-over the second appellant was the holding company of the first appellant. In the report of the board of the third appellant accompanying its financial statements for the year ended 31 December 1993, it was announced that:

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“Safetec (second appellant) bought the assets and liabilities of its two subsidiaries, Buffalo Sign Company Limited and Buffalo Sign Cape (Pty) Ltd on 1 July 1993 and the business operations of these companies were continued as divisions of Safetec as from this date.”

[3] There are strong indications that the sale of the assets and liabilities of the first appellant had indeed been implemented. Letterheads were brought into use in which the former business of the first appellant was described as being conducted by ‘Buffalo Sign a division of Safety Technologies Limited.’ The additional member in the court a quo disbelieved the

appellants' witnesses that the letterheads were wrong, I do not believe them either.

[4] The second appellant resolved on 4 February 1994 to formally conclude the transaction for the purchase of the assets and liabilities of the first appellant and notice was given of a general meeting of the sole shareholder of the first appellant which was to have been convened on 7 February 1994 to consider passing the necessary resolution. There was no evidence before the court a quo on whether or not such a resolution was passed. It is the appellants' case that it was not. The reason for the failure to adopt the shareholders' resolution was the supposed refusal of the first appellant's board to approve the transaction. There is no merit whatever in this contention. The first appellant's directors would not and could not have held out against the wishes of the second appellant which was the only shareholder and also the other interested party. Moreover, the financial statements of the third appellant which deal with events subsequent to the year end occurring as late as 10 March 1994, make no mention of cancellation of the sale.

[5] The second appellant must have changed its mind about the wisdom of having acquired the first appellant's business. The business was going from bad to worse. It must have been during early February 1994 that the

auditors were working on the 1993 financial statements and I surmise that there must have been discussions concerning the first appellant's alarming losses. These losses would, of course, have had to be borne by the second appellant. Earlier, the consolidation of the businesses of the first appellant and Buffalo Sign Cape (Pty) Ltd in the second appellant made good commercial sense. Now the priority was to extricate the second appellant from the debt-ridden business it had bought from the first appellant.

[6] On 15 June 1994 we find the second appellant writing to the first appellant 'withdrawing its offer to purchase the business', saying that this 'has the effect of Buffalo Signs Company Limited (the first appellant) being a separate entity trading under its own name for its own account including the period 1 July 1993 to the date of this letter.'

[7] Shortly before, on 30 May 1994, a general meeting of the only shareholder of the first appellant had elected four new directors who were with immediate effect to replace Reuben Sachs and the first respondent who both resigned from the first appellant's board with effect from 30 June 1994. This meant that on the date of the supposed withdrawal of the offer the second appellant had its own directors on the board of the first appellant and owned all its shares. The failure of the first appellant's

board, even now, to approve the sale can mean only one thing: the board was in agreement with the second appellant that the sale should be undone.

[8] Five days after the 'withdrawal of the offer' which the first appellant's directors had (so the appellants would have us believe) so obstinately resisted, a letter was dispatched by 'Buffalo Sign' to the appropriate industrial council announcing the closure of 'our Industria operations with effect from 30 June 1994.' The letter informs the industrial council that there was little prospect of paying employees any monies other than their June salaries or wages and outstanding leave pay. It said, furthermore, that 'we are at present negotiating with our creditors to accept as little as possible for their outstanding debts in an endeavour to save the Company (the first appellant) from being liquidated.' The letter also expresses the intention to 'make the Company dormant from 1 July 1994.'

[9] Of course, if the employees and the creditors had realised that the assets and liabilities of the first appellant had been bought by the second appellant such a compromise arrangement would not have been possible. The second appellant then set about conducting what its witnesses described as an informal winding-up of the first appellant. This was just as well for the second appellant. If the first appellant had been compulsorily

wound up, the liquidator would undoubtedly have discovered that creditors' and employees' claims since 1 July 1993 lay, not against the first appellant, but against the second appellant which was not in as precarious a financial situation.

[10] On 5 May 1994 the first appellant (not "Buffalo Sign, a division of Safety Technologies Limited") issued what it called an "employee communiqué/brief." This communication advised employees that attempts up to that point to improve the financial viability of the company had failed and that it had become necessary to consider the possible closure of the operation at Industria. Employees were invited to discuss and consult with the first appellant about the impending rationalisation and possible closure of the operation at Industria before or during the week of 16 May 1994. The decision with regard to 'possible corporate rationalization and the continuation of the operation at Industria' would be announced before or on 20 May 1994.

[11] On 23 May 1993 there was another 'employee communiqué/brief'. It reads as follows:

"We regret to inform you of the Board of Directors' decision to close the Industria operation of the Company with effect from 30 June, 1994. The decision to close the Industria operation can be directly attributed [to] the continued downturn of the country's economy, the Company's lack of

financial performance in the past years and the lack of viable product orders for the short to medium term future.

A compounding factor is the Company's high overhead cost structure, which impacts detrimentally on the Company's competitive advantage in an extremely competitive market. In short, the Board of Directors having given due consideration and regard to all circumstances is of the opinion that the Industria operation is and has been financially unviable for some time now, thus necessitating its urgent closure and the retrenchment of all employees.

We expect all employees to report for work as per normal and help with the administrative closure of the branch, inclusive of the packing of equipment and stock loading, cleaning and transferring activities until Thursday, 30 June, 1994. We will allow staff members reasonable paid time off during working hours to find suitable alternative employment, subject to prior notice and operational requirements.

We are at present unfortunately not in a position to guarantee to pay our employees severance packages. An investigation into the financial affairs of the Company has been initiated to determine whether severance packages to employees are in fact possible. We will communicate to (sic) our employees upon completion.

Leave pay will be calculated as at 30 June, 1994 and will be paid out in lieu of same. All monies due to employees will be paid out on Thursday, 30 June 1994 as per normal payment procedure.

All employees will receive a letter of reference from the Company.

We once again truly regret having to part company with you under these circumstances and would again ask that you give us your full co-operation in

facilitating the speedy and orderly closure of the Industria operations. We would further like to make use of this opportunity to thank you for the time and effort you have put into the Company and would like to wish you the very best for the future.”

- [12] On the view I take of this matter the letter, supposedly written to convey information to the respondents (and others) which might serve as a basis for consultation on their retrenchment, was false from beginning to end. It was part of the deceit practiced on employees and creditors alike. The respondents' employer was not in dire financial straits. The respondents were no longer employees of the first appellant. The first appellant had stopped trading on 1 July 1993 when its business was sold to the second appellant as a going concern. Thereafter the respondents, who carried on with their jobs, could only have been employed by the second appellant. They say that they were. There is no evidence from the appellants that they were not, although it would have been a simple matter for the second appellant to establish that it did not pay their salaries. Any retrenchment exercise should, of course, have been carried out by the second appellant. Instead, it was carried out by the first appellant who pretended to be the employer so that it could relieve the second appellant of its retrenchment burden. The whole distasteful exercise was flawed and thoroughly unfair, both procedurally and substantively. The second appellant, as employer, is liable to compensate the respondents.

[13] The respondents sought and obtained in the court a quo an order that all the appellants should be jointly and severally liable. I do not believe that such an order was competent. The industrial court is not empowered to make an order for compensation against anyone other than an employer. This follows from the jurisdiction conferred on it by the Labour Relations Act 1956 in regard to the remedying of unfair labour practices. An unfair labour practice can only be committed as between employer and employee. The fact that the third appellant was probably an accomplice to the second appellant's deceitful dealings does not by itself turn it into an employer. There is no such thing as a fictional employer. The word 'employer' is defined in the 1956 Labour Relations Act as meaning:

“any person whomsoever who employs or provides work for any person and remunerates...him or who ... permits any person whomsoever in any manner to assist him in the carrying on or conducting of his business...”

[14] The only person against whom the industrial court could properly have made an order is one who fits the above description. In each case the correct enquiry is into the true identity of the employer. If necessary, he may be plucked from his hiding place behind the corporate veil, but when

he is brought forth he must still be shown to be the real employer. The question that the industrial court should have asked itself was this: was the third appellant the employer of the respondents? Did it, in other words, pay them or permit them in any way to assist it in the conduct of its business? It has been established on a balance of probabilities that the second appellant paid the respondents. There seems to be no room on the facts of this case for concluding that the third appellant in fact paid them. There is no evidence of the extent to which the third appellant provided finance for the day to day running of the second appellant's business. The only question in this regard which was really debated was the provision of a performance guarantee by the third appellant in favour of the first appellant. That, of course, does not assist the present enquiry. The proposition that the respondents may have assisted the third appellant in the conduct of its business is met by the objection that they were employees of the second appellant and that there was not between these two appellants that incestuous interrelationship, coupled with an abuse of the second appellant's corporate personality, which might permit one to say that they were, despite the corporate trappings, in truth and in equity one and the same juristic person.

[15] Media Workers' Association of SA & Others v Facts Investors' Guide (Pty) Ltd & another (1986) 7 ILJ 313 (IC) was not a case of piercing the

corporate veil. The court simply decided who, prima facie, having regard to all the evidence, the employer was. The decision on which Mr. Pauw for the respondents placed some reliance, Paper, Printing, Wood and Allied Workers' Union and Others v Kaycraft (Pty) Ltd & Another (1989) 10 ILJ 272 (IC) at 282 – 284 was, in my opinion, wrong. The court concluded (at 284 E – F) that “...with due regard to all the considerations of equity... the respondents should be held responsible as a group for the consequences of an unfair retrenchment.” There is no principle by which a person who is not an employer may (in law or equity) be held responsible for the consequences of an unfair retrenchment. I hold the same view about the correctness of the decision in SA Chemical Workers Union & Others v Toiletapak Manufacturers (Pty) Ltd & Others (1988) 9 ILJ 295 (IC)

- [16] The court in the Kaycraft case (supra) relied on the decision in SA Allied Workers' Union & Others v Contract Installations (Pty) Ltd (1988) 9 ILJ 112 (IC). Although the result was probably correct, the following dictum is not: “...though in strict law the applicants may have been employees of the first respondent only, in equity the second respondent as the ‘umbrella company’ of the group should be held responsible with the first respondent for the consequences of an unfair retrenchment...” A person either falls within the definition of employer or he does not. There is no employer in equity.

[17] Bearing in mind what Smalberger JA said recently in Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd 1995 4 SA 790 (A) (at 802 H – I) that ‘the law is far from settled with regard to the circumstances in which it would be permissible to pierce the corporate veil’, and (at 803 A) that ‘a court has no general discretion simply to disregard a company’s separate legal personality whenever it considers it just to do so’, I think that the court a quo should have been a good deal more cautious in its approach.

[18] There was no evidence before the court a quo that the third appellant had abused the second appellant’s legal personality or had used it in a fraudulent scheme. The fraud was that of the second appellant which, although the third appellant controlled it, did not have the same directing mind. See the remarks of Corbett CJ in The Shipping Corporation of India Ltd v Evdomon Corporation and Another 1994 1 SA 550 (A) at 566 C – F.

[19] Mr. Kruger, who appeared for the appellants was critical of the amount of the compensation awarded by the Industrial Court. I have, after careful consideration, concluded that there is no reason to interfere with the award. Having regard to the losses suffered by the respondents and the

deceitful way in which the second respondent treated them, there is nothing unfair about it.

[20] The third appellant has been successful on appeal, the first and second appellants have not. Having regard to the fraudulent conduct of the first and second appellants, I consider that they should pay the costs of the appeal proceedings. The dictates of the law and fairness do not require that the respondents should pay the third appellant's costs. Since the third appellant incurred no costs of its own, such an order would be equivalent to one that each party pay its own costs. That would in my view be unfair.

A. The appeal succeeds to the extent that the order of the industrial court is set aside and replaced by the following order -

“1. The termination of the services of the applicants by the second respondent constituted an unfair labour practice.

2. The second respondent is ordered to pay compensation of R 211 572.00 to the first applicant and R27 900.00 to the second applicant.

3. The respondents are jointly and severally to pay the applicants' costs on the highest magistrates' court scale.

B. The first and second appellants are to jointly and severally pay the

respondents' costs of the appeal.

CONRADIE JA

I agree

NGCOBO AJP

Counsel for Appellant: M. A. Kruger

Counsel for Respondent: P. Pauw

Date of Hearing: 18 February 1999

Date of Judgment: 3 March 1999