



Reportable

REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

(HELD AT DURBAN)

Case no: DA 2/11

BARGAINING COUNCIL FOR THE FURNITURE

MANUFACTURING INDUSTRY, KWAZULU-NATAL

Appellant

and

UKD MARKETING CC AND 11 OTHERS

Respondents

Heard: 17 May 2012

Delivered: 20 August 2012

Coram: WAGLAY DJP, DAVIS JA and JAPPIE JA

JUDGMENT

DAVIS JA

Introduction

- [1] This is an appeal against a judgment of Molahlehi J in which he dismissed an application by the appellant for an order that: the first respondent was obliged to have registered with the appellant in terms of Clause 17 of the Main Collective Agreement promulgated in Government Gazette No 18896 of 18 May 1998; to have complied with the various terms of that agreement, including Clause 26 thereof, and the various other collective agreements in the furnishing industry within the Kwazulu-Natal Province in respect of the said period; to have kept records provided for in Clause 20 of the Main Collective Agreement and to have paid to the appellant the amounts provided for in Clauses 13 and 16 of the Main Collective Agreement; Clause 13 of the appellant's Provident Fund and Mortality Benefit Association Collective Agreement; and, to have paid its employees the wages prescribed by Clauses 2 and 16 of the Main Collective Agreement.
- [2] With leave of the court *a quo*, the appellant has approached this Court on appeal.

The factual matrix

- [3] Various respondents conduct a business that manufactures and markets readymade kitchen cupboards to major retail chain stores. For the period which is relevant to this dispute, namely that which commences on 1 March 2003, the operation of the business was structured so that first respondent solicits orders from retail chain stores for various ranges of readymade kitchen cupboards, manages the workflow to meet these orders and acts as a wholesaler or distributor in selling and delivering the finished product to the store.
- [4] The various stages of the manufacturing process are undertaken by the other respondents through close corporations or sole proprietorships. According to the respondents, through their joint but separate efforts, kitchen cupboards are produced to meet the orders which first respondent has procured.

- [5] Each of the respondents contends that it operates a separate business entity with its own workforce. In one case, that of fifth respondent, it has subcontracted work to other contractors. From the evidence, it appears that most of the respondents are registered for VAT and those that have employees pay contributions for UIF, PAYE and Workman's Compensation on behalf of their employees.
- [6] A minute of a consultation held at first respondent's premises on 28 September 2006 and which was attended by Mr Bengy Premrajh, who together with his wife, are the members of first respondent, Mr A Hamilton, the attorney for appellant, Mr J du Toit, the attorney for first respondent and Mr D Fumage, an independent accountant employed by appellant to check the business operation of respondents, provides a clear overview of this structure. According to this document, Premrajh initially produced readymade kitchens through his own entity. However, as a result of labour problems and proposals from ex-employees, he decided to initiate a new structure. The basis of this structure is set out in the minute. As it represents a critical component of evidence, I reproduce extensive parts thereof:

'1.6 The ex-employees would form their own individual entities, register with the Bargaining Council (BC), charge per set produced, employ their own labour and comply with all government regulations.

1.7 The ex-employees are referred to as "sub-contractors /suppliers".

1.8 The Suppliers applied to the BC to register for levies however they were turned down as they were not affected (or did not meet the BC requirement for registration).

1.9 They would enjoy some of UKDM's profits and at the same time be empowered to take control of their individual processes within the manufacturing process.

1.10 This was how the current structure was initially set up and this has now progressed to the stage where they are buying their own tools and machinery.

1.11 The suppliers were initially running bank accounts in their personal capacity and had not opened one in the name of the CC's. When the case went to the CCMA, they didn't have bank accounts and were deemed to be employees of UKDM. BP asked to register them as employees and the BC said no as it was the same structure.

1.12 The suppliers would get all their own systems in place by doing the following:

- a) Register and pay VAT;
- b) Pay a rental for use of the premises, lights and water, machinery etc.
- c) They would charge UKDM weekly for work produced (per item produced) and not hours charged.

1.13 The current structure is like a clothing factory, CMT (or Cut, Trim and Make).

1.14 The majority of the raw materials is purchased by UKDM and the suppliers are responsible for manufacturing units.

1.15 JS Machinery (Machine Shop) owns all (or most) of the big machinery. Sundry items e.g. hand guns, spray tools and other small items are owned by the suppliers.

2. Paper Trail

2.1 UKDM will receive a bulk order from a customer e.g. Elleries and presumably there is some sort of a schedule worked out as to when the

goods must be ready.

2.2 Individual, manual orders are issued daily to the suppliers UKDM and the suppliers in turn will invoice their goods back to UKDM each day. The daily orders to the suppliers will match the bulk order received from UKDM's customer.

2.3 When units are completed by a specific section, they are invoiced to UKDM as set prices, daily. Manual invoices are made out and VAT is charged on these invoices (assuming the supplier is VAT registered)> the physical units are delivered back to UKDM in a central holding section on the floor where they can then be handed over to the next stage in the process.

2.4 At each stage, the units are checked for quality before being handed over to the next section. This ensures that the department responsible for any quality defects can be easily identified. The invoices are always verified for the number of units delivered (and their quality) but not necessarily signed.

2.5 Goods that are physically handed back to UKDM once a stage is completed are not invoiced by UKDM back to the next department.

2.6 Invoices are accumulated from Thursday to Wednesday and then attached to a statement which is given to UKDM on Thursday mornings. The statement is paid on the Thursday and the suppliers presumably pay wages to their employees on Fridays.

2.7 A weekly statement is issued along with the daily invoices to UKDM who will then make payment to the supplier.

2.8 The suppliers get paid per set produced at a preset price which is usually adjusted annually. It would be unusual for prices to be adjusted during the year but it has happened if market conditions have changed.

2.9 There are fixed lines and only 3, 4 or 5 piece lines are produced. This is therefore all repeat work.

2.10 The suppliers have their own accountant's however we could not establish who actually did the manual invoicing to UKD and other day-to-day administrative work.

3. **JSPS Importers and Distributors cc**

3.1 JSPS owns all the major machinery and the vehicles that transport the kitchen units to customers.

3.2 JSPS charges rentals to the suppliers for use of the machinery and transport however it does not appear as if invoices are made out. (I note that on the statements issued by the suppliers to UKDM, a charge for rental is deducted from the amount payable by UKDM). It needs to be established who is charging the rental.

3.3 It also needs to be established whether UKDM charges rental for use of the factory floor.

3.4 It does not appear as if invoices are issued for the rental however receipts are issued for the payment of these rentals.

3.5 JSPS owns one of the CNC routers (there are two).

3.6 When the boards come out, these get invoiced to UKDM. JSPS cuts the components and then the doors.

3.7 JSPS also supplies outside customers with these components.

4. Description for the functions

No	Function	Entity	Description
1		UKD Marketing CC	Acquisition of raw materials and sales of finished products
2	Cutting of Components	J S Machining CC	Cuts boards into the components
3	Edging	Sonke Edging Works CC	Edging and spraypainting of doors
4	Assembly	Saafies Cabinet Works CC	Assembling boxes, gluing and stapling
5	Filling	Govenders Spraypainting	Sprays undercoats and then fills any holes
6	Sanding	Moses Sanding	Sands down units (use portable sanders)
7	Spraypainting	MGV Spaypainters	Gives units the final spray
8	Finishing	Saafies Cabinet Works CC	Performs final assembly of units e.g. handles, hinges etc put on
9	Spray Door Panels	SRS Spraypainters CC	Does the doors but this is not part of the main line
10	Oak kitchen units	Brownwyn Designs CC	Manufactures the entire Oak range from start to finish
11	Oak kitchen units	Musa's Assemblers CC	Sub-contractors to Bronwyn Designs – has no interaction with UKDM
12	Oak kitchen units	Brooklyn Machining	Sub-contracts to

		CC	Bronwyn Designs – has no interaction with UKDM
13	Final Assembly	Hampshire Components CC	Closed in February 2006 but was responsible for final assembly prior to this being given to Saafies

- [7] Notwithstanding this detailed description of the structure, appellant still contends that the entire ‘setup’ was created as a ‘device, stratagem or sham’ by Premraj to avoid the consequences of an employment relationship between first respondent and its employees, being the balance of respondents together with those persons employed by respondents. Accordingly, it sought to have the ‘corporate veil’ behind which it contested first respondent sought to hide its employees pierced or lifted so as to justify a conclusion that first respondent was in fact and therefore in law the employer of all those who were members of the close corporations or ‘employees’ thereof. In this, appellant contended that all were employees of first respondent in the furniture manufacturing industry. This would mean that all those persons engaged upon the various activities which created the readymade kitchens, which were the subject of orders procured by the first respondent, would be regarded as employees of first respondent.

The evidence led by the appellant

- [8] Mr Numthkumar, an independent furniture manufacturer, testified with regard to certain letters that had been discovered and which were addressed to him by some of the respondents, which sought to solicit work from him. Mr Acker,

who appeared on behalf of the appellant, contended that Mr Numthkumar's evidence made it clear that these letters that he had received were false and had been created to give the impression that the second and third respondents in particular were entitled to take on other customers (other than in respect of orders procured by first respondent) in circumstances where this was plainly not the case. In other words, the suggestion was that this evidence indicated the nature of the sham which respondents sought to cover up by way of false letters.

[9] A major competitor of respondents Mr Neethling, who had been a past chairman of appellant, was called to testify on behalf of the appellants. The essential thrust of his evidence was that the restructuring of first respondent's business, to which reference has been made, would not have been viable if the bargaining council wage rates had been paid to all employees. Accordingly, he testified that the only persons who could benefit were the various respondents and thus the persons employed in the scheme had to have been underpaid for the particular business structure set up by Mr Premraj to have operated successfully.

[10] Mr Furmage, the independent accountant, was taken carefully by Mr Acker through the minute of the consultation meeting, to which reference has already been made. He testified that he was unable, other than by way of invoices, to establish that there was any documentation which confirmed the relationship between first respondent and the other entities. Mr Furmage also examined a series of invoices generated by second and further respondents which had been provided after the meeting on 16 January 2007. He was then asked by Mr Acker as to the outcome of this investigation. He answered as follows:

'I was initially told by Mr Premraj that invoices would be accumulated by the close corporations for one week running from Thursday to Wednesday of every week. A statement would then be issued on the Thursday morning of

each week for the prior week, working day week. He then explained that that statement would be paid by UKD into the close corporation's account. That would take place on Thursday and the object of this exercise was just to test a few of those close corporations' statements and see if money was actually paid over by UKD.

And? --- And I found it was – that it did happen.'

- [11] Mr Simelane, who had been an inspector employed by appellant, testified about inspections that he had undertaken of the business operations of respondents and the report that he had subsequently prepared. In this report, after having analysed the activities of the various respondents, he concluded that:

'In conclusion it was quite evident that the activities at Grimsby Road were designed to produce kitchen units as an end result and was very similar, to the normal activities associated with a factory, manufacturing the same products.

It was also been observed that the employee's irrespective of where they work, earned more or less the same amount per week irrespective of the alleged payment 'per set', system.

It was also noted that the employee's in general appeared to be confused as to whom they are really employed by and the inference was drawn that U.K.D Marketing was ultimately in control of the entire operation.

The employee's also indicated that they were reluctant to complain about their rights concerning minimum wages and social benefits as they fear victimisation and dismissal.

The employee's indicated that they wish that the benefits and wages as prescribed, be restored.'

- [12] Another inspector, Mr Le Roux, was also called to testify on behalf of the appellant. He produced a flow chart which explained how the operation of respondents business took place, a description of which was broadly consistent with the documentation to which reference has been made earlier in this judgment.
- [13] The final witness on behalf of the appellant was Mr Radebe, a former employee of Mr Premraj, although employed by an entity which at the time was referred to as Unique Kitchen Designs. Mr Radebe appeared to be employed in some or other capacity within this operation from 1999 until 2006. Insofar as the material period for this dispute commences in 2003, it appeared that Mr Radebe had been reemployed on 21 March 2005. He denied that, when he returned to the operation, he worked for Mr Ramcherad, the sole member of the eleventh respondent. By contrast, he insisted that he worked for Mr Premraj.
- [14] So much for the witnesses who testified on behalf of appellant. At the close of appellant's case respondents called no witnesses. Accordingly, Mr Acker submitted that an adverse inference should be drawn against respondents who had failed to call available witnesses in circumstances where the relevant facts were particularly within their knowledge. He contended that it was clear that Premraj and the various 'so called' members of the close corporations together with the sole proprietors were available to testify and that clear indications had been provided during the cross-examination of appellant's witnesses of the intention, at least, to call some of them. In Mr Acker's view, this was a case where the internal workings of the entire structure and hence the scheme were exclusively within the knowledge of Premraj and the other members of close corporations and sole proprietors. Their failure to testify in these circumstances was inexplicable.
- [15] In support of this argument, Mr Acker referred to the well-known rule in

*Galante v Dickinson*¹ where Schreiner JA said:

‘In the case of the party himself who is available, as was the defendant here, it seems to me that the inference is, at least, obvious and strong that the party and his legal advisers are satisfied that, although he was obviously able to give very material evidence as to the cause of the accident, he could not benefit and might well, because of the facts known to himself, damage his case by giving evidence and subjecting himself to cross-examination.’

It is a prerequisite to the application of this principle that appellant’s evidence must have been of such a nature that, when it closed its case, there was sufficient evidence to enable the court to say, having regard to the absence of an explanation, that the appellant’s version was more probable than not. See in particular *Putter v Provincial Assurance Co Ltd and Another* 1963 (3) SA 145 (W) at 150 C; *Marine and Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 49 H.

- [16] Accordingly, it is necessary to examine what case appellant made out in terms of the evidence which I have briefly summarised. In this process, a court shall take into account the *dictum* of Miller JA in *Titus v Shield Insurance Co Ltd*²

‘It is clearly not an invariable rule that an adverse inference be drawn; in the final result the decision must depend in large measure upon “the particular circumstances of the litigation” in which the question arises. And one of the circumstances that must be taken into account and given due weight, is the strength or weakness of the case which faces the party who refrains from calling the witness.’

- [17] In my view, the evidence which was provided by appellant’s witnesses was, at best, equivocal, to its own case. For example, Mr Numthkumar accepted

1 1950 (2) SA 460 (A) at 465.

2 1980 (3) SA 119 (A) at 133 E-F.

that Mr Premraj had operated 'within a bigger system involving outsourcing'. He also conceded that the eleventh respondent had advertised that they were prepared to do business with Mr Numthkumar in that they had excess capacity to take additional order. Mr Furmage, on whose evidence much emphasis was placed by appellant, conceded that the entire structure had been transparent, that he had been shown how the operation had worked, that there had been no pretence by those whom he had interviewed and, that something different in the manufacturing process was being conducted at the various operations. He was asked, 'in respect of the labour there is UIF, there is Workman's Compensation, those sorts of government regulations, the CC's were the ones that were responsible for complying with that and as far as you could see he did', to which Furmage answered 'As far as I could see, yes.' Under cross-examination, he accepted that he had spoken to a number of the members in the CC's and they testified when he asked 'who employs you' that 'I am working here for myself but I was employed by UKD and was given this task now to take this department to be on my own.' It is significant, given the emphasis placed upon Furmage's evidence, that when read as a whole, it did little to gainsay the description of discrete operational units as described in the minute of 28 September 2006.

- [18] Faced with this evidence, Mr Acker was invited by this Court to provide an indication of the best possible and unequivocal evidence which appellant had produced to substantiate its case. He referred to a *souvenir* brochure which had been produced to celebrate the 25th anniversary of first respondent. This document, *inter alia*, spoke about 'the business outgrew its premises and Ironstone Road and required a further 200m to accommodate its current level of production including fellow expansion'. Further 'it is not uncommon to find Bengy (Premraj) at his desk drawing designs that he may have thought of doing during his drive to work. His creative genius is not duly acknowledged but it is his ability that has played a key role in the success of UKD'.

[19] Later Mr Premraj was described as a 'charismatic leader who is in full control of his staff and business'. But, in the very same document, the following appears as a description of the new business strategy:

'This new business strategy was in line with Government's philosophy of job creation and Black Economic Empowerment. Bengy resolved to restructure his entire business based on the principle of empowerment and job creation.

He Empowered his staff by sharing profits and assisted them in becoming the employers in their own right. Mr Premraj empowered his production staff and allowed them to form their own companies, which are now contracted to UKD. The benefit of this restructuring enabled the creation of job opportunities for more people. Employees formed their own companies and started contracting to UKD Marketing to manufacture UKD Marketing to manufacture modular kitchens on a piece meal basis.

The benefit of the restructuring to UKD is a fixed labour cost per unit produced. The benefit to these subcontractors is the distribution of wealth as they now participate in profit sharing... UKD has now engaged thirteen subcontractors to produce kitchen components each with its own staff, machinery and infrastructure and quality control standards.'

[20] In summary therefore, when all of this evidence is read and analysed as a whole, it did not provide a sufficient basis to enable this Court to conclude that, notwithstanding no direct explanation on the part of respondents, appellant's version was more probable than not. To the contrary, there is no justification, on the probabilities, to have concluded that the various proprietorships and close corporations did not operate for their own account or that it could be said that first respondent had any financial interest therein. In particular, the uncontroverted evidence was that there were close corporations registered as employers with UIF, some were VAT vendors duly registered with SARS, the various respondents hired and fired employees, paid their wages, made statutory deductions and regulated the hours of work

of those who were so employed. The evidence certainly did not suggest that these respondents were not entitled to assume additional work outside of that which was required in terms of orders which had been procured by first respondent.

The lifting of the corporate veil

[21] It is now possible to examine appellant's argument about lifting the corporate veil. In *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd*³ Smalberger JA noted that: '[o]ver the years it has come to be accepted that fraud, dishonesty or improper conduct could provide grounds for piercing the corporate veil.' At 803 G He warned that 'it is undoubtedly a salutary principle that our Courts should not likely disregard a company's separate personality but should strive to give effect to and uphold it. To do otherwise would negate and undermine the policy and principles that underpin the concept of separate corporate personality and the legal consequences that attached to it.' At 803 H The learned judge of appeal then went on to say that, where fraud dishonesty or other improper conduct was to be found, then further considerations would influence the overall assessment as to whether the corporate veil should be pierced. In this connection, the court would proceed to examine the substance rather than the form of the adopted structure in order to determine whether there has been a misuse of corporate personality which would justify it being disregarded. Smalberger JA then noted that fraud or improper conduct was not the only basis by which the corporate veil could be lifted. Citing Gower (The Principles of Modern Company Law (5ed at 133)) at 804 C 'it also seems clear that a company can be a facade even though it was not originally incorporated with any deceptive intentions; what counts is

³ 1995 (4) SA 790 (A) at 803 D.

whether it has been used as a facade at the time of the relevant transactions.’

- [22] In this case, the relevant transactions appear to be between first respondent and a range of other entities which are owned by persons at arm’s length from the members of first respondent. Furthermore the conduct of the balance of the respondents, particularly in the manner in which they are registered for VAT, pay necessary amounts pursuant to their obligations as employers such as UIF, and when it cannot be established that, in the event of excess capacity, these other respondents are not entitled to take on further orders, does not provide the evidential basis to disregard a company’s separate personality, particularly when the authorities consider that this decision should only be taken in rare cases. *Cape Pacific Limited* at 803 H. In these proceedings, appellant has not made out a case which would justify conflating the entire structure and operation as set out in the minute of 28 September 2006 into a business conducted, organised and operated solely and exclusively by first respondent. Yet, if the corporate veil cannot be so lifted, then that is the only plausible conclusion to be arrived at by this court.

Costs

- [23] The court *a quo* made a punitive costs order on the scale as between attorney and own client as a mark of displeasure by the court of the conduct of the appellant in disclosing the inner workings, business model and financial statements of the respondents to Mr Neethling, who was a direct competitor of first respondent. Mr Neethling himself had testified that it was an extremely competitive market where ‘there is a tremendous scrap to get your piece of pie’. Accordingly, it must have been to his considerable benefit to obtain figures relating to the costs of respondents’ operation and to examine files and financial statements, invoice minutes of meetings and detailed information regarding the running of his competitors’ business operation. These do not appear, in my view, to be any basis by which to disturb this particular order of the court *a quo*.

[24] For these reasons therefore, the appeal is dismissed with costs.

Davis JA

I Agree

Waglay DJP

I Agree

Jappie JA

APPEARANCES:

FOR THE APPELLANT: B A Acker SC

Instructed by Hamilton Attornyes

FOR THE RESPONDENT: M Pillemer SC

Instructed by Pearce and Lister and Company