IN THE HIGH COURT OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE Nos. 44740/09;

45110/2009;

51337/09

Reportable in:

SAFLII, JDR (Juta) and JOL (LexisNexis) only

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(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED.	
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In the matters between:

KELLY GROUP LIMITED Applicant

and

WORKFORCE MANAGEMENT (PTY) LTD & OTHERS Respondents

JUDGMENT

WILLIS J:

[1] Originally, I had before me no fewer than six applications to be heard together. The parties have, in the meantime, agreed among themselves as to the procedure to be followed in three of them. In all of these matters Kelly Group Limited has been one of the applicants, Workforce Management (Pty) Limited has normally been one of the respondents, one Solly Tshiki and various companies in which Solly Tshiki has a controlling interest, as other respondents and the South African Post Office Limited also normally as one of the respondents. Solly Tshiki has, indirectly, a majority interest in Workforce Management (Pty) Limited. For the sake of convenience, I shall refer to Kelly Group simply as "the applicant", Workforce Management (Pty) Limited as "the respondent" Solly Tshiki and the various companies in which he has a controlling interest, other than the respondent, Workforce Management (Pty) Limited itself, as "Solly Tshiki" and the South African Post Office Limited as "the Post Office". Before being heard before me, the six applications have absorbed the attentions of Splig, Mathopo, Kgomo JJ and Farber AJ over the period from late October 2009 to late January 2010. In respect of the three that I have now been asked to adjudicate upon (the three whose case numbers appear above), 2nd February was the return day of various rules nisi issued consequent upon the orders of Splig J (on 22nd and 23rd

October, 2009) and Kgomo J (on 10th December, 2009). In these applications which were brought as a matter of urgency before Splig and Kgomo JJ, interim orders were also issued. The applicant now seeks, in each instance, confirmation of the rules nisi and that the interim orders should be made final. Solly Tshiki and the Post Office seek the discharge of not only of the rules nisi but also the interim orders. Costs have thus far either been formally reserved in each instance or held over for determination on this the return day. Various so-called employees of the respondent have also been cited as respondents in some instances. I refer to them as "so-called employees" because, as will appear later, they are not employees in the conventional sense of the word. Nevertheless, in order not to confuse matters further, I shall refer to these persons hereinafter simply as "the employees".

[2] In each instance the rules nisi as well as the interim orders are prolix. It would be tedious and, in my view, unnecessary to repeat them here. The critical issue is whether the respondent and/or Solly Tshiki should be prohibited from recruiting the employees, from time to time, to work for the Post Office on a temporary basis. After much drama and considerable huffing and puffing, that is what these cases are all about.

[3] The applicant and Solly Tshiki are the sole shareholders in the respondent. The applicant is the minority shareholder, Solly Tshiki holding the majority of the shareholding in the respondent. The applicant and Solly Tshiki came together as shareholders in the respondent in a so-called "joint venture" for the sole purpose of acting as labour brokers for the Post Office. The respondent supplies employees to work on a temporary basis for the Post Office according to the Post Office's requirements. In effect, that is all the respondent does. There is a so-called "shareholders" agreement" between the applicant and Solly Tshiki which affects their relationship. The

respondent has been providing labour broking services to the Post Office over several years.

[4] The employees number several hundred. From the viewpoint of employment or labour law, the employees may be described as "right-less persons". Apart from their right to decline an invitation to take up temporary employment with the Post Office from time to time, they have, effectively, no rights whatsoever. They have all agreed, however, to abide by the rules of the Post Office. Their agreements with the respondent also deal with certain ancillary matters such as not consuming alcohol while at work. Many of these employees have worked intermittently for the Post Office over a number of years.

[5] The joint venture between the applicant and Solly Tshiki was a soc-called "BEE (Black Economic Empowerment) partnership deal". The applicant may be described as an "old and established" company. Solly Tshiki is black and has the useful contacts. It has become apparent to me with depressing frequency in this, the South Gauteng High Court, that the relationship between these BEE partners often sours. The reason for the souring of relationships in these "BEE deals" may normally be attributed to mutual resentments at having to share the spoils. This souring of relationships has occurred here. In this case, Solly Tshiki now wishes to terminate the joint venture and provide the labour broking services to the Post Office himself. Furthermore, the Post Office sees no need to continue using the respondent as its labour broker. The applicant is outraged. That is why it has come to court in the frenzied manner which it has. Obviously, in consequence of the termination of the relationship between the applicant and Solly Tshiki, the applicant will no longer share in the profits of this apparently lucrative deal with the Post Office.

[6] I have been informed from the Bar that, since the applications were heard before Splig J, the applicant has taken steps against Solly Tshiki and others to claim damages arising from an alleged unlawful breach of contract. The shareholders' agreement between the applicant and Solly Tshiki contains an arbitration clause for the resolution of disputes between them. I presume that the correct steps have been taken. As the resolution of the dispute between the parties as to damages has still to run its course, it would be inappropriate for more to express any view as to the prospects of success in that dispute.

[7] The shareholders' agreement records that "the company's (i.e. the respondent's) sole source of income is the SAPO (i.e. the Post Office) contract" and that:

> In the event that the company should lose the SAPO contract or should SAPO fail to renew the contract (collectively referred to as a "termination event"), the basis for the existence of the company will cease.

Although the applicant may be understandably distressed that the respondent's seemingly lucrative contract with the Post Office has come to an end, it has clearly always been within the contemplation of the parties that "the good times" would not necessarily last forever. In any event, it is my understanding that one of the reasons for BEE partnership deals is to facilitate the transfer of skills to historically disadvantaged persons. This, it seems to me, necessarily entails that most, if not all, BEE partnership deals will have a relatively short "shelf life".

[8] The shareholders' agreement also provides that:

> For the sake of clarity, nothing contained in this agreement shall in any way restrict the shareholders from the conduct

> of their business, including any business that competes with the company.

Counsel for Solly Tshiki submitted that this means that Solly Tshiki could act precisely as it has by seeking to secure exclusive provision of labour broking services to the Post Office business but the applicant contends that this necessarily means that Solly Tshiki could compete for any business *other than* that of the Post Office. This is an issue directly relevant to the question of whether there has been any breach and, if so, what damages are payable to the applicant. It seems to me that, in order to decide the matter without prejudicing the parties in their still-to-be-resolved dispute, I must in this application assume, without deciding the matter, that Solly Tshiki has, in fact, been in breach of contract.

[9] As the applicant is seeking final interdicts, I must determine the issue according to the classic test in *Setlogelo v Setlogelo*[1] and decide whether the applicant has shown, in respect of the relief sought:

> (a) a clear right;
>
> (b) an injury actually committed or reasonably apprehended; and
>
> (c) the absence of similar protection by any other ordinary remedy.

As I have already said, I have assumed, without deciding the matter, that an injury, in the form of a breach of contract has, in fact, been committed.

[10] Mr *Wasserman*, who has appeared for the applicant, has expressly disavowed that his client seeks relief derived from any field of the law of competition other than that which is to be located in Solly Tshiki's alleged breach of contract. In any event, in relation to the list of employees, it does not seem to me that there is any "capital" which the applicant has built up which required any special skills,

[1] 1914 AD 221 at 227

expertise, experience, knowledge or information on the part of the applicant such that this "capital" deserves special protection by way of an interdict. Accordingly, although the applicant may or may not have a clear right to a legal remedy arising from the alleged breach of contract, I am far from certain that the applicant has a clear right to the relief which it seeks. It is my understanding of the law that in order to obtain an interdict an applicant must go further than to establish that he has a right which has been infringed in law but must go further and satisfy the court that the facts justify a final order (See *Nienaber v Stuckey*[2]). In case I am wrong in this regard I shall now turn to consider whether there is an absence of similar protection by another ordinary remedy.

[11] It is well established that the courts will not grant an interdict if the applicant can be adequately compensated for the injury complained of by an adequate award of damages.[3] Although the applicant's rights, in the event of a there being a breach of contract, may continue to be violated, the quantum of damages will be easily established: Solly Tshiki will be receiving from the Post Office what should have gone to the respondent to be shared between the applicant and Solly Tshiki. There is also nothing to suggest that Solly Tshiki is a "man of straw" and that the pursuit of damages would prove to be futile. Accordingly, it seems to me, that the applicant has failed to establish that it has no other ordinary remedy that will afford it similar protection.

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[2] 1946 AD 1049 at 1053

[3] See, for example, *Cresto Machines (Edms) Bpk v Die Afdeling Speuroffisier SA Polisie, Noord-Transvaal* 1970 (4) SA 350 (T) at 367H-368H (the appeal was dismissed- see 1972 (1) SA 376 (A)) ; *Erasmus v Afrikander Proprietary Mines Ltd* 1976 (1) SA 950 (W) at 965F-967D; *Minister of Law and Order, Bophuthatswana, & Another v Committee of the Church Summit of Bophuthatswana and Others* 1994 (3) SA 89 (B) at 99G-H.

[12] Finally, I turn to consider the question of the discretion of the court. It seems clear that the court retains a residual, judicial discretion as to whether or not to grant an interdict.[4] In addition to other factors, it seems to me to be not irrelevant that the interdict, if granted, could prejudice the employees whose position is perilous enough as it is. Mr *Wasserman* was astute to remind me that, in deciding this case, I am sitting as a judge of the High Court and not the Labour Court and that I did not have a discretion to decide the matter "according to labour law principles". I understood Mr *Wasserman* to mean that I do not have a broad, equitable discretion to do whatever I consider to be fair in the matter. It hardly needs be said that I fully subscribe to the notion that judges do not have a free rein to do as they please: they are constrained by law. Nevertheless, an exercise of a judicial discretion requires, in my view, that the court should have regard to the full *conspectus* of the facts. It seems to me that it would indeed be legitimate to have some regard to the interests of the employees, although I accept that their interests cannot prevail to the extent that that this would prevent the applicant from the lawful exercise of its rights.

[14] The applicant and Solly Tshiki have both employed two counsel. The sheer volume of work has justified the employment of two counsel.

[13] Accordingly, the following are the orders of the court (in case nos. 44740/09; 45110/2009 and 51337/09):

(a) The rules nisi are discharged;

(b) The interim and provisional orders are discharged;

(c) The applications are dismissed;

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[4] See, for example, *Transvaal Property & Investment Co. Ltd and Reinhold & Co v S.A. Townships Mining & Finance Corporation Ltd. and The Administrator*, 1938 TPD 512 at 521 (the judgment of Schreiner J, as he then was) and *Candid Electronics v Merchandise Buying Syndicate* 1992 (2) SA 459 (C) at 464G-465A.

(d) Kelly Group Limited is mulcted in costs;

(e) The costs are to include the costs of two counsel, as well as all costs reserved to date.

DATED AT JOHANNESBURG THIS 10th DAY OF FEBRUARY, 2010

N.P. WILLIS

JUDGE OF THE HIGH COURT

Counsel for the Applicant: Adv. *J. G. Wasserman* SC (with him, *G.W. Amm*)
Counsel for the Solly Tshiki: Adv. *A. Bham* SC (with him, *W.B. Pye*)
Counsel for the Post Office: Adv *P.G. Seleka*

Attorneys for the Applicant: Lowndes Dlamini
Attorneys Solly Tshiki: Knowles Husain Lindsay Inc
Attorneys for the Post Office: Madhlopa Inc.

Date of hearing: 3rd February, 2010
Date of judgment: 10th February, 2010.