

SOUTH AFRICA / JUDGMENT

Kelly Group Limited and Another v Solly Tshiki & Associates (SA) (Pty) Ltd and Others (2010/5594) [2010] ZAGPJHC 77; 2010 (5) SA 224 (GSJ) (11 March 2010) [2010] ZAGPJHC 77

COURT

South Gauteng High Court, Johannesburg

BEFORE

André Gautschi

CASE / FILE NUMBER

2010/5594

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IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER : 2010/5594

DATE: 11/03/2010

In the matter between

KELLY GROUP LIMITED First Applicant

WORKFORCE MANAGEMENT (PTY) LTD Second Applicant

and

SOLLY TSHIKI & ASSOCIATES (SA) (PTY) LTD First Respondent

TSHIKI, SOLLY Second Respondent

SICKLE, BRIAN Third Respondent

THE SOUTH AFRICA POST OFFICE LIMITED Fourth Respondent

THE EMPLOYEES OF THE SECOND APPLICANT Fifth Respondent

JUDGMENT

André Gautschi AJ

The first applicant's predecessor and the first respondent formed a joint venture in about 2001 in terms of which they agreed to pursue the opportunities of placing "temporary labour" with the fourth respondent (The South Africa Post Office Limited – "the Post Office") which they did through the vehicle of the second applicant (Workforce Management (Pty) Ltd – "Workforce"). I shall refer to the first applicant and its predecessors interchangeably as "Kelly" and to the first respondent as "STA". The person behind STA is Mr Solly Tshiki ("Solly Tshiki" or "Tshiki"). Kelly has at all times been considered as an expert in the provision and administration of personnel recruitment services, with the necessary expertise to do so effectively and efficiently. The expertise and experience of STA relates to the general management, marketing and sale of temporary personnel recruitment services. In addition, it seems that STA, as a BEE company, had the necessary entrée with the Post Office. There is a dispute as to whether Kelly had brought into the joint venture its "core workforce", which had until then been contracted to Kelly, which had trained it, and paid for such training. According to the respondents, the workforce (several hundred persons working for the Post Office in the Western Cape) were already "employed" by the Post Office and had at some stage in the past been turned from permanent employees of the Post Office into temporary employees placed by labour brokers. It is not necessary that I resolve this dispute. In September 2003, but backdated to 1 February 2001, Kelly and STA concluded a written shareholders' agreement to govern their

relationship. The relevant material terms for purposes of this application are the following :

4.1 Clause 1.2.2

"1. In this agreement –

...

1.2.2 the following expressions shall bear the meanings assigned to them hereunder and related expressions shall bear corresponding meanings –

1.2.2.12 'SAPO contract' - the contract awarded to the company [Workforce] by the South African Post Office Limited ('SAPO') in terms of which the company supplies temporary employees to the SAPO pursuant to a labour brokerage agreement."

4.2 Clause 2

"2.1 It is recorded that LO [LogicalOptions (Pty) Ltd, now Kelly] has procured the incorporation and registration of a limited liability company in accordance with the laws of the RSA.

2.2 As soon as possible after the signature date, the parties shall procure that -

2.2.1 the financial year end of the company shall be 30 September;

2.2.2 the company shall have as its principal object and main business the provision of human resource services and personnel recruitment services in respect of temporary placement of staff within the territory. "

4.3 Clause 4

"As soon as possible after the signature date, the parties shall procure that the entire issued share capital of the company is held as to 49% by LO and 51 % by Tshiki [STA] and shall do all such things, pass all such resolutions and sign all such documents as may be required to give effect to the foregoing."

4.4 Clause 5

"5.1 The shareholders undertake that they will promote and maintain the interests of the company in the territory and will exercise the utmost good faith towards each other. Without departing from the generality of the foregoing -

5.1.1 the shareholders undertake and agree that they will not misinform each other as to any matter or thing in relation to the company or its business or withhold any material information coming to their knowledge in regard to the affairs of the company;

5.1.2 LO and Tshiki undertake and agree that they shall use their best endeavours to procure business for the company; and

5.1.3 at the election of the board, LO will make available to the company, on such terms and conditions as may be agreed to by LO and the board such management resources and debtor factoring as may reasonably be required to carry on the business.

5.2 For the sake of clarity, nothing contained in this agreement shall in any way restrict the shareholders from the conduct of their businesses, including any business that competes with the company."

4.5 Clause 8

"8.1 It is recorded that -

8.1.1 LO has expertise and experience in the provision and administration of personnel recruitment services;

8.1.2 Tshiki has expertise and experience in general management, marketing and sales in respect of temporary personnel recruitment services.

8.2 The shareholders shall procure that resources shall be provided to the company (by way of subcontracts or otherwise) in order to enable it to perform work under the contracts which are awarded to it, by the shareholders in accordance with their expertise

and experience as set out in 8.1 and otherwise in such manner as the board from time to time determines is appropriate. "

4.6 Clause 13.8

"The shareholders shall procure that none of the directors, officers or employees of the company will have authority to bind or commit the company to any of the following resolutions or transactions, nor will the shareholders or their nominees take any

steps of any nature to approve, authorise or permit the company to become bound or committed to any such resolution or transaction,

unless such resolution or transaction will have been approved in advance, in writing, by shareholders representing 80% of the total

effective shareholder in the company –

13.8 the diversification by the company into any other business;"

4.7 Clause 16.5

"It is recorded and agreed that -

16.5.1 the company's sole source of income is the SAPO contract;

16.5.2 in the event that the company should lose the SAPO contract or should the SAPO fail to renew the contract (collectively referred to as 'a termination event'), the basis for the existence of the company will ceased. Then and in such an event the parties agree to proceed as provided for in 16.6."

4.8 Clause 16.6

"Upon the happening of a termination event, the parties agree as follows -

16.6.1 no further contracts will be transacted through the company;

16.6.2 the management of the company will continue to collect the debtors of the company and the company will discharge the liabilities of the company as and when they fall due. To the extent that insufficient cash resources are available to the company to discharge such liabilities, the shareholders shall, notwithstanding anything to the contrary to the provisions of 7, be obliged to lend to the company the funds necessary to effect such payments.

16.6.3 Upon the discharge of all the company's liabilities and the collection of all its debtors (after having taken into account any write-offs) in accordance with 16.6.2, LogOpt [Kelly] shall by written notice ('call notice') to Tshiki oblige Tshiki to sell to LogOpt and LogOpt shall accordingly purchase with effect from the date of the call notice ('call date') all of the ordinary shares held by Tshiki in the company ('call shares'), which shall sell same.

16.6.4 ...

16.6.5 ...

16.6.6 ...

16.6.7 ..."

4.9 Clause 19

"19.1 Save as may otherwise be provided in this agreement, should any party ('defaulting party') commit a breach of any provision of this agreement and fail to remedy such breach within thirty days of receiving written notice from any other party ('aggrieved party') requiring it to do so, then the aggrieved party shall be entitled, without prejudice to its other rights under this agreement or in law, to claim immediate specific performance of all of the defaulting party's obligations whether or not due for performance, in either event without prejudice to the aggrieved party's right to claim damages.

19.2 Notwithstanding anything to the contrary contained in this agreement, neither party shall in any circumstances be entitled to cancel this agreement.

4.10 Clause 22.2

"No party shall be bound by any representation, express or implied term, warranty, promise or the like not recorded herein or reduced to writing and signed by the parties or their representatives."

It will be seen from these clauses that at that time Workforce's only initial reason for existence was the work it supplied to the Post Office. Services were rendered by the joint venture to the Post Office from 2001 onwards and, once the shareholders' agreement was concluded,

Workforce was the vehicle used by the joint venture for this purposes. As can be seen from clause 4 of the shareholders' agreement, STA held 51% of the shares in Workforce, and Kelly 49%. The nature of the contract between Workforce and the Post Office seems somewhat notional. I accept for purposes of this application that the Post Office as a matter of fact used Workforce consistently and extensively to supply temporary labour to it, but there was no contract which the Post Office had entered into with Workforce which obliged it to do so. Kelly performed all the office and payroll administration services required by Workforce in regard to the supply of labour to the Post Office. The following is a summary of the way in which labour was placed and payment was made. The Post Office would place orders in regard to the placement of temporary staff a week in advance. The employees thus employed would complete manual timesheets, which were approved and signed off by relevant officials of the Post Office and then collected by Workforce in Cape Town. The information would then be captured by Workforce on a computer system maintained by Kelly in Sandton. Between Kelly and Workforce they would compile reports as to what amount was owed by the Post Office. In addition, a payslip would be made for each individual employee and Kelly would pay the employee accordingly. An invoice would then be submitted to the Post Office for payment and payment collected from it. From this it can be seen that bridging finance was required by Workforce, which is said to be some R3.2 million over every given two month period. From the beginning of October 2009, the Post Office placed an order on STA for the provision of the temporary staff which until then had been provided by Workforce, and STA advised Workforce that it (Workforce) was with effect from 16 October 2009 no longer required to provide back office services for the Post Office. There was thereafter an exchange of correspondence, in which Kelly demanded that Workforce be allowed to continue

with its business and operations, and STA took up the position that it was entitled to compete with Workforce. Kelly launched an urgent application which came before Spilg J on 22 October 2009. The order granted was essentially a rule nisi (to operate as interim relief pending a referral of the disputes to arbitration) directing the respondents (at that time STA, Workforce and three other Solly Tshiki corporate entities) to deliver the time sheets to the applicants, and to render assistance to Workforce and/or Kelly so as to ensure timeous payment of salaries due to the employees; and furthermore interdicting and restraining the Solly Tshiki respondents from interfering with and/or frustrating Kelly in the fulfilment and execution by it of the services it provided to Workforce, not limited to back office services and payroll administration. At that time Kelly was the only applicant, no doubt because Kelly had only a 49% interest in Workforce and therefore did not have a controlling shareholding. Later Workforce was to feature as an applicant, apparently on some derivative basis.

There was then some difficulty with the time sheets furnished by STA to Kelly in that they had been so compiled that Kelly was unable to fulfil the back office obligations which it owed to Workforce.

Accordingly, on 23 October 2009 Kelly approached Spilg J again. The result was a refinement of the order with regard to the time sheet information to be furnished to Kelly and the widening of the interdict against interference and/or frustration to certain other respondents. The balance of the relief granted is not immediately relevant to this application. Time sheets were continued to be made out in the name of STA, and accordingly a further application was launched, which resulted in a series of undertakings being recorded in an order of court on 2 December 2009. On 7 December 2009 Kelly launched an urgent application to interdict STA from using the employees of Workforce for the purposes of tendering to and obtaining orders from the Post Office. On 10 December 2009 Kgomo J granted a rule nisi (to operate as an interim interdict) restraining the relevant respondents from, in essence, competing with Workforce.

On 14 December 2009 Kelly launched a further application in which it sought to interdict the Post Office from making payment to STA arising from the placement of temporary staff and employees during the period October 2009 to 11 December 2009. The relief sought was granted by Mathopo J. The matter then came before Willis J on the return day (or extended return day in some cases) of the rules nisi issued. He was concerned only with the two orders granted by Spilg J and the order granted by Kgomo J. Willis J discharged the rules nisi and the interim and provisional orders, dismissed the applications and ordered Kelly to pay the costs, including the costs of two counsel as well as all reserved costs to date. In his judgment, Willis J assumed without deciding, that STA is in breach of the shareholders' agreement. He found that Kelly did not have a clear right to the relief which it sought, and that there was an adequate alternative remedy in the form of a claim for damages. He also exercised his discretion against Kelly. An application for leave to appeal was delivered against the judgment and order of Willis J. Whilst waiting for that application to be heard, the present application was launched. The relief sought, summarised, is the following :

interdicting and restraining STA, Tshiki and Sickie (formerly a director of Workforce, and later a director of STA) from interfering with Kelly's back office services and payroll administration work; utilising or engaging the services of the employees in rendering

services to the Post Office; coercing and/or soliciting the services of the employees to render services to the Post Office;

utilising the infrastructure, processes and systems of Workforce for any purpose other than those of Workforce (prayer 2); that the relief in prayer 2 operates as an interim interdict pending the final outcome of an appeal against the orders and judgment of Willis J (prayer 3);

directing that the rules nisi granted by Spilg J on 22 and 23 October 2009 and by Kgomo J on 10 December 2009 "be revived and/or continue to stand and/or operate pending the outcome of the appeal ..." (prayer 4).

The application for leave to appeal before Willis J was to be heard the day after this application was heard. Although there was some suggestion in the papers that this application should have waited for that application, that point was not taken in argument before me. Even assuming that the granting of leave to appeal might affect the outcome of this application, that is not to say that the refusal of leave to appeal would operate to the contrary, because Kelly would be entitled to seek leave to appeal from the Supreme Court of Appeal, the result of which will only be known after this judgment has been handed down. I think that the proper approach is to assume that leave to appeal will be granted. It is by now established that an application for leave to appeal or the noting of an appeal does not revive an interim order which has been discharged¹. It is therefore incumbent upon the applicant whose interim order (with or without a rule nisi) was discharged, to bring a further application for an interim interdict pending the outcome of any appeal, should it so desire.

There is authority for the proposition that where the court holds that the applicant made out no case for an interim interdict, that would by definition preclude the applicant from obtaining an interim interdict pending an appeal against that order. In *Constantinides v Jockey Club of South Africa*², the applicant applied for an interim interdict, but the parties agreed that if the court should find that the applicant was entitled to a final order, it should grant a final interdict. Herbstein J held as follows³ :

"On the main application I held that the applicant made out no case for an interdict. It seems to me that I would be stultifying myself and frustrating that judgment if I now held that the applicant is entitled to an interim interdict pending the decision on the appeal"

Herbstein J referred to an unreported judgment of Murray J in *Anschutz v Jockey Club of SA*⁴. The case involved the withdrawal of Anschutz's trainer's license by the Jockey Club. Anschutz applied for a temporary interdict

restraining the Jockey Club from putting such withdrawal into operation pending a decision by the court. Murray J came to

conclusion that the application had to be dismissed and the rule nisi operating as a temporary interdict discharged. He was then asked to grant a fresh interdict restraining the respondent pending the hearing of an appeal. Herbstein J then continues as follows⁵ :

"His lordship came to the conclusion that as he had held that the applicant had no right at all, he must act on that

judgment

despite the fact that a different opinion might eventually be held by the Appeal Court. I adopt that statement as applicable to

the present matter before me.

....

This Court has held that the applicant has shown neither a clear right nor a prima facie right. If the applicant failed to do that in the main application then, in equal measure, he must be held to have failed to show a clear right or a prima facie right in the present application. On that ground alone the Court would have to exercise its discretion against the applicant. I agree with this submission [which had been made by counsel]."

See also LAWSA on Interdicts⁶ :

". . . the noting of an appeal against an order dismissing an application for a final interdict does not revive the interim interdict which was an adjunct to these proceedings, nor is the court entitled to grant an interim interdict pending the appeal."

As authority for the latter proposition, the Constantinides case is cited.

I do not believe that the mere fact that an interim interdict is discharged on the return day, when the final interdict is considered, precludes the applicant from succeeding in obtaining an interim interdict pending an appeal against that decision. I do however accept the correctness of the Constantinides decision, that if an application for an interim interdict is refused, on the basis of a finding that no prima facie right has been established, the court is not entitled to grant an interim interdict pending the appeal. When Willis J set aside the rules nisi and the interim and provisional orders, he was concerned with a final interdict and dismissed the applications on the basis that the applicants were not entitled to a final interdict. That does not in itself suggest that the applicants had not met the test for an interim interdict, and Willis J made no finding in this regard. The fact that the applicants are unable to establish a clear right does not per se entail that they are unable to establish a prima facie right. The Constantinides case is distinguishable because in that case Herbstein J had found that the applicant had shown neither a clear right nor a prima facie right, and it is not in my view authority for the blanket statement made in the passage quoted above from LAWSA. Thus, it seems to me, the procedure followed by the applicants in this matter is competent and, provided they can establish the elements of an interim interdict, and subject to the exercise of my discretion, they would be entitled to relief.

The applicants approached the matter on the basis that this was in effect an application for leave to execute, and that the test laid down in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*⁷ is applicable. It was also submitted that I should have regard to the prospects of success on appeal and that if leave to appeal were granted, that would mean in effect that a *prima facie* case had been established. I do not agree. One must in my view be careful not to misconstrue the remedy sought and thereby to apply an incorrect test. This is not an application for leave to execute, but the seeking of an interim interdict pending an appeal. There is a difference between the two, and the test for each is different. It would also be wrong in my view to equate reasonable prospects of success on appeal with the establishment of a *prima facie* right for purposes of such an interim interdict. To do so would run contrary to the proposition, which I accept, that if an interim interdict is refused, no interim interdict can be granted pending the appeal. On the test proposed by the applicants in this matter, once leave to appeal is granted, an interim interdict should follow, even if the court may have found that no *prima facie* right had been established. I shall first address the *prima facie* right. It seems clear from the papers that the Post Office and the employees have complete freedom of contract, so that the Post Office can decide which labour broker it wishes to employ from time to time, and the employees may choose for which labour broker they wish to work from time to time. The applicants pitch their case entirely on a breach of the shareholders' agreement, and more particularly clause 5 thereof, which is quoted in paragraph [4] above. The applicants' submission is that clause 5, read with the other

relevant clauses of the shareholders' agreement, makes it clear that the sole *raison d'être* of the joint venture was, at least at that time, providing labour to the Post Office, and that it would be absurd if either party could compete with Workforce in relation to the Post Office work.

Accordingly, clause 5.2 (which allows the shareholder unrestricted

conduct of their own businesses "including any business that competes with the company") "can only reasonably and properly be interpreted to mean that each party may continue with its existing labour broking activities and with any contract that was in place at the time that Workforce was formed, even if such business was with the Post Office, and, additionally, that each party may compete in relation to any other contracts or business conducted by Workforce, save obviously for the specific Post Office contract standing at the heart of the joint venture and the

shareholders agreement"⁸. It was pointed out to me by respondents' counsel that, in the application before Kgomo J, the applicants contended for a tacit or implied term to this effect.

Respondents' counsel on the other hand contended that the wording of clause 5.2 was clear, that there is a prohibition in clause 22.2 against reading any implied terms into the contract (this apparently does not exclude tacit terms), and that clause 5.2 is not absurd if regard is had to the fact that future business was envisaged for Workforce, that is beyond merely servicing the Post Office. There appears to be a tension between the provisions of clause 5.1 and clause 5.2. Clause 5.1 requires utmost good faith, best endeavours to procure business for Workforce and the like. It seems anomalous that clause 5.2 would then allow a shareholder to compete directly with

Workforce.

Nevertheless it seems to me that the applicants' contentions with regard to clause 5.2 are untenable. First, any tacit term contended for by the applicants would be in conflict with the plain meaning of clause 5.2. Secondly, what I am asked to do is not so much to construe clause 5.2, but to rewrite it. The wording of clause 5.2 is plain, and it allows the shareholders to conduct "any business that competes with the company". To qualify it as contended for in paragraph 6 of the applicants' heads of argument would change the meaning of clause 5.2, and would entail a rewriting of the clause which, whilst it would admittedly remove the tension and any potential absurdity between clauses 5.1 and 5.2, would in my view alter the intention of the parties as expressed in clause 5.2. The applicants' remedy in my view lay in a rectification, which has not been advanced in the affidavits. In April 2003 the Post Office still recognised STA as a "vendor" of the Post Office. The shareholders' agreement was concluded in September 2003, when STA would have been alive to the fact that it was recognised as a vendor of the Post Office, and it is not that strange that it would have wished to preserve that part of its business, even if it meant that it would compete with Workforce. In my view therefore Kelly and STA were entitled to compete with Workforce in relation to the Post Office, and STA committed no

breach of contract. The applicants have in my view not established a *prima facie* right in this regard. Even if I am wrong on the question of breach, there is still the question of specific performance, for that is what the applicants sought before Willis J. Counsel for the applicants submitted that there was no difficulty in granting such an order, for it simply meant instructing the respondents not to breach the terms of the shareholders' agreement by competing unlawfully with Workforce. But the position is not that simple as I see it. Specific performance entails ultimately that the shareholders' agreement be enforced, and that STA be obliged to comply with its obligations in terms thereof. The following difficulties arise. In the first place, there is clearly a quasi-partnership, if not a partnership, between Kelly and STA. A partner is allowed unilaterally to dissolve the partnership, despite opposition, but subject to a claim for damages being available against it⁹. In the present case there is clearly a stand-off (I put it no higher than that but it probably is higher) between Kelly and STA. By decreeing specific performance, a court would be forcing the partners or quasi-partners to remain in the joint venture, which is not only against the principle just mentioned but also in my view undesirable. A court would not easily grant such specific performance. Secondly, clause 5.1 of the shareholders' agreement contains obligations which involve the exercise of the utmost good faith, using best endeavours to procure business for the company, and the like. Whilst such expressions would not necessarily render the agreement void for vagueness (I make no finding in this regard), a court would not in my view readily decree specific performance where such expressions are relevant. A court could not police or readily determine whether a party used his best endeavours or acted in the utmost of good faith, and for that reason such clauses would not in my view be enforced by way of specific performance. That, too, would be a bar to a claim for specific performance. I am therefore by no means convinced that a court would ever grant the applicants specific performance, and in my view the applicants have not made out a *prima facie* case for this right. The aforesaid conclusions make it unnecessary that I consider the other elements of an interim interdict, namely

irreparable harm, balance of convenience and the absence of an adequate alternative remedy. In fairness to the parties I will nevertheless set out my views on these aspects briefly. Irreparable harm was not challenged by the respondents, and was, as I understood it, accepted by them. There was a dispute about the balance of convenience, but it clearly in my view favours the applicants. The applicants have made it clear that Workforce would be wound-up if it was not able to conduct further business. On the other hand, STA, if it had to maintain the status quo would still be entitled to 51% of the profits made by Workforce, and would, if it one day succeeded in the appeal, be entitled to pick up where it left off. It was said that there was no tender of damages by the applicants, but counsel for the applicants made that tender in reply. Should damages be caused to STA, Kelly would be liable for such damages and, as a listed company, is clearly able to pay same. The same cannot be said for STA, which has put up no facts which would satisfy me that it would be able to pay a substantial claim for damages. Accordingly, in my view the balance of convenience favours the applicants.

Willis J found, as I have already stated, that the applicants had an adequate alternative remedy, namely a claim for damages. He found that "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." I regret that I do not agree with that finding. The respondents put up no facts which would satisfy me that STA is able to provide the bridging finance necessary to pay the employees, let alone to pay damages which were said in the affidavits to be in the order of R8.6 million. The statements by STA are too bald to satisfy me that it could pay a substantial claim for damages, and the only document that was put up (in reply) was a letter from Standard Bank indicating that STA and Solly Tshiki had in excess of R2 million available on borrowings. That is not in my view sufficient to assist STA. I am therefore of the view that a claim for damages is not an adequate alternative remedy.

However, once I have found that there is no prima facie right, the application must inevitably fail. Accordingly, the application is dismissed with costs, such costs to include the costs of two counsel.

ANDRÉ GAUTSCHI

ACTING JUDGE OF THE HIGH COURT

Date of hearing : 25 February 2010 Date of judgment : 11 March 2010 For applicants : Adv G Farber SC, with him Adv G W Amm (instructed by Lowndes Dlamini) For respondents : Adv A E Bham, with him Adv W B Pye (instructed by Knowles Hussain Lindsay Inc)

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1 MV Snow Delta; Serva Ship Ltd v Discount Tonnage Ltd 2000 (4) SA 746 (SCA) at para [6]; Ismail v Keshavjee 1957 (1) SA 684 (T) at 688A; SAB Lines (Pty) Ltd v Cape Tex Engineering Works (Pty) Ltd 1968 (2) SA 535 (C) at 537E-G; Isaacs v Williams en Andere 1983

(2) SA 723 (NC) at 730D - foot

2 1954 (3) SA 35 (C)

3 At 53H

4 WLD, 10 December 1953

5 At 54G – 55A

6 Vol 11 (Second Edition) para 428

7 1977 (3) SA 534 (A) at 545E-G

8 paragraph 6 of applicants' heads of argument.

9 Herbst en 'n Ander v Solo Boumateriaal 1993 (1) SA 397 (T) at 399G-400C

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