

IN THE LABOUR COURT OF SOUTH AFRICA HELD AT JOHANNESBURG

Case Number J 1643/98

In the matter between

JAN HENDRIK WHEELER

FIRST APPLICANT

R S MAHASHA

SECOND APPLICANT

And

J C J VAN RENSBURG

MANIE STEYN

BASIE DE BEER

T/a DRIVE SHAFT ENGINEERING CENTRE

previously known as PRETORIA PROPSHAFT CENTRE

also trading as PROPSHAFT PROFESSIONAL

STELZNER, AJ:

1. This is a ruling on an application for substitution of a party for an existing party in terms of Rule 22(5) of the Rules of this Court and a ruling on the issue of costs, preliminary to an application arising out of the alleged unfair dismissal of the applicant, apparently by reason of the operational requirements of the business.
2. The first peripheral issue which required my attention was the question of condonation for the late filing of respondent's statement of case, an application to that effect having been filed. There was no opposition to such condonation by the applicant and condonation was, accordingly, granted as requested.
3. It was apparent from the pre trial minute filed by the parties, and was confirmed to me at the outset of the proceedings, that the dispute in regard to second applicant had been settled. Accordingly it is only the case of first applicant which is proceeding and my ruling is made in respect of and only concerns first applicant.

4. Respondent initially raised a point *in limine* namely that this Court does not have jurisdiction in respect of the dispute arising out of applicant's dismissal because the parties who had been cited as respondents were not the applicant's employer. Applicant cited three individuals as co-respondents, namely J C J Van Rensburg, Manie Steyn and Basie De Beer (hereinafter referred to as "Van Rensburg", "Steyn" and "De Beer", respectively), trading as Drive Shaft Engineering Centre previously known as Pretoria Propshaft Centre also trading as Propshaft Professionals (Reg no. 92/01337/07), and alleged in his statement of case that these respondents were (collectively it would appear) his employer. Respondent contended that at all material times applicant was employed by Pretoria Propshaft Centre CC, an incorporated entity.
5. Both parties led evidence on the issue and the facts emerged as follows. Applicant had indeed been employed by Pretoria Propshaft Centre CC (this much being conceded as at least a possibility by applicant in evidence but being conceded as a fact by applicant's attorney in argument), the members of which were Van Rensburg, Steyn and De Beer. It was also common cause that applicant's services were terminated in writing on 3 October 1997 on a letterhead headed Pretoria Propshaft Centre. No reference was made on that letter to the fact that Pretoria Propshaft Centre was a close corporation, the registration number of the corporation was absent as were the names of the members of the close corporation. It was conceded on behalf of respondents in argument that this constituted a contravention of the provisions of s 23(1) of the Close Corporations Act, No 69 of 1984.
6. Applicant testified that he responded to an advertisement in *Die Beeld* newspaper, was interviewed for the job by Van Rensburg and subsequently advised that his application had been successful. He was then told by Van Rensburg that he would be

sent for two weeks training with Van Rensburg's partner ("vennoot" was the term used by applicant giving evidence in Afrikaans). He was in fact sent for training at a business known as Drive Shaft Engineering Centre in Pretoria which business appeared to be run by Steyn. Thereafter he reported for duty at Pretoria Propshaft Centre at a different location in Pretoria. He started working for Pretoria Propshaft Centre in May 1997. Van Rensburg ran the business but he reported directly to one Mr Stoltz, the foreman.

7. Frederik Stoltz, the foreman, (hereinafter referred to as "Stoltz") also testified. He stated that he had been employed by Pretoria Propshaft Centre CC, reporting to Van Rensburg. Besides being advised at the time he was employed that he would be working for the close corporation, which fact had in any event appeared from the advertisement to which he had responded, the details of the close corporation had appeared on invoices and the various books of the business. These facts were not placed in dispute.
8. Van Rensburg testified that applicant had from time to time worked at the counter where he would have dealt with documents such as invoices reflecting the corporate identity of the business. Furthermore, by agreement a copy of a salary cheque of the applicant for the month of August 1997 was handed in as evidence, which cheque was drawn on the name of Pretoria Propshaft Centre, underneath which appeared the letters "BK" and the registration number of the close corporation, the cheque being signed by Van Rensburg and one of the other two members, either Steyn or De Beer. Applicant's evidence confirmed that he had worked at the counter occasionally but that he had not noticed anything on the documents with which he worked anything which suggested to him that he was working for a close corporation. Similarly with his salary cheque, he testified that he received his cheque each month from Van

Rensburg's secretary and simply handed it to his wife to deposit in his bank account. Under cross examination it became clear that the letters "BK" and the registration number following thereon simply had no meaning to the applicant. He did not know what a close corporation or a partnership were, did not understand the difference between a partner in or the owner of a business, not did he appreciate or understand the concept of limited liability. As far as he was concerned he worked for the business known as Pretoria Propshaft Centre, which business was owned by Van Rensburg and his partners.

9. When applicant's dispute was initially processed by his then attorneys (Leander Wiid attorneys) the dispute was characterised as being between applicant and Pretoria Propshaft Centre. All the conciliation referral and related documents were prepared on this basis. Mr Boshoff (hereinafter referred to as "Boshoff"), a candidate attorney at the time, handled the matter and also testified in these proceedings. At a point in the process the representatives were advised that the business of Pretoria Propshaft Centre had closed down. Boshoff testified that he then telephoned the business and spoke to a woman who appeared to be the telephonist or receptionist. He was advised by her that Pretoria Propshaft Centre was now known as Drive Shaft Engineering Centre but that the owners ("eienaars") remained the same. On the strength of that telephonic advice Boshoff proceeded to process applicant's dispute against Drive Shaft Engineering Centre, informing the CCMA that this was the name of the business formerly known as Pretoria Propshaft Centre. He also wrote that Van Rensburg was one of the owners. At this stage conciliation had passed and the representatives were attempting to obtain a date for arbitration. Under cross examination Boshoff testified that he had simply accepted his client's description of Pretoria Propshaft Centre as being name of the business for which he worked, the

business having three “owners”. It never occurred to him at any stage to investigate the matter further or to conduct a company search, even though it was clear that his client was not familiar with legal terminology. He also maintained that at far as he himself was concerned the terms owner and partner (“eienaar” and “vennoot”) amounted to the same thing.

10. The statement of claim in these proceedings was filed by applicant’s current attorneys of record, Anderson and Kloppers Attorneys. No evidence was presented to me as to the reason therefor but the facts speak for themselves as to the manner in which respondents were cited. I was advised that the business known as Propshaft Professionals was included because that business appeared to be the employer of second applicant who has since, as mentioned before, fallen out of these proceedings. It is nevertheless still relevant to note that this business (cited as a corporate entity if one has regard to the registration number) was included as one of the trading names of the three individual respondents.
11. When respondent’s statement of defence was served and filed on or about 28 October 1998, the point *in limine* was pertinently raised and it was clearly alleged that applicant had been employed by Pretoria Propshaft Centre CC. In subsequent pre-trial proceedings further discovery was requested from respondent in regard to this aspect of the matter and respondent subsequently delivered copies of the various incorporation documents and financial statements of the close corporation.
12. There was no application by applicant’s representatives either to amend the pleadings or, in terms of Rule 22, to join and / or substitute any other party to the proceedings when the matter commenced or when argument commenced. On the morning of the second day of the proceedings, when Ms Anderson, who appeared for

applicant, resumed her argument in reply, she sought leave to bring an application in terms of Rule 22(4) to amend the citation of the parties to include Pretoria Propshaft Centre CC as first respondent. She sought leave also to serve the application on the representatives of the individual respondents in court, as well as condonation for failure to comply with the rules in regard to service. It was subsequently agreed that the application ought more appropriately to have been brought under the provisions of rule 22(5) which provides for the substitution of a party. Initially Mr Kruger, who appeared on behalf of respondent, indicated that he had no instructions to accept service of the application on behalf of Pretoria Propshaft Centre CC, however, he subsequently, after an adjournment, accepted that as Van Rensburg, one of the members, was in Court it ought to be accepted from a practical point of view that Pretoria Propshaft Centre CC had notice of the application and that while he may not have initially been instructed by Pretoria Propshaft Centre CC it was clear that he would be representing it in any further proceedings in which it might be involved regarding this matter. In any event, the three members of the CC were all before Court in the matter, were fully aware of the proceedings and were represented. It would appear artificial in the circumstances to hold that the CC had no notice or knowledge of the application to substitute it as a party.

13. Ms Anderson accepted after some deliberation and adjournment to enable her to canvass and consider the issues, that Pretoria Propshaft Centre CC was applicant's employer and therefore ought to be the party before Court. The case against the individual respondents was thus withdrawn with the acknowledgment that some sort of costs order would have to follow. It remained thus for me to consider the question of the substitution of Pretoria Propshaft Centre CC as the respondent, and costs in relation to this late application as well as the late withdrawal of the case against the

individual respondents.

14. I am satisfied that in the circumstances it would be appropriate to substitute Pretoria Propshaft Centre CC as the respondent in this matter. On the evidence led thus far Pretoria Propshaft Centre CC was clearly the employer of the applicant. Such an order would not cause any prejudice to the respondents that could not be cured by an appropriate order as to costs. The evidence which will need to be canvassed during the trial on the merits, the documents to be discovered and indeed the pleadings would be essentially the same, save for the substitution as aforesaid. In addition, if I were to simply refuse the application for substitution applicant would have to start afresh against the correct respondent on essentially the same papers, thus duplicating the costs. I do not think that such a situation would be in the interests of either party. The question which remains thus is what order as to costs would be appropriate in the circumstances.
15. It appears appropriate to consider the conduct of the various parties and legal representatives in dealing with this issue. I am satisfied that on the evidence before me the applicant himself was in no way to blame for the sorry state of affairs which has resulted in the significant accumulation of costs before reaching the position where this matter can now proceed to be dealt with on the merits. Had respondent/s not contravened the provisions of s 23(1) of the Close Corporations Act, it is likely that the correct respondent would have been before this Court from the outset. It is also possible that respondents could have come forward at the conciliation stage to set the record straight, but in the absence of evidence on that issue I cannot rule or base my decision thereon. At the same time, however, the conduct of the applicant's attorneys (both erstwhile and current) would appear to have been lacking in due diligence and attention to the factual and legal issues. I do not think that they acted in the manner

one would expect of a reasonable attorney. As a result the applicant's case was not properly formulated and unnecessary costs have been incurred and it is the applicant who is belatedly seeking the indulgence of this Court. At the very least one would have expected the issue of substitution to have been considered and the application in respect thereof to have been brought at a much earlier stage in the proceedings. It would have been a simple matter to verify respondent's version as to the existence of otherwise of the CC known as Pretoria Propshaft Centre CC.

16. In the circumstances it seems to me to be appropriate and fair to order that the wasted costs occasioned by the late substitution of Pretoria Propshaft Centre CC as respondent in this matter and the withdrawal of the case against the individual respondents be paid by the applicant's attorneys *de bonis propriis*. I make this ruling *mero motu* as costs *de bonis propriis* were not sought by respondents' representative. I have exercised my discretion to make such award in an attempt to achieve a fair and just result. However, in view of the contravention of the provisions of s 23(1) of the Close Corporations Act by the respondents and the fact that this undeniably misled applicant's representatives, I am ordering that only such costs as were incurred after 28 October 1998 (when respondents' statement of defence was filed and the point *in limine* raised for the first time) be paid by applicant's attorneys. These will include the costs of appearance in Court on 28 July 1999 and 29 July 1999 until the lunch adjournment, as well as preparation for presenting evidence on and arguing the point *in limine*. I do not believe that an order that costs be paid on an attorney client scale would be appropriate, having regard to the conduct of all the parties as detailed above.

17. In the circumstances I make the following order:

17.1 The application to substitute Pretoria Propshaft Centre CC as the respondent in this matter is hereby granted.

17.2 It is recorded that the case against the respondents as previously cited has been withdrawn.

17.3 The applicant's attorneys are to pay the wasted costs occasioned subsequent to 28 October 1998 by virtue of the application for substitution and withdrawal as aforesaid, which costs are to include the costs of appearance in Court on 28 July 1999 and 29 July 1999 until the lunch adjournment, as well as preparation for presenting evidence on and arguing the point *in limine*. These costs are to be paid on a party and party scale and are to include the costs of counsel.

STELZNER AJ

Date of hearing :28 and 29 July 1999

Date of judgment :29 July 1999

For the applicant :Ms R Anderson

Of :Anderson and Kloppers Attorneys

For the Respondent :Mr Kruger

Instructed by :Rothmann, Rothmann and Nell Inc