



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable
Case no: C465/17

In the matter between:

**NATIONAL UNION OF METALWORKERS
OF SOUTH AFRICA**

First Applicant

JACQUELINE SIEBRITZ

Second Applicant

and

**SPINE INDUSTRIES (PTY) LTD T/A
THE TRUCK CHAIRMAN**

First Respondent

JACQUELINE KEARLEY T/A CHAIRMAN

Second Respondent

Heard: 8 March 2018

Delivered: 03 May 2018

Summary: Correction of the citation of a party aimed at addressing a misnomer and there is no prejudice to the second respondent.

Substituting the second respondent for the first respondent as the employer in accordance with section 197 of the LRA.

JUDGMENT

NKUTHA-NKONTWANA. J

Introduction

- [1] In this matter, the first applicant ('NUMSA') and the second applicant ('Ms Siebritz') seek an order correcting the citation of the first respondent and to simultaneously substitute it with the second respondent. The application is brought in terms of Rule 22 (4)¹ and Rule 22 (5)² of this Court's Rules read with the section 197 of the Labour Relations Act³ ('the LRA').
- [2] Ms Siebritz was employed by the Truck Chairman CC and was dismissed on 15 August 2015. She successfully challenged her dismissal; save that the employer party was cited as the Spine Industries (Pty) Ltd t/a Truck Chairman. A default arbitration award dated 11 February 2015 was issued in terms of which the dismissal of Ms Siebritz was found to be unfair and a compensation of R22 500.00 was awarded.
- [3] The arbitration award was served on the first respondent on 12 February 2015 and certified in terms of section 143 (3) of the LRA on 3 March 2016. On 26 September 2016, having obtained the writ of execution issued by the registrar of this Court, the Sheriff attached some immovable property found at 12 Green Street in Paarl, being the premises from which the first respondent conducted its business. The attached goods included four industrial machines that had been used by the first respondent to conduct its business. The Sheriff subsequently received a sworn statement from the second respondent, distancing herself from the first respondent and claiming that the attached goods belong to her son.
- [4] The Sheriff instituted interpleader proceedings on 17 March 2017, which was postponed to 30 March 2017 in order to allow the second respondent to file her particulars of claim by not later than 29 March 2017. In her particulars of

¹ Rule 22(4) provides that: 'if a party to any proceedings has been incorrectly or defectively cited, the court may, on application and on notice to the party concerned, correct the error or defect and may make an order as to costs.'

² Rule 22(5) provides that: 'If in any proceedings it becomes necessary to substitute a person for an existing party, any party to such proceedings may, on application and on notice to every other party, apply to the court for an order substituting that party for an existing party and the court may make such order, including an order as to costs, or give such directions as to the further procedure in the proceedings as it deems fit.'

³ Act 66 of 1995 as amended.

claim filed in the interpleader proceedings, Ms Siebritz contended that the goods were rightly attached for the following reasons:

- 4.1. The goods attached were found at 12 Green Street in Paarl, the same premises that the first respondent conducted its business from and was then used by the second respondent to trade, and
- 4.2. The business had changed hands from the first respondent to the second respondent. It was trading from the same premises, using the same equipment and servicing the same clients with the same staff compliment. Therefore, the business had been transferred as a going concern in terms of section 197.

[5] As at the hearing of the interpleader on 30 March 2017, the second respondent had not filed her particulars of claim. The Court, as per Rabkin-Naicker J, ordered that Ms Siebritz had a valid claim against the attached goods and directed the Sheriff to continue with the sale in execution. The second respondent was ordered to pay Ms Siebritz's costs and sheriff's fees.

[6] The Sherriff realised R7 600.00 from the sale in execution. Ms Siebritz was paid R2 054.85 and the rest was deducted as the Sherriff's fees. The outstanding balance is R20 445.15. Now the applicants seek to substitute the first respondent with the second respondent as the employer and the judgement debtor.

The legal principles and application

[7] The applicants claim is hinged on section 197⁴. The parties accept the interpretation accorded to section 197 in *National Education Health and*

⁴ '197. Transfer of contract of employment

(1) In this section and in section 197A –

(a) 'business' includes the whole or a part of any business, trade, undertaking or service; and

(b) 'transfer' means the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern.

(2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6) –

(a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;

Allied Works Union v University of Cape Town & Others (NEHAWU),⁵ where the Constitutional Court stated the following:

'The proper approach to the construction of section 197 is to construe the section as a whole and in the light of its purpose and the context in which it appears in the LRA. In addition, regard must be had to the declared purpose of the LRA to promote economic development, social justice and labour peace. The purpose of protecting workers against loss of employment must be met in substance as well as in form. And, as pointed out earlier, it also serves to facilitate the transfer of businesses. The section is found in a chapter that deals with unfair dismissal. Construed against this background, the section makes provision for an exception to the principle that a contract of employment may not be transferred without the consent of the workers. Subsection (1) says so and it makes it possible to transfer the business on the basis that the workers will be part of that transfer. This will occur if the business is transferred "as a going concern".'

[8] Emphasising the dual purpose of Section 197, the Constitutional Court further stated that:

'Section 197 strikes at the heart of this tension and relieves the employers and the workers of some of the consequences that the common law visited on them. Its purpose is to protect the employment of the workers and to facilitate the sale of businesses as going concerns by enabling the new employer to take over the workers as well as other assets in certain circumstances. The section aims at minimising the tension and the resultant labour disputes that often arise from the sales of a businesses and impact negatively on economic development and labour peace. In this sense, section 197 has a dual purpose, it facilitates the commercial

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- (b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;
 - (c) 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
 - (d) the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer.'

⁵

[2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC)

transactions while at the same time protecting the workers against unfair job losses.' (Emphasis added)

- [9] The second respondent disputes that section 197(2) is applicable in the circumstances of this matter. She argued that there was no sale agreement or transaction that could have facilitated the transfer of the business. This argument is clearly untenable. The question whether section 197(2) applies to a particular case cannot be determined with reference to the intricacies of the transaction effecting the transfer. The existence of a contract is not a pre-condition for the application of section 197(2) in a particular case.⁶ In *Aviation Union of South Africa & Another v South African Airways (Pty) Ltd & Others*,⁷ the Constitutional Court stressed that the key event which brings section 197 (2) into play is the transfer of a business as a going concern. Accordingly, its application must always be determined with reference to three requisites, namely, 'business', 'transfer' and 'going concern'.
- [10] The definition of 'business' provided in section 197(1)(a) refers to 'the whole or part of any business, trade, undertaking or service'. Whilst section 197 (1)(b) defines 'transfer' as 'the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern'.
- [11] In *NEHAWU*, the Constitutional Court defined the words "going concern" to mean the following:

'The phrase 'going concern' is not defined in the LRA. It must therefore be given its ordinary meaning unless the context indicates otherwise. What is transferred must be a business in operation 'so that the business remains the same but in different hands.' Whether that has occurred is a matter of fact which must be determined objectively in the light of the circumstances of each transaction. In deciding whether a business has been transferred as a going concern, regard must be had to the substance and not the form of the transaction. A number of factors will be relevant to the question

⁶ *Nokeng Tsa Taemane Local Municipality v Metsweding District Municipality* (2003) 24 ILJ 2179 (LC) at 2183 referred with approval in the second judgment of the Constitutional Court in *Rural Maintenance (Pty) Limited and Another v Maluti-A-Phofung Local Municipality* [2016] ZACC 37; 2017 (1) BCLR 64 (CC); (2017) 38 ILJ 295 (CC); [2017] 3 BLLR 258 (CC) at para 87.

⁷ 2012 (1) SA 321 (CC); 2012 (2) BCLR 117 (CC); [2012] 3 BLLR 211 (CC); (2011) 32 ILJ 2861 (CC) at para 44.

whether a transfer of a business as a going concern has occurred, such as the transfer or otherwise of assets both tangible and intangible, whether or not workers are taken over by the new employer, whether customers are transferred and whether or not the same business is being carried on by the new employer. What must be stressed is that this list of factors is not exhaustive and that none of them is decisive individually. They must all be considered in the overall assessment and therefore should not be considered in isolation.’⁸ (Emphasis added)

- [12] Interestingly, in the present case, the second respondent readily conceded that she had been leasing the same premises that the first respondent had been trading from; that she purchased the machinery that the first respondent utilised in its business, albeit, from the landlord; that she employed two of the previous employees of the first respondent; and that she is servicing the same clientele that was serviced by the first respondent. In fact, in her answering affidavit, the second respondent explicitly states that:

‘The business I conduct is similar to that previously conducted by the close corporation, as such, it stands to reason that some close corporation’s erstwhile clients would also become the clients of mine. There is nothing neither strange nor untoward in obtaining clients for my business, especially since I had done marketing on a contract basis for the close corporation it stands to reason that I would approach these potential clients in an attempt to expand my business.’⁹

- [13] Clearly, the first respondent’s operation continued, alternatively resumed, with similar activities under the new employer, being the second respondent. Besides, the second respondent is also trading as Chairman.

⁸ NEHAWU above n 11 at para 56.

⁹ Answering affidavit, pages 98 and 99 para 69.

- [14] Nothing turns on the second respondent's argument that the first respondent had ceased trading when she commenced with the business. Firstly, it is inconsistent with the applicants' undisputed evidence that the employment contracts of the first respondent's employees taken by the second respondent were never interrupted. They were paid by the first respondent up until end of February 2016 and commenced with the second respondent on 1 March 2016. Secondly, even if there was an interruption, the first respondent's operation did resume under the second respondent, the new owner.
- [15] In view of the above, it is evident that the components of the first respondent's business did pass to the second respondent as a going concern in accordance with section 197(2). As a result, the dismissal of Ms Siebritz by the first respondent is considered to have been done by the second respondent, the new employer.¹⁰
- [16] Turning to the issue of correction of the citation of the first respondent, the second respondent initially opposed this application. During oral arguments in Court, she, however, backtracked, submitting that she shall abide the Court's decision.
- [17] The applicants argued that the correction sought is aimed at addressing a misnomer in the citation of the first respondent with no prejudice to the second respondent.¹¹ I agree. In any event, the second respondent has since prudently abandoned her contestation in this regard.

Conclusion

- [18] In all the circumstances, I am persuaded that the applicants have made a case for granting the order correcting the citation of the first respondent and substituting it with the second respondent.

¹⁰ See section 197(2)(c), in particular.

¹¹ *Lamprecht v Pienaar Brothers (Pty) Ltd* [1998] JOL 2171 (LC) at para 6 and 7.

Costs

[19] The Constitutional Court made it clear in *Zungu v Premier of the Province of KwaZulu-Natal and Others*¹² that the rule of practice that costs follow the result does not apply in matters before this Court as orders of costs in this Court are to be made in accordance with the requirements of the law and fairness. In this instance, it would not be fair and just to award costs. In any event, the applicants did not persist with their claim for costs.

Order

[20] I, therefore, make the following order:

1. The citation of the first respondent is corrected as 'The Truck Chairman CC'.
2. The second respondent is substituted for the first respondent.
3. There is no order as to costs.

P. Nkutha-Nkontwana

Judge of the Labour Court of South Africa

¹² [2018] ZACC 1 at para 24 to 26.

Appearances:

For the applicants:

Ms T Ralehoko

of Cheadle Thompson and Haysom Inc.

For the second respondent:

Advocate J Rysberg

Instructed by

Duvenage & De Villiers Hogan attorneys

LABOUR COURT