

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

Case no: JA 32/06

IN THE MATTER BETWEEN

Anglo Office Supplies (PTY) LTD

Appellant

and

Roger Lotz

Respondent

JUDGMENT

TLALETSI AJA

Introduction

- [1] This is an appeal against a judgment of the Labour Court on a point *in limine* that was raised by the appellant against the respondent in relation to a dispute concerning the dismissal of the respondent by the appellant which the respondent referred to the Labour Court for adjudication. The nature of

the *point in limine* will become clear later herein. The Labour Court dismissed the *point in limine*. The Labour Court refused a subsequent application for leave to appeal. The appellant petitioned the Judge President of this Court for leave to appeal and this Court subsequently granted the appellant leave to appeal to this Court against the order of the Labour Court.

[2] The appellant is a duly registered company conducting, as part of its business, retail of stationery products. The respondent was employed by the appellant as a sales representative in its retail division. On the 3rd September 2004 the appellant dismissed the respondent from its employ. The respondent was aggrieved by such dismissal which he regarded as unfair. Naturally, the appellant regarded the dismissal as fair. A dispute arose between the parties about the fairness or otherwise of the respondent's dismissal. He referred the dispute to the Commission for Conciliation, Mediation and Arbitration ("CCMA") for conciliation. When attempts at conciliation failed, the respondent referred the dispute to the Labour Court for adjudication in terms of sec 191(5) of the **Labour Relations Act** (Act 66 of 1995) ("the Act"). In this regard the respondent duly served and filed his statement of claim.

[3] In due course the appellant served and filed its response to the respondent's statement of claim. Later it filed and served an amended response to the statement of claim. In the light of the nature and effect of the *point in limine* that the

appellant took against the respondent, it is necessary to quote the relevant allegations made by the respondent in his statement of claim to found his claim against the appellant. The respondent's statement of claim read thus:

"3. Statement of fact that will be relied on to establish the Applicant's claim

3.1 On or about 27 January 2003 the Applicant and the respondent, then known as Double Option Trading 39 (Pty) Ltd entered into an employment contract whereby the applicant was employed as a Sales Representative.

3.2 The Applicant performed his duties as set out in the employment contract.

3.3 Double Option Trading 39 (Pty) Ltd at some point changed its name to that of the Respondent.

3.4 At or about August 2004 the Applicant was requested by Howard Tucker, ("Tucker"), the Managing Director of the Respondent, to attend an interview with a company known as Makulu Time Office Products (Pty) Ltd ("Makulu") as the retail division in which the Applicant worked was to be sold to Makulu.

3.5 The Applicant attended the aforementioned interview with, inter alia, Makulu's Managing Director, Neville Davies ("Davies").

3.6 At the interview the Applicant discovered that the terms and conditions of his employment with the Makulu would differ drastically to that of the Respondent. The Applicant voiced his concerns to Tucker related to the change in the terms and conditions of his employment, Tucker, representing the respondent, failed to respond to the Applicant's concerns as aforementioned.

3.7 The Applicant was not offered a position of employment with the Makulu under same or similar conditions enjoyed with the respondent, or at all.

3.8 On 1 September 2004, the Respondent, represented by Tucker, notified the Applicant that his employment had been terminated. No disciplinary hearing was held nor was the Applicant advised that he had committed a dismissable offence.

3.9 Tucker wrote to the Applicant again on 3 September 2004 and advised him that he did not work his notice period and thereby making his dismissal instantaneous.

3.10 The Application (sic) thereafter referred a dispute to the Commission for Conciliation for (sic) Mediation and Arbitration ("CCMA"), which dispute remained unresolved after conciliation.

3.11 On 21 September 2004 Tucker wrote a letter to certain of the Respondent's clients stating that Makulu had purchased the commercial stationery customer base of the Respondent and that the purchase was effective on 1 October 2004.

3.12 The Applicant had performed his functions as a sales representative within the commercial stationery division of the Respondent.

3.13 The Applicant's average salary for the preceding six months was R37 000 (THIRTY SEVEN THOUSAND RAND)

4. LEGAL ISSUES THAT ARISE FROM THE FACTS

The Applicant was unfairly dismissed without a substantive reason and a proper procedure being followed. His dismissal was automatically unfair in terms of Section 187(1)(g) of the LRA".

The relief sought by the respondent was twenty four months compensation and costs of suit.

[4] Section 187(1)(g) upon which the respondent relies for its claim provides:

"A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is-

(g) a transfer, or a reason related to a transfer, contemplated in section 197 or 197A; or"

[5] Having set out the respondents' relevant allegations in his statement of claim, it is necessary to quote the *point in limine* that was taken by the appellant in its amended response to the respondent's statement of claim. The relevant part of the response reads as follows:

"1A **POINT IN LIMINE**

1A(i) On the Applicant's own version his employment with the Respondent was terminated on or about 3 September 2004.

1A(ii) The Respondent transferred as part of its business, namely the retail operations, as a going concern to Makhulu Time Office Products (Pty) Ltd with effect from 1 October 2004.

1A(iii) In terms of Section 197(2)(c) of the Labour Relations Act, anything done before the transfer by or in relation to the old employer (the Respondent) including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have done by or in relation to the new employer.

1A(iv) In the circumstances, the Respondent is not liable to the Applicant for the relief claimed in this Application and as such, the Respondent prays that the Applicant's Application be dismissed with costs".

[6] Section 197(2)(c) of the Act upon which the appellant relies provides:

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

(a)

(b)

(c) Anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and

(d)"

[7] Subsequently, the parties agreed that the Labour Court should decide the *point in limine* before the matter could go to trial on the merits if in the end it would go to trial on the merits. In due course the matter was set down for argument on the appellant's *point in limine* before the Labour Court. Heads of argument were filed by the parties. It was agreed between the parties that for purposes of the adjudication of *the point in limine*, the respondent's allegations as contained in his statement of claim would be regarded as correct.

Proceedings in the Labour Court

[8] The issue for determination before the Labour Court was whether the provisions of sec 197(2)(c) of the Act could be

interpreted to mean that the respondent should have properly instituted his claim of unfair dismissal against Makulu (Pty) Ltd the new owner of the retail of the appellant's business, as opposed to the appellant.

[9] The appellant contended that since the respondent averred on his papers that his dismissal was for a reason related to the transfer of a part of the business as a going concern, the provisions of Sec 197(2)(c) of the Act were automatically triggered. This, it was contended, meant that anything done by the appellant before the transfer of the relevant part of the business to Makulu, including the dismissal of the appellant, should be considered to have been done by or in relation to Makulu. As a result, so went the argument, the appellant was not liable to the respondent for the relief claimed and the respondent should have cited Makulu and not the appellant.

[10] The Labour Court expressed the view that there are sufficient indications in the reported cases that not in every case of a transfer in terms of section 197 would an employee be obliged to have recourse against the new employer and that it is a matter to be determined with reference to the particular facts of each case. The Labour Court accepted as critical the fact that the respondent was not included on the list of the employees to be transferred. This fact, the Labour Court reasoned, suggested that the respondent was withdrawn from the transfer process. The Court further noted that one particular employee who had been transferred and

in respect of whom there appeared to have been a pending dispute, was singled out and provision was made in the contract for the 'handling of his case', whereas no such provision was made in respect of the appellant.

- [11] The Court a quo further remarked that it is not a *sine qua non* that the employment contracts of employees be transferred as well for a transaction to qualify as a transfer of a business as a going concern within the meaning of Sec 197 of the Act. It held that the test is not whether the respondent was ultimately transferred, but whether his dismissal was for a reason related to the contemplated transfer. The Labour Court dismissed the point *in limine* with costs.

The Appeal

- [12] The notice of appeal was filed 12 days out of time. The appellant has filed an application for condonation which is opposed by the respondent. The reason for the delay is attributed to the financial difficulties experienced by the appellant during the course of litigation of this case. This problem led to the appellant having to suspend its decision to lodge the appeal pending the sale of its main assets to raise funds. It was only when the appellant was almost sure that the purchase price was guaranteed that it proceeded with the appeal. In response, the respondent contended that the explanation for the delay should be rejected. It was contended that the appellant could have noted the appeal which was not an expensive exercise at least up to that stage

and only reconsider its financial position thereafter to determine whether it could proceed with the appeal. It was conceded by the respondent's counsel that the delay of 12 days in filing the notice of appeal was not excessive. There is also no doubt that the respondent did not suffer any prejudice as a result of that delay of 12 days. It may well be that the appellant should have filed the notice earlier but, quite clearly, this is a case where condonation should be granted even before a consideration of the merits of appeal. Accordingly, I see no reason why the delay in filing the notice of appeal should not be condoned.

[13] The grounds of appeal relied upon in the notice of appeal are that the labour court erred:

[13.1] by finding that there are sufficient indications in the reported cases that not in every case of a transfer in terms of section 197 would an employee be obliged to have recourse against the new employer;

[13.2] in not recognising that in terms of section 197(2)(c) of the Act the new employer assumes liability, as a matter of law, for "anything done before the transfer by or in relation to the old employer including the dismissal of an employee";

[13.3] in not recognising that any party that has some potential liability of the kind outlined in section

197(2)(c) must be before court to answer to and/or oppose that potential liability;

[13.4] in equity and or in law in dismissing the point *in limine* with costs;

[14] Before us, Counsel for the appellant contended that the Labour Court should have found that the provisions of Section 197(2)(c) of the Act were applicable and as such the new employer assumed liability, as a matter of law, for the dismissal of the respondent. He submitted that the relief sought is fatally flawed and cannot succeed against the appellant as long as it is based on the facts as contained in the statement of claim. He submitted that Makulu should have been cited as the respondent.

[15] Upon a proper consideration of the appellant's *point in limine* what the appellant is saying in effect is that the respondent's statement of claim does not disclose any cause of action against it because, if the allegations contained therein are true, the appellant dismissed the respondent for a reason connected with the transfer of the appellant's retail division to Makulu as a going concern. The appellant contends that, where an old employer as envisaged in sec 197(1) of the Act dismisses one of its employees employed in a part of its business that is about to be or is being transferred as a going concern to a new employer as envisaged in sec 197(1) of the Act and such a dismissal is related to the transfer or a reason

related to the transfer of such part of the business, in terms of sec 197(2)(c) of the Act it is the new employer in this case Makulu who is liable for such dismissal and the employee should sue such new employer and not the old employer. As the appellant is the old employer, so went the argument, it should not have been sued. The reference to the appellant being the old employer and Makulu being the new employer is based on those concepts as used in sec 197(1) of the Act.

[16] For the purpose of properly considering the appeal it is convenient to quote the relevant sections again.

[16.1] Section 197(1) and (2) of the Act provides:

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

- (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;*
- (c) anything done before the transfer by or in relation to the old employer, including the dismissal of an*

employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and

- (d) *the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer.*" (emphasis added)

[17.2] Section 187(1)(g) of the Act upon which the respondent relied in his statement of claim to contend that his dismissal was automatically unfair provides as follows:

"A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is-

(g) a transfer, or a reason related to a transfer, contemplated in section 197 or 197A; or"

There can be no doubt that the respondent's reliance upon sec 187(1)(g) of the Act in his statement of claim means that his case was that the appellant dismissed him because of the transfer, or for a reason related to the transfer of the retail division to Makulu.

[18] The predecessor to section 197(2)(c) which is the old section 197(2)(a) before section 197 was substituted by section 49 of **Labour Relations Amendment Act** 12 of 2002 read as follows:

"If a business, trade or undertaking is transferred in the circumstances referred to in sub-section (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 had been rights and obligations between the new employer and each employee and, anything done before the transfer by or in relation to the employer will be considered to have been done by or in relation to the new employer."

[19] In his minority judgment in **National Education Health & Allied Workers Union v University of Cape Town & others** (2002) 23 ILJ 306 (LAC) (2002) 4 BLLR 311 (LAC) **Zondo JP**, interpreting the provisions of the old Sec 197(2)(a), laid down the principle as follows at p 347D-F para [92]:

"When a business is transferred by one employer to another as a going concern in solvent circumstances, neither the consent of the employees nor that of the business transferor and business transferee is required, before the contracts of employment of the employees become contracts between each employee and the new employer unless there is agreement with the workers or their representatives to the contrary, the new employer assumes liability for all the actions done by the old employer in relation to each employee and also acquires any rights that the old employer may have had in relation to each employee; for all intents and purposes the business transferee takes the position of the transferor."

[20] The above principle was unanimously approved by the Constitutional Court on appeal in **National Education Health & Allied Workers Union v University of Cape Town** (2003) 24 ILJ 95 (CC) at p 122 C para [64] where it was held:

"Reading the section as a whole, and, in particular, having regard to the fact that all rights and obligations flowing from employment with the

transferring employer are transferred to the new employer in the case of a solvent business; that in the case of an insolvent business the contracts of employment are transferred; that the transfer of business does not interrupt the workers' continuity of employment; the inference that the transferee employer takes over the workers and that the transferee employer is, by operation of law, substituted in the place of the transferor employer is irresistible. It follows by necessary implication".

(The case is also reported as 2003 (2) BCLR 154; 2003 (3) SA 1 (CC); [2003] 5 BLLR 413 (CC).

[21] The Constitutional Court held further that, if there was any doubt about the principle referred to above, the new section 197 puts matters beyond doubt by providing that the '*new employer is automatically substituted in the place of the old employer in respect of all contracts of employment.*'

[22] The legal position enunciated in the above authorities makes it clear that the new employer steps into the shoes of the old employer by operation of law. Unless there is agreement with the employees or their representatives to the contrary, the new employer assumes liability for all the actions done by the old employer in relation to each employee. This means that if an employee is dismissed before the transfer of a business or the relevant part of the business, the new employer is liable for such dismissal even though it is the old employer who actually dismissed the employee. Indeed, all the rights that the dismissed employee had against the old employer at the time of the transfer of the business, including the right to institute or pursue legal proceedings in a dismissal dispute, becomes a right that he has against the

new employer. Accordingly such an employee must, where he has instituted proceedings against the old employer, pursue those proceedings against the new employer instead of the old employer. The result would be that if the dismissal is found, after the transfer of the business, to have been unfair, any order of reinstatement would probably have to be made against the new employer. See: **Transport Fleet Maintenance (Pty) Ltd & Another v National Union Metal Workers of SA & Others** (2004) 25 ILJ 104 (LAC) at p 114H to 115B; [2003] 10 BLLR 975; [2004] 3 BLLR 199 (LAC); **National Education Health & Allied Workers Union v University of Cape Town & others (LAC)** supra: at p343G-344A para [80] and [81].

- [23] Counsel for the respondent submitted that the decision of the Labour Court should be upheld for a number of reasons. He contended that the respondent was not part of the business unit that was transferred to Makulu because his transfer was 'withdrawn' by the appellant as he was not on the list of the employees to be transferred. His second submission was that the provisions of section 197(2)(c) were not applicable in this case because the parties to the sale agreement have, by implication, limited the liability of Makulu to only employees listed in the schedule attached to the agreement as part of the warranty clause. His third submission was that this Court should take an approach which creates the least uncertainty between the parties. In this regard, he submitted that we should find that, because only part of a business had been sold to Makulu and that the

appellant continued trading, the respondent should be deemed to have been dismissed by the old employer unless there were clear indications that it was the intention of the parties that Makulu accepted responsibility for the respondent.

[24] It is evident from the statement of claim that the respondent specifically based its cause of action on the fact that he was dismissed within the context of a transfer of a business as a going concern. At paragraph 4 of his statement of claim, under legal issues that arise from the facts, he stated that his dismissal was automatically unfair in terms of 'section 187(1)(g) of the LRA.'

[25] Because the parties agreed in the Labour Court that the point *in limine* should be decided solely on the basis of the allegations in the statement of claim and the sale agreement, the respondent cannot now change and say that his dismissal was not as he had alleged in the statement of claim. Similarly, the Labour Court's conclusion that the respondent was withdrawn from the transfer process is not supported by the agreed facts. Accordingly, the basis upon which the respondent sought to take himself out of sec 197(2)(b) and (c) was one that fell outside the agreement of the parties that the *point in limine* be decided on the basis that his allegations in the statement of claim were true.

[26] In my view, the picture which is sketched out by the respondent places him squarely within the ambit of section

197 of the Act. On his own version he was informed in no uncertain terms that part of the appellant's business in which he was employed was being sold and that he attended an interview as part of the transfer of the business unit. He, however, was dissatisfied with the terms and conditions at Makulu. On his own version his dismissal was connected to the transfer of the business and at the time of the transfer he had a dispute pending with the appellant. Nowhere does he allege that he reached an agreement with the appellant that he would not be part of the business unit to be transferred and that his dismissal could not have been connected to the transfer.

[28] I find no merit in the submission that because only part of the business was transferred the respondent should be deemed to have been dismissed by the appellant in order not to create an uncertainty. There is no uncertainty in the statement of claim as to the circumstances that led to the respondent's dismissal and what transpired after his dismissal.

[29] A reading of the respondents statement of claim, the provisions of sec 187(1)(g) of the Act that he refers to in his statement of claim and the provisions of sec 197(2)(b) and (c) of the Act reveals that the dismissal was for a reason connected with the transfer. The respondent was told of his dismissal on the 3rd of September 2004. The sale agreement pursuant to which the retail division was to be sold and transferred was signed on 8 September 2004 which was five

days later. It seems from the statement of claim that the dismissal was on notice because it is alleged that he was told after 3rd September 2004 that he did not need to serve his notice. If his notice was a week's notice, it seems that the dismissal took effect after the sale agreement had been signed. If the notice was a months notice, which is likely, then the notice period ended in October 2004 because it would either have begun running on 3 or 4 September 2004 in which case it would have ended on 3 October or it would have in law run from 1 October. In either case the dismissal would have taken effect after the transfer of the relevant part of the business.

[30] I therefore come to the conclusion that on the fact alleged in the statement of claim, if the dispute were to go to trial and the respondent were to be successful no order would be competent against appellant. The statement of claim as it stands does not disclose a cause of action against the appellant. The appeal should therefore be upheld. With regard to costs I am of the view that no order of costs should be made in this case.

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

1. The application for condonation for the late filing of the notice of appeal is granted.
2. The appeal is upheld.
3. There is to be no order as to costs on appeal.
4. The order of the Labour Court is set aside and replaced with the following order:

(a) The *point in limine* is upheld.

(b) The applicant is granted leave to amend his statement of claim, if so advised within 30 calendar days from the 22nd November 2007 failing which his claim against the respondent will be deemed to have been dismissed.

(c) There is to be no order as to costs.

Tlaletsi AJA

I agree.

Zondo JP

I agree.

Waglay JA

Appearances:

For the Appellant: Adv Graham

Instructed by: Marshall Attorneys

For the Respondent: Adv Lennox

Instructed by: Moni Attorneys

Date of Judgment: 22 November 2007