

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO. JR 429/07

REPORTABLE

In the matter between:

KOPELEDI (PTY) LTD

Applicant

and

ELIAS MADONTSELA
AND 20 OTHERS

1st Respondents

THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION

2nd Respondent

THE COMMISSIONER, NORMAN MBELENGWA

3rd Respondent

HEARD ON:

23 MAY 2008

JUDGMENT BY:

C.J. MUSI, AJ

DELIVERED ON:

27 JUNE 2008

Introduction

1. This is an application to review and set aside an arbitration award rendered by the third respondent (the Commissioner) under the auspices of the second respondent (the CCMA).

Background

2. The applicant specializes in, *inter alia* the development and management of sectional title townhouse units. As part of its operations it had different business units. The Kopeledi Homes (plaster division) which was established in 2004 was one such unit. This division was responsible for plastering newly built homes. The first and other respondents (first respondents)¹ employed by the applicant, were attached to the plastering division. The applicant disputes that Mr A Zita, one of the first respondents, was ever employed by it. This aspect is, for the purpose of this judgment, of no moment.

¹ The 21 employees were cited as the First Respondents. I propose for pragmatic reasons also to refer to all the employees as the First Respondents.

3. During August 2006 the applicant decided to sell the plastering division as a going concern. On 15 September 2006 a written agreement was concluded between the applicant and Mr **Mesiya** Velaphi Nhlapo (Nhlapo). The relevant parts of the contract reads as follows:

2. RECITAL

- 2.1 The SELLER carries on business under the style of **KOPELEDI HOMES (PLASTER DIVISION)** (“**the BUSINESS**”) carried on at RUIMSIG COUNTRY ESTATE (“**the PREMISES**”)
- 2.2 The SELLER has agreed to sell to the PURCHASER who has agreed to purchase the said BUSINESS, its goodwill, its staff compliment and its fixed assets as a going concern on the terms and conditions hereinafter set forth.

3. DEFINITIONS

In this agreement unless the context otherwise requires:-

“the EFFECTIVE DATE” shall mean, notwithstanding the date of signature hereof, the commencement of business on the 18 SEPTEMBER 2006

“the BUSINESS” shall mean the business conducted by the SELLER under the name of KOPELEDI HOMES (PLASTER DIVISION) and shall include, but shall not be restricted to:

- 3.3.1 the goodwill thereof;
- 3.3.2 the trained staff compliment thereof;
- 3.3.3 all fixed assets thereof as at the EFFECTIVE DATE listed in Annexure “A” hereto;
- 3.3.4 all intellectual property belonging to and of the BUSINESS;

3.4 The singular shall where appropriate include the plural and vise-versa.

3.5 For the purpose of this agreement, the fixtures, fittings and equipment referred to in Clause 3.2 are collectively referred to as “the FIXED ASSETS” which assets are hereby sold voetstoots and which are listed on the Annexure attached hereto marked Annexure “A”.

3.6 Clause headings are inserted for the purpose of convenience only, and shall not be taken into account in the interpretation of the provisions of this agreement.

4. **SALE**

With effect from the EFFECTIVE DATE, the SELLER hereby sells to the PURCHASER who hereby purchases the BUSINESS from the SELLER.

The sale herein recorded is indivisible the BUSINESS: its goodwill, its staff compliment and fixed assets.

It is further recorded that the BUSINESS will be an income earning activity as at the EFFECTIVE DATE.

It is recorded that it is the intention of the PURCHASER to continue with the BUSINESS after the EFFECTIVE DATE.

It is recorded that it is the intention of the PURCHASER to retain all staff employed by the BUSINESS after the EFFECTIVE DATE.

5. **PURCHASE PRICE**

The purchase price payable by the PURCHASER to the SELLER in respect of the sale herein recorded shall be the sum of R110 000 (ONE HUNDRED AND TEN THOUSAND RAND), which amount includes value-added tax at a 14% rate, the sale herein being lock, stock and barrel.

6. **VALUATION IN TERMS OF SECTION 197 OF THE LABOUR
RELATIONS ACT 1995**

It is agreed that the PURCHASER is automatically substituted in the place of the SELLER in respect of all contracts of employment in existence immediately before the effective date and the following conditions will apply;

all the rights and obligations between the SELLER and an employee at the time of the transfer continue in force as if they had been rights and obligations between the PURCHASER and the employee;

anything done before the transfer by or in relation to the SELLER, 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 PURCHASER; and

the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the PURCHASER as if with the SELLER.

All employment terms and conditions are on the whole not less favourable to the employees than those on which they were employed by the SELLER.

Although the SELLER is not aware of any leave pay, severance pay or any other pay due to an employee, the SELLER will make provision for any contingent claim arising from an employee after the effective date. The provision will be an amount as calculated in Annexure B attached to this agreement.

the PURCHASER will be liable for any or all claims by an employee as the SELLER has made ample provision for any possible claim that might arise from a labour dispute prior to the effective date.

the PURCHASER acknowledge that the provision as per 6.5 is adequate for any obligation on the PURCHASER that may arise

7. PAYMENT

Payment of the purchase price of R110 000 aforesaid less the Labour Contingency Provision as per paragraph 6 shall be made by the PURCHASER to the SELLER as follows:

R 2000.00 (TWO THOUSAND RAND) per month until the balance of the purchase price is repaid, 1st payment commencing on the EFFECTIVE DATE.

8. HAND-OVER

Provided that the PURCHASER has complied with the payment obligations contained herein, possession and occupation of the BUSINESS shall be given to the PURCHASER on the EFFECTIVE DATE.

Upon the BUSINESS being so handed over, the BUSINESS shall be at the sole risk of the PURCHASER who shall then be entitled to all income and be liable for all expenditure of the BUSINESS.

9. **RESERVATION OF OWNERSHIP OF THE FIXED ASSETS AND
GOODWILL**

Notwithstanding anything to the contrary herein contained, the ownership and goodwill of the BUSINESS and the ownership of the fixed assets shall not pass to, vest in or become the property of the PURCHASER, but shall remain vested in the SELLER until such time as the whole of the purchase price payable in terms of this agreement shall have been paid to the SELLER.”

The first respondents were all given a copy of the agreement and they were informed in writing that they were to report to Nhlapo.

Evidence

4. Mr Elias Phasha testified that he was employed by the applicant as a plasterer. He earned R1 500.00 per fortnights. The workers had a meeting with the applicant's project manager, Mr Pieter Oosthuizen. During this meeting the first respondents complained about the applicant's failure to give them leave pay. They also enquired whether they are registered for UIF purposes. They were informed that they are.

5. On Friday, 15 September 2006, Oosthuizen gave them a copy of the sale agreement and told them that they will henceforth be working for Nhlapo because Nhlapo bought the company. They worked for Nhlapo for two days and then asked him whether he would be responsible for paying their UIF and benefits. Nhlapo informed them that the applicant is responsible for that and that he regarded them as new employees. Nhlapo told them that they would be too expensive for him. They went back to the applicant and were told that Nhlapo is their employer. The applicant paid them for the two days that they worked for Nhlapo.

6. Mr Rapheal Moyane confirmed that Oosthuizen told them on 15 September 2006 that they will be working for Nhlapo from Monday, 18 September 2006. They objected to the short notice that the applicant gave them in relation to the change of their status. They worked for Nhlapo. On the Thursday Nhlapo said they should not continue working. They asked him why and he told them that they do not understand the “*thing*” between him and the applicant. They went back to the applicant. They spoke to Le Roux who advised them to register as sub – contractors. They told him that if he wants them to sub contract he should first give them their severance pay. He refused.
7. Mr Jopie Le Roux, the general manager of the applicant testified that during June / July 2006 he approached two employees Elias Madontsela and Raymond Sithole, who are part of the first respondents, to work on a sub – contract basis. They refused.
8. During September 2006, when they had three houses left to built and plaster at their development he approached Nhlapo, a tiling sub – contractor to purchase the plastering division. He agreed. The agreement referred to above was entered into.

They further agreed that the respondent would supply Nhlapo with enough work that would last him two years.

9. On 15 September 2006 the employees (first respondents) were paid and informed about the agreement between the applicant and Nhlapo. They were told that their terms and conditions of employment will remain the same but they will be paid by Nhlapo.
10. On Monday, 18 September 2006, he was requested by Oosthuizen to go to the site. On arrival he noticed that the first respondents were not working. He asked them what the problem was and Elias informed him that they refused to work for Nhlapo because they were concerned that he would not pay them. He assured them that Nhlapo would pay them. They still refused and went to the Department of Labour. On the Monday afternoon he had a meeting with Madontsela and Sithole whereat he explained to them that they are Nhlapo's employees. They understood. On 19 September 2006 they started working for Nhlapo. On 20 and 21 September 2006 Nhlapo complained that the workers were on a go slow and they refused to listen to him or accept his authority.

11. On 21 September 2006, he was called to the site. When he got there he spoke to Sithole and Nhlapo. He called Madontsela on his cellphone and suggested again, that they sub –contract. Madontsela told him that they can discuss that issue on the next day. The next day the employees refused to work.
12. During cross examination it was put to him that the employees worked for Nhlapo for two days and then Nhlapo told them that he does not want to work with them. His response was that he was not at the meeting where Nhlapo told them that.

Ruling

13. The third respondent made the following finding:

“I find that the agreement entered into between the respondent and Nhlapo falls short of a business transaction that could be classified as a going concern. The manner in which the agreement was (conclude) was not in line with the provisions of the section. The fact that the respondent paid the applicants for the two days they worked for Mr

Nhlapo gives the impression that the respondent regarded the applicants as its employees. I am of the view that the respondent should have accepted the applicants back and commence with a consultation process. A process that should have been inclusive of all affected employees instead of only two as it was previously done.

I find that the applicants have discharged the onus of proving the existence of a dismissal. The dismissal of the applicants was not for a valid reason and it was not in accordance with a fair procedure....”

Argument

14. The third respondent's finding is attacked on various grounds.

The applicant alleges, *inter alia* that the third respondent erred in:

- Finding that there was a duty on the applicant to consult with the effected employees;
- Finding that the plastering division of the applicant was not sold as a going concern;
- Finding that there was a duty on the applicant to accept the first respondents back into its employ;

- Finding that the applicant was the employer of the first respondents after 18 September 2006;
- Finding that the applicant dismissed the first respondents;
- Finding that the applicant should reinstate the first respondents.

Issues

15. The first question to consider is whether the third respondent's finding that the first respondents were employees of the applicant is, on the evidence, tenable. The fact whether the plastering division was sold as a going concern is inextricably linked to that question. The other issue is whether the finding that the first respondents were dismissed by the applicant is a finding that a reasonable commissioner could make.

Law

16. Section 197 of the Labour Relations Act, 66 of 1995 (the Act) deals with the transfer of a business as a going concern. It reads as follows:

“197 Transfer of contract of employment

- 1) In this section and in section 197A –
 - a) “business” includes the whole or a 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 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...”

It is common cause that there was no agreement in terms of section 197(6) of the Act.

17. In **Van der Velde v Business and Design Software (Pty) Ltd and Another** (2006) 27 ILJ 1225 LC at paragraph 19 Van Niekerk AJ stated that:

“As a general rule, s197 must be purposively applied, so as to give effect to the Constitution and in particular, to the right to fair labour practices. Consistent with the concept of fair labour practices, s197 attempts to strike a balance between employer and employee interests. The section does so by protecting security of employment and employers rights when a business is transferred by permitting transfers of contracts of employment without employee consent. The section also avoids retrenchments and the obligation to pay severance pay in circumstances of business transfers.” I agree.

Van Niekerk AJ also, correctly in my view, points out in ***Van der Velde supra*** paragraph 22 that section 197 creates a statutory exception to the common law in that if a business is transferred as a going concern one employer is *ex lege* substituted for another irrespective of the consent of the employee.

18. Whether a business was in fact transferred as a going concern must be determined objectively in the light of the unique facts and circumstances of each case with due regard to the substance and not the form of the transaction. See **National Education Health and Allied Workers Union v University of Cape Town and Others** (2003) 24 ILJ 95 (CC) at paragraph 56. See also the minority judgment in **National Education Health and Allied Workers Union v University of Cape Town and Others** (2002) 23 ILJ 306 (LAC) for a thorough and detailed discussion of the legal position in South Africa and other jurisdictions in relation to transfers of businesses as going concerns.

19. Part of the objective factors to consider is the underlying agreement. If the underlying agreement in relation to the transfer of the business is subject to a suspensive condition it must first be determined whether that condition has been fulfilled.

Evaluation

20. In clause (7) of the agreement it is stipulated that the purchase price of R110 000.00 must be paid at a rate of R 2000.00 per month, the first (1st) payment commencing on the effective date. The effective date was 18 September 2006, according to clause 3.1. Clause 8.1 stipulates that provided that the purchaser has complied with the payment obligations contained therein, possession and occupation of the business shall be given to the purchaser on the effective date.

21. The applicant relied on a contract that is subject to a suspensive condition. It was incumbent upon him to prove that the condition precedent has been fulfilled. In **Resisto Diary v Auto Protection Insurance Co** 1963 (1) SA 632 A at 644 G Hoexter JA said the following:

“In our law the fulfilment of a true suspensive condition must be pleaded and proved by the person who is relying on the contract...”

22. It is clear from the unambiguous wording of Clause 8.1 read with 8.2 that the condition in relation to the 1st payment had to

be fulfilled before the agreement became effective. Clause 8.1 created a suspensive condition. In **Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd** 1982 (1) SA 398 A at 432 C it was stated that:

“A true suspensive condition in a contract has the effect of postponing the operation of the contract until the happening of some future uncertain event”

There was no evidence, before the third respondent, that indicates whether the condition in relation to the first payment was fulfilled or not. The operation of the contract governing the transfer was suspended until clause 8.1 was fulfilled.

23. The evidence in this matter indicates that the business was handed over from the putative transferor employer to the putative transferee employer on 18 September 2006. The employees were informed in writing that Nhlapo would be their new employer. A copy of the contract in terms of which it was done was also given to the employees. The employees reported to Nhlapo on 18 September 2006 albeit under protest. Nhlapo was going to operate the same business with the same workforce. All these factors point to a proper transfer. The

crucial question however is still whether 18 September 2006 was the date on which Nhlapo took final and unconditional control and responsibility for the transferred enterprise or business, *vide Van der Velde supra*, paragraph 20. In a sale subject to a suspensive condition delivery of the *merx* before the fulfilment of the condition does not pass ownership to the buyer. The risk remains with the seller. See *Christe RH, The law of Contract in South Africa*, 5th Edition at page 141 and the authorities cited therein. In my view and in the light of the absence of any evidence that the suspensive condition has been fulfilled this question cannot be answered definitively.

24. It is not clear what the third respondent meant when he said

“The manner in which the agreement was (conclude) was not in line with the provisions of the section.”

Section 197 does not prescribe the manner or form that a transfer agreement should adhere to. The agreement underlying the transfer may be an oral agreement or a written agreement. The importance of section 197 is that after the transfer certain consequences follow *ex lege*. If no transfer has

taken place, then it follow that the consequences contemplated in section 197 may not follow. It is only when an agreement in terms of section 197 (6) to vary or exclude the legal consequences of a transfer is entered into that it must be in writing. As stated above no such agreement was entered into between the parties in this matter. In as far as the third respondent was of the view that section 197 prescribes a certain manner in which transfer agreements should be concluded he totally misconstrued the law and thereby committed a gross irregularity.

Dismissal

25. It was common cause between the first respondents, or at least Moyane, and the applicant that Nhlapo actually dismissed the first respondents. The third respondent did not categorically find that the first respondents were dismissed by the applicant. He makes a vague and unsubstantiated assertion that,

“I find that the applicants have discharged the onus of proving the existence of a dismissal...”

There is no finding as to who dismissed the applicants. In terms of section 192(1) the employee must establish the existence of the dismissal by the employer. It must be remembered that dismissal as defined in section 186 (1) (f)

“means that an employee terminated a contract of employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer.”

It is clear that a dismissal in terms of section 186(1) (f) can only occur after a transfer in terms of section 197 or 197A. If it is found that there was such transfer then the new employer should or must be held liable for any unfair dismissal. See also section 197(2) (c) referred to above. The evidence shows that the putative transferee employer dismissed the first respondents and not the applicant. The third respondent's finding to the contrary is a finding which a reasonable decision maker could not reach.

Non Joinder

26. During argument I raised, *mero motu*, the question whether the third respondent should not have joined Nhlapo in these proceedings. Mr Van der Merwe on behalf of the applicant was constrained to agree.

27. Section 115 (2A)(d) of the Act empowers the second respondent to make rules regulating the joinder of any person having an interest in the dispute in any conciliation and arbitration proceedings. Rule 26 of the second respondent's rules reads as follows:

“(1) The Commission or a Commissioner may join any number of persons as parties in proceedings if their right to relief depends on substantially the same question of law or fact.

a. The Commissioner may make an order joining any person as a party in the proceedings if the party to be joined has a substantial interest in the subject matter of the proceedings

b. A Commissioner may make an order in terms of subrule (2)-

i. of its own accord

ii. on application by a party; or

iii.

(4)

(5) When making an order in terms of subrule (2), a

Commissioner may-

(a) give appropriate directions as to the further procedure
in the proceedings;...”

28. In **Khumalo v Wilkins and Another** 1972 (4) SA 470 (N) at 475 A – B, Milne J said the following:

“In my view, once it is shown that 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, the court will not deal with those issues without such joinder being effected and no question of discretion nor of convenience arises.” See also *Public Servants Association v Department of Justice and Others* (2004) 25 ILJ 692 (LAC) at paragraphs 25 to 29.

29. It should have been clear to the Commissioner that Nhlapo had a direct and substantial interest in this matter. It became clear during the evidence of the first witness that Nhlapo is alleged to have bought the business, that there was a dispute as to whether Nhlapo knew that he became, *ex lege*, the first

respondents new employer and that all the rights and obligations between the old employer and the employees continued to be in force as if they had been rights and obligations between him and the employees. The order in this matter, logically, means that Nhlapo has been divested of his “*business*”. In terms of section 197(9) of the Act the old and new employer are jointly and severally liable in respect of any claim concerning any term or condition of employment that arose prior to the transfer. The Commissioner was in my view in light of the evidence before him obliged of his own accord to order the joinder of Nhlapo. Generally in section 197 disputes, depending on the nature of the dispute and the facts, it is advisable to join the old and the new employer or the old employer and putative transferee employer as the case may be.

Conclusion

30. In conclusion, to sum up, the Commissioner committed a gross irregularity by finding that the applicant had to engage in a “*consultation process*” with the first respondents before the transfer. His finding that the manner in which the agreement was concluded was not in line with the provisions of section 197

is also a gross irregularity. Likewise his finding that the applicant dismissed the first respondents is, based on the evidence before him, untenable. There was, as mentioned above, no evidence or indication as to whether there was compliance or not, with the suspensive condition in relation to the first payment. In my view the decision of the third respondent is a decision that a reasonable decision maker could not reach. **See Sidumo v Rustenberg Platinum Mines** 2008 (2) BCLR 158 (CC) paragraph 110.

Ruling

31. The award of the third respondent ought to be set aside. The matter ought to be remitted to the second respondent for hearing. It is best that the matter be heard by another Commissioner.

Costs

32. Mr Van der Merwe on behalf of the applicant requested me to make a costs order in favour of the applicant. The issue in relation to the suspensive condition and joinder was not raised

by the applicant. I am of the opinion that having regard to the facts and circumstances of the case the most equitable and fair order would be to make no costs order.

Order

33. I accordingly make the following order.

- 1. The arbitration award made by the third respondent dated 22 January 2007 is set aside.**
- 2. This matter is remitted to the second respondent for rehearing before a Commissioner other than the third respondent.**
- 3. No order as to costs is made.**

C.J. MUSI, AJ

On behalf of the Applicant:	Adv H A Van der Merwe Instructed by: Senekal Simmonds Inc.
On behalf of the Respondents:	H Kgotleng Kgotleng Attorneys