

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J 2736/2000

In the matter between:

NATIONAL UNION OF FURNITURE & ALLIED

WORKERS UNION OF SOUTH AFRICA First Applicant

JIM MOBE MAHLANGU & OTHERS 2nd & Further Applicants

And

FA LUTHER N.O. First Respondent

TRADE STYLE CC Second Respondent

OLIVIER, GIDEON WALDIMAR Third Respondent

JUDGEMENT

GERING AJ

- [1] The First Applicant is a duly registered trade union. The Second & Further Applicants are members of the First Applicant, and were employees of the Discount Kitchens CC ("**the employer**"). The application is made by the First Applicant, which alleges that it is the duly authorised agent of the Second & Further Applicants, for an order directing the Second and Third respondents to comply with an arbitration award dated 2 October 1996.

[2] There is no opposition to the application by the First Respondent, who is cited in his capacity as the liquidator of Discount Kitchens CC (in liquidation). The Second and Third Respondents have raised several points in limine, which, if successful, would, they hope, bring **"a brisk end"** to the application, and the purpose of this judgment is to determine whether these points in limine are sound.

[3] The following facts are common cause :

(4) The Second & Further Applicants (referred to herein as **"the employees"**) were dismissed by their employer, Discount Kitchens CC on 14 July 1995.

(4) The issue of their dismissals was referred to arbitration under a written agreement entered into in September 1996 between the First Applicant and the employer. Pursuant to this agreement, an award dated 2 October 1996 was handed down, in terms whereof the arbitrator reinstated the employees with retrospective effect and directed the employer to pay wages from 14 July 1995 to 14 March 1996. This award was final and binding in terms of section 28 of the Arbitration Act 42 of 1965.

(4) The employer failed to comply with the award, and filed an

application in the Transvaal Provincial Division of the High Court to review the award; the review application was dismissed, and the award was made an order of the High Court on 29 July 1997.

(4) On 28 July 1997 Discount Kitchens CC was placed under voluntary liquidation at the instance of the Third Respondent, the sole member of that close corporation.

[4] The Applicants allege that the business of Discount Kitchens CC (hereinafter referred to as "**the old employer**") was transferred in January 1997 as a going concern in terms of section 197 of the Labour Relations Act 1995 ("**the LRA**") to Trade Style CC, the Second Respondent (hereinafter referred to as "**the new employer**"). This is denied by the Second and Third Respondents (hereinafter referred to as "**the Respondents**", in the absence of any opposition by the First Respondent).

[5] In para 20.2 of their Answering Affidavit, the Respondents state:

"There is no basis on which the First Applicant can base the allegation that the business of Discount Kitchens CC had been transferred as a going concern to the Second Respondent."

It is clear that this dispute cannot be resolved on the affidavits without the hearing of oral evidence and the cross-examination of relevant persons. It may however be mentioned that at all material times the Third Respondent has been the sole member of Discount Kitchens CC and of the Second Respondent.

[6] The hearing on 13 December 2000 was devoted entirely to argument on the points in limine, submitted on behalf of the Respondents, and detailed in their Heads of Argument. Their validity has to be considered on the basis that the Applicants would be able to prove the above-mentioned allegation of a transfer in January 1997 in terms of section 197 of the Labour Relations Act 1995 ("**the LRA**"), in which case the Applicants contend that "**all the obligations between the old employer and each employee at the time of the transfer would continue in force as if they were the obligations between the new employer and each employee**" as provided by section 197(2)(a) of the LRA, and, so the Applicants contend, these "**obligations**" would include the obligations that arose from the arbitration award dated 2 October 1996.

[7] The main point in limine relied on by the Respondents in argument at the hearing on 13 December pertained to the date of the dispute vis a vis the

date on which the LRA came into effect, namely, 11 November 1996. As stated in their Heads of Argument, as the employees were dismissed on 14 July 1995, **"this is the date on which the true dispute arose"**; and **"the cause of action in casu can only be the dismissal"** of the employees. The contention of the Respondents is that as the dispute and the cause of action arose prior to 11 November 1996, this Court does not have jurisdiction to grant the application.

[8] A similar argument, in a case where the dismissal occurred prior to the coming into effect of the LRA, was considered and rejected by the Labour Appeal Court in the recent case of **Success Panel Beaters & Service Centre CC v NUMSA & another [2000] 6 BLLR 635 (LAC)**, dismissing an appeal against the judgment of the Court a quo, reported **[1999] 9 BLLR 970 (LC)**.

[9] The judgment of the Labour Appeal Court stated the issue to be determined as follows:

"The appeal turns on the question as to whether the rights and obligations created by section 197(2)(a) of the LRA apply to dismissals which occurred prior to the coming into operation of the

LRA relating to dismissals".

[10] In that case the employee and his union applied to the Labour Court for a declaratory order that the new employer, having accepted the transfer of the business of the old employer as a going concern after the LRA 1995 came into operation, was bound by the order of reinstatement made by the Industrial Court functioning in terms of the Labour Relations Act of 1956, even though the dismissal occurred prior to 11 November 1996.

[11] The Labour Court granted the application. In his judgment, Jajbhay AJ stated:

"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."

[12] On appeal, the Labour Appeal Court dismissed the appeal against the judgment of Jajbhay AJ. As the dismissal of the employee occurred before

the coming into operation of the provisions of the LRA relating to dismissals, the appellant in that case -- as the respondents in the present matter -- **"relies very strongly on the trite presumption against retrospectivity to argue that section 197(2) (a) did not apply"**. After setting out the provisions of section 197(2) (a) , item 21(a) and item 22(a) of Schedule 7, the Court held that the retrospectivity argument did not come to the aid of the appellant.

[13] The judgment of the Labour Appeal Court continues as follows:

"Both the transfer of the business and the order of the Industrial Court occurred after the coming into operation of the LRA in full on 11 November 1996. . . Moreover, the provisions of section 197(2) (a) are plain enough. They provide, inter alia, that 'anything done before transfer by. . . the old employer will be considered to have been done . . . by the new employer.' In other words the unfair dismissal of [the employee] by [the old employer] will be considered to have been effected by the appellant [the new employer]. Item 21(a) does not assist the appellant. The issue before the court a quo was whether or not to make the order of the Industrial Court applicable to the appellant. The court a quo was not called upon to determine the fairness or otherwise of the

[employee's] dismissal. The issue that the court a quo was called upon to decide arose after the commencement of the LRA and consequently, item 21(a) did not prevent the Labour Court from considering the matter or making the order which it did."

[14] In my view this reasoning applies to the present matter. There is the distinguishing fact that in the present matter there is no order of the Industrial Court, but here the dispute as to the fairness or otherwise of the dismissal of the employees had been resolved by the arbitration. This Court is not called upon to determine the fairness or otherwise of the dismissal of the employees by the old employer. The award of the arbitrator was final and binding in terms of section 28 of the Arbitration Act, even prior to being made an order of the High Court. The issue that I am called upon to decide is whether, on the assumption that there was, after 11 November 1996, a transfer of the business of the old employer as a going concern in terms of section 197 of the LRA to the new employer, the provisions of section 197(2)(a) would be applicable as against the Second Respondent. This issue arose after the commencement of the LRA. The arbitration award gave rise to existing rights and obligations. The employees acquired rights under the arbitration award prior to the introduction of the LRA. Those rights continued to exist after the coming into operation of the LRA. On the test as formulated by Jajbhay AJ, if section 197 is not applied, this would

impair the existing rights of the employees. These rights are enforceable against the new employer, on the assumption that the transfer of the business as a going concern, after 11 November 1996, from the old employer to the new employer, i.e. the Second Respondent, can be proved.

[15] In my view, therefore, the above point in limine, is not sound, and must be dismissed.

[16] The position of the Third Respondent requires separate consideration. In para 21.1 of the Answering affidavit deposed to by the Third Respondent, he states: " I admit to being the sole member of Discount Kitchens CC and the Second Respondent at all material times and that it had been my decision to place Discount Kitchen CC in liquidation." He denies the allegation in para 5 of the Founding Affidavit that the sole reason for the Discount Kitchen CC being placed in liquidation was "to thwart compliance with the arbitration award". To resolve this dispute would clearly require oral evidence and cross-examination of the Third Respondent, and would involve "piercing the corporate veil". As stated by Smalberger JA in *Cape Pacific Ltd v Lubner Controlling Investments Pty Ltd* 1995 (4) SA 790 (AD), quoted in *Buffalo Signs Co Ltd v De Castro* [1999] 20 ILJ 1501 (LAC) at 1507-8, "the law is far from settled with regard to the circumstances in

which it would be permissible to pierce the corporate veil". But "where fraud, dishonesty or other improper conduct is found to be present", other considerations may come into play. These are matters that cannot be resolved on affidavit without the hearing of oral evidence.

[17] In my view it would be wrong to uphold at this stage the objection in the Answering Affidavit deposed to by Third Respondent that as the employees were employed and dismissed by a close corporation, and as on the First Applicant's version the Second Respondent is the entity which carries on the business of the erstwhile close corporation, "there exists no reason why any relief should or can be granted against me [i.e. Third Respondent] in my personal capacity." As I have held that the main objection in limine raised by the Respondents, namely, that based on the retrospectivity argument, is not sound, and that oral evidence will be needed in order to determine whether the transfer of the business as a going concern, after 11 November 1996, can be proved, it seems to me that that would be the appropriate forum to determine whether the corporate veil should be pierced, so as to impose liability on the Third Respondent.

[18] The remaining points in limine, raised in para 3 and 5 of the Answering Affidavit, may be dealt with shortly. In para 3 the Respondents state: "There is no confirmation in the First Applicant's affidavit that the Second to

Further Applicants wish to be or are a party to the application." The employees are members of the First Applicant, and the First Applicant avers that it "is the duly authorised agent of the Second to Further Applicants and is therefore entitled to bring this application on their behalf." In my view there is no merit in this objection to this Court's jurisdiction.

[19] In para 5.2 of the Answering Affidavit, after referring to the fact that the arbitration award was made an order of the High Court, the Respondents go on to aver : "This Honourable Court has no jurisdiction to enforce an order of that Court." In my view this objection is based on a misunderstanding of the real nature of the relief claimed in this application, and is not a bar to this Court's jurisdiction. The Applicants are not seeking to enforce an order of the High Court, but are endeavouring to make the arbitrator's award dated 2 October 1996, enforceable and effective against the Second and Third Respondents. It may well be advisable for the Applicants to consider amending the relief claimed by approaching the Court for an appropriate declarator as indicated in the judgment of Jajbhay AJ. I express no view on the necessity for this, but I mention it in the interests of justice.

[20] In the result, my order is that the objections in limine be dismissed with costs.

L GERING

ACTING JUDGE

LABOUR COURT

Appearances:

: Mr G. Higgins

: Sampson Okes Higgins Inc

: Mr E Y Stuart

: EY Stuart Incorporated

: 13 December 2000

: 31 January 2001