REPUBLIC OF SOUTH AFRICA

Reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case: JS 867/05

In the matter between:

JAFTER NGEMA & OTHERS **Applicant**

and

SCREENEX WIRE WEAVING MANUFACTURERS (PTY) LTD **First Respondent**

JOHNSONS SCREENEX registered as SCREENEX MANUFACTURING (PTY) LTD **Second Respondent**

INDIVIDUAL RESPONDENTS APPEARING ON ANNEXURES "B" AND "C" TO THE FOUNDING AFFIDAVIT **Third and further Respondents**

Heard: **7 December 2010**

Delivered: **19 October 2011**

JUDGMENT

LAGRANGE, J:

Introduction

[1] This is an application to substitute and replace the first respondent ('Wire Weaving') with the second respondent ('Screenex Manufacturing') in an order of the Labour Appeal Court under case number JA49/07.[1] The applicants also seek to join the directors of the second respondent in the proceedings and seek a declaratory order to the effect that the directors of the second respondent are in contempt of court following their failure to comply with the order of the LAC ordering the first respondent to reinstate the individual applicants.

[2] The second respondent also objected to the *locus standi* of the first applicant to act on behalf of the other individual applicants in initiating these proceedings. It appears that the first applicant did not have authority at the time when the proceedings were initiated to act on behalf of the remaining applicants and they did not sign powers of attorney authorising the applicant's attorneys of record to act on their behalf. Strictly speaking, it is only the first applicant who is before the court as an applicant party, though I may refer to the applicants in the course of this judgment in the sense of them being parties to the earlier proceedings in this Court and the LAC.

Background Facts

[3] On 20 September 2005, the applicants were retrenched by the first respondent.

[4] On 22 September 2005, the applicants referred the dispute to the CCMA alleging an unfair dismissal. Following a failure to resolve the matter amicably, the matter was referred to the Labour Court.

[5] During March 2006, the first respondent's business was sold as a going concern to Taboo Trading 68 (Pty) Ltd within the meaning of section 197 of the Labour Relations Act[2], which led to a change of name to Screenex Manufacturing

[1] *Screenex Wire Wearing Manufacturing (Pty) Ltd v Jafter Ngema and Others* .
[2] 66 of 1995.

(Pty) Ltd. No mention of this impending event was made in the first respondent's answering statement filed on 21 February 2006. Similarly, in the minutes of the pre-trial conference held on 17 March 2006 and filed on 30th of March 2006, no mention is made of any other party that might not be an interested party in the proceedings.

[6] The matter was set down for trial on 13 August 2007 and judgment was delivered on 20 August 2007 by the Honourable Justice Hendricks AJ. He found the dismissal of the applicants to be procedurally and substantively unfair and ordered their reinstatement to 20 September 2005. There is no mention in the judgment of the events of March 2006, nor any other indication that the Court was aware at the time the trial was conducted, or when judgment was handed down, that another employer had taken transfer of the business, even though the first respondent must have been aware of at the time.

[7] The first respondent appealed against the judgment of the court *a quo*, but did not cite the second respondent as an interested party in the proceedings. It appears that the appeal proceedings took place on 29 May 2009 and judgment in the matter was handed down on 2 September 2009.

[8] According to a letter dated 9 June 2009, written by the first respondent's attorneys to the registrar, when the Court reserved judgment, the legal representatives of the parties were instructed to engage in consultation regarding the practicality of the possible reinstatement of the individual applicants. The letter also states that the legal representatives were instructed to address the Court through the Registrar by 10 June 2009 on the outcome of such consultations. Failing any agreement being reached in those consultations, it appears that the LAC had advised that it would proceed to hand down judgment in the matter.

[9] The letter goes on to state:

'With regard to the possibility of reinstatement of the company, it is our instructions that Mr Catsicas, who acts on behalf of the previous owners of Screenex Wire Weaving Manufacturing (Pty) Ltd ie the appellant in this matter, had discussions with Mr Griessel, as well as the current owners of Johnson's Screenex, with regard to the possibility and the practicality of the reinstatement of the respondents.

It is our instructions that during the aforementioned discussions between the parties the following became apparent:

1.) Screenex Wire Weaving Manufacturing (Pty) Ltd was sold as a going concern during or about November 2007 by the original owners, Messrs. Feissle and Rosenbuch.

2.) The company was subsequently sold to an American company and is now known as Johnson Screenex.'

[10] The letter then explains that according to information about the financial position of the company now known as Johnson Screenex (the second respondent), reinstatement of the individual applicants was not a feasible option. It goes on to advise that in the circumstances, the parties agreed to abide the judgment of the Court. At this juncture, it must be mentioned that in the second respondent's answering affidavit, the sequence of the transactions appears in a different order. At paragraphs 8 and 10 of the answering affidavit, the second respondent claims that in March 2006, the business was sold as a going concern and it was only in September 2007 that the company itself was sold to an American company, Weatherford Global Products Ltd. It appears that the parties in this application agree on this sequence of events.

[11] At paragraph [28] of the unanimous judgment of the LAC, Judge Zondo, JP noted on the question of relief that the appellant attacked the decision of the Court below for ordering the reinstatement of the individual respondents, as reinstatement was not reasonably practicable, among other reasons, because the appellant company's business had been sold to a different entity. The LAC addressed this argument as follows: 'The argument that the appellant's business was sold presents no difficulty because in fact what had happened is that the appellant remained the employer but its shareholders sold their shares'.[3]

[12] The learned judge continued: 'It was also pointed out to us that since the sale of shares referred to above, there had been a further change of hands in the

[3] At page 16, paragraph [29] of the unreported judgment.

business. However, this seems to have happened after the judgment of the Labour Court had been handed down'. It appears that the learned judge must have been referring to the information regarding the 2007 transfer of the business in 2007. He addressed this point as follows:

'[30] When this Court decides on appeal from a judgment of the Labour Court , it is required to decide the matter in the same way as the Labour Court ought to have decided it at the time it did and on the basis of what was before the Labour Court in. This is the general rule. Accordingly in an appeal a court cannot, generally speaking, take into account events that occurred after the Labour Court had given its judgement. This court cannot make an order which the Labour Court could not have given at the time it handed down its judgement. That being the case, it seems to me that the order which I propose to make is the correct order to be made.'

[13] From the above, it appears that the LAC did not consider the separate question whether or not, in the light of subsequent information, the second respondent should have been joined in the proceedings.

<u>Evaluation</u>

[14] The first observation that must be made is that it was only with the transfer of the business in March 2006 that a change in the corporate identity of the employer was involved. It is trite law that the sale of a controlling interest in the business resulting in a change in the majority shareholders in the business does not change the corporate identity of the registered company, which is sold.[4]

[15] The second point, which is also trite law, is that the employer which receives transfer of a business as a going concern in terms of the provisions of section 197 of the LRA, for most intents and purposes assumes the legal identity of the transferring employer *vis-a-vis* the former employees of the transferring employer who were engaged in the business that was transferred. Not only is the continuity of employment of existing employees maintained between one employer and the next,

[4] See, for example, *Long v Prism Holdings Ltd & Another* (2010) 31 ILJ 2110 (LC) at 2116, paras [30] – [34]

but unfair dismissals by the former employer are deemed to be done by employer who receives the transferred business. Section 197(2)*(c)* states:

“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...”[5]

[16] In *Anglo Office Supplies (Pty) Ltd v Lotz* (2008) 29 *ILJ* 953 (LAC)

the LAC summarised the position as follows:

’[18] The predecessor to s 197(2)*(c)*, which is the old s 197(2)*(a)* before s 197 was substituted by s 49 of Labour Relations Amendment Act A 12 of 2002, read 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 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); C [2002] 4 BLLR 311 (LAC) Zondo JP, interpreting the provisions of the old s 197(2)*(a)*, laid down the principle as follows at 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

[5] See *Success Panel Beaters & Service Centre CC v NUMSA & Another* [2000] 6 BLLR 635 (LAC) at 637, in which Willis JA held in respect of section 197(2)(a), which was the predecessor of section 189(2)(c),: “ 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.”

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 & others*(2003) 24 *ILJ* 95 (CC) at 122C 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."

[21] The Constitutional Court held further that, if there was any doubt about the principle referred to above, the new s 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 an 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, become a right that he has against the new employer'.[6]

[6] *Anglo Office Supplies (Pty) Ltd v Lotz* at 961-2.

[17] Consequently, if the former employer is found to have unfairly dismissed an employee, the employer to which the business is transferred is held to have unfairly dismissed the employee. What the applicants seek to do in this instance is to give effect to the judgments of the Labour Court and the LAC and to the relief granted therein by substituting the second respondent for the first respondent in the judgment.

[18] There seems to be no basis in law for the second respondent to argue that the finding of the Court on the unfair dismissal of the applicants is not, in effect, a finding that it unfairly dismissed them in terms of the provisions of section 189(2)(c). The only issue is whether the applicants or the first respondent should have joined the second respondent in the proceedings before the Labour Appeal Court, once it became known that there had been a transfer of the business in March 2006.

[19] In so far as the second respondent ought to have been joined in the LAC proceedings, it must also be asked if it waived its right to be joined. This possibility arose when it did not apply to join the proceedings between the date of the hearing in the LAC and before judgment was handed down. It was during this interval that the second respondent was approached by the first respondent to obtain its views on whether it would be able to give effect to a possible order of reinstatement being contemplated by the LAC.

[20] In *Lotz,* the LAC made it clear that the new employer's automatic liability for the wrongs of the first employer also means that if a transfer has occurred, the aggrieved employees must pursue their claims against the new employer and not against the old 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 Metalworkers of SA & others* (2004) 25 *ILJ* 104 (LAC) at 114H-115B; ... *National Education*

Health & Allied Workers Union v University of Cape Town & others (LAC) at 343G-344A paras 80 and 81." [7]

[21] In this matter, the transfer occurred after the dismissals but before the matter was heard by the court *a quo.* When the matter was argued and the question of relief was debated in the Labour Appeal Court, it is apparent that by then the individual applicants had been made aware of the transfer which had taken place. At that point, even though it was at the appeal stage, they ought to have applied for the second respondent to be joined in these proceedings, but they did not. For the reasons mentioned above, the LAC did not seem to think it was necessary for it to address the joinder question *mero motu* either. So, even though it was aware of the subsequent transfer of business, the LAC confined itself to the question of whether the relief granted by the Labour Court had been correct. The applicants have not appealed against the LAC's finding in this regard.

[22] In *Amalgamated Engineering Union v Minister of Labour,*[8] the Appellate Division recognised that joinder of an interested third party even at the appeal stage was not inappropriate and could be ordered *mero motu* by the appeal court. It must be emphasised that the court in that case was addressing the question of joinder occurring *before* judgment was passed. It is not correct as the applicants submit that joinder may take place after judgment has been handed down. The case of *Mokoena and Others v Motor Component Industry (Pty) Limited and Others* (J1112/1999) [2005] ZALC 55 (25 February 2005) cited by the applicants does not support their argument, because that case concerned an application for joinder of parties who had not participated in conciliation proceedings.

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[7] *Anglo Office Supplies (Pty) Ltd v Lotz* at 962,para [22]
[8] 1949 SA (3) 637 (A).

[23] The core principles underlying the requirement of joinder were summarised in the *AEU* judgment as follows:

’Indeed it seems clear to me that the Court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interests.’[9]

[24] Even if the second respondent could not have disputed the fairness of the dismissals, it ought to have been heard on the question of relief, which after all is something that could directly affect it and not merely in a financial sense.

[25] It was argued on behalf of the individual applicants that the second respondent could not rely on its non-joinder by either or both of the original parties to the proceedings because it must be taken to have waived its right to rely on non-joinder. In the *AEU* case, Fagan, AJA had this to say about a waiver of the right to be joined:

“There may also, of course, be cases in which the Court can be satisfied with the third party's waiver of his right to be joined, e.g. if the Court is prepared, under all the circumstances of the case, to accept an intimation from him that he disclaims any interest or that he submits to judgment. It must be borne in mind, however, that even on the allegation that a party has waived his rights, that party is entitled to be heard; for he may, if given the opportunity, dispute either the facts which are said to prove his waiver, or the conclusion of law to be drawn from them, or both.

Mere non-intervention by an interested party who has knowledge of the proceedings does not make the judgment binding on him as *res judicata*. There may be further circumstances present which would support an allegation of waiver or estoppel against him, but that is another matter.”[10]

[9] *Amalgamated Engineering Union v Minister of Labour* at 659.
[10] *Amalgamated Engineering Union v Minister of Labour* at 659-660.

[26] In the case of *Road Accident Fund v Mothupi*,[11] the SCA held that: 'Waiver is first and foremost a matter of intention' ; and 'the knowledge and appreciation of the party alleged to have waived is furthermore an *axiomatic* aspect of waiver'

[27] The evidence in support of a waiver of the right to be joined lies in the letter of the first respondent to registrar, and the second respondent's acknowledgment that there were some informal discussions between it and the first respondent along the lines sketched in the letter. On the basis of this evidence alone, I am not persuaded on a balance of probabilities that the second respondent most probably knew an order could be made against it, even though it was not a party to the litigation, and that despite that knowledge it decided not to do anything about it. The limited evidence of waiver in this case is distinguishable from the facts of a case such as *Success Panelbeaters* in which a party expressly elected not to participate in pending proceedings on the basis that it had been indemnified by the previous owner of the business.[12]

Conclusions

[28] In light of the analysis above, I am not satisfied that I can simply substitute the second respondent for the first respondent in the judgment of the Labour Appeal Court, if indeed the Labour Court has the power to do so.

[29] Secondly, insofar as the second respondent and its directors ought to have been joined in the proceedings, that is a matter which should have been raised and

[11] 2000 (4) SA 38 (SCA) at 49E-F and .at 50B-C.
[12] *Success Panel Beaters & Service Centre CC v NUMSA & Another* at 638.

considered in the LAC proceedings, as the court which was seized with the matter and not after judgment was handed down.

[30] Further, it follows that if I cannot substitute the second respondent for the first in the Labour Appeal Court judgment, then I cannot entertain an application for contempt against any directors of the second respondent for not implementing the order made against the first respondent.

[31] The result is far from satisfactory since the applicants do have a judgment in their favour, but that does not allow this Court to simply ignore the principles of joinder and the case authority in terms of which the new employer needs to be cited as a respondent in litigation where a transfer of a business as a going concern has taken place after a dismissal.. In so far as the applicants might have had a remedy that remedy does not lie in dealing with the matter by way of a substitution of parties ordered by the Labour Court after the LAC proceedings have been concluded. Rather, it would appear to lie in whether the joinder issue was properly addressed in the LAC proceedings.

[32] On the question of costs, I believe that the applicant was not unreasonable in believing that this Court would be compelled to give effect to the LAC judgment favour of himself and the other applicants, by compelling the second respondent to comply with it. I also accept that the applicant was *bona fide* in bringing this application and it would be inequitable to make them pay the second respondent's costs in this instance. Accordingly, no cost order is made.

[33] Regarding the *in limine* objection that the first applicant was not properly authorised to act on behalf of all the individual applicants in the absence of confirmatory affidavits to that effect at the time the proceedings were launched, I agree that the second and further applicants were not properly before the Court.

<u>Order</u>

[34] Accordingly,

a. The application to substitute the second respondent for the first respondent in the judgment of the Labour Appeal Court in case number JA49/07 handed down on 2 September 2009 is dismissed.

b. The application to join the third and further respondents as judgment debtors in the aforesaid judgment is dismissed.

c. The application to hold the third and further respondents in contempt of the aforesaid judgment is dismissed.

d. No order is made as to costs.

R LAGRANGE, J

JUDGE OF THE LABOUR COURT

APPEARANCES**:**

FOR THE APPLICANT**:**	Nalane instructed by Maserumule Inc**.**
FOR THE SECOND RESPONDENT**:**	A Redding, SC assisted by G Fourie instructed by Glyn Marais**.**