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IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

Case Number: C459/2004

In the matter between:

NEHAWU OBO CORNELIUS & 17 OTHERS **Applicant**

and

HIGH RUSTENBURG ESTATE (PTY) LTD **First Respondent**

HIGH RUSTENBURG HYDRO (PTY) LTD **Second Respondent**

Date heard: 30 July 2015

Delivered: 10 February 2016

Summary: Determination of a Special Case by order of the Labour Appeal Court in High Rustenburg Estate (Pty) Ltd v NEHAWU obo Cornelius and 17 Others and the Sheriff of the High Court Stellenbosch (CA 11/2010 delivered 26 April 2012); whether s197(5) of the Labour Relations Act 68 of 1995 applies to an arbitration award which was reversed by the Labour Court but only after the transfer of the relevant undertaking had taken place.

JUDGMENT

RABKIN-NAICKER J

[1] This matter came before me as a special case pursuant to an order by the Labour Appeal Court in its judgment in **High Rustenburg Estate (Pty) Ltd v NEHAWU obo Cornelius and 17 Others and the Sheriff of the High Court Stellenbosch.**[1] The order by the Labour Appeal Court reads as follows:

"1. The appeal is upheld and the order of the court a quo is set aside and replaced with the following:

(i) The dispute between the appellant and the respondent shall, in terms of Rule 58(6)(i) of the Consolidated Rules of the High Court be dealt with by way of a special case to be heard in the Labour Court.

(ii) The special case must determine whether s197(5) of the Labour Relations Act 68 of 1995 applies to an arbitration award which was reversed by the Labour Court but only after the transfer of the relevant undertaking had taken place. The parties are granted leave to apply for the joinder of any other party.

(iii) In this special case, first respondent shall be the applicant and the appellant shall be the respondent.

2. There is no award of costs pursuant to this appeal."

[2] Section 197(1)- (6) of the LRA provides as follows:

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)-

[1] CA11/2010

(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;

(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.

(3) (a) The new employer complies with subsection (2) if that employer employs transferred employees on terms and conditions that are on the whole not less favourable to the employees than those on which they were employed by the old employer.

(b) Paragraph (a) does not apply to employees if any of their conditions of employment are determined by a collective agreement.

(4) Subsection (2) does not prevent an employee from being transferred to a pension, provident, retirement or similar fund other than the fund to which the employee belonged prior to the transfer, if the criteria in section 14 (1) (c) of the Pension Funds Act, 1956 (Act 24 of 1956), are satisfied.

(5) (a) For the purposes of this subsection, the collective agreements and arbitration awards referred to in paragraph (b) are agreements and awards that bound the old employer in respect of the employees to be transferred, immediately before the date of transfer.

(b) Unless otherwise agreed in terms of subsection (6), the new employer is bound by-

(i) any arbitration award made in terms of this Act, the common law or any other law;

(ii) any collective agreement binding in terms of section 23; and

(iii) any collective agreement binding in terms of section 32 unless a commissioner acting in terms of section 62 decides otherwise.

(6) (a) An agreement contemplated in subsection (2) must be in writing and concluded between-

(i) either the old employer, the new employer, or the old and new employers acting jointly, on the one hand; and

(ii) the appropriate person or body referred to in section 189 (1), on the other.

(b) In any negotiations to conclude an agreement contemplated by paragraph (a), the employer or employers contemplated in subparagraph (i), must disclose to the person or body contemplated in subparagraph (ii), all relevant information that will allow it to engage effectively in the negotiations.

(c) Section 16 (4) to (14) applies, read with the changes required by the context, to the disclosure of information in terms of paragraph (b)."

[3] The background facts relevant to this special case are as follows:

3.1 The National Education Health and Allied Workers Union (Nehawu) represents J Cornelius and 17 Others ("the Claimants") in these proceedings.

3.2 The Claimants were employed by High Rustenburg Hydro (Pty) Ltd (Hydro). Their employment was terminated and they referred an unfair dismissal dispute in terms of the LRA, which was dismissed in the CCMA but upheld by the Labour Court in review proceedings. The Labour Court, in its review judgment delivered in May 2008, further awarded each Claimant compensation equivalent to 12 months compensation.

3.3 After the CCMA Arbitration, but before the Labour Court hearing, Hydro had sold the business conducted by it under the name and style of High Rustenburg Hydro as a going concern to Iprop (Pty) Ltd who in turn, onsold the business as a going concern to High Rustenburg Estate (Pty) Ltd (the First Respondent).

3.4 The sheriff thereafter attached property at the High Rustenberg Hydro. First Respondent challenged the validity of that attachment in the Labour Court. The Labour Court held that it was appropriate to apply the interpleader provision found in High Court Rule 58 to the situation and further held that, by reason of section 197 of the LRA, Claimants were entitled to enforce their claims against First Respondent.

[4] The task of this court is essentially to decide on the interpretation to be given to the phrase contained in section 197(5) (a) of the LRA i.e.: "**For the purposes of**

this subsection, the collective agreements and arbitration awards referred to in paragraph (b) are agreements and awards that bound the old employer in respect of the employees to be transferred, immediately before the date of transfer." As stated by Wallis JA in his oft quoted dictum: "The inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."[2]

[5] One case that is of particular assistance to the court, which was not referred to by the parties is that of **Edgars Consolidated Stores Ltd v SA Commercial Catering & Allied Workers Union & others**, [3] in which Le Grange AJ (as he then was) considered the authorities on the meaning of 'immediately before', and was of the view that the interpretation of the ordinary meaning of the phrase provides the best guide to what is meant by 'immediately before' as used in ss 197 and 197A of the LRA . He stated as follows:

> "[20] In analysing the phrase 'immediately before' it is useful to consider the way an equivalent phrase 'immediately preceding' was interpreted in the case of Ackerman v Cape Law Society 1933 CPD 171. In that case, the court was contemplating the meaning of that phrase in s 2(c) of Act 30 of 1892, which governed the admission of attorneys. The provision required an applicant for admission as an attorney to produce proof that for a period of three years 'immediately preceding' the date of his admission or enrolment as an attorney of the Orange Free State Provincial Division he had been articled to serve or had served as a clerk to an enrolled attorney in the division. In the case before it the applicant had only been admitted three years after completing his articles. The court decided to condone the delay between the conclusion of the applicant's articles and his admission because he had continued to work for the attorney he had served articles with up to the time of his admission and the delay was attributable to his only passing his exams three years after completing his

[2] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) ([2012] 2 All SA 262; [2012] ZASCA 13) para 18
[3] (2010) 31 ILJ 2578 (LC)

articles. The court decided that a 'liberal interpretation' ought to be given to the phrase 'immediately preceding' as had been done in the case of Ex parte Middleton. In that case a full bench of the CPD looked at the purpose of the provision and decided that the phrase was inserted in the section to ensure that clerks should not take up some other work after serving their articles and then, having forgotten what they had learnt, revert to the law and then be admitted as attorneys.

[21] For present purposes, what is relevant about these cases is that the ordinary meaning of the phrase 'immediately preceding' was understood to refer to a three-year period of articles which ended very shortly before the candidate's admission, even though the courts ultimately adopted a far more relaxed interpretation of the phrase taking into account the purpose of the provision. Although the phrase 'immediately preceding' is used to describe the point in time at which a person completed articles relative to their application for admission, I believe the interpretation of the ordinary meaning of that phrase provides a better guide to what is meant by 'immediately before' as it is used in the provisions of ss 197 and 197A of the LRA.

[22] In this sense, I would agree with the applicant that the phrase 'immediately before' contemplates two virtually contemporaneous occurrences. The two 'occurrences' that are under consideration in s 197A(4) concern, firstly, the existence of a binding arbitration award and, secondly, the act of placing the employer in provisional sequestration. It is important to note that the section does not refer to an arbitration award being issued immediately before the employer's provisional sequestration, but rather refers to an arbitration award which is binding on the old employer immediately before the sequestration. In other words, it describes a state of affairs in which an employer that is currently bound by an arbitration award, is placed in provisional liquidation. For this reason, I think the applicant is incorrect when it argues that the event which must be compared with the occurrence of the transfer, is the issuing of the award. Rather, the question is whether or not an arbitration award is still binding on the old employer on the eve of the transfer. (My emphasis)

[23] In order for an award to bind an employer it need not have been issued recently: it is sufficient that it simply has not yet prescribed. Because of the various actions of the parties since the award was handed down, prescription would have been interrupted in this matter and, understandably, was not raised as an issue by the applicant. The award in question here had been issued less than eight months prior to CNA's provisional liquidation, and therefore s 197A(4) applied to the award because it was still binding on that date. Consequently, by virtue of the operation of s 197(5) the award became binding on Edcon when the business of CNA was transferred to it. For this reason the award is enforceable against the applicant."

Evaluation

[6] I find no reason to depart from the interpretation given to the words "immediately before" as set out above. In this matter, the Award (until its setting aside and substitution by the review court) bound the old employer (and the affected employees) immediately before transfer of the business on the approach taken by the court in the **Edgars Consolidated Stores** matter above. The Award declared that the dismissal of the claimants was fair. Had the Award not been set aside and substituted, the claimants would have had no recourse against the new employer. The question to ask then must be this: Is an award that bounds the old employer in terms of section 197(5) susceptible to review and does a new employer take on the risk of an award (which serves its interests at date of transfer), from being substituted on review subsequent to transfer, by an award that does not.

[7] In **Aviation Union of South Africa and Another v South African Airways (Pty) Ltd and Others**[4] the Constitutional Court dealt with the proper approach to the interpretation of section 197 of the LRA:

"[34] It is important to identify the correct approach to interpreting provisions of the LRA at the outset. Section 3 of the LRA obliges any person interpreting the LRA to

[4] 2012 (1) SA 321 (CC)

adopt a construction that complies with the Constitution and public international law while at the same time giving effect to the LRA's primary objects. These objects are listed in s 1. They include the regulation of and giving effect to the rights entrenched in s 23 of the Constitution.

[35] In National Education Health and Allied Workers Union v University of Cape Town and Others (NEHAWU) this court had occasion to interpret s 197. In that case the correct approach to interpreting the section was defined in the following terms:

'The proper approach to the construction of s 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.'

[36] Section 197 is located in Ch 8 of the LRA, which deals with dismissals and unfair labour practices. It promotes the right to fair labour practices, guaranteed by s 23 of the Constitution. This right is enjoyed by the workers and the employers, and consequently the provision serves a dual purpose of advancing both their interests. These interests may sometimes come into conflict.

[37] The dual purpose of s 197 was pronounced in NEHAWU where this court said:

'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 businesses and impact negatively on economic development and labour peace. In this sense, s 197 has a dual purpose, it facilitates the commercial transactions while at the same time protecting the workers against unfair job losses.'

[38] The section achieves its purpose by preserving all contracts of employment between the workers and the owner of the business which is transferred as a going concern. In this way, on the one hand, the workers' employment is safeguarded and, on the other, a new owner is guaranteed a workforce to continue with the operation of the business. Section 197 must be interpreted against this background."

[8] Taking into account the approach of the Constitutional Court to the interpretation of section 197, which emphasises the dual purpose of the section in the interests of both employers and employees, it may be apposite to consider the issue before us in an opposite scenario to the one *in casu*. In such a scenario, the old employer is unsuccessful at the CCMA and an award is issued prior to the transfer of the business that the dismissal of the employees was unfair and reinstatement and/or compensation is awarded. The old employer takes this decision on review and the Labour Court hands down judgment after the transfer of the business to a new employer has taken place. If the court then substitutes the Award with an order that the dismissals were fair, on the logic of the respondent in this matter, the new employer would not be in a position to benefit from the terms of the court order but carry obligations towards the said employees.

[9] In my view, an award binding on the old employer immediately before date of transfer in terms of section 197(5), cannot be considered *sui generis*, i.e that it is an award not susceptible to review in terms of the LRA. It could not have been intended that a review judgment in respect of such an award could have no legal force and effect, if the award is reviewed and substituted subsequent to the

transfer of the business. That the effect of such substitution by the Labour Court may impact on the employees of the old employer and on the new employer (who has stepped into the shoes of the old), is consistent with a constitutionally sensitive reading of section 197. In other words both employees of the old employer and new employers carry the risk that a court order may intervene after transfer, affecting the respective rights and obligations between them by virtue of section 197. Of course this risk is tempered by the opportunity provided by section 197(5)(b) that the parties may enter into an agreement in terms of section 197(6).

[10] I therefore find, that s197(5) of the Labour Relations Act 68 of 1995 applies to an arbitration award which was reversed and substituted by the Labour Court but only after the transfer of the relevant undertaking had taken place. In the context of this matter, I therefore make the following order:

Order

1. The rights which the Applicant's members had, following their unfair dismissal by Second Respondent, were rights which were transferred to First Respondent by virtue of Section 197 of the Labour Relations Act.

2. The writ of execution under case number C459/04 issued by the Applicant, on behalf of the said members, was lawfully issued, and the assets attached pursuant to such writ may be sold in order to satisfy the claims of the Applicant's members.

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H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

Applicant: A.C. Oosthuizen S.C. with C MD Tsegairie instructed by Marius A Abrahams Attorneys

First Respondent: C. Joubert instructed by Werksmans Attorneys