



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

CASE NO: JS 809/16

In the matter between:

ASSOCIATION OF MINEWORKERS

AND CONSTRUCTION UNION (AMCU)

First Applicant

SEKHOKHO, A & 11 OTHER AMCU

MEMBERS WHOSE NAMES APPEAR

ON ANNEXURE "A"

Second to Further Applicants

and

PRESTPROPS 1315 CC

First Respondent

UNISPAN HOLDINGS (PTY) LTD

Second Respondent

Heard: 19 October 2017

Delivered: 29 March 2018

Summary: When the applicants acquire the knowledge that a different entity was required to have been cited as the second respondent after they had filed their statement of claim, it is not necessary for the applicants to refer their unfair dismissal dispute against that entity to conciliation before launching an

application for that entity to be joined as a respondent as envisaged in section 200B of the LRA.

JUDGMENT

Lallie, J

- [1] The second to further applicants who will be referred to as the applicants in this judgment were employed to work at the first respondent's premises. Pursuant to the termination of the employment relationship in January 2015, the first applicant, who will be referred to as the AMCU in this judgment, instituted an unfair dismissal claim against the first and second respondent. In the statement of claim the applicants contended that they were employed by both respondents, alternatively, that they were employed by the first respondent and that the second respondent is liable for breaches of the Labour Relations Act¹ (the LRA) and the Basic Conditions of Employment Act (the BCEA) by the first respondent by the operation of section 200B of the LRA. In the response to the statement of claim, the second respondent denied that section 200B of the LRA applied to it and alleged that it was Augusta, its subsidiary, that had the commercial relationship in issue with the first respondent. Based on the response, the applicants launched this application to have Augusta Steel (Pty) Ltd joined as the third respondent in these proceedings. They further sought leave to amend their statement of claim to include reference to Augusta Steel (Pty) Ltd. The application is opposed by Augusta Steel (Pty) Ltd which will be referred to as Augusta in this judgment.
- [2] Augusta opposes this application on the grounds that the applicants failed to refer the unfair dismissal dispute against it to conciliation before it was referred to this court. It was argued on behalf of Augusta that when the referral between the applicants and the respondents was made, Augusta should have been incorporated into LRA Form 7.11. It was further argued that

¹ 66 of 1995

in the absence of a referral to conciliation this court lacks jurisdiction over the dispute. Augusta relied on *National Union of Metal Workers of South Africa v Intervolve (Pty) Ltd and others* (2015) 36 ILJ 363 (CC). The argument was further supported by the decision in *Themba Big Save CC* 2016 10 BLLR 1016 (LAC).

- [3] The applicants denied that they were obliged to refer the dispute against Augusta to conciliation before approaching this court. Their application for joinder is based on section 200B of the LRA which provides as follows:

‘(1) For the purposes of this Act and any other employment law, ‘employer’ includes one or more persons who carry on associated or related activity or business by or through an employer if the intent or effect of their doing so is or has been to directly or indirectly defeat the purposes of this Act or any other employment law.

(2) If more than one person is held to be the employer of an employee in terms of subsection (1), those persons are jointly and severally liable for any failure to comply with the obligations of an employer in terms of this Act or any other employment law.

- [4] The applicants sought to rely on *Themba Big Save (supra)* paras 29 and 32 where the court held as follows:

[29] Having said that a referral for conciliation is indispensable and a precondition to Commissioner's or the Labour Court's jurisdiction over unfair dismissal disputes means that if a party is not part of the conciliation proceedings it cannot be joined at a later stage. The question that arises however is whether the general principle is applicable in a case where a dismissal employee, having referred his/or employer to conciliation for an unfair dismissal dispute, later discovers that his/her employer has changed because the business in which they were employed has changed hands.

[32] In this matter, the employees allege that the appellant has taken over the business of the former employer and for that reason they sought to join the appellant. Since the appellant is alleged to have stepped into the shoes to the old employer it may be joined to the proceedings. I therefore agree with the court a quo's conclusion that in the context of an alleged s197 transfer, a

successful applicant would have to hold the transferee accountable because not only has that transferee an interest in the outcome of the dispute, it may be held liable to satisfy the relief, if any, that is granted against the old employer.

- [5] The general rule is expressed in *Intervolve* (supra) and referred to with approval in *Themba Big Save* (supra). It is that conciliation is a precondition to the Labour Court's jurisdiction over unfair dismissal disputes. A party that was not part of the conciliation proceedings cannot be joined at a later stage. However, in *Themba Big Save* (supra) the Labour Appeal Court held that there are exceptions to the rule and accepted that when a dismissed employee who discovered after he or she has referred an unfair dismissal dispute that his or her employer has changed by operation of section 197 of the LRA, the need to refer the old and new employer to conciliation can be dispensed with as referral of one suffices.
- [6] The applicants sought to rely on *Themba Big Save* (supra) and argued that as they got to know after they had filed their statement of claim that Augusta was their employer as envisaged in section 200 B of the LRA there was no need to refer their dispute against Augusta to conciliation. It was argued on behalf of Augusta that the need to refer the dispute could not be dispensed with. It was further argued that the applicants' reliance on *Themba Big Save* was misplaced as in the matter at hand the business did not change hands.
- [7] I am not convinced that the decision in *Themba Big Save* (supra) can only be relied on in cases where a business has changed hands. I am of the view that it acknowledges that there are exceptions to the general rule laid down in *Intervolve* (supra). The purpose of section 200B of the LRA is to protect the right of employees when there is more than one employer who can be held responsible for the violation their rights.
- [8] In *Association of Mineworkers and Construction Union and Others v Buffalo Coal Dundee (Pty) Ltd and Another*² the court stated the purpose of section 200B as follows:

² [2006] 9 BLLR 885 (LAC)

'Section 200B was enacted to prevent collusion by two or more persons involved in an associated or related business by or through an employer in order to undermine the provisions of the Act or any employment law.'

The argument on behalf of Augusta of the absence of collusion does not exclude Augusta from being an employer as envisaged in section 200B. Augusta pleaded to the applicant's statement of claim and explained its role in the relationship between the applicants' and the respondents as that of an employer within the meaning of section 200B. The applicants could not reasonably have known that the second respondent owned Augusta and that since 2014 the second respondent was incorporated into Augusta. The respondent also pleaded that the second respondent ought to have been Augusta.

[9] The applicants got to know after they had filed their statement of claim that August should have been the second respondent and given the nature of the relationship between the respondents and Augusta, the applicants were not required to refer their unfair dismissal dispute against Augusta to conciliation before this application for joinder was launched.

[10] In the premises the following order is made:

Order:

1. Augusta Steel (Pty) Ltd is joined as the third respondent in these proceedings.
2. The Applicants are granted leave to amend their statement of claim to include references to Augusta Steel (Pty) Ltd.

Z Lallie

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate Itzkin

Instructed by: Larry Dave Attorneys

For the First Respondent: Advocate Venter

Instructed by Bregman Moodley Attorneys

LABOUR COURT