

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT PORT ELIZABETH**

CASE NO. P829.99

Heard and Delivered on: 27.8.2004

In the matter between

NUMSA AND INDIVIDUAL EMPLOYEES

LISTED IN ANNEXURE A

Applicants

and

LEE ELECTRONICS (PTY) LIMITED

First Respondent

SOUTH SOUND (PTY) LIMITED

Second Respondent

CHEN0HSUNG LEE

Third Respondent

JUDGMENT

J U D G M E N T

PILLAY, J

[1] This is an application for the joinder of South Sound (Pty) Ltd (“South Sound”) and Chen-Hsung Lee (“Lee”) as second and third respondents respectively. Lee is the sole shareholder of the first respondent and South Sound.

[2] The first applicant alleges that the individual applicants joined the first applicant in October 1998. In the same month the first respondent started moving his machinery to South Sound which is situated across the road from the first respondent. The first applicant demanded of the first respondent to stop the removal of the machinery. The next day, that is 30 October 1998, the first respondent replied that it was entitled to dispose of the assets as it deemed best without having to consult with the first applicant.

[3] In March 1999 the individual applicants were dismissed purportedly for participating in a

go slow strike. They instituted automatically ² unfair dismissal proceedings. This application is to join South Sound and Lee in those proceedings.

[4] The issue raised in limine is whether any claim against South Sound and Lee has prescribed.

[5] Mr Kroon pointed to the applicant's allegations that the removal of the goods occurred in October 1998. That is more than three years ago. Hence the reliance on the Prescription Act No. 68 of 1969. The removal of the machinery might have occurred in 1998. However, it was only in 2003 when the sheriff and an organiser of the first applicant attended on South Sound that the applicant deduced that the first respondent had transferred the business and assets to the second respondent. Consequently on the facts, the issue of prescription does not arise.

[6] I do not deal with all the issues raised in argument and will do so, if necessary, later.

[7] Lee has been less than frank with the court. The first respondent's attorneys sarcastically informed the applicant by letter dated 11 May 1999 as follows:

"Kindly note that Mr Lee does not trade as Lee Electronics. The company Lee Electronics (Pty) Limited formerly traded as Lee Electronics and has successfully been closed down by yourself and your members. We are further instructed that the company will be placed in liquidation in the near future and accordingly Lee Electronics (Pty) Ltd will not be paying any subscription to your head office. You may in due course prove a claim against the company in liquidation."

On affidavit Lee reiterated in this application that:

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"For a period of approximately one year after the dismissal of the 2nd to the 88th applicants, the first respondent remained closed and did not assemble radios at all."

And that:

"After a period of approximately one year from the date of dismissal of the 2nd to the 88th applicants, the first respondent commenced assembling radios once more, but on a limited scale."

Lee further admitted that one Ngqondi:

"Was employed by Lee Electronics (Pty) Ltd in 1988 and remained employed by Lee Electronics (Pty) Ltd."

He denies she was employed by South Sound where she was seen by the organiser and the sheriff when they attended to serve processes.

[8] The questions that arise are the following: If the first respondent had been closed for a year, by whom and where was Ngqondi employed? What work did she do and for whom? How was she paid and by whom, if the first respondent was not operating? The only reasonable inference to be drawn from the facts before me is that she must have been employed by South Sound during the period the first respondent was closed. The probabilities are also that she continues to be employed by both South Sound and the first respondent in the same way that Mr Shale is employed as a production manager of both first respondent and South Sound.

[9] That indicates that it may be possible for the applicants to not also be reinstated or re-employed by South Sound if they succeed in their dismissal action.

[10] Mr Kroon submitted that the first applicant's evidence is contradictory because in one breath it alleges that the first respondent had closed or moved and in another breath it alleges that it re-employed some of its workers who were not dismissed along with the individual applicants. There is nothing contradictory about this aspect of the applicant's evidence. It was

the first respondent who informed the applicant by the letter quoted above that it had been successfully closed down. It is also the first respondent's case that it continues to employ at least some employees.

[11] The first respondent's attorneys withdrew on 26 February 2002. In doing so, they gave the first respondent's address as 87 Canal(?) Street. Lee does not deny that that address in Fort Beaufort is a deserted warehouse with no functioning fax. The conduct of Lee and the first respondent in furnishing an ineffective address for service raises serious doubts about their bona fides and willingness to resolve the dispute. Moreover the attorneys who were on record for the first respondent at the time and who withdrew, namely Hutton & Cook, reinstated themselves as the attorney for all the respondents in this application subsequently. Clearly there is much more to the relationship between the respondents than meets the eye. There has also been no willingness to co-operate with the applicants to bring this matter to finality.

[12] At the time when Lee alleges that the first respondent was not operating, the electricity account dated 23 June 1999 issued in its name reveals that it consumed R1 033,99 worth of electricity. This is prima facie evidence that the first respondent was operating when it alleges that it was not operating. While this evidence was raised in reply, Lee did not apply to file further evidence to refute this. All in all the respondents have much to answer for. There is a reasonable probability that there is a claim against them for which they have to answer.

[13] Mr Kroon submitted that the application should be dismissed because it is not accompanied by an application for an amendment of the pleadings, which if they are allowed to stand, will be excipiable. If the pleadings are excipiable, he has a remedy to cure that in the usual way. No doubt if the applicants wish to hold the second and third respondents jointly and severally liable, they will also have to plead and prove their case. If they fail to do so, then they run the risk of being awarded costs against them for the second and third respondents.

[14] In all the circumstances, the applicants have established that the respondents have conducted themselves improperly to warrant this

court granting the application for ⁵joinder.

[15]

(1) I grant an order joining South Sound (Pty) Ltd trading as South Sound and Chen-Hsung Lee as the second and third respondents respectively.

(2) The respondents to pay the applicant's costs jointly and severally the one paying the others to be absolved.

Pillay D, J

20 September 2004