



IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO J S 1135/12

In the matter between:

DENNIS PEARSON & 14 OTHERS

APPLICANTS

and

TSAFRICA CATERING SOLUTIONS

1ST RESPONDENT

SODEXHO SOUTHERN AFRICA (PTY) LTD

2ND RESPONDENT

Trial: 27 February 2014

Judgment: 28 February 2014

JUDGMENT

VAN NIEKERK J

[1] The applicants have filed a statement of claim in terms of Rule 6 in which they seek a declaratory order to the effect that the outsourcing contract by and on behalf of Media 24 to the second respondent subsequent to 'cancellation of the same contract' between Media 24 and the first respondent, is a transfer of business as a going concern within the meaning of s 197 of the Labour Relations Act (LRA). They also seek a declaratory order to the effect that they be transferred to the second respondent, with no loss of benefits, and that this order should operate retrospectively from 1 May 2012.

[2] The statement of claim was drafted and filed by the applicants' erstwhile attorney of record, who withdrew a week ago. The terms of the statement of claim canvass the factual and legal issues that arise from what is contended to be a transfer of a business as a going concern for the purposes of s 197 during the course of May 2012, when the second respondent appears to have substituted for the first respondent as a service provider to Media 24, specifically, to provide catering services.

[3] In its response to the statement of claim, the second respondent avers that the declaratory relief sought by the applicants is not competent, and that regardless of the merits, the claim should be dismissed for this reason. In essence, the second respondent contends that the failure by the applicants to refer an unfair dismissal dispute to this court renders the relief they seek (i.e. a declaratory order as to whether s 197 applies) of no consequence. At the outset of the trial that commenced yesterday, the parties' representatives were invited to address the court on this issue.

[4] The facts relevant to these preliminary issues are briefly the following. The applicants state that on 13 April 2012, Media 24 advised the first respondent that the second respondent would 'take over the catering business as at the beginning of 1st May 2012'. When they presented themselves after a handover to the second respondent they were told that there were no jobs for them on the site and they were evicted from Media 24's premises. It appears from the pre-trial minute that the majority of the applicants were employed by the first respondent on fixed term contracts at other sites, and that with four exceptions, they remain so employed. On 5 May 2012, the applicants referred disputes to the CCMA. They categorised the disputes as ones concerning an unfair dismissal, and indicated that they wished to be reinstatement

and/or compensated. On 22 May 2012, for reasons that are not apparent, the applicants referred a dispute to the bargaining council in which they claimed that they had been unfairly dismissed by the second respondent. The dispute was categorised as one concerning an unfair retrenchment. After conciliation, the dispute remained unresolved, and on 2 August 2012, a certificate to this effect was issued by the council. Again, for reasons that are not apparent, the matter was thereafter referred to the CCMA for arbitration. The arbitration was set down for 26 November 2012. The applicants state that they did not proceed with the arbitration because they received advice that the CCMA lacked jurisdiction to entertain the dispute and that it ought to be referred to this court for determination.

[5] On 7 March 2013, the applicant's erstwhile attorney filed the statement of case.

[6] The statement of case makes no mention, at least in express terms, of any dismissal, let alone an unfair dismissal. The high water mark is averments that I have mentioned above regarding events when the applicants presented themselves at Media 24 after 30 April. All of the averments in the statement of case address the relief sought, i.e. a declaratory order.

[7] It is often forgotten that this court is a creature of statute, its powers and jurisdiction are defined and conferred by the LRA and other labour-related legislation, and it has authority and inherent powers only in relation to matters under its jurisdiction (s 151 of the LRA). Section 157 establishes the jurisdiction of the court, and provides for exclusive jurisdiction in respect of matters that either in terms of the LRA or any other law are required to be determined by this court. Rule 6 of the rules of this court regulates matters that may be referred for determination, and establishes the procedure to be followed. Rule 7 and 7A apply to those matters required to be brought by way of application. In other words, this court does not operate on the principle applicable in the High Court, where the foreseeability of any material dispute of fact largely dictates the appropriate procedure. In this court, the LRA, read with the Rules, is prescriptive. The nature of the dispute between the parties both confers jurisdiction and dictates the manner in which the matter is to proceed, whether way of action or application.

[8] This court is afforded a range of powers (s 158). Included in these is the power to make declaratory orders (s 158 (1) (a) (iv)). But the court may not exercise its powers if it has no jurisdiction.

[9] The applicants seek a declaratory order. As I have indicated, the court is empowered to grant such orders. However, I am not persuaded that the court has jurisdiction to grant the order. They face what appear to me to be two insurmountable obstacles. The first is the point made by the second respondent, to the effect that there is no unfair dismissal dispute before the court. The applicants do not aver that they were dismissed by the second respondent (at least not within the definition of 'dismissal' contained in s 186 (1) of the LRA), nor do they contend that any dismissal that may have been effected by the second respondent was unfair. Even then, this would not be sufficient to establish jurisdiction. The court has jurisdiction to determine disputes that concern dismissals that are alleged to have been effected for a reason that is automatically unfair. Included in the list of automatically unfair reasons is a transfer in terms of s 197, or a reason related to a transfer.

[10] Jurisdiction is to be determined on the pleadings and not the substantive merits of the case. The pleadings contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. (*Chirwa v Transnet Ltd & others* (2008) 29 ILJ 73 (CC); *Gaba v Minister of Safety and Security & others* (2010) 31 ILJ 296 (CC)). A referring party in a claim such as the present must at least assert the existence of a dismissal, and facts and sufficient facts to sustain the claim that the reason for the dismissal is a transfer in terms of s 197 or related to the transfer. The applicants have failed to plead facts that sustain a cause of action cognizable by this court under Rule 6.

[11] More fundamentally, and on the assumption that the applicants' real dispute is that they were unfairly dismissed by the second respondent on account of a transfer in terms of s 197, the applicants have failed to comply with s 191 (11) of the LRA. That section requires that the referral of a dispute to this court for determination must be made within 90 days after the CCMA or a bargaining council has certified that the dispute remains unresolved. In the present instance, the certificate was issued on 2 August 2012. The referral was made on 7 March 2013, almost seven months after the

referral and thus some four months late. The applicants have not applied for the condonation of their late referral. When a dispute is referred late and no condonation is sought, it is trite that the court has no jurisdiction to entertain the claim.

[12] For these reasons, the applicants' claim stands to be dismissed.

[13] In so far as costs are concerned, the court has a broad discretion to make an order for costs on the basis of requirements of the law and fairness. Although the institution of this litigation was misguided, I suspect that the applicants relied on the advice of Mr. Samuels, their previous attorney of record. They were badly advised. The irony is that had the applicants approached the court by way of an urgent application for the declaratory order they now seek, the court would have entertained the application.

I make the following order:

1. The applicants' referral is dismissed.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

APPEARANCES

For the applicants: Adv. S Swartz, instructed by Bagraim Sachs.

For the second respondent: Adv. C Watt-Pringle, instructed by Shepstone & Wylie