

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO : J3341/98

In the matter between :

NATIONAL UNION OF METAL WORKERS
OF SOUTH AFRICA

First Applicant

SHEZI, E C

Second Applicant

and

SUCCESS PANELBEATERS AND SERVICE CENTRE CC
t/a SCORE PANELBEATERS AND SERVICE CENTRE

Respondent

JUDGMENT

JAJBHAY, A.J.

[1] The First Applicant in this matter is the National Union of Metal Workers of South Africa, a registered trade union (the Union). The Second Applicant is E C Shezi who is a member of

the Union. The Respondent is Success Panelbeaters and Service Centre CC, a Close Corporation registered in terms of the Close Corporations Act 69 of 1984 with its principal place of business at 38 Rosettenville Road, Village Main, Johannesburg.

[2] The material facts can be summarised as follows :

a. The Second Applicant was employed by a business known as Score Panelbeaters and Service Centre. He was dismissed on the 7th of March 1996. At the time of his dismissal, the business was owned by a Close Corporation called Stescore CC.

b. A dispute concerning an unfair labour practice in respect of the dismissal of the Second Applicant was referred to the Industrial Court, and processed in terms of the provisions of Section 46(9) of the Labour Relations Act of 1956 as amended (the 1956 Act).

c. During or about January and February 1997, however by no later than the 3rd of February 1997, the business referred to as Score Panelbeaters and Service Centre, and owned by Stescore CC was purchased by the Respondent in the present matter.

d. On the 19th of February 1997, the Industrial Court determined that the dismissal of the Second Applicant constituted an unfair labour practice in terms of the 1956 Labour Relations Act and ordered that the Respondent in the Industrial Court proceedings (i.e. the old employer) reinstate the Second Applicant and pay to the Second Applicant compensation.

e. The old employer was a party to the proceedings in the Industrial Court.

[3] In terms of the Notice of Application, the Applicants seek an order in the following terms :

a. Declaring that an employer who accepted transfer of the whole or any part of a business, trade or undertaking as a going concern after the commencement of the Labour Relations Act 66 of 1995 (the 1995 Act) is bound by an order of the Industrial Court in respect of a dismissal by the previous employer;

b. Declaring that Success Panelbeaters and Service Centre CC having accepted transfer of business, Score Panelbeaters and Service Centre, as a going concern after the commencement of the Act, is bound by the order of the Industrial Court in respect of the dismissal of Mr M C Shezi, the Second Applicant in this application, by the previous owner of the business, Score Panelbeaters and Service Centre, and is therefore required :

i. to reinstate the Second Applicant with effect from 19th of February 1997 on terms and conditions no less favourable than those that governed his employ prior to his dismissal on 7th March 1996; and

ii. to pay the Second Applicant R24 200,00 as compensation for his unfair dismissal.

c. Directing the Respondent to reinstate the Second Applicant with effect from 19th February 1997 on terms and conditions no less favourable than those that governed his employ prior to his dismissal on 7th March 1996, and to pay the Second Applicant R24 200,00 as compensation for his unfair dismissal;

d. Directing the Respondent to pay the costs of this application.

[4] The issue that I have been asked to determine is whether a new employer who accepted transfer of the whole or any part of a business, trade or undertaking as a going concern after the commencement of the 1995 Act, is bound by an order of the Industrial Court pronounced in terms of the 1956 Act, regarding a dismissal by the old employer.

[5] Section 197 of the 1995 Act which deals with the transfer of contract of employment reads :

"(1) *A contract of employment may not be transferred from one employer (referred to as the old employer) to another employer (referred to as the new employer) without the employee's consent, unless -*

(a) *the whole or any part of a business, trade or undertaking is transferred by the old employer as a going concern; or*

- (b) *the whole or a part of a business, trade or undertaking is transferred as a going concern -*
 - (i) ...
 - (ii) ...
- (2)
 - (a) *If a business, trade or undertaking is transferred in the circumstances referred to in sub-section (1)(a), unless otherwise agreed, all the rights and obligations between the old employer and each employee at the time of the transfer continue in force as if they were rights and obligations between the new employer and each employee and, anything done before the transfer by or in relation to the old employer will be considered to have been done by or in relation to the new employer."*

For the purposes of the present matter, it is important to consider Schedule 7, Items 21(1) and Item 22(1).

Item 21(1):

"Any dispute contemplated in the Labour Relations laws that arose before the commencement of this Act must be dealt with as if those laws had not been repealed.

Item 22(1):

In any pending dispute in respect of which the Industrial Court or the Agricultural Labour Court had jurisdiction and in respect of which proceedings had not been instituted before the commencement of this Act, proceedings must be instituted in the Industrial Court or Agricultural Labour Court (as the case may be) and dealt with as if the labour relations laws had not been repealed. The Industrial Court or the Agricultural Labour Court may perform or exercise any of the functions and powers that it had in terms of the Labour Relations laws when it determines the dispute."

[6] In the matter of **Schutte and Others v Power Plus Performance (Pty) Limited and Another** (1999) 2 BLLR 169 LC Seady A.J. stated the following at paragraph 27 of the

judgment :

*"Section 197 is the first of its kind to find its way into the South African statute books. The section commences by giving legislative effect to common law prohibition of transferring a contract of employment from one employer to another without the employee's consent. In the celebrated terminology of the English Court of Appeal in **Nokes v Doncaster Amalgamated Collieries** (1940) AC 1041, an employee's right to choose her employer constitutes "the main difference between a servant and a serf".*

[7] A proper construction of the 1995 Act is determined by having recourse to the explanatory memorandum that accompanied the Draft Labour Relations Bill. The relevant paragraph pertaining to the case on hand reads :

"The Draft Bill explicitly deals with the employer's rights and obligations in the event of a transfer of an undertaking. This resolves the common law requirement that existing contracts must be terminated and new ones entered into, which leads to the retrenching of employees, the paying of severance benefits etc. and escalates costs in a way that inhibits these commercial transactions. Provision is made in the Draft Bill for the automatic transfer of contracts of employment to the transferee provided that the employee's consent to the transfer. All rights and obligations arising from the contract of employment are transferred. In the case of insolvency however ..."

[8] In Schutte's case **supra**, Seady, A.J. sets out in paragraph 30 that :

a. *"The primary purpose of Section 197 is to protect the rights of employees during certain processes of business restructuring. Their continuity of employment is ensured if there is a change of employer. This is an area of legal regulation where the tension between commercial interests and social policy for employees is at its highest. B Jordaan puts it in this way : At the heart of the disputes over transfers and closure lies a clash between the employer's interest in the efficiency or survival of the undertaking and the employee's interest in job security; between*

the employer's right to safeguard sensitive information and the employees to be informed at the earliest possible opportunity of changes in the structure and organisation of the enterprise; or between the employer's right to transfer the undertaking and the employee's right to freely choose his/her employer."

(See Transfer, Closure and Insolvency of Undertakings (1991) 12 ILJ at 935.)

Seady A.J. continues at paragraph 31 in the **Schutte and Others** judgment *supra* :

*"Given the fundamental conflict of interests addressed by Section 197 it is regrettable that its provisions are so terse. Perhaps this is inevitable since the section strikes at the very heart of that conflict and the Act, in its final form, is a product of a negotiated agreement between organised labour and capital, the representatives of the conflicting interests. The provisions of Section 197 are part of the Act's mechanisms designed to provide security of employment in times of change. **They give effect to the Constitutional right to fair labour practices in situations of business restructuring and reorganisation of employment and must be interpreted in this context.**" (Emphasis added).*

[9] The Labour Appeal Court in the case of **Edgars Stores Limited v SACCAWU and Another** (1998) 5 BLLR 447 (LAC) at 449 stated :

"In terms of Items 21(1) and 22(1) of Schedule 7 of the 1995 Act the Industrial Court is required to determine the dispute if :

- the dispute was contemplated by the 1956 Act;*
- the dispute arose prior to 11 November 1996;*
- the Industrial Court had jurisdiction to determine the dispute; and*
- proceedings had not been instituted prior to 11 November 1996 to determine the dispute."*

[10] On the 19th of February 1997, the Industrial Court had made the following award :

- "1. *I am satisfied that the dismissal of the Applicant was procedurally and substantially (sic) unfair and this constitutes an unfair labour practice;*
2. *The Respondent is required to reinstate the Applicant on terms and conditions no less favourable to him than those that governed his employ prior to 7 March 1996;*
3. *The Respondent is further required to pay the Applicant as compensation, an amount equal to R24 200,00 calculated at R550,00 x 4 x 11, which amount shall be made payable within 14 days from date of this order when the Applicant reports for duty;*
4. *There is no order as to costs."*

[11] It is not disputed in the present matter that Score Panelbeaters and Service Centre were the Respondents in the matter that was determined at the Industrial Court.

[12] Thereafter, an application was instituted in terms of Rule 30 of the Rules of the Industrial Court, for an order that the incorrect party was cited as the Respondent. On the 12th of May 1997, the Industrial Court in response to this application made the following order :

- "1. *Having considered the representations and other documentation placed before it, and having regard to the specific circumstances of the various applications made by the parties, the Court, after having carefully considered all the foregoing, deems it equitable and reasonable to order that :*
- 1.1 *The Court lacks jurisdiction to consider the Applicant's application in terms of Rule 30 of the Rules of this Court.*
- 1.2 *Equally, the Court lacks jurisdiction to consider the Respondent's counter application in terms of Rule 15 of the Rules of this Court.*

- 1.3 *A default judgment granted by the Court on 19 February 1997 under case number NH11/2/28336 stands unvaried.*
- 1.4 *The Applicant, Loyal Panelbeating CC t/a Score Panelbeaters and Service Centre, may if it so wishes apply for a rescission of the judgment mentioned in paragraph 3 above within 21 days from date of delivery of this order.*
- 1.5 *The Respondent may also, if it so wishes, and depending on paragraph 4 above consider utilising provisions of Rule 11 of the Rules of this Court.*
- 1.6 *There is no order as to costs."*

[13] There has neither been an application for the rescission of the judgment, nor has the Applicant attempted to execute his rights in terms of the order of the Industrial Court.

[14] Upon a proper reading of the papers, it appears that the Respondent has not applied for the rescission of the judgment of the Industrial Court, because it was advised all along that the incorrect party was cited as the Respondent. This point was neither raised nor argued in the present matter, and consequently I am not called upon to make an appropriate finding.

[15] In my view, the provisions of Schedule 7, Items 21(1) and 22(1) do not apply in this particular application. The dispute referred to in terms of the 1956 Act was determined by the Industrial Court. This Court is not empowered with any residual powers to interfere with the orders of the Industrial Court. An appeal to the Labour Appeal Court regarding a decision of the Industrial Court is a different matter and is specifically catered for by the Rules of this Court. The dispute envisaged by Schedule 7, Item 21(1) has been duly pronounced upon and a judgment or order has been obtained. The dispute has been fully determined and the subject-matter of the dispute has been finalised. If I were to hold otherwise, in my view, I would be reopening a matter that has already been determined by the Industrial Court. This Court is not empowered to do that.

[16] The rights and obligations determined by the Industrial Court may not be lost through a mere delay in enforcing it and no reason exists for holding otherwise in this case where the Applicant was anticipating an application to rescind the order granted by the Industrial Court. The Applicant has attached several letters to its founding affidavit which is conclusive proof of this fact. In the absence of proper time constraints determined by the presiding officer in the exercise of such order, in my view, such rights in compliance of the order must be exercised within reasonable time, it does not follow that a failure to exercise the right within such time results ***ipso facto*** in its loss, (this is apart from the law relating to prescription). In the light of the above, I am not persuaded by Mr Landman's argument that the dispute concerning the Second Applicant's "*alleged unfair dismissal was a dispute contemplated in the Labour Relations laws that arose before the commencement of the 1995 Act, which therefore must be dealt with as if those laws had not been repealed*".

[17] Does Section 197 of the 1995 Act apply to the present transaction? The uncontroverted evidence is that the Industrial Court order was against a business known as Score Panelbeaters and Security Centre which was owned by Stescore CC (the old employer). The business was purchased by Loyal Panelbeaters CC on or about the 3rd of February 1997, which subsequently changed its name to Success Panelbeaters and Service Centre (the new employer and the Respondent in the present application).

[18] There is good reason to apprehend that in fact a transfer as a going concern had been effected at this stage. The words :

"All rights and obligations between the old employer and each employee at the time of the transfer continue in force as if they were rights and obligations between the new employer and each employee ...", in Section 197(2)(a) of the 1995 Act are enabling and empowering words. They confer a legislative right and power on the individuals referred to (each employee). Conversely they create a duty on the person against whom it is conferred (the new employer) to exercise it.

[19] The enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right. In the present matter, it is precisely these rights of the Applicant that require the exercise of power. A proper approach in determining whether Section 197 applies in the present matter is by considering whether if it is not applied, it would impair existing rights and obligations. An accrual of this right which was acquired prior to the introduction of the 1995 Act is enforceable in the circumstances of the present test. In the event of the non-recognition of this right, the beneficiary of this right could in terms of Section 158(1)(a)(iv) approach this Court for an appropriate declarator. **Kgethe and Others v LMK Manufactures (Pty) Limited and Another** (1998) 3 BLLR 248 (LAC) 37.

[20] In view of the above, Mr Landman's submission that this Court does not have jurisdiction to grant the order prayed for in terms of the Notice of Application cannot be sustained.

[21] The Respondents further contended that the Industrial Court order is unenforceable because of the fact that the Respondent cited at that forum was merely a trade name and consequently a warrant of execution could not be issued against the Respondent cited therein. This particular point was not forcefully adopted, correctly in my view, when Mr Van der Riet submitted that a trading name is merely an alias for the owner of the business. He quoted the case of **Mathoe v Auto Service (Pty) Limited t/a Kwaggasrand Motors** (1992) 13 ILJ 976 (LAC) as authority for this proposition. In the present matter, it was not argued who the owner was after the transfer of the business.

[22] The Industrial Court is not statutorily empowered to pronounce on the provisions of the 1995 Act. Accordingly this Court is the correct forum that can pronounce on the relief sought by the Applicants. In the present matter, the substantive rights and obligations pronounced by the Industrial Court remain unimpaired and are capable of enforcement by the invocation of Section 197 of the 1995 Act. Therefore, in my view, there is no reason to conclude that the provisions of Section 197 of the 1995 Act were not intended to apply to the present circumstances. If this was not so, the Second Applicant would be deprived of a

vested right.

[23] The facts of the present matter indicate that the Industrial Court had ordered on the 12th of May 1997 that it "*lacks jurisdiction to consider the Applicants' application in terms of Rule 30 of the Rules of this Court*". In addition, the presiding member had advised the Respondent in that matter, that it could apply for a rescission of the judgment within 21 days. However this invitation was never taken up. The documents indicate that from the 22nd of May 1997, initially the First Applicant, and thereafter the legal representatives acting on behalf of the First and Second Applicants requested on several occasions a date from the labour consultant acting on behalf of the Respondent setting out when the application for rescission will be made (the Respondent referred to here is the old employer). I quote the contents of a letter that was addressed to the First Applicant by a Mr Martin Hennig who is cited as a labour relations consultant. The letter is dated the 23rd of May 1997 and it is set out as follows :

"Dear Sir

*IN RE : M C SHEZI v SCORE PANELBEATERS
CASE NUMBER NH/11/2/28336*

Your facsimile received by me on the 22nd of May 1997, refers.

- 1. This letter serves to confirm our telephonic discussion of this morning wherein you were advised on the following :*
 - 1.1 That the order given by the Industrial Court on the 12th of May 1997 granted a period of 21 days for the Applicant (Loyal Panelbeating CC) to apply for a rescission of the default judgment of 19th February 1997;*
 - 1.2 That client is in the process of drafting documentation with the intention of launching an application to the Industrial Court before the expiry of the said 21 days;*
 - 1.3 That should your client (Mr M C Shezi) proceed to issue a warrant of execution, same will be opposed together with the request for a costs order on the basis of attorney and*

client scale.

2. *We hereby record, and once again reiterate, that should your client obtain an attachment of Loyal Panelbeating CC's assets, prior to the expiration of the 21 day period, then our client will launch an application in the High Court to set aside such attachment and this letter will be used in support thereof.*

Yours faithfully"

[24] On the 17th of July 1997, a letter was communicated on behalf of the Applicants by their legal representatives Cheadle Thompson and Haysom informing the labour consultant that :

"We note that no application for rescission of the Industrial Court's order dated 19 February 1997 has been made. Kindly advise when Mr M C Shezi may report for duty at your client's premises."

In response to this letter, the labour consultant acting on behalf of the old owner, affords an ingeniously thought and lame explanation that arises for the first time along the following lines :

"The default judgment mentioned in your letter was granted against Score Panelbeaters, which was at all times a trading name and not a legal entity. My client, now known as Success Panelbeaters CC purchased the business from the previous owner. At no stage, whatsoever, was there an employment contract between my client and Mr Shezi and therefore there is no obligation on my client to reinstate Mr Shezi. Kindly seek the necessary recourse from the previous owner of Score Panelbeaters."

This attitude clearly constituted an attempt to frustrate the Applicants to exercise and enforce their rights determined in terms of the Industrial Court order. There were several subsequent communications between the attorneys acting on behalf of the Applicants and the labour consultant who acted on behalf of the old employer in a similar vein. However the Applicants received no joy from the labour

consultant. Thus necessitating the present application.

[25] In the present matter the requirements of law and fairness as envisaged in Section 162 of the 1995 Act require that a costs order not be made. I do not know of a matter that has been referred to this court on similar facts as the present one, neither has one been referred to me. The matter is a complex one, and in the circumstances I do not believe that the Respondent should be made to pay the costs of the Applicants.

[26] In the result I make an order declaring :

a. That Success Panelbeaters and Service Centre CC having accepted transfer of the business, Score Panelbeaters and Service Centre, as a going concern after the commencement of the Labour Relations Act 66 of 1995, is bound by the order of the Industrial Court in respect of the dismissal of Mr E C Shezi, the Second Applicant in this application, by the previous owner of the business, Score Panelbeaters and Service Centre, and is therefore required :

i. to reinstate the Second Applicant with effect from 19 February 1997 on terms and conditions no less favourable than those that governed his employ prior to his dismissal on 7 March 1996; and

ii. to pay the Second Applicant R24 200,00 as compensation for his unfair dismissal.

b. I make no order as to costs.

M JAJBHAY

Acting Judge of the Labour Court
of South Africa

RING : 23rd of April 1999

OF JUDGMENT : 7th of May 1999

ICANTS : Advocate J G Van der Riet instructed by Cheadle
Thompson and Haysom

ONDENT : Advocate A Landman instructed by J L Van der Walt