



**REPUBLIC OF SOUTH AFRICA
THE LABOUR COURT OF SOUTH AFRICA**

JUDGMENT

Reportable

Case no: J861/11

In the matter between:

JOHANNES LODEWIKUS DU PREEZ

Applicant

and

L.S. PRESSINGS CC

First Respondent

DARTINGO TRADING 212 (PTY) LTD

t/a DARTINGO PRESSINGS

Second Respondent

Heard: 10 July 2012

Delivered: 26 July 2012

JUDGMENT

DODSON, AJ

Introduction

- 1] This is an application to join the second respondent in terms of rule 22 of the rules of this court.
- 2] The second respondent opposed the application. However there was no appearance for the second respondent at the hearing of the matter, its attorney having withdrawn shortly before the hearing.

Factual context

- 3] The applicant was employed by the first respondent for close on 20 years from 1991 until 23 February 2011.
- 4] The applicant was dismissed by the first respondent on the alleged basis that it was going into liquidation.
- 5] The applicant referred a dispute against the first respondent to the CCMA and subsequently obtained a default arbitration award from a commissioner of the CCMA on 28 April 2011 declaring his dismissal to have been procedurally and substantively unfair and awarding him eight months compensation in the sum of R305 263,60. In terms of the award, the amount was required to be paid by no later than 20 May 2011.
- 6] The award was not honoured by the first respondent. In the course of trying to enforce the award, as well as a separate award aimed at recovering unpaid pension contributions which were required to be paid in respect of the applicant by the first respondent, the applicant has established that-
 - 6.1] the first respondent has leased all of its machinery to the second respondent;

- 6.2] the second respondent has taken occupation of the same premises that were being used by the first respondent;
 - 6.3] the second respondent has employed the majority of the first respondent's employees;
 - 6.4] although this is disputed by the directors concerned, according to its letterhead, the second respondent has appointed as two of its directors, the former directors of the first respondent;
 - 6.5] the second respondent has continued to produce exactly the same product as that produced by the first respondent; and
 - 6.6] The second respondent, on 15 April 2011, addressed a letter to the first respondent's clients essentially claiming that the first respondent had been liquidated but saying that the second respondent had taken over exactly where the first respondent left off 'on the same premises with most of the employees from LS Pressings including the owners of the liquidated LS Pressings. This means you get the same on-time delivery, the same competitive prices, the same fast, responsible service, the same dedication to excellence you have come to rely on from LS Pressings... We expect things to be back to normal ... by July 2011.'
- 7] The second respondent attempts, disingenuously, to distance itself from the first respondent in its answering affidavit. Moreover there are contradictions between affidavits provided by the directors of the second respondent to the police, the affidavit deposed to in these proceedings by the managing director of the second respondent and the letter addressed to clients by the second respondent referred to above. In particular, there is prevarication about whether or not the first respondent has in fact been liquidated. Certainly, no order of provisional or final liquidation is put up by the second respondent.
- 8] The applicant contends that the business of the first respondent has been

transferred to the second respondent as a going concern as contemplated in section 197(1) of the Labour Relations Act No. 66 of 1995 ("the LRA").

- 9] This would have the consequence in terms of section 197(2)(c) of the LRA that, absent a statutorily compliant agreement in terms of section 197(6) -

'[a]nything 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 in terms of section 197(9) that –

'[t]he old and new employer are jointly and severally liable in respect of any claim concerning a term or condition of employment that arose prior to the transfer.'

- 10] The applicant seeks an order 'joining the second respondent as a party to this proceeding'.

Analysis

- 11] Unfortunately, whilst I have great sympathy for the predicament in which the applicant finds himself, there are two fundamental difficulties with the joinder which he seeks.

- 12] First, the provision for joinder in rule 22 is plainly a provision for joinder in proceedings before the Labour Court. In fact, there are no proceedings between the applicant and the first respondent in the Labour Court to which the second respondent can be joined. What he has is a default arbitration award from a commissioner of the CCMA. That award has, according to the applicant, been subject to certification in terms of section 143(3) of the LRA which provides as follows:

'An arbitration award may only be enforced in terms of subsection (1) if the

director has certified that the arbitration award is an award contemplated in subsection (1).'

13] Section 143(1) provides as follows:

'An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court, unless it is an advisory arbitration award.' (emphasis added)

14] The words "as if it were" confirm that the award is not in fact an order of the Labour Court. Section 143 only provides a mechanism for enforcing an award as if it were an order of the Labour Court. Accordingly, there are no proceedings in the Labour Court to which the second respondent may be joined.

15] My view in this regard is borne out by the decision of this court in *Tony Gois t/a Shakespeare's Pub v Van Zyl and Others*.¹ In that case the CCMA refused to consider an application for rescission of an arbitration award on the basis that the effect of section 143(1) along with certification in terms of section 143(3), was to render the award an order of the Labour Court so that only that court could consider a rescission application. The court in that case held as follows:

'[21] If the third respondent had considered the reasons for the amendments to the Act it would have realised that the purpose of the amended section 143 of the Act was to simplify the process of executing CCMA awards. The amendments arose out of the recognition that the process in terms of section 158(1)(c) was cumbersome. The Labour Court can now be omitted from the process of enforcing CCMA awards. The effect of the second respondent's ruling is to artificially include the Labour Court in a process from which the legislature has chosen to exclude it. A party against whom an award is handed down by the CCMA which award is certified cannot approach this court for a rescission of the award or rescission of the certification because there is no order issued by this court for it to rescind.'²

¹ [2003] 11 BLLR 1176 (LC).

² Id at para 21.

- 16] Similarly, there are no proceedings before this court to which the second respondent may be joined.
- 17] The second impediment to the relief sought by the applicant in this matter is the fact that, as matters stand, the proceedings before the commissioner of the CCMA are complete and he is *functus officio*. That precludes a joinder. The purpose of a joinder is to allow participation in live proceedings. The applicant has put up authority to show that joinder of a party may be effected after the stage of conciliation by a bargaining council or the CCMA.³ However, in each case, proceedings before the Labour Court were still pending. There was no final judgment.
- 18] The effect of joining the second respondent to the proceedings in which there is already a default award, without any prior rescission of the award, and of seeking to hold the second respondent liable on the basis of the award, would be to allow judgment to be taken and enforced against the second respondent without its ever having been heard.
- 19] I am supported in my view by the decision of this court in *Ngema and Others v Screenex Wire Weaving Manufacturers (Pty) Ltd and Others*.⁴ There, a joinder was sought after judgment had been given both in the Labour Court and in an appeal to the Labour Appeal Court. Lagrange J held as follows:

[22] In *Amalgamated Engineering Union v Minister of Labour*, the Appellate Division recognized 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 emphasized 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 & Others v Motor Component Industry (Pty) Ltd & Others* (2005) 26 ILJ 277 (LC) cited by the applicants does not support their argument, because that case concerned an application for

³ *Mokoena and Others v Motor Component Industry (Pty) Ltd and Others* (2005) 26 ILJ 277 (LC) at 280A-B; *NUMSA obo its Members v Steinmuller Africa (Pty) Ltd* ([JS 758/10](#)) [2012] ZALCJHB 13 (16 February 2012).

⁴ (2012) 33 ILJ 681 (LC).

joinder of parties who had not participated in conciliation proceedings.

[23] The core principles underlying the requirement of joinder were summarized 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.”(footnote omitted)

[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.

...

[28] In the 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.

...

[31] The result is far from satisfactory since the applicants do have a judgment in their favour, but that does not allow this court simply to 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. Insofar 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.’⁵

20] It is so that the applicant indicated from the bar that future unspecified proceedings to enforce the applicant’s rights in terms of section 197 are

5 Id at at paras 22-31.

contemplated. I am of the view that that is the time when the second respondent should be joined.

21] In the circumstances, I make the following order:

21.1] The application for the joinder of the second respondent is dismissed.

21.2] No order is made as to costs.

DODSON AJ

Acting Judge of the Labour Court

APPEARANCES:

For the applicant: Ms M Howells of Goldberg Attorneys