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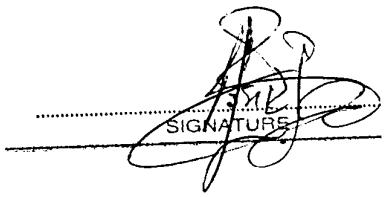
IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 20/7/2005

CASE NO: 24676/2004

DELETE VvHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.



In the matter between:

Acraft Investments (Pty) Ltd	**Applicant**
and	
Funiture, Bedding & Upholstery Industry Bargaining Council, Greater Northern Region	**First Respondent**
Anthony Peter	**Second Respondent**
Dumisane Welcome	**Third Respondent**
Xoko Mlindeni Ndlovu	**Fourth Respondent**
Ntakana Herbert Ndlovu	**Fifth Respondent**
Hlomesakhe Zenele Nkanyana	**Sixth Respondent**
Pule Ruben Machate	**Seventh Respondent**
Joseph Mntukabongwa Gcaba	**Eight Respondent**
Trust Simon Mapangire Estate Late S P Mngomezulu	**Ninth Respondent** **Tenth Respondent**

JUDGMENT

BOSIELO, J

[1] **BACKGROUND**

1.1 The applicant is a private company with limited liability duly incorporated in terms of the Company laws of South Africa. The

first respondent is a bargaining council duly registered and certified in terms of the Labour Relations Act, 66 of 1995 (as amended). The second to the ninth respondents, are all major males who are employed in various capacities at the Meubelsentrum Builiding situate at 111 Kerk Street, Johannesburg which building is owned by the applicant. The tenth respondent represents a certain Mr 5 P Mngomezulu, who prior to his death was also employed at Meubelsentrum Building.

1.2 During or about 24 October 2004, the applicant purchased a commercial property known as Meubelsentrum from the companies known as Meubelsentrum Properties (One) (Pty) Ltd and Meubelsentrum Properties (Two) (Pty) Ltd. In terms of the written agreement of sale this property was sold and purchased as a going concern. At the material time, first respondent had leased part of the commercial property purchased by the applicant which incidentally comprised *inter alia* a number of commercial office blocks. It would appear that following upon the sale of the property, the applicant took over the lease agreement in terms whereof first respondent was one of the tenants. As the applicant did not have managerial personnel and infrastructure to administer and manage the commercial property, it appointed first respondent as its managing agent,

until such time that applicant had its own management team. I may also mention that even prior to the sale of the property aforesaid, first respondent managed and administered the property on behalf of the sellers.

1.3 Having concluded the sale agreement, first respondent proceeded to manage and administer the commercial property aforesaid. I find it necessary to state that in addition to managing the property, first respondent was also a tenant of the applicant at the same property. During or about January 2003, first respondent, in its capacity as the applicant's managing agent of the property, demanded payment of some R 89 516.75 from the applicant which purported to represent the salaries and expenses paid by the first respondent on behalf of the applicant as part of the necessary expenses for the maintenance of the property. Upon enquiry, the applicant was informed by one Janse van Rensburg that his amount represented the salaries paid to second to the tenth respondents. The applicant denied liability for the salaries of second to the tenth respondents as according to the applicant, these respondents were not employed by the applicant, but were employed by the first respondent. Mr Janse van Rensburg maintained that these respondents were in the lawful employment of the applicant. In support of this stance, he

furnished the applicant with the personnel files pertaining to the second to the tenth respondents. It was Janse van Rensburg's contention that as the applicant bought the business as a going concern, second to tenth respondents automatically became the applicant's employees by operation of law (section 197(2) of the Labour Relation Act, 66 of 1995). It is this state of affairs which gave rise to this highly contested application.

[2] 2.1 In order to resolve this impasse, the applicant approached this court on motion proceedings for a declaratory order concerning the true status of second to the tenth respondents i.e. whether they are, in law, employed by the applicant or the first respondent. Depending on the response to the first enquiry, the applicant prayed that first respondent be ordered to pay back to the applicant all the monies which the applicant had paid to the second to tenth respondents as salaries and related employment benefits.

2.2 I interpose to state that the applicant conceded during submissions that as no proper basis had been laid for the repayment of the money paid, to second up to tenth respondents, that this claim be deferred for later date. Consequently no more will be said about this claim.

[3] 3.1 The applicant filed both a founding and replying affidavit wherein it fully set out its case. On the other hand, first respondent filed an answering affidavit wherein he set out his defence, and in particular, dealt with the applicant's averments: '

3.2 As alluded to in paragraph 1.3 above, one Janse van Rensburg of the first respondent, furnished the applicant with all the relevant personnel files which it had kept pertaining to second to tenth respondents. Extracts of these documents were annexed to the applicant's affidavits. It is patently clear from all the documents referred to above that the employer of second to tenth respondents is reflected as first respondent. What is noteworthy is that these are official documents comprising *inter alia,* copies of the UIF cards, applications forms for employment to first respondent, minutes of interviews of the respondents conducted by first respondent, documents reflecting the employees pension fund, identification cards, determination of salary increases and allocation, applications for leave, minutes and records of disciplinary hearings etc. In addition to the above-stated documents, all the respondents except for number ten who is since deceased, have all deposed to affidavits to the effect that, at all material times, they were lawfully employed by first respondent and not the applicant.

3.2 In its answering affidavit, the first respondent has sought to extricate itself from an obvious legal quagmire spawned by the affidavits of the various respondents and supported by the extracts from the personnel files referred to above. The only plausible explanation which first respondent could proffer against this damaging evidence is that "it is possible that on occasion letters would have been addressed on the letterhead of the First Respondent and not the property companies, but this is understandable as clerks do not always clearly distinguish the identity of the different entities whose affairs they managed". It should be clear from this response that first respondent is plainly tentative if not ambivalent. The truth of the matter is plainly that the documents attached by applicant are not mere letters but official documents e.g. UIF forms and applications for employees' pension benefits. Furthermore some of the documents referred to herein were signed not by mere clerks but by senior personnel of first respondent i.e. the General Secretary and Personnel Manager. It is furthermore worth mentioning that such documents were written on first respondent's official letterheads. In an attempt to support its denial, first respondent attached copies of the seventh respondent's contract of employment. First respondent averred that the same is true for second, third, fourth, fifth, sixth respondents and the later Mr Mngomezulu. However, it is

patently clear from that contract marked annexures "JO" "JP" and "JQ" that, contrary to first respondent's assertion, these contracts relate to a period before the purchase of the property by applicant viz. 1998,1999 and 2001. Furthermore it appea'rs *ex facie* annexure "JR1" described as the UIF electronic submission report that during 2002 the second to the tenth respondents were employed by 03 Meubelsentrum Properties (Pty) Ltd. First respondent has not explained if there is any nexus between Meubelsentrum Properties (One) Pty Ltd and Meubelsentrum properties (Two) Pty Ltd who were parties to the sale of the property to applicant. Absent any acceptable explanation, I am unable to find that the three different companies are one and the same corporate entity.

3.3 I interpose to state that in the contract of sale signed by the parties, there is no express reference to the fact that applicant purchased the property with the contracts of employment of the second to the tenth respondent. In the ordinary course of business, one would have expected that there would have been a separate addendum which clearly stipulates the employees who were taken over by the applicant. In terms of clause 16 of the contract, the parties accepted that the agreement constituted the entire contract *inter partes* and further that there were no representations, terms, conditions or warranties

made which were not embodied in the written contract. Clause 17 reflects the normal non-variation clause unless such is reduced to writing and signed by both parties. Based on this, I am of the view that I cannot admit any evidence extraneous t0 the Deed of Sale signed by the parties.

[4] 4.1 The crisp legal question to be answered is whether on the conspectus of the admitted evidence, it is probable that second to tenth respondents were lawfully employed by the applicant and not first respondent.

4.2 Mr Lubbe for the applicant placed strong reliance on the supporting affidavits of the second to the ninth respondents, which were corroborated by extracts from their personnel files as well as correspondence emanating from first respondent's office. He submitted that all these documents were eloquent and incontrovertible evidence that the respondents were lawfully employed by first respondent and not the applicant. On the other hand, Mr Stobl for the first respondent submitted that I should not attach any weight to the extracts from the respondent's personnel files as they contained incorrect information. He argued that I should find that the respondents were, at the time of the sale, in the employment of the seller and that by operation of the law (section 197 (2) of the Labour

Relations Act) automatically became the applicant's employees. In conclusion, he submitted that as the first respondent was merely the applicant's managing agent, it is patently illogical that he could have employed the respondents whose services benefited the applicant and not first respondent

[5] 5.1 Having given this matter careful consideration, I find it extremely difficult to comprehend the case put forward on behalf of the first respondent. What is patently clear is that the contract of the sale is silent regarding any possible take over by applicant of the various respondents. Furthermore there is a plethora of documentary evidence, prepared by first respondent which states categorically that the first respondent is the lawful employer of the various respondents. Some of these documents are important official documents prepared for the Department of Labour. In addition hereto, all the respondents, except for the late Mr Mngomezulu have deposed to affidavits to the effect that they were at all material *times,* employed by first respondent and not the applicant. As against this overwhelming evidence, first respondent offers a hollow explanation that it is possible that its clerks made mistakes. I find the explanation proffered by first respondent to be so far-fetched that it cannot be the truth. In fact, on the admitted evidence, the inference is inescapable that first respondent is being untruthful. In the

> circumstances, I feel constrained to find, as I hereby do, that the first respondent is the lawful employer of second to tenth respondents and further that first respondent is responsible in law to pay all their salaries and related employment benefits .. ’

[6] Mr Lubbe, for the applicant prayed for a punitive cost order against first respondent. He submitted, with zeal, that there is sufficient evidence to prove that first respondent was being deliberately mendacious in his denial of the fact that he had employed the various respondents. He furthermore contended that it is seriously reprehensible if not repugnant that first respondent tried to impugn the accuracy of the documents prepared and kept by first respondent. I agree with Mr Lubbe, that by providing documents pertaining to seventh respondent only, first respondent was being selective to a point where it can be inferred that this was a diligent attempt at suppression or perversion of the truth. If is trite that courts of law have a responsibility to protect their dignity and efficacy. Courts should not hesitate to denounce any attempt to abuse the process of court. I agree that this is a case where the court should clearly articulate its profound displeasure at first respondent's reprehensible conduct by a punitive cost order.

In the result, a declaratory order is hereby issued to the effect that:

(a) At all relevant times hereto, there was a valid contract of employment in existence between the first respondent arid second to tenth respondent;

(b) That there is at present a valid contract of employment in existence between first respondent and second to ninth respondent;

(c) That there is no failed contract of employment in existence between applicant and second to ninth respondents; and

(d) That there was never a valid contract of employment in existence between the applicant and the tenth respondents;

(e) The first respondent is ordered to pay the costs of this application on the attorney and client scale.

L.O. BOSIELO

JUDGE OF THE HIGH COURT

FOR THE APPUCANT:
INSTRUCTED BY:
FOR THE FOURTH RESPONDENT:
INSTRUCTED BY:
DATE OF JUDGMENT:
HEARD ON: