

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

CASE NO JA48/99

In the matter between:

SUCCESS PANEL BEATERS AND SERVICE CENTRE CC

Appellant

and

**NATIONAL UNION OF
METALWORKERS OF SOUTH AFRICA**

First Respondent

SHEZI, EC

Second Respondent

JUDGEMENT

WILLIS JA. :

This is an appeal against a decision of the Labour Court ordering the appellant (respondent in the Court *a quo*) to reinstate the second respondent (second applicant in the Court *a quo*) and to pay him R24 000 as compensation for his unfair dismissal.

The Court *a quo* granted leave to appeal to this Court.

The judgement of the Court *a quo* has been reported.(**National Union of Metalworkers of SA & another v Success Panelbeaters & Service Centre CC t/a Score Panelbeaters & Service Centre** (1999) 20 ILJ 1851 (LC).)

The Industrial Court, functioning in terms of the Labour Relations Act No 28 of 1956 (“ the old Act”) , had granted its order against an employer known as Score Panel Beaters and Service Centre (“Score”). This was the trading name of the business which prior to its sale was owned by Stescore CC .The business of this employer was sold to the appellant. The respondents invoked the provisions of Section 197 (2)(a) of the Labour Relations Act No. 66 of 1995 (“the LRA ”) to obtain the same order against the appellant in the Labour Court .

The appeal turns on the question as to whether the rights and obligations created by Section 197 (2)(a) of the LRA apply to dismissals which occurred prior to the coming into operation of the provisions of the LRA relating to dismissals. The appellant, not surprisingly, contends that they do not. Equally unsurprisingly, the respondents contend that they do.

The relevant facts are common cause and are relatively straightforward:

(1) The second respondent was dismissed from Score on 7th March 1996;

(2) The second respondent thereupon duly referred a dispute relating to his alleged unfair dismissal to the Industrial Court in terms of Section 46 (9) of the old Act.

(3) During either January or February 1997 but by no later than 3rd February, 1997 the business of Score was sold as a going concern to the appellant.

(4) On 19th February, 1997, the Industrial Court made the order referred to above requiring Score to reinstate the second respondent and to pay him compensation. (Score was in default of appearance at the hearing although it had, in its answering affidavit in the Industrial Court

proceedings, opposed the relief sought by present respondents.)

(5) The provisions of the LRA relating to all matters relevant to this matter, including but not limited to unfair dismissals, came into effect on 11 November, 1996.

(6) On 7th December 1998 the respondents brought an application in the Labour Court for the order made by the Industrial Court against Score to be made effective against the appellant.

(7) The Labour Court granted the aforesaid relief to the second respondent.

Section 197 (2)(a) of the LRA provides as follows:

“ If a business, trade or undertaking is transferred in the circumstances referred to in subsection (1) (a), unless otherwise agreed, all the rights and obligations between the old employer and each employee at the time of the transfer continue in force as if they were rights and obligations between the new employer and each employee and anything done before transfer by or in relation to the old employer will be considered to have been done by or in relation to the new employer.”

Subsection (1)(a) refers to the transfer of “the whole or any part of a business, trade or undertaking” by an “old employer” to another employer “as a going concern”. This, of course, is precisely what happened in this case.

There is no dispute that there was no applicable agreement that would exclude the operation of Section 197 (2)(a).

As the dismissal of the second respondent occurred before the coming into operation of the provisions of the LRA relating to dismissals, the appellant relies very strongly on the trite presumption against retrospectivity to argue that section 197(2)(a) does not apply to the order made by the Industrial Court.

The appellant also relies on the provisions of Item 21(a) and Item 22(a) of Schedule 7 of the LRA.

Item 21(a) provides as follows: “ *Any dispute contemplated in the labour relations laws that arose before the commencement of this Act must be dealt with as if those laws had not been repealed.* ”

Item 22(a) provides as follows: “*In any pending dispute in respect of which the industrial court or the agricultural labour court had jurisdiction and in respect of which proceedings had not been instituted before the commencement of this Act, proceedings must be instituted in the industrial court or the agricultural labour court (as the case may be) and dealt with as if the labour relations laws had not been repealed. The industrial court or the agricultural labour court may perform or exercise any of the functions or powers that it had in terms of the labour relations laws when it determines the dispute.*”

In my view, the retrospectivity argument does not come to the aid of the appellant.

Both the transfer of the business and the order of the Industrial Court occurred after the coming into operation of the LRA in full on 11th November, 1996.

The LRA was gazetted on 13nd December, 1995 (*Government Gazette* No. 16861). The

provisions of the LRA were available to the public for a long time before the transfer of the business. Indeed, the appellant claimed that it had obtained a suitable undertaking that the previous sole member of the seller would assume “ liability in respect of any claim arising in connection with the business in respect of which the cause of action arose prior to 1st January, 1997.”

Moreover, the provisions of section 197(2)(a) are plain enough. They provide, *inter alia* , that “ anything done before transfer by..... the old employer will be considered to have been done by the new employer.” In other words, the unfair dismissal of the second respondent by Score will be considered to have been effected by the appellant.

Item 21(a) does not assist the appellant .The issue that came before the Court *a quo* was whether or not to make the order of the Industrial Court applicable to the appellant. The Court *a quo* was not called upon to determine the fairness or otherwise of the second respondent’s dismissal. The issue that the Court *a quo* was called upon to decide arose after the commencement of the LRA and, consequently, Item 21(a) did not prevent the Labour Court from considering the matter or making the order which it did.

Item 22(a) provides that a pending dispute in respect of which the Industrial Court had jurisdiction must be dealt with as if the labour relations laws had not been repealed. The pending dispute in respect of which the Industrial Court had jurisdiction was concerned with the issue as to whether the second respondent had been unfairly dismissed or not. At the time of the commencement of the LRA there was no issue, much less a dispute, as to the applicability to the appellant of any order that the Industrial Court may make. The transfer of the business had not yet occurred. Item 22(a), for these reasons, does also not assist the appellant.

The appellant has also raised the issue of its non-joinder in the Industrial Court proceedings. The appellant contends that the respondents were, at the time of the hearing in the Industrial Court on 19th February, 1997, well aware of the fact that the business of score had been transferred to the appellant and ought to have joined the appellant as a person having a direct interest in any order which the Court may have made.

It is quite clear from the record, including an affidavit signed by Mahomed Irfaan Yunoos, the sole member of the appellant that he had been informed by the first respondent of the pending application in the Industrial Court and that he elected not to attend the proceedings. He, on his own version of events, gave as his reason the fact that the seller of the business had undertaken “ liability in respect of any claim arising in connection with the business in respect of which the cause of action arose prior to 1st January 1997.”

It is well settled law that a party with a direct and substantial interest in any order which a court may make should be joined in proceedings unless it is clear that he has waived his right so to be joined. (See **Amalgamated Engineering Union v Minister of Labour** 1949 (3) SA 637 (A) at 659, which case has been followed in numerous judgements, reported and unreported, ever since.)

It is clear from the above that the appellant waived its right to be joined. In effect, it told the respondents before the Industrial Court hearing “Do your damnedest!”

For these reasons I am satisfied that the Court *a quo* correctly decided the matter. I should accordingly dismiss the appeal. Neither the Industrial Court nor the Court *a quo* made any

order as to costs. These orders seem to me to have been fair in the circumstances.

Nevertheless, if one bears the provisions of section 179 in mind, it seems to me that fairness now requires that the costs of the appeal should follow the result. The parties agreed that this should be the case.

Accordingly, the following order is made:

The appeal is dismissed with costs.

DATED AT JOHANNESBURG THIS DAY of MARCH 2000.

N.P. WILLIS

JUDGE OF APPEAL

I agree

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R.M.M. ZONDO

ACTING JUDGE PRESIDENT

I agree.

J.H. CONRADIE

JUDGE OF APPEAL

Counsel for the Appellant: Adv. M. Van As

Counsel for the Respondents: Adv. J.G. Van Der Riet SC

Attorneys for Appellant: J. L. Van Der Walt

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Date of hearing: 7th March, 2000

Date of judgement: 17th March, 2000