



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

CASE NO: JS 423/2015

In the matter between

LILENE VAN HOOLWERF

Applicant

And

IMPERIAL GROUP LTD

First Respondent

TURBO EXCHANGE (PTY) LTD

Second Respondent

Heard: 11 September 2015

Delivered: 16 September 2015

Summary: Employment by subsidiary company which separate entity from the holding company does not create employment relationship with the holding company. The holding company incorrectly cited. Plea of misjoinder upheld.

JUDGMENT

BALOYI AJ

Introduction

- [1] The dispute between the parties is being referred in terms of Rules 6 of the rules of conduct of proceedings of this Court. The parties have finalized the pre-trial process and the minutes have accordingly been filed. The matter is now before Court for determination of preliminary issue raised by the Respondents, namely misjoinder of the First Respondent. The Court held a view that was clearly disseminated to the parties that the point in question has little to do with disposal of the dispute if upheld or at least to bring about a consequence of amendment to pleadings. Oral evidence within trial of the matter was in the Court's view the most appropriate way to dispose of the preliminary point. The issue of costs as pointed by counsel for the Respondents happened to be a compelling factor to have the matter proceeded with. Furthermore the First Respondent will have to keep on preparing for trial in the matter which it believed that only the Second Respondent was the employer of the Applicant.

The Issues

- [2] The Respondents submitted that in Applicant's own words as contained in the statement of case it is alleged that she was at the time of her dismissal employed by the Second Respondent. The Court's attention was specifically drawn to paragraph 5.1 of the statement of case which reads as follows:

"The Applicant was employed by the First Respondent from **May 2000** and by the Second Respondent from **August 2011 as Financial Director** until her dismissal on **20 January 2015**. At the time of her dismissal she was employed as the Financial

Director with the Second Respondent on an annual salary of **R990 886-00**".

- [3] It is on this basis that the Respondents believe that the First Respondent has been unnecessarily brought to Court. Since there was no employment relationship between the Applicant and First Respondent when the Second Respondent dismissed the Applicant, the First Applicant cannot be held as party having interest in the matter. The mere fact that the First Respondent is a holding and a separate entity from the Second Respondent clearly shows that there is no substantial interest in existence.
- [4] The basis for inclusion of the First Respondent as party is that its resources were used in pre dismissal processes ranging from notices, charges and the dismissal being communicated on its letterhead. The participation of the First Respondent's HR Director in the said process and that Mr Patrick Williams happened to be the director of both companies was further brought to light by the Applicant.

Evaluation

- [5] Both parties seem to be *ad idem* on the fact that misjoinder should be taken *in limine* and if not taken cannot be raised subsequently. They referred to authorities in support of this point. Parties are also in agreement that a substantial interest need to be shown to sustain the presence of partly cited in the proceedings. In *Mdlalose v Fila SA (Pty) Ltd*¹ the Court allowed a joinder of another entity under the circumstances set out in paragraph 23 as follows;

"[23] This is not a case where the applicant alleges that the corporate entity abuse its legal personality status and seeking the Court to pierce the corporate veil. Nor is it a case where the applicant seeks a joinder or declaratory on the basis of the remedies provided for in section 197 of the Act this section has, therefore, no application herein. Instead, it is a case where the applicant alleges that two separate independent corporate entities, owned by the same persons, operating in the same or virtually the same business activity, using the same staff complement. On the same premises and using the same machinery, equipment and stationery. The two entities concerned were Fila South Africa (Pty) Ltd, the respondent herein on the one hand, and Footwear Trading CC on the other. As a result of this conduct by the respondent and Footwear Trading CC, a confusion was not only foreseeable but it was certain to

¹ 2003 24 ILJ 2328 (LC), upheld on appeal: (2005) 5 BLLR 452 (LAC)

arise, most likely to the detriment and prejudice of innocent third parties involved in commercial or legal dealings with either of these entities. The respondent and footwear Trading wear trading CC foresaw this problem, but recklessly failed to do something to avert the confusion. In fact, their actions tended to show that they intended, directly or indirectly, the confusion to arise and that it would accord them a legal defence in claims such as the present one”.

- [6] When coming to this instant matter it appears that the third party is attached to these proceedings in so far as the processes related to dismissal of the Applicant. There is nothing to suggest that the Applicant was dismissed on the basis of her being the First Respondent’s employee. I have also looked at what parties recorded as common cause in the pre-trial minute with specific attention given to paragraph 3 where parties had this to say:

- “•The Applicant was employed by the First Respondent from May 2000 to August 2011.
- The Applicant was employed by the Second Respondent from August 2011 until her dismissal on 20 January 2015.
- The Applicant was employed as Financial Director of the Second Respondent.”

- [7] In this regard the grounds laid by the Applicant surely do not warrant the presence of the First Respondent in this matter. The situation as it appears does not require further interpretation based on what is placed before the Court. Clearly the First Respondent should not have been cited. In *National Union of Metalworkers of South Africa v Lee Electronics (Pty) Ltd and others*² the Court declined to pierce corporate veil of entity which allegedly controlled company which dismissed employees and true employer was held to be entity which effected dismissal. In the present matter the Second Respondent is the true employer of the Applicant. Therefore, it should not have been joined as a party to these proceedings.

- [8] As to costs this is not a matter which calls for the costs to follow the order. Despite the fact that parties had at their disposal an opportunity to deal with this point during trial, it is undisputed that litigation is still ongoing between the parties. Any cost order may impede the parties’ chances of resolving the dispute amicably. Further regard is had to

² [2013] 2 BLLR 155 (LAC)

what is recorded in the pre-trial minute that parties have not given up in finding resolution of the dispute.

Order

[9] In the circumstances the following order is made:

11.1. The Respondents' plea on misjoinder is upheld.

11.2. There is no order as to costs.

Baloyi AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: G J De Villiers, De Villiers-Möhr Attorneys

For the Respondent: Adv. A Bishop instructed by Dewey Herzberg Levy Inc.