REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: JR 437/01 & J787/02

In the matter between:

SATAWU obo 212 MEMBERS	**Applicant**
and	
COMMAND SECURITY SERVICES (PTY) LTD	**First Respondent**
MOHAMMED IQBAL PARKER	**Second Respondent**
KALMAN GORDON DRUKER	**Third Respondent**
MAURICE MUSA MDLOLO	**Fourth Respondent**
SIMON BANDA	**Fifth Respondent**
WILSON RICH and 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**

Heard: **29 and 30 October 2015 and 7 December 2015**

Delivered: **10 February 2016**

Summary: **Dispute about the true identity of the employer referred to oral evidence.**

JUDGMENT

AC BASSON, J

Parties to the dispute

[1] The 212 individual applicants were dismissed on 6 and 7 November 2000. On 5 March 2001 the CCMA ordered the first respondent (Command Security Services (Pty) Ltd) to reinstate all the individual applicants retrospectively to the date of their dismissals. This award was made an order of court by Landman, J on 26 August 2003. The employer is cited as the first respondent (Command Security Services (Pty) Ltd) in the CCMA award and in all subsequent legal proceedings instituted in this Court.

[2] There are 12 respondents before this Court. Mr Stelzner SC appeared on behalf of the first to ninth respondents and the eleventh respondent. There is no appearance on behalf of the twelfth respondent. Mr Van der Riet SC appeared on behalf of the applicants.

[3] It is now some 15 years since their dismissal and some 13 years after Landman, J made the award an order of court. The applicants instituted contempt proceedings against the respondents and are seeking to have two of the directors of the first respondent, - the second and third respondents (who were directors at the time of the contempt application but not directors at

the time of the dismissals nor at the time of the court order) - incarcerated for contempt unless the individual applicants are “reinstated” into the employment of the first respondent with retrospective effect.

[4] The first respondent denies that it had at any stage employed any of the individual applicants and also denies that it is the responsible employer in terms of the award and the subsequent court order. I will return to the submissions on behalf of the respondents in more detail herein below.

[5] The contempt application served before Lagrange, J. After having heard argument on the papers, Lagrange, J referred the matter to oral evidence. The following two issues were reserved for determination–

5.1 the true identity of the employer liable for complying with the order of the Labour Court issued on 26 August 2003;

5.2 insofar as the first respondent might be the employer party liable for complying with the 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. (The contempt application was served on them in August 2006).

[6] The respondents have also brought a counter-application in terms of which rescission of the court order dated 26 August 2003 is sought on the basis that it was fraudulently obtained and erroneously granted. This application will stand over to a further date. In the event this Court decides the two questions in favour of the applicants, the contempt application will also stand over to a later date.

[7] I have already pointed out that this dispute originated more than 15 years ago. The papers are voluminous and contain the papers that served before this Court in various applications. I do not intend summarising the facts in detail. In his judgment (referring this matter to oral evidence) Lagrange, J summarised the history in fair detail. I am in agreement with his summary of the events that culminated in these proceedings.

<u>Brief exposition of the chronology</u>

[8] In order to place the present issue before this Court in its context, it is necessary to briefly refer to the some events that preceded the contempt application.

[9] Mr Mowzer (the current CEO of the first respondent's holding company and the Command group) was the witness on behalf of the first respondent. He is also cited as one of the respondents although no relief is sought against him other than the costs of this application.

[10] The businesses of Highfield Security CC and Ithuba CC were sold as going concerns to Celtic Holding Inc in 1999. Celtic Holding Inc in turn sold the business to Seventy-Seven investments (Pty) Ltd later during that same year. Seventy-Seven Investments (Pty) Ltd sold the business to the first respondent with effective date 15 December 2000.

[11] The individual applicants were dismissed for alleged misconduct in the course of unprotected strike action between 6 and 7 November 2000. Command Security Services (Pty) Ltd (the first respondent) was cited as the employer in the CCMA proceedings. As already pointed out, the CCMA ordered the first respondent to reinstate all 212 employees retrospectively.

[12] After the business was transferred to the first respondent with effective date December 2000, the business was, according to the first respondent, again transferred to an entity called Ixia Trading 234 (Pty) Ltd (the twelfth respondent – "Ixia"). In terms of this agreement the seller, Command Security Services Pty Ltd (the first respondent), sold the business (which is the business of providing security and security related services, industrial and commercial guarding) to Ixia. This transaction is of vital importance to deciding the questions referred to oral evidence. I will return to some of the salient aspects of this agreement herein below.

[13] The case for the first to ninth and eleventh respondents (collectively referred to as "the respondents") is that it did not employ the dismissed employees when they were dismissed on 6 and 7 November 2000: The first respondent

only became the owner of the business employing the individual applicants on 15 December 2000 when the business was transferred to the first respondent from Seventy-Seven Investments (Pty) Limited. It appears to be common cause that business was transferred to the first respondent as a going concern as contemplated in section 197 of the LRA with effect December 1999.

[14] The respondent's main defence against the claim that they are in contempt of court is that the business of the first respondent was sold to Ixia (the twelfth respondent) and therefore Ixia stepped into the shoes of the first respondent and is therefore liable in terms of the court order. On behalf of the respondents it was submitted that –

(i) At the time when the applicants were dismissed (6 and 7 November 2000), the first respondent did not employ the dismissed employees. The first respondent became the owner of the business employing the individual applicants on 15 December 2000.

(ii) The first respondent sold the business to the twelfth respondent (IXIA) with effect 1 January 2001 and accordingly the business (in which the individual applicants were employed by the first respondent) was transferred as a going concern to Ixia with effect from 1 January 2001. Under these circumstances, so it was submitted, Ixia automatically and *ex lege* stepped into the shoes of the previous employer in terms of section 197 of the LRA. Ixia therefore became liable in respect of the CCMA arbitration award and the subsequent court order of the Labour Court (dated on 26 August 2003).

(iii) Mr Nieuwoudt, the main shareholder and director of Ixia, conducted the business in which the individual applicants had been employed. He was the person who dismissed them and he was the person who therefore employed the individual applicants at Ixia. However, Nieuwoudt fraudulently continued to represent to this Court in various court proceedings that he was acting for the first respondent when he had no authority to do so. This, according to the respondents, happened without their knowledge.

[15] In respect of the second issue namely, whether the director knew about the Labour Court order (26 August 2003), it would appear from the evidence of Mowzer that, at the very least, the directors knew about the order before the contempt of court application was served. In this regard the evidence confirms that Mowzer was informed by Mr Howard (who represented the first respondent at a meeting on 7 July 2005) of the existence of the order shortly after the meeting.

[16] Turning now to the first issue namely the identity of the employer. It appears to be common cause that there was an agreement to sell the first respondent to Ixia with effect from 1 January 2001 although that agreement was only signed on 28 June 2001. I will return to the submission on behalf of the applicants to the effect that the mere fact that there was such an agreement does not mean that there was also a "transfer of the business as a going concern" as contemplated by section 197 of the LRA. It was further also submitted on behalf of the applicants that the suspensive conditions provided for in the sale of business agreement have in any event not been fulfilled as there is no evidence thereof. The effect thereof is that the business was never transferred as a going concern to Ixia.

<u>The agreement between the first respondent and Ixia</u>

[17] On 28 June 2001 an agreement of sale was concluded between the first respondent and Ixia. In terms of the sales agreement Ixia acquired from the first respondent '"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 previously conducted by Highveld Security CC and Ithuba CC and currently being conducted by the seller (the first respondent) at its Witbank and Pretoria branches respectively.

[18] At the time Ixia was controlled by Nieuwoudt. Niewoudt also previously controlled Highveld Security CC and

Ithuba CC. Effectively therefore Niewoudt bought back his two businesses which were previously sold to Celtic Holding Inc, then sold to Seventy-Seven investments (Pty) Ltd and later sold to the first respondent.

[19] Although this agreement was effective from 1 January 2001 the agreement was subject to the fulfilment of various suspensive conditions. Clause 5.5 reads as follows:

> ‘Unless the suspensive conditions are fulfilled by no later than 31 July 2001, (or such later date as may be agreed in writing by the seller and the purchaser which agreement will not be unreasonably withheld) the provisions of this agreement will be of no further force or effect, and save as specifically provided for herein neither the seller nor the purchaser will have any claim against the other in terms of this agreement and the status quo ante shall be restored.’

[20] Further in terms of this agreement between the first respondent and Ixia, Ixia was entitled to use and trade under a name incorporating the word “Command” and shall be entitled to use the logo “Command Security Services” on the purchaser’s (Ixia) uniforms, vehicles, letterheads, business cards and the like for a period of 36 months from the date on which this agreement becomes unconditional.

[21] In terms of clause 12.12 the purchaser (Ixia) shall assume all liabilities of the seller to employees of the business.

[22] On 22 November 2000 the parties entered into a third agreement (addendum). (The first and second addendums are not attached to the papers as they could not be found.) This (third) addendum specifically refers to clause 5.5 of the sale of business agreement (dated 8 December 1999). The date upon which the suspensive condition had to be fulfilled was now amended to read 7 November 2011. The date of third addendum is 31 October 2001. The suspensive condition was “the passing of a resolution in terms of Section 228 of the Companies Act … at a general meeting of the seller authorising or ratifying in specific terms the transaction contemplated in this agreement”. As already pointed out, clause 5.5 provides that if this

suspensive condition is not fulfilled by 31 July 2001 (and extended to 7 November 2001 in terms of the third addendum), the agreement will be of no further force or effect. Mowzer could not dispute in his evidence that the date for the fulfilment of the suspensive condition was changed to 7 November 2001.

[23] There is no evidence before this Court to confirm that the suspensive conditions have been fulfilled. It is furthermore clear from the evidence that Mowzer did not know whether the suspensive condition was fulfilled. It was in fact put to Mowzer that it could be inferred from the facts that the suspensive condition was not fulfilled as of 31 October 2001 because if it had the parties would not have entered into a further agreement extending the date for the fulfilment to 7 November 2001. Mowzer stated that he could not comment because he did not know.

[24] I am in agreement with the submission advanced on behalf of the applicants: The mere fact that there was an agreement of sale in terms of which it was contemplated that a business (namely that of the first respondent) would be transferred to the purchaser (in this instance Ixia), does not mean that there was an actual transfer of a business as a going concern. There is simply no evidence before this Court that there was fulfilment of the suspensive condition. To restate - Mowzer testified that he did not know whether that had occurred. It cannot therefore be concluded that there was a transfer as a going concern from the first respondent to Ixia. Furthermore, this conclusion is consistent with the common cause fact that Ixia never traded nor has it ever used the “Command” logo as it was entitled to do in terms of the agreement of sale. Mowzer also acknowledged that he knew that Ixia has never traded under the name “Command Security” even though it was entitled to do so. This conclusion is further consistent with the evidence of Potgieter and Khambule who testified that they were at all material times employed by the first respondent and that they had never been made aware that Ixia had taken over the business of the first respondent.

[25] In light of the aforegoing I am of the view that the first respondent is the employer liable to comply with the reinstatement order issued by the Labour Court on 26 August 2003.

[26] Apart from what has already been stated there are also other indications that support the conclusion that the first respondent was the employer of the individual applicants (and not Ixia) and in this regard, it is instructive to refer what has happened after the dismissal of individual applicants and after they had been reinstated by the CCMA.

[27] On 17 April 2001 the first respondent filed a review application challenging the award. On 26 August 2003 Landman, J (under case number JR 437/01) dismissed the review application and also made the award an order of court in terms of section 158(1)(c) of the LRA.

[28] On 21 February 2000 Maya, AJ dismissed a rescission application by the first respondent noting that the first respondent had failed to make out a case for rescission. In a judgment the Court described the first respondent as “extremely tardy and lackadaisical”. Undeterred the first respondent filed an application for leave to appeal against this judgment but the application was dismissed on 9 June 2005.

[29] After receipt of the judgment of Maya, AJ, the applicant’s attorneys wrote a letter to the first respondent’s then attorneys of record informing them of the judgment and requesting the company to indicate when and where the individual applicants could tender their services and when they could expect payment of the salaries and benefits in terms of the CCMA award. On 14 June 2005, the attorneys representing the first respondent wrote to the applicants’ attorneys requesting a meeting on 27 June 20015 at the client’s offices.

[30] A meeting took place on 7 July 2005. Present at the meeting was, *inter alia*, Mr Potgieter (apparently on behalf of Command Security Services) and Mr Howard (“Howard” – a labour consultant on behalf of the first respondent). The minutes reflect that the meeting was held between Command Security Services and SATAWU. It is clear from this meeting that the timeframe within

which employees would return to Command to work was discussed. Howard also explained that Command would need a detailed name list from the union setting out the number of people actually intending to be taken back. The minutes reflect that various other issues regarding the return of the individual applicants were discussed.

[31] A further meeting between Command Security and SATAWU was held at Witbank on 18 August 2005. Howard was again present on behalf of the first respondent as well as Potgieter. It is instructive to point out that Howard played a very active role in the meeting: Howard, *inter alia,* noted that the cut-off date for employees to report had expired on 7 July 2005. He further, with reference to the original list of 212 applicants, noted that only hundred and six employees were effectively dismissed. He also wanted to know how many people were ready to render their services.

[32] A third meeting was held between SATAWU and Command Security Service SA (Pty) Ltd on 6 October 2005 in Witbank. Potgieter and Howard were present. It appears from the minutes that Howard played an important and active role in the discussions. The main topic at this meeting was the list of dismissed employees. It is further instructive that Howard asked Mr Mahlangu (from SATAWU) whether the union had considered any settlement proposals. Mahlangu responded that the company had to make the first move. Potgieter then suggested that the company could only consider a settlement proposal on what it believed to be the correct number of people on the list.

[33] In a letter dated 14 November 2005 Mahlangu (from SATAWU) recorded that no one had attended the follow up meeting on 10 November 2005 and proposed a follow-up meeting on 15 November 2005. The letter also recorded that all members will report for duty on 1 December 2005. On 5 December 2005, the legal officer of SATAWU wrote a letter to Potgieter advising him that SATAWU and the company (Command Security Services (Pty) Ltd) were busy discussing a settlement proposal and that the settlement will include the reinstatement of some of the individual applicants as well as a financial offer.

[34] On 15 August 2006, the applicants launched a contempt of court application.

[35] Mowzer persisted in his claims that the respondents (other than Potgieter) were completely unaware that other entities controlled by Niewoudt and Potgieter fraudulently traded under the name Command Security. He also persisted with his claim that he and the other respondents had no knowledge of any Labour Court proceedings which preceded the contempt application. According to Mowzer Nieuwoudt and Potgieter conducted litigation in the name of the first respondent without the knowledge or authority of himself and his co-respondents.

[36] I have already referred to the minutes of at least three meetings between Howard (representing the first respondent), and SATAWU. These minutes convey in no uncertain terms that the reinstatement of 212 employees was discussed at length. The minutes, however, reflect that Howard (who acted on behalf of the first respondent) played an active role in the discussions regarding compliance with the court order and the reinstatement of the individual applicants. From the minutes it certainly does not appear that Howard was merely there to find out what was going on. In fact, it is common cause that at some stage, a settlement proposal was placed on the table for SATAWU to consider. In terms of this proposal all the members will report for work within 7 days. Those who did not report would not be accommodated nor would they receive financial compensation.

[37] Mowzer was asked to explain why the first respondent was prepared to settle the matter in circumstances where it (the first respondent) did not consider themselves responsible for the matter. He replied that they felt on humanitarian grounds that they had to find employment for the individual applicants. At the time the first respondent anticipated a contract on a coal mine which would have required them to appoint approximately 300 new staff members. I have several difficulties with the version Mowzer presented to the Court: Mowzer attempted to persuade the Court that he had no idea what the meetings were about despite the fact that, on his own version, the first respondent (represented by Howard) was engaged in ongoing discussions with SATAWU officials and that there were various communications and meetings until May 2007. Mowzer further states in his answering affidavit (in

the contempt application) that ‘it was agreed by both parties that it was in the interests of all concerned to settle this matter amicably without resorting to the courts’. In fact, negotiations between Mowzer and Mr Mokgalabone (of SATAWU) went as far as reaching a point where a Mowzer was handed a draft settlement agreement for signature. This settlement agreement refers to case numbers JR437/01 and J787/02 and purports to be an agreement between SATAWU obo 212 members and Command Security Services. This agreement sets out the chronology of litigation in the Labour Court. In terms of this agreement, Comwezi Security Services (Pty) Ltd would re-employ all the applicants. I have already referred to the fact that it was Mowzer’s evidence that they merely engaged in settlement discussions with the union on humanitarian grounds as well as on practical grounds. I find this version difficult to accept. In terms of a court order 212 employees were reinstated into the employment of the first respondent. If the first respondent was not the true employer of the applicants, it is highly improbable that it would have entered into extensive negotiations in respect of settling a dispute that culminated in a court order. I also find it difficult to accept that Howard, a labour consultant engaged by Mowzer, would engage in extensive negotiations with SATAWU in respect of the reinstatement of the individual applicants if the first applicant had not been the employer.

<u>Order</u>

[38] In the event, the following order is made:

38.1 The first respondent is the employer liable to comply with the reinstatement order issued by the Labour Court on 26 August 2003.

38.2 The respondents before Court are ordered to pay the costs of this application jointly and severally the one paying the other to be absolved.

AC Basson, J

Judge of the Labour Court

<u>Appearances:</u>

For the Applicant:	Advocate Van der Riet SC
Instructed by:	Cheadle Thompson and Haysom
For the Respondents:	Advocate Stelzner SC
Instructed by:	T Erasmus & Associates c/o Goldberg Attorneys.