JUDGMENT

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

JOHANNESBURG

CASE NO J1074/03

REPORTAB

LE

DATE 2005-05-17

In the matter between

LAZARUS CUSA obo MOTHLE L	Applicant
and	
MERCHANDISING MANAGEMENT SOLUTIONS	1st Respondent
ALLAN RAINS	2nd Respondent
KALAI GOVENDER	3rd Respondent

J U D G M E N T

REVELAS, J:

[1] Lazarus Mothle a member of the applicant (SECCWU or "the union") had been in the employ of the first respondent (Merchandising Management Solutions) since 15 September 1999 as a supervisor, when he was dismissed on 21 February 2002. He referred a dispute about an unfair dismissal to the

Commission for Conciliation, Mediation and Arbitration ("the CCMA") where it was eventually arbitrated in the absence of his employer (the first respondent) and on 20 November 2002 he obtained a default award in his favour. In terms of the award the first respondent was to reinstate him which it failed to do.

[2] The award was subsequently made an order of court in terms of section 158(1)(c) of the Labour Relations Act 66 of 1995 ("the Act"). There was no compliance with that order. The Union now seeks compliance with that order in the form of an application to hold the respondents in contempt of court and to direct the respondents to reinstate Mr Mothle and direct that he be paid additional compensation. The Union has also in the same application, asked for an order to join the second, third and fourth respondents to these proceedings.

[3] In the founding affidavit, no grounds for joinder are set out. The application is opposed on the basis that Mr Mothle cannot be reinstated in the employ of a company which no longer exists. In the answering affidavit the first respondent stated that the second respondent, that is Mr Allan Rains, was no longer employed by the first respondent as an officer or director for that matter, and that the second respondent had not been employed by/or associated with the first respondent since that time. According to the first respondent it ceased trading at the beginning of 2002 and in addition it was deregistered as a corporate entity that no longer existed.

[4] The third respondent Mr Kalai Govender, was never employed by the first respondent according to the same answering affidavit.

[5] In its replying affidavit the applicant did not dispute any of the aforesaid facts except for denying that the third respondent was not employed by the first respondent. The affidavits before

me were deposed to by Mr F. Tjatji of SECCWU. The grounds upon which the applicant relies in support of the application are very sparse.

[6] There are no facts set out in the founding affidavit which could persuade me to join any party to these proceedings. There has been no attempt by the applicant to pierce the corporate veil. As it stands there is no entity such as the first respondent upon whom an order can be served and executed.

[7] The applicant was unable to dispute conclusively that the first respondent was deregistered and that the second respondent left the services of the first respondent long before the award was granted. As that evidence is uncontested I am compelled to accept it. (In this regard see *Plascon Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (A) at 634E to 635C.) In any event, if there is such a dispute of which the effect is mutually destructive of the facts and there was no request for evidence, I have to determine this factual dispute in favour of the respondent. (In this regard see *Morapa Technology (Pty) Ltd v Schroeder & Others* (2000) 23 ILJ 2031 (LAC) p 38; *Ampofo & Others v Member of the Executive Council for Education, Arts, Culture, Sports and Recreation: Northern Province & Another* (2001) 22 ILJ 1975 T p 35; *Denel Informatics Staff Association & Another v Denel Informatics (Pty) Ltd* (1999) 20 ILJ 137 (LC) p 26.

[8] In addition, the entire version before me is based on hearsay since the affidavits were deposed to by Mr Frattoria Tjatji. Insofar as the issue of contempt of court is concerned, it must be emphasised that it is a serious offence which could invite a criminal sanction. There must be a certain wilfulness on the part of the party against whom such an allegation is levelled before finding contempt. In this regard I wish to refer to the

matter of *National Union of Mineworkers & Another v BKH Mining Services CC t/a Dancarl Diamond Mine & Others* (1999) 20 ILJ 885 (C) where it was held as follows at paragraph 4:

> **"This Court, being a superior court with powers equal to those of a provincial division of the High Court (see section 151(2) of the Labour Relations Act 66 of 1995) has the power to enforce its orders by contempt proceedings. Such proceedings may, as in the present case, be instituted by the aggrieved party on notice of motion: see for example, *Ntombela v Herridge Hire and Hall CC & Another* D359/97 dated 13 November 1998 (unreported). That these proceedings are instituted by notice of motion does not alter the facts that the aim is essentially penal: if the second and further respondents are guilty of contempt of court, they can be punished by fines or imprisonment, or both. This means that applicants can only succeed if they satisfy this court beyond reasonable doubt that the respondents are guilty of an offence: *Uncedo Taxi Service Association v Maninjwa & Others* [1998] 6 BLLR 683 (E). What must be proved according to that standard is: (a) that an order of court was granted against the respondents, (b) that the respondents were aware of the order and its terms, (c) that the respondents were in fact in breach of the order and, if so (d) that their failure to comply with the order was wilful."**

And further at paragraph 10:

> **"An essential element of the offence of contempt of court is that the alleged offender's non-compliance must be wilful. This means (a) that he must be responsible for the breach and/or (b) that he must intend to defy the order."**

[9] On the facts of this case there is more than a reasonable

doubt that the first, second and third respondents are not in contempt of court. There is no evidence of any wilful conduct. On the evidence that I have to accept the contrary is true. It is also clear from the evidence that the first respondent could not have known about the order since it ceased trading and in fact had been deregistered long before that. There is no evidence that the third respondent knew of the order and, although the second respondent subsequently knew of the order it was only handed down after he had ceased to be in any way associated with the first respondent and the order is not applicable to the second respondent.

[10] Then there is also the question that it is impossible for any of the respondents to comply with the order and as such there is no wilful non-compliance. Therefore the application falls to be dismissed, and accordingly such an order is made. I make no order as to the costs.

_____

E.REVELAS

DATE OF HEARING: 21 APRIL 2005

DATE OF JUDGMENT: 17 MAY 2005

ON BEHALF OF THE APPLICANT: F. Tjatji (Union Official)

ON BEHALF OF THE RESPONDENT: Snyman van der Heever Heyns