REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

CASE NO: JR 437/01 &

J787/02

In the matter between:

SATAWU OBO 212 MEMBERS	**Applicants**
and	
COMMAND SECURITY SERVICES (PTY) LTD	**First Respondent**
MOHAMMED IQBAL PARKER	**Second Respondent**
KALMAN GORDON DRUKER	**Third Respondent**
MAURICE MUSA MDLODLO	**Fourth Respondent**
SIMON BANDA	**Fifth Respondent**
WILSON RICH & ASSOCIATES	**Sixth Respondent**
STEPHEN VAN DIGGELE	**Seventh Respondent**
SUSANNA HENDRINA RENTZKE	**Eighth Respondent**

CHAGAN JADAV VAGHELA	**Ninth Respondent**
MARIUS POTGIETER	**Tenth Respondent**
MOHAMMED SHAFFIE MOWZER	**Eleventh Respondent**
IXIA TRADING 234 (PTY) LTD	**Twelfth Respondent**

Delivered: 02 March 2015

Summary: (Contempt – effect of s 197 on transmissibility of liability - referral to oral evidence)

RULING

LAGRANGE, J

Introduction

[1] This matter concerns an application for an order finding the various respondents in contempt of an order of this Court handed down on 23 August 2003 in which an arbitration award reinstating the individual applicants was made an order of Court. The first to ninth and eleventh respondents have opposed the matter. The application was originally launched in August 2006 and the respondents in question only filed their answering affidavit a year later. It was only in October 2013 that the applicants filed an amended notice of motion, the sole purpose of which was to include the twelfth respondent, Ixia Trading 234 (Pty) Ltd ('Ixia'). However, the amended application did not include any director of Ixia as a respondent.

[2] The applicant parties to all intents and purposes are based in Johannesburg or Witbank, whereas only the tenth respondent, Mr M Potgieter ('Potgieter'), the first respondent's General Manager, is based in Witbank. All the remaining individual respondents save for the third respondent who passed away in June 2013 and the fourth respondent, Mr M Mdlolo, who has been out of the country for the last four years, are resident in Cape Town. The registered address of Ixia is in Menlo Park

and according to a certificate issued by the Registrar of Companies and Close Corporations on 12 November 2013, the sole director of Ixia who has not been joined as a respondent in these proceedings, Mr G Gouws, is also resident in Menlo Park.

[3] For the sake of completeness it should be mentioned that the sixth respondent, Alun Rich of Wilson Rich and Associates was replaced as the company secretary in March 2006 by Dominique McLachlan of Coastal Corporate Registrations CC. The seventh respondent, Mr S Van Diggele resigned as a director of the first respondent in October 2006 and the ninth respondent, Mr C J Vaghela, similarly resigned as a director in February 2006. The opposing respondents denied that Potgieter was ever a director of the first respondent.

Synopsis

[4] On or about 07 November 2000, the individual applicants were dismissed for alleged misconduct in the course of unprotected strike action. In 2001, they obtained an arbitration award in their favour ordering their reinstatement by the first respondent following a finding that their dismissals were substantively unfair. At the time of their dismissal and in all subsequent court proceedings the employer party was cited as Command Security Services (Pty) Ltd, which is the first respondent. The first respondent denies that at any stage it employed any of the individual applicants. The reasons for its denial become apparent in the balance of the synopsis.

[5] In 1999, the businesses of Highveld Security CC and Ithuba CC were sold as going concerns to Celtic Holdings Inc. Mowzer claims that Celtic Holdings in turn sold the business to Seventy-Seven investments (Pty) Ltd (‘SSI’) the same year. The latter company, now in liquidation, then sold the businesses to the first respondent in terms of an agreement having an effective date of 15 December 2000. This agreement was apparently concluded in late November 2000 after the individual applicants had been dismissed on 7 November that year. Mowzer provides no explanation for these successive sales. Shortly afterwards in January 2001, this

commercial version of the children's game 'pass-the-parcel' came full circle.

[6] In January 2001, it appears that the 12th respondent, Ixia, acquired from the first respondent the businesses identified in the sale agreement as "the business of providing security and security related services including but not limited to the provision of guarding services, asset and property protection, industrial and commercial guarding and armed security response Security previously conducted by Highveldt Security CC and Ithuba CC and currently being conducted by the seller [first respondent] at its Witbank and Pretoria branches respectively." Ixia is allegedly controlled by a Mr M Niewoudt ('Niewoudt'). So the apparent nett effect of a series of sales of the underlying businesses between 1999 and 1 January 2001 is that ownership passed from businesses controlled by Niewoudt to three other entities, the last of which was the first respondent, before passing to Ixia allegedly also controlled by Niewoudt.

[7] In terms of sale agreement between the first respondent and Ixia, Ixia was entitled to trade under a name including the word "Command" for a period of 36 months after the sale agreement became unconditional and was given an option to continue to do so for 36 months thereafter. Oddly, Mowzer claims to know that Ixia never traded under the name "Command Security" even though it was entitled to. On the other hand, apparently unbeknownst to him and his co-respondents, entities controlled and managed by Potgieter and Niewoudt did trade under that name, creating the false impression that they were trading as the first respondent.

[8] The entities which Mowzer says were trading fraudulently as 'Command Security' were Highveld Security CC ('Highveld'), Ithuba CC ('Ithuba') and HS Sekuriteitskonsultante ('HS'). The businesses of the first two entities mentioned were the very ones that were sold to Ixia. Mowzer claims that all the respondents except Potgieter were unaware of this alleged fraud perpetrated by Potgieter and Niewoudt until the contempt application was initially launched in August 2006.

[9] Mowzer further claims that the first respondent had instructed its attorneys of record to investigate "this state of affairs and to take the necessary and

appropriate steps including claims for damages and reporting this unlawful conduct of the relevant authorities." No indication is provided in the answering affidavit attested to in August 2007, a year later, what steps had actually been taken by its attorneys of record at that stage, nor did Mowzer and his correspondents seek to file any supplementary affidavit setting out what transpired in this regard seven years later.

[10] In August 2003, the first respondent's attempt to review the award was dismissed (under case number JR 437/01) and the Court granted an application (under case number J787/02) in terms of section 158 (1) (c) of the Labour Relations Act 66 of 1995 ('the LRA'). It appears that the order was granted by default and that the first respondent had failed to reconstruct the arbitration record. It had also failed to oppose the application brought by the applicants and blamed its erstwhile attorneys for not making it aware of the application to dismiss the review and to make the award an order of court.

[11] In February 2004, the first respondent attempted to rescind the Court order of 26 August 2003. That application was dismissed on 21 September 2004 by the Honourable Justice Maya, AJ in a judgment which was highly critical of the way in which the applicant had conducted the review application and its failure to oppose the counter application to dismiss it. Undeterred, the first respondent applied for leave to appeal against this judgement, but the application was dismissed on 9 June 2005.

[12] During the rest of 2005, SATAWU, on behalf of the individual applicants, sought to reach agreement with the first respondent on the implementation of the order of reinstatement. Some of the discussions concerned the identification of the 212 individual applicants and how many had been contacted by the union who were in a position to tender their services. One such meeting between the union and the first respondent took place on 7 July 2005. Although the meeting was ostensibly conducted as a meeting between the first respondent, as represented by Potgieter and a certain Gary Howard, a labour law consultant, Mowzer claimed that as far as himself, the first respondent and Howard were concerned the meeting dealt with disputes between entities controlled by Niewoudt and some of

the union's members which had nothing to do with the first respondent. No confirmatory affidavit was attached by Howard explaining how he could have been in a meeting on the face of it representing the first respondent yet dealing with disputes which did not concern it. These 'entities' which Mowzer says Niewoudt controlled I can only assume refer to Highveld, Ithuba and HS. Mr Potgieter declined to file an answering affidavit to explain his role as the first respondent's general manager in all of this, though Mowzer attaches an email in which Potgieter supposedly acknowledged his part in the alleged fraud.

[13] At this juncture it is important to mention that in April the same year, before the above discussions commenced, another agreement had been concluded between Kommand Distribusie en Sekerheid CC, Niewoudt Sekerheids Konsultante CC, Niewoudt, Quickvest 321 (Pty) Ltd ('Quickvest') and Comwezi Security Services (Pty) Ltd ('Comwezi') in terms of which the security, armed response, monitoring and any other related businesses of the two closed corporations (jointly referred to as' KDS') were sold as a going concern to Quickvest. Mowzer represented both Quickvest and Comwezi in the transaction. A curious feature of this agreement is that even though Comwezi was a party to the agreement, it acquired neither rights nor obligations to any other party under the agreement. Comwezi is a subsidiary of the first respondent.

[14] On 05 December 2005 the regional secretary of the union, Mr T Mahlangu, confirmed a discussion between himself and the tenth respondent, Mr M Potgieter (' Potgieter') and, recording *inter-alia* that:

> *"The company i.e. Command Security has been sold to new owners who were not keen on taking back of members who are reinstated by the labour court the company is busy discussing a settlement proposal to the union… The said settlement will include the reinstatement of some of the reinstatement of some for the individual applicants in the above matter as well is a financial offer."*
>
> (*sic*)

[15] Potgieter never filed in the answering affidavit and the other respondents were not in a position to dispute the union's interactions with the first respondent except in relation to the interactions SATAWU's legal officer had with the Chief Executive Officer of the first respondent. Both Mowzer and Potgieter were present in Court when this application was heard. According to Mowzer, he and his other co-respondents had no knowledge of the preceding Labour Court proceedings prior to receiving the contempt application. He claims that all the devious proceedings were managed by Niewoudt, Potgieter and Vijoen without the knowledge or authority of himself and his co-respondents. However, he admits he was aware of a dispute with SATAWU as a rather modest provision was made for it in the Schedule of disputes attached to the sale agreement of KDS signed in April 2005. It is somewhat difficult to understand how that could be the same dispute under consideration given the amount involved and given that Mowzer claims that the dispute was between SATAWU members and Highveld, Ithuba and HS. Further, in a letter dated 11 September 2006 written by Mowzer to the union's legal officer, Mr R Mokgalabone, he stated amongst other things:

> *"An associate company within the Command group (Comwezi Security Services (Pty) Ltd) entered into a transaction to acquire the contracts of Kommand Distribusie Sekuriteit CC and Mr Niewoudt during April 2005. In terms that are of Mr Niewoudt disclosed the action with your union and warranted payment in terms thereof."*

It is difficult to understand that this could refer to anything other than the preceding litigation, but it would appear that Mowzer would still argue that he was under the impression that this litigation did not involve the first respondent but the entities Comwezi was buying from Niewoudt.

[16] It would seem from this letter that the first respondent through Comwezi was suggesting that the applicant's dispute lay with Kommand Distribusie Sekuriteit CC whereas in the answering affidavit Mowzer seems to rely on a representation by Potgieter that the individual applicants had been

employed by Highveld, Ithuba and HS. On the face of it therefore Mowzer has held different views on which entities employ the individual applicants.

[17] Mowzer says that once he became aware of the contempt application he engaged with the union and attempted to conclude a settlement agreement in the interests of all parties. Although a draft agreement was under consideration in early July 2007, he claims that the union brought matters to an abrupt end by issuing a letter on 13 August 2007 to the effect that the union could not reach any settlement and would now proceed with contempt proceedings against the first respondent. Mowzer says that he engaged in settlement discussions not because the first respondent accepted any legal liability for the reinstatement of the individual applicants, but for humanitarian and practical reasons. The latter related to avoiding the unnecessary incurral of legal costs and the fact that the first respondent's group of companies was always on the lookout for employing suitable candidates in its security business.

[18] In filing its answering affidavit in the contempt application in August 2007, the first respondent also filed a fresh application in the form of a counter application to rescind the portion of the default judgement of the Court order of 26 August 2003, which made the arbitration award an order of Court. The first respondent has not pressed this issue in these proceedings thus far.

<u>Central issues in dispute</u>

[19] Notwithstanding the response of Mowzer, the applicants maintain that at all material times the first respondent was their employer and that it participated in the arbitration and subsequent Court proceedings arising from their dismissal. It further contends that Niewoudt acted in his capacity as a director of the first respondent and Potgieter as its human resources or general manager and that these two individuals represented in the course of the proceedings and related interactions with the union.

[20] The applicants also maintain that the agreements on which the respondents rely to distance themselves from the dispute were not pleaded with sufficient particularity to enable them to reply properly there

to. Indeed, there are some inexplicable omissions of portions of some of the agreements attached to the respondent's answering affidavit.

[21] On the face of the first two sale agreements of the businesses of Ithuba and Highveld to Celtic those businesses were transferred as going concerns. The effective date of the transfer of those businesses was 30 June 1999. The third sale agreement also entailed the sale of the same businesses to SSI. Mowzer refers to annexure MSM4 as a copy of that sale agreement but in fact it is simply a letter making reference to the main agreement dated 24 August 1999 and another amending document dated 20 October 1999. Neither of these documents form part of the annexures to the answering affidavit.

[22] Mowzer further avers that the fourth agreement in terms of which the first respondent allegedly acquired the same businesses from SSI was not set out in a separate document, but he referred to annexure MSM5 as containing a record of that sale. Clause 2.2.2.27 of that document contains the following definition:

> *" "**the sale of business agreement"** - the sale of business agreement dated 8 December 1999 in terms of which the businesses of Ithuba and HS were sold by SSI to Command Security."*

Clause 13.1 of the same document speaks of the agreement not coming into force "unless by 15/12/2000" which Mowzer claims was the effective date of the sale agreement. The effective date of the sale of the businesses to Ixia was 1 January 2001.

[23] If the chronology of sales alleged by the opposing respondents is correct then it would appear the dismissal of the individual applicants took place when the businesses were owned by SSI and that thereafter they were transferred successively to the first respondent and to Ixia.

The effect of a sale of a business as a going concern

[24] Central to the defence of the opposing respondents is that, since the underlying businesses from which the applicants had been dismissed were not owned by it at the time the Court order was issued in August

2003, but were owned by Ixia, it was this latter entity which acquired the obligation to comply with the order by virtue of section 197(5)(b)(i) of the Labour Relations Act 66 of 1995 ('the LRA'). Insofar as Mowzer's averments about the success of transfers of the business may be correct, the applicants nevertheless dispute the implications of s 197(5)(b)(i) as argued for by the respondents. They contend on the contrary that on a proper interpretation of the section, since the Ixia and the first respondent had "agreed otherwise" it was the first respondent, not Ixia, which was bound by the arbitration award (and the subsequent order of court).

[25] What the applicants are referring to when saying that the first respondent and Ixia had "agreed otherwise" is the underlined portion of following clause in the sale agreement between the two entities:

> *"12.2 the purchaser shall assume all liabilities of the seller to employees of the business in respect of the barrier is determined by the Sectoral Determination Number 3 and any amounts owed to employees of the business as at the closing date as a result of services rendered, leave entitlements, commissions and bonuses shall be the liability of the purchaser, and the purchaser indemnifies the Seller against the aforementioned liabilities. <u>This expressly exclude any liability of the Seller to employees pursuant to or resulting from CCMA and/or labour court actions with effect from the effective date in the case of the Witbank branch and 1 April 2000 in the case of the Pretoria Branch</u>."*

(*sic*)

[26] However, the term "unless otherwise agreed" must be construed in terms of the provisions of section 197 (6) which clearly confines the expression to an agreement between the buying and selling employers and a party which an employer would be obliged to consult with over retrenchments. S 197(6)(a) reads:

> *"An agreement contemplated in subsection (2) must be in writing and concluded between—*

(i) either the old employer, the new employer, or the old and new employers acting jointly, on the one hand; and

(ii) the appropriate person or body referred to in section 189(1), on the other."

[27] In other words, it does not include a bilateral agreement than simply between the seller and the buyer must be a trilateral agreement in which the third party represents the interests of the affected employees. It is true that in this instance any purported transfer to Ixia in terms of section 197 took place before the amendment of section 197 in 2002. Nevertheless, at that stage the pertinent provisions of section 197 read:

1) A contract of employment may not be transferred from one employer (referred to as 'the old employer') to another employer (referred to as 'the new employer') without the employee's consent, unless –

(a) the whole or any part of a business, trade or undertaking is transferred by the old employer as a going concern; or

(b) the whole or a part of a business, trade or undertaking is transferred as a going concern –

(i) if the old employer is insolvent and being wound up or is being sequestrated; or

(ii) because a scheme of arrangement or compromise is being entered into to avoid winding-up or sequestration for reasons of insolvency.

(2)(a) If a business, trade or undertaking is transferred in the circumstances referred to in subsection (1)(a), unless otherwise agreed, all the rights and obligations between the old employer and each employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and each employee and, anything done before the transfer by or in relation to the old employer will be considered to have been done by or in relation to the new employer.

(b) If a business is transferred in the circumstances envisaged by subsection (1)(b), unless otherwise agreed, the contracts of all employees that were in existence immediately before the old employer's winding-up or sequestration transfer automatically to the new employer, but all the rights and obligations between the old employer and each employee at the time of the transfer remain rights and obligations between the old employer and each employee and anything done before the transfer by the old employer in respect of each employee will be considered to have been done by the old employer.

(3) An agreement contemplated in subsection (2) must be concluded with the appropriate person or body referred to in section 189(1)."

[28] In the case of ***Transport Fleet Maintenance (Pty) Ltd v NUMSA*** [1] which was decided before the amendment of the section, it was held that dismissed employees could proceed against the new employer after the transfer of the business:

"It can also be said that, because section 197 (2) (a) provides that anything done by the business transferor in relation to an employee before the transfer of the business must be regarded as having been done by the business transferee, the business transferee is regarded, after the transfer of the business, as the one who dismiss the employee and is, therefore the person against whom an employee is entitled to pursue arbitration or legal proceedings to enforce his right not to be dismissed unfairly."[2]

[29] I am in agreement with the respondent's submissions in this regard that it could never be intended that the agreement referred to in section 197 could be one in terms of which the two employers acting on their own could defeat the objects of the section by concluding a bilateral agreement.

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[1] (2004) 25 ILJ 104 (LAC)

[2] At para [25].

Disputes of fact

[30] Although the legal effect of a transfer is clear, on the evidence there is the unresolved issue of the alleged fraudulent use of the first respondent's identity over a very lengthy period of at least five years. On the one hand, the Court is asked to accept the opposing respondents' complete ignorance of dealings in the first respondent's name with the applicants over their dismissal. On the other, there is the evidence of a number of sale of business transactions between the first respondent or companies within the Command Security group and entities allegedly controlled by the very individual accused of fraudulently masquerading as a representative of the first respondent. Then there is the evidence of the applicants having been involved in extensive litigation and dealings with persons purporting to be acting for the first respondent as the party against whom the arbitration award and subsequent Court order were enforceable. Further, the incomplete written record of the successive sale agreements concerning the transfers of the businesses coupled with the fraudulent misrepresentation claim about the true identity of the employer party engaged in the litigation with the applicants, exacerbate the difficulty of determining the correct identity of the employer liable for complying with the Court order. These disputes are not possible to resolve on the affidavits and are not frivolous ones.

[31] Clearly oral evidence is needed to supplement the incomplete details of the relevant sale agreements and how the opposing respondents could have remained so ignorant of the allegedly fraudulent conduct of Niewoudt, and possibly Potgieter, while having associated businesses operating in the same locality and despite concluding substantial sale of business agreements with Niewoudt who supposedly controlled the entities acting fraudulently. How Potgieter, as the first respondent's general manager, could have become embroiled in such an elaborate deception under Niewoudt's influence will also be able to be examined. If necessary, the parties can then subpoena persons whose evidence would shed light on these issues, apart from any oral evidence they can lead in this regard.

It is regrettable that these proceedings were not brought and concluded a long time ago, but the launching of the contempt proceedings only became feasible in 2006 because of the employer's resistance to giving effect to the award while it pursued all other legal avenues available to it. A further delay of a year was occasioned it seems by settlement discussions, but there was a long delay between the filing of the answering affidavit in 2007 and the applicant's replying affidavit in 2010 and the still later filing of an amended notice of motion in 2013.However, it is also important that orders of Court are not avoided by dilatory legal stratagems. Seat of the court where proceedings are to be conducted.

[32] I am sympathetic to the situation of the individual respondents opposing the contempt application who reside in Cape Town, being summonsed to appear in Johannesburg. On the other hand, the order which the applicants seek to enforce and which was not complied with would be given effect to in Witbank and the failure to give effect to it is likewise manifested by the failure to reinstate them in the businesses located there. The concrete manifestation of the alleged act of contempt is thus to be found in the failure to give effect to the order in Witbank, even if it is possible the subjective elements of the offence might have occurred elsewhere. Consequently, it is not inappropriate that the proceedings should take place at the seat of the Court closest to Witbank from which the various judgments leading to the contempt application also emanated. Though not an overriding consideration, it will be also be easier for the far more numerous individual applicants who might wish to attend the proceedings if the proceedings are conducted in Johannesburg. Further, in the event the respondents are successful, the costs of their accommodation and travel could be recovered from the applicants. Although all the respondents were ordered to attend Court when the contempt proceedings were enrolled, the applicants were amenable to relaxing the requirement that they be present when the contempt application was originally argued. I see no reason why a similar arrangement accommodating their non-attendance at least for part of the proceedings cannot be made when oral evidence is led, if they are content not to be present during all the proceedings.

<u>Order</u>

[33] In light of the above, the contempt proceedings are adjourned to a date to be determined by the registrar for the hearing of oral evidence on the following issues in dispute:

33.1 The true identity of the employer liable for complying with the order of this Court issued on 23 August 2003.

33.2 Insofar as the first respondent might be the employer party liable for complying with said order, whether or not the respondents who are or were directors of the first respondent knew of the said order before being served with the contempt application in 2013.

[34] The third respondent is no longer a party to the proceedings.

[35] Costs are reserved.

R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicants: F S Nalane instructed by Cheadle, Thompson

For the Respondents: R Stelzner, SC instructed by T Erasmus & Associates c/o Goldberg Attorneys