



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA40/2015

TEMBA BIG SAVE CC

Appellant

and

MLAMLI KUNYUZA AND ANOTHER

First Respondents

ACE WHOLSALERS (PTY) LTD

Second Respondent

BIG SAVE (PTY) LTD

Third Respondent

Heard: 01 March 2016

Delivered: 28 June 2016

Summary: Practice and Procedure – party objecting to the late filing of the statement of response without a condonation application in a replying affidavit - other party contending that objection not proper as contemplated by the Labour Court Practice Manual – court finding a notice of objection needs not be formal document – any manner in which any party is made aware of its intention to object sufficient – Labour Court correct in accepting the notice of object and dismissing the statement of response.

Joinder – employer contending that employees' joinder application should be dismissed because there was no conciliation - principle restated that referral for

conciliation is indispensable and a precondition to the Labour Court's jurisdiction over unfair dismissal disputes –employee alleging s197 transfer - in the context of an alleged s197 transfer, there is no need to refer the new employer to conciliation - the new employer takes the place of the old employer in all material respects – Labour Court correct in joining the employer – Appeal dismissed with costs.

Coram: Waglay JP, Tlaetsi DJP et Davis JA

JUDGMENT

WAGLAY JP

- [1] This is an appeal against the decision of the Labour Court (Steenkamp J) in terms of which he: (i) condoned the late filing of the statement of case by the first respondent; (ii) refused to allow the appellant's answering affidavit because it was filed outside the prescribed time limits; and, (iii) joined the appellant as a party to the action instituted by the first respondent.
- [2] The first respondent, who constitute two employees (hereafter "employees") aver that they were dismissed, which dismissal they allege amounts to an automatically unfair dismissal. They seek compensatory relief for such wrongful dismissal.
- [3] This appeal is against the Labour Court's refusal to allow the appellant's answering affidavit and the ordering of the appellant to be joined as a party to the action.
- [4] The employees instituted action against two parties Ace Wholesalers (Pty) Ltd (Ace Wholesalers) and Big Save (Pty) Ltd (Big Save). They alleged that they were employed by Ace Wholesalers, a wholesale and retail business which was sold to Big Save in and during August 2011 and in September, they were dismissed. They allege that their dismissal constitutes an automatically unfair

dismissal as there was non-compliance with s197 and 197A of the Labour Relations Act 66 of 1995.

- [5] The employees allege that the sale of Ace Wholesalers to Big Save constituted a transfer of a business as a going concern as contemplated by s197.
- [6] At some time,¹ the Labour Court granted default judgment against Ace Wholesalers and Big Save ordering them to pay the respondents an amount in excess of R1.5 million. A warrant of execution was issued and the sheriff attached the property of the appellant, Temba Big Save CC, (who was not cited as a party to the proceedings) to meet the judgment debt.
- [7] The appellant did not institute an interpleader but together with Big Save applied to have the judgment rescinded.
- [8] In its founding affidavit in support of the application to rescind the default judgment, the deponent Joao Antonio Da Silva Ferreira had this to say:
- (i) that he was a director and shareholder of Big Save and a member of the appellant (the appellant is a close corporation)²
 - (ii) that Big Save and the appellant are two separate entities who do not share the same directors, shareholders and members;³
 - (iii) that Big Save had taken over all the assets of Ace Wholesalers in liquidation of Ace Wholesalers indebtedness to it;
 - (iv) after the assets were taken over, the appellant was formed and the appellant purchased the assets from Big Save;
 - (v) having purchased the assets, the appellant started operating a retail and wholesale business which was a similar business as the one run

¹ I see no need to recall the long and sorry history of the matter which results in the appeal being heard five years after the respondents were dismissed.

² Paragraph 1.1 of the founding affidavit.

³ Paragraph 1.2 of the founding affidavit.

by Ace Wholesalers, this business was conducted from the premises from which Ace Wholesalers operated;

- (vi) that the appellant did employ some of the staff who had worked for Ace Wholesalers, which it did because it felt socially responsible to do so;
- (vii) that the business in operation was that of the appellant and not Big Save;
- (viii) that Big Save had on 29 September and 25 October 2011 (after the appellant had purportedly started running the business) addressed a letter to the trade union representing employees of Ace Wholesalers stating that it was Big Save which was running the business and which had employed some of the erstwhile staff of Ace Wholesalers: adding that Big Save had not purchased the business from Ace Wholesalers as a going concern but only its assets and that the erstwhile employees of Ace Wholesalers whom it did employ were employed on a fixed term contract.

[9] As is evident, the founding affidavit in support of the rescission application is replete with contradiction and confusion, so much so that it is impossible to ascertain the true position. It appears that persons controlling Big Save and the appellant used the names of these entities interchangeably or were themselves unsure as to the functions of each entity; who purchased what; who sold what; and, who in fact was conducting the business.

[10] The above factors are in my view relevant when considering the issue of joinder because while Big Save and the appellant deny any s197 transfer, they continue to make contradictory statements relating to which entity had purchased what, when they were formed, and, whether they were separate entities.

[11] The further point taken in support of the rescission application was that the employees had not served their statement of claim on Big Save. This appeared to be fatal and the rescission of the default judgment was granted.

- [12] After the rescission was granted and further time consumed with all kinds of legal processes, the employees filed an application to condone the late filing of their statement of claim. The appellant while not a party to the action nevertheless opposed the application together with Big Save. In the event, the application was dismissed because the employees had yet to serve their statement of case upon Big Save.
- [13] The employees then launched an application which sought condonation for the late filing of their statement of case and to join the appellant as co-respondent with Ace Wholesalers and Big Save. Condonation for the late filing of the statement of case was granted and there is no appeal against this decision.
- [14] In opposing the employees' application, the appellant filed its answering papers 17 days after the period within which to do so. The employees objected to the late filing of the answering affidavit and did so by way of a point *in limine* contained in their replying papers.
- [15] The appellant did not see the need to apply for condonation and argued that it did not have to do so because the employees had failed to file a proper notice of objection as provided for in the Practice Manual that sets out the Judge President's directive with regard to practice in the Labour Court.
- [16] The Practice Manual provides as follows:
- '11.4.2 Where the respondent or the applicant has filed its opposing or replying affidavits outside the time period set out in the rules, there is no need to apply for condonation for the late filling of such affidavits unless the party upon whom the affidavits are served files and serves a Notice of Objection to the late filing of the affidavits. The Notice of Objection must be served and filed within 10 days of the receipt of the affidavits after which time the right to object shall lapse.'
- [17] The court considered the "point in limine" in the employees' reply and found that that was sufficient to constitute a notice of objection to the late filing of the answering affidavit and held that, in the absence of an application to condone

the late filing of the answering papers, it was entitled not to receive the answering affidavit.

- [18] I agree with the Labour Court that a notice of objection does not need to be a document in the formal sense of a notice. The purpose of paragraph 11.4.2 is for the party upon whom affidavits are filed outside the prescribed time limit to inform the offending party and the court that it is not prepared to accept such affidavit so that the offending party is aware thereof and considers its options. This avoids the practice that, on the date of a hearing, a party for the first time is made aware that the papers filed outside the prescribed time limits are unacceptable resulting often in the matter being delayed unnecessarily.
- [19] In the absence of the application for condonation and any request by the appellant to be granted an opportunity to apply for condonation, the Labour Court considered the matter and refused to allow the answering affidavit.
- [20] I see no basis on which to interfere with that decision of the Labour Court. It is a discretion which the Labour Court is entitled to exercise and it did so properly exercise.
- [21] The above notwithstanding, I have considered the averments made in the answering affidavit with respect to the appellant's opposition to the joinder application. Essentially, the appellant raises four issues:
- (i) that Ace Wholesalers had in fact closed its business and therefore the employees had lost their jobs by virtue of such closure;
 - (ii) Big Save was a creditor of Ace Wholesalers and took over all of Ace Wholesalers stock in settlement of the debt. This stock was then sold to the appellant;
 - (iii) the premises from which Ace Wholesalers operated its business remained closed for about three months: thereafter the appellant started conducting a similar or a more expanded business from the same premises; and that,

(iv) there was no sale of a business as a going concern by Ace Wholesalers to either Big Save or the appellant.

[22] As against this, we have the averments made by the employees: they only became aware of the appellant once the appellant launched the rescission application. In their view, the negotiation for the sale of business commenced while they were still working for Ace Wholesalers; that there was not a closure of a business as if the business was coming to an end but that the business was closed for the premises to be renovated, to bring in changes that the new owners wanted to bring. When the business operated under the new name, it was still a wholesale and retail business but expanded to include a butchery and a bottle store.

[23] Based on the averments made by the parties, I would have had no hesitation in granting the joinder as quite properly, it is for the trial court to determine whether there was a s197 transfer. The application was not without merit. Hence even if the answering affidavit were admitted, in my view, it would not have resulted in the joinder being refused.

[24] The other ground of appeal is that the Labour Court was wrong in granting joinder because the employees had not referred their automatically unfair dispute against the appellant for conciliation.

[25] The appellant, relying on paragraph 40 read with its footnote number 53 in the Constitutional Court's judgment *National Union of Metal Workers of South Africa v Intervale (Pty) Ltd and Others (Intervale)*⁴, argued that it was not permissible for the Labour Court to grant the joinder because the employees had not referred their dispute to conciliation. Paragraph 40 and footnote 53 state as follows:

‘[40] Referral for conciliation is indispensable. It is a precondition to the Labour Court's jurisdiction over unfair dismissal disputes. NUMSA therefore had to refer the dispute between the employees and Intervale and BHR for conciliation. The question is whether it did so.’

⁴ [2015] 3 BLLR 205 (CC); (2015) 26 ILJ 363 (CC).

Footnote 53 The Labour Appeal Court was therefore right (at paras 15-22) to distinguish the factual circumstances in *Mokoena* and *Selala* ... and to disapprove of the erroneous view, expressed in both those judgments, that the Labour Court has a discretion to condone non-compliance with the conciliation requirement. The Labour Appeal Court noted that the party joined in *Mokoena* was a transferee who had taken over the going concern of another business. Judgment against the old business was therefore effective against the transferee, who would be jointly and severally liable for any claim. The transferee therefore had an interest in the outcome of the dispute. The joined party in *Selala* also had an interest in the outcome of the case, as he was a co-employee currently employed in a position the applicant claimed should have been his. By contrast, *SACCAWU* ...at para 10 rightly held that an applicant in the Labour Court “cannot rely on a joinder in terms of rule 22 to avoid its obligations to comply with section 191 of the LRA.’

[26] In considering the submissions, the court *a quo* had regards to the *Intervolve* judgments of the Constitutional Court and this Court.⁵ The court *a quo* agreed with the appellant on the principle recorded in the above quote that a party cannot be joined in proceedings if it was not party to a conciliation process. However, the court *a quo* disagreed with the appellant’s interpretation of footnote 53 in the Constitutional Court judgment.

[27] The court *a quo* found that the appellant’s interpretation of paragraph 40 with footnote 53 of the judgment of the Constitutional Court was misconceived and correctly so. The reading of footnote 53 evinces that the Constitutional Court had agreed with the Labour Appeal Court in distinguishing the facts in *Intervolve* with those in *Mokoena v Motor Component Industry (Pty) Ltd* (2005) 26 ILJ (LC) (*Mokoena*) and *Selala and Another v Rand Water* (2000) 21 ILJ 2102 (LC) confirming, inter alia, that where s197 transfer was in play there was no need to refer both the old and the new employer to conciliation in an unfair dismissal dispute.

⁵ The judgment is reported as *Intervolve (Pty) Ltd and Another v National Union of Metalworkers of South Africa obo Members* (2014) 35 ILJ 3048 (LAC).

- [28] The appellant's interpretation of *Intervalve*'s judgment of both the LAC and the Constitutional Court is spurious. A judgment should be read in *toto* not as in a piecemeal fashion like the appellant seeks to do. It does not help the appellant to extract in the judgment what it believes advances its case and leaves out the essence of the judgment.
- [29] Having said that a referral for conciliation is indispensable and a precondition to Commissioner's or the Labour Court's jurisdiction over unfair dismissal disputes means that if a party is not part of the conciliation proceedings it cannot be joined at a later stage. The question that arises however is whether the general principle is applicable in a case where a dismissed employee, having referred his/her employer to conciliation for an unfair dismissal dispute, later discovers that his/her employer has changed because the business in which they were employed has changed hands.
- [30] In answering this question, the LAC in *Intervalve* held that:

'In *Mokoena*, the Labour Court allowed the joinder of one of the parties. The party joined was a party that the Labour Court held had taken over the respondent's business in circumstances that invoked s197 of the LRA. In terms of this section where a business is transferred as a going concern the transferee takes over the employment responsibilities of the transferor. The joinder was thus granted not on the basis of any exercise of a discretion of joining a party not taken to conciliation but because s197(9) of the LRA placed the new employer in the shoes of the old employer. In the circumstances, there was no need to refer both the new and the old employer to conciliation any one would suffice as judgment against one was effective against the other.'⁶

- [31] This quote illustrates that, in the event of a party invoking the provision of section 197 of the LRA, there is no need to refer the old and the new employer to conciliation. Any one of the parties will suffice because in terms of the section, the new employer takes the place of the old employer in all material respects, including but not limited to contracts of employment and

⁶ At para 16.

any pending litigations. Hence, where the old employer was taken to conciliation there is no need to also take the new employer because one is not dealing with two employers but only one. Clearly, the appellant wrongly interpreted the *Intervalve* judgments.

[32] In this matter, the employees allege that the appellant has taken over the business of the former employer and for that reason they sought to join the appellant. Since the appellant is alleged to have stepped into the shoes of the old employer it may be joined to the proceedings. I therefore agree with the court *a quo*'s conclusion that in the context of an alleged s197 transfer, a successful applicant would have to hold the transferee accountable because not only has that transferee an interest in the outcome of the dispute, it may be held liable to satisfy the relief, if any, that is granted against the old employer.

[33] In the result, I make the following order:

The appeal is dismissed with costs.

I agree

Waglay JP

I agree

Tlaletsi DJP

Davis JA

APPEARANCES:

FOR THE APPELLANT:

Adv W P Bekker

Instructed by Nothnagel Attorneys

FOR THE FIRST RESPONDENTS

Adv A L Cook

Instructed by Crawford and Associates
Attorneys