IN THE LABOUR APPEAL COURT OF SOUTH AFRICA HELD AT JOHANNESBURG

CASE NO: CA 7/2005

IN THE MATTER BETWEEN

ZIKHETHELE TRADE (PTY) LTD	APPELLANT
AND	
COSAWU (on behalf of its members)	FIRST RESPONDENT
FAIZEL BARDIEN N.O In his capacity as trustee of Zelpy 2178 (pty) Ltd Formerly trading as Khulisa Terminal Services (in liquidation)	SECOND RESPONDENT
JURGENS JOHANNES STEENKAMP In his capacity as trustees of Zelpy 2178 (Pty) Ltd formerly trading as Khulisa Terminal Services (in liquidation)	THIRD RESPONDENT

JUDGEMNT

JAPPIE AJA

[1] This matter came before this Court on the 7th November 2006.Up until then the matter had been unopposed but when the matter was called the first respondent, the Commercial Services and Allied Workers Union (COSAWU), through its attorneys, sought an adjournment so that it could present argument in the appeal. Having heard argument in the application for the adjournment we came to the conclusion that no sound reasons existed for the matter to be adjourned and the application was accordingly refused. Nevertheless, the first respondent was afforded an opportunity to deliver written argument in response to the argument delivered in court on behalf of the appellant, Zikhethele Trade (Pty) Ltd. In due course this was done.

[2] The appellant appeals against a judgment of the Labour Court sitting in Cape Town delivered by Murphy AJ. The Labour Court granted a declaratory order declaring that certain members of the first respondent, based in Cape Town and identified in a list annexed to the Notice of Motion, were in the employ of the appellant. Further, it was declared that all the rights and obligations between Khulisa Terminal Services ("Khulisa"), a company in liquidation and under the trusteeship of the second and third respondents, and the above mentioned members of the first respondent, as at 31st March 2005, continued to be in force as if they had been rights and obligations between the appellant and the aforesaid members of the first respondent.

<u>BACKGROUND</u>

[3] The first respondent had represented 181 employees of Khulisa then working at the harbours in Cape Town, Port Elizabeth and Durban. It was the business of Khulisa to supply terminal and stevedoring services to a company known as Fresh Produce Terminals (“FPT”) at the aforementioned three ports.

[4] Up until 2000 the first respondent’s members had been employed directly by FPT when the latter decided to outsource the terminal and stevedoring services, as part of a Black Economic Empowerment initiative, to Signal Hill Manpower Specialist (Pty) Ltd (“Signal Hill”) to which some of the first respondent’s members were transferred in terms of section 197 of the Labour Relations Act 66 of 1995(“the Act”).

[5] Signal Hill performed the terminal services in Cape Town and in Durban. In Durban, Signal Hill outsourced the terminal services to a company known as Sizonke Logistics (Pty) Ltd. In Cape Town, Signal Hill outsourced the terminal services to a company known as Evening Rainbow (Pty) Ltd. This company was then headed by Mr Nathi Mfundisi (“Mfundisi”) who is current managing director of the appellant.

[6] The contracts for the rending of terminal services at the various harbours terminated on the 28th February 2004. FPT at that stage proposed that the three different companies, i.e. , Evening Rainbow (Pty) Ltd, Sizonke Logistics (Pty) Ltd and Signal Hill Manpower Specialist (Pty) Ltd should merge to form one company to provide the total services solution at all the three harbours. To give effect to

this proposal Khulisa was formed in or about January 2004. Mfundisi occupied the position of managing director, whilst Mr Johan Immelman ("Immelman") became the operations director thereof.

[7] FPT and Khulisa subsequently entered into an agreement in terms of which Khulisa would provide the terminal services at the three harbours.

[8] A dispute arose between management and employees of Khulisa which caused FPT to terminate its agreement with Khulisa. FPT embarked on a tender process and invited the two factions within Khulisa, being the "Mfundisi faction", on the one hand, and the faction headed by Immelman, on the other, to tender for the terminal services.

[9] Two new companies were formed. Mfundisi formed the appellant and Immelman revived a shelf company known as Business Venture Investments No. 829 (Pty) Ltd trading as Signal Hill Operation Services. Both companies tendered for the contract to provide terminal services for FPT. It was agreed that Khulisa would continue with the operations until 31st March. Thereafter, either Immelman's or Mfundisi's company would take over the operations and step into the shoes of Khulisa from the 1st April 2005.

[10] At the time most of the Cape Town members of the first respondent pledged their support to Immelman while those

employees in Durban and Port Elizabeth did not express an allegiance either way.

[11] On the 14th March 2005 FPT awarded the contract to be the national services provider in respect of all terminal and stevedoring services to the appellant.

[12] Correspondence was entered into between the first respondent and the appellant seeking clarity as to whether Khulisa's employees were to be retrenched in terms of section 189 of the Act or whether they would be transferred automatically to the appellant.

[13] On the 1st April 2005 the appellant notified all the employees of Khulisa in Cape Town that they would be seconded to the appellant as from the 1st April until the 11 April 2005.

[14] The secondment was extended pending the outcome of proceedings in the High Court, Cape of Good Hope Provincial Division, between Business Venture Investment and FPT, in which proceedings Business Venture Investments had sought to interdict the implementation of the tender that had been awarded to the appellant by FPT.

[15] The appellant then invited those members of the first respondent who were in the employ of Khulisa to apply for employment with the appellant. It notified the first respondent's members that the appellant would decide who to employ and would notify those who had applied for employment of its decision. The appellant eventually employed 104 out of the 147 former Khulisa employees

in Cape Town and further employed all former Khulisa employees in Durban and Port Elizabeth.

[16] It is against this background that the first respondent contended that the business of Khulisa had been transferred to the appellant as a going concern and that all employees of Khulisa had been transferred, through the operation of law, into the employ of the appellant. This was said to have occurred in terms of section 197 of the Act.

Proceedings before the Labour Court

[17] In the Labour Court the first respondent sought a declaratory order declaring that the contracts of employment which had existed between its members in Cape Town and Khulisa as at the 31 March 2005 were automatically transferred to the appellant. The first respondent contended that the contracts were automatically transferred in terms of section 197(2) of the Act. It is convenient to quote both subsections 1 and 2 of section 197.

They read as follows-:

"(1) In this section and in section 197A-

(a) 'business' includes the whole or part of any business, trade, undertaking or service and

(b) 'transfer' means the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern.

(2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6)-

(a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;

(b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;"

[18] The appellant argued that the *Court a quo* should have first dealt with certain procedural aspects of the application before it considered the merits of the application and raised four points in limine in its opposition to the application. One of the points in limine raised by the appellant was that there had been a non-joinder of FPT. The appellant argued that, if a transfer of the contracts of employment had occurred as envisaged in section 197 of the Act, such a transfer would have occurred as a result of FPT"s conduct in cancelling the contract it had with Khulisa and then awarding the same to the appellant. If there was a transfer of business or services as envisaged by section 197 of the Act, then that would be the transfer of FPT's business or service. It was argued, therefore, that FPT clearly had a direct and substantial interest in the court proceedings. FPT might wish to resist any proceedings aimed at declaring that what it did in cancelling the contract with Khulisa and awarding it to the appellant attracted the provisions of section 197 of the Act. If such an order was made without FPT having been joined or being given an opportunity to indicate that it would abide the decision of the Court, FPT would not be bound by such an order and it would be entitled to seek to have such an order set aside.

[19] The Labour Court saw no merit in the point in limine and dismissed it. It then granted the first respondent the declaratory order it sought. The appellant then applied for and was granted leave to appeal to this Court.

<u>The Appeal</u>

[20] Before this Court, counsel for the appellant submitted that the *Court a quo* had erred in dismissing the point of non-joinder. He submitted that quite clearly FPT had a substantial and legal interest in the proceedings before the *Court a quo*. Essentially counsel for the appellant advanced the same argument that was presented before the *Court a quo* on this point.

[21] In its written heads of argument, submitted after the date on which the appeal was heard, the first respondent did not at all address the point of the non-joinder of FPT. It made no submissions in this regard.

[22] The *Court a quo* had concluded that the transfer from Khulisa to the appellant took place in two phases and stated its conclusion as follows-:

> "In the premises I am satisfied on the facts and in the circumstances of this case that a transfer of business took place in two phases when FPT cancelled the contract with Khulisa with effect from 31st March 2005 and then granted the contract to Zikhethele with effect from 1st April 2005. As a consequence, Zikhethele was automatically substituted in place of Khulisa in respect of all contracts of employment in existence on 31st March 2005 and all the rights and obligations between Khulisa and its employees continued in force as if there had been rights and obligations between Zikhethele and the employees"

[23] In *Khumalo v Wilkins and Another 1972 (4) SA 470 (N)* Milne. J at 475A stated the position in regard to the necessity of joining parties in proceedings in which they have an interest as follows-:

> "In my view, once it is shown that the a party is a necessary party in the sense that he is directly and substantially interested in the issues raised in the proceedings before the court and that his rights may be affected by the judgment of the court and the court will not deal with those issues without such joinder being effected and no question of discretion nor of convenience arises."

[24] In my view it is implicit in the findings of the *Court a quo* that, when FPT cancelled the contract with Khulisa on the 31st March 2005, the employees of Khulisa were then transferred to FPT and when FPT then granted the stevedoring contract to the appellant with effect from the 1st April 2005, the employees were then transferred from FPT to the appellant. FPT thus had direct interest in the proceedings before the Labour Court.

[25] That being the position the *Court a quo* ought to have held that FPT had a direct and substantial interest in the proceedings before the Court. It would appear that the *Court a quo* failed to appreciate that the order which it made would have legal consequences for FPT. The *Court a quo* ought not to have proceeded with the application without FPT being joined as a party. Accordingly, it erred in granting the order which it granted without FPT having been joined or having indicated that it would abide the decision of the Court.

[26] The appellant sought the leave of this Court to lead further evidence in this matter. It was argued that as the application in the *Court a quo* had been brought as a matter of urgency the appellant was unable, due to time constraints, to place all relevant material evidence before the *Court a quo.* The evidence which the appellant sought to lead was set out in an affidavit deposed to by Mfundisi. In the said affidavit Mfundisi alleges that those members of the first respondent whom the first respondent sought to declare as being in the employ of the appellant had expressly stated and had, through their conduct, made clear that they did not wish to be transferred into the employ of the appellant. In seeking to lead this further evidence the appellant submitted that the facts outlined above constituted circumstances which, could have materially altered the finding of the *Court a quo.*

[27] As I have already concluded that the *Court a quo* had erred in proceeding with the application without FPT being joined in the proceedings, it is unnecessary for this Court to deal with the other remaining issues raised by the appellant in this appeal including the application to lead further evidence. In light of the above the appeal must succeed. The *Court a quo* should have upheld the objection to the non-joinder of FPT. This does not mean that the *Court a quo* should have dismissed the application. It should simply have struck it off the roll to enable the party which had brought the application to join FPT. If need be, the *Court a quo* could also have granted leave for FPT to be joined.

[28] The first respondent, in its written heads of argument, has argued that this Court should not award any costs in this matter in the

event of the appeal being upheld. It has submitted that the first respondent is a small and "financially fragile trade union". It has further argued that it is in the public interest for it to defend the judgment of the *Court a quo*. In the light of all the circumstances of this case including the fact that the appeal was not opposed until the eleventh hour, it seems to me that the requirements of the laws and fairness dictate that no order as to costs should be made.

[29] In the result I make the following order:

1. The appeal is upheld.
2. The order of the Labour Court is set aside and replaced with the following order-:

   "(a) the objection to the non-joinder of Fresh Produce Terminals is hereby upheld.

   (b) the application is struck off the roll.

   (c) In so far as it may be necessary, leave is hereby granted for the joinder of Fresh Produce Terminals in this application.

   (d) There is to be no order as to costs."

Jappie AJA

I agree.

Zondo JP

I agree.

Khampepe AJA

Date of Judgment: 29 June 2007

On behalf of the Appellants: Adv. G.O van Niekerk SC
Instructed by Mundell incorporated

Cape Town

On behalf of the Respondents: Mr D. Cartwright
Instructed by
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