

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case no: C 594/04

In the matter between:

SHERIFF FOR THE HIGH COURT, STELLENBOSCH **Applicant**

HIGH RUSTENBURG HYDRO **Respondent**

and

NEHAWU **Execution creditor**

J CORNELIUS & 17 OTHERS **First claimant**

HIGH RUSTENBURG ESTATE (PTY) LTD **Second claimant**

JUDGMENT

STEENKAMP J:

INTRODUCTION

[1] This case concerns the application of section 197 of the Labour Relations Act in the context of interpleader proceedings.

THE BACKGROUND

[2] J Cornelius and 17 other workers were dismissed by High Rustenburg Hydro. They referred an unfair dismissal dispute to arbitration at the CCMA. The arbitrator, Adv Bill Maritz, find that their dismissal was not unfair. Nehawu, the trade union representing the workers, took the matter

on review to the Labour Court. Gush J upheld the review; found that the dismissals were unfair; and ordered High Rustenburg Hydro to pay compensation to the workers (cited as the first claimant in these interpleader proceedings) equivalent to 12 months' remuneration.

- [3] At the time of the dismissal, High Rustenburg Hydro was the trading name of High Rustenburg Hydro (Pty) Ltd ("Hydro"). After the arbitration and before the hearing of the review application in the Labour Court, on 17 May 2006, Hydro sold the business as a going concern to iProp (Pty) Ltd. On the same day, iProp in turn sold the business as a going concern to High Rustenburg Estate (Pty) Ltd ("Estate"). Counsel for the second claimant accepted for the purposes of these proceedings that the sale of business could be viewed as one from Hydro to Estate.
- [4] Gush J handed down judgement in the review proceedings in January 2008. The respondent was cited as "High Rustenburg Hydro". The attorneys for Hydro at the time, Carelse attorneys of Table View, did not bother to inform the court or the applicants (Nehawu and the workers) that the business had been sold to Estate.
- [5] Pursuant to the Labour Court order, Nehawu instructed the Sheriff (the applicant in these proceedings) to attach the property of "High Rustenburg Hydro" as their claim remained unpaid. The Sheriff duly attached movables to the value of R 840 024, 90 at the premises of the business.
- [6] It then became apparent that there were competing claims pertaining to the attached property. The Sheriff therefore issued an interpleader summons calling upon the claimants to deliver particulars of claim setting out their competing claims.
- [7] The second claimant ("Estate") now contends that the attached property belongs to it and that the court order was granted against Hydro and not against Estate. The execution creditor and first claimant (Nehawu and the workers) submit that, due to the provisions of section 197 of the LRA, the order against Hydro can be executed against Estate.

- [8] Mr Con *Joubert*, who appeared for the second claimant, did not dispute that the business was sold to Estate as a going concern and that section 197 applied. He submitted, though, that Nehawu would have to obtain a declaratory order, by way of separate legal proceedings, declaring Estate (the new employer) to be liable for the judgement debt, on the strength of which Nehawu would only then be able to execute against Estate's property.
- [9] In the agreement of sale, "the business" is defined as "the wellness business carried on by High Rustenburg Hydro (Pty) Ltd as a going concern on the property on the effective date under the name 'the Hydro at Stellenbosch'. It is specifically recorded that the business is sold as a going concern. It is further recorded that the seller indemnifies the purchaser against all loss, liability, damage or expense, which the purchaser may sustain as a result of any liabilities or obligations of whatsoever nature and howsoever arising in respect of the business which was incurred or arose prior to the effective date.
- [10] It was specifically recorded that, on the effective date (ie 17 May 2006), "transfer of the employees currently employed in the business shall take place in terms of section 197 of the Labour Relations Act". It was also recorded that "the seller hereby indemnifies the purchaser against payment of all amounts which employees may be entitled to or deductions which had to be made from employees' salaries in respect of any period up to the effective date: provided that the seller shall not be liable for payment of any amounts which an employee may become entitled to in terms of the LRA or any other Act due to the termination of his services by the purchaser after the effective date."

THE LAW

Interpleader

- [11] Interpleader proceedings are not dealt with in the LRA or in the rules of the Labour Court. In terms of rule 11(3):

“If a situation for which these rules do not provide arises in proceedings or contemplated proceedings, the court may adopt any procedure that it deems appropriate in the circumstances.”

[12] The appropriate procedure to be adopted in interpleader proceedings is that provided for in rule 58 of the High Court rules.

Transfer of a business as a going concern

[13] The purpose and effect of section 197 of the LRA has been the subject of much debate in this court and has largely been clarified by the Constitutional Court in *Nehawu v UCT*.¹

[14] The pertinent subsections for the purposes of these proceedings are the following:

“197(2) If a transfer of business takes place, unless otherwise agreed in terms of subsection (6) –

- 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 that time of the transfer continue in force as if they had been 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

“(5) (b) Unless otherwise in 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;”.

[15] In *Nehawu v University of Cape Town*² the Constitutional Court explained the objectives of section 197 as follows:

“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... In this sense, section

¹ *Nehawu v University of Cape Town* 2003 (2) BCLR 154 (CC), (2003) 24 ILJ 95 (CC)

² *Supra* para [53]

197 as a dual purpose, it facilitates the commercial transaction while at the same time protecting the workers against unfair job losses."

[16] Section 197 holds the new employer liable for any obligations between the old employer and the employee at the time of the transfer. And subsection (5)(b) specifically provides that the new employer is bound by any arbitration award made in terms of the LRA. But what about the situation such as this one, where the initial arbitration award (before the sale of the business) was in favour of the old employer; but it was overturned on review subsequent to the sale of the business?

[17] In *Transport Fleet Management v NUMSA*³ the reinstatement of employees dismissed by the old employer prior to the transfer of the business required the new employer to give effect to that order. Zondo JP held that it was consistent with the purpose of the Act and the European Community Directive 77/187 that an employment relationship continues, despite the dismissals, to enable the dismissed employees to exercise their rights against the new owner of the business.

[18] And in *NUMSA v Dorbyl Ltd*⁴ the Labour Appeal Court confirmed that an order for compensation could be made against the new employer.

[19] I also have regard to the judgement of the Labour Appeal Court in *Success Panel Beaters & Service Centre v NUMSA*⁵ holding that an order for reinstatement and payment of compensation to an employee unfairly dismissed by the old employer was enforceable against the new employer. Willis JA pointed out that 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 [new employer]".

³ [2003] 10 BLLR 975 (LAC); followed in *Anglo Office Supplies v Lotz* (2008) 29 ILJ 953 (LAC) para [21].

⁴ (2007) 28 ILJ 1585 (LAC)

⁵ [2000] 6 BLLR 635 (LAC) 637

EFFECT OF THE TRANSFER ON INTERPLEADER

[20] It seems to me that it would be contrary to the purpose of section 197 to hold that the employees in a situation such as this one would first have to obtain a declaratory order before they could execute an order for compensation against the new employer. The sale agreement specifically recorded that the business would be transferred as a going concern; that the employees fall within the ambit of section 17; and that the old employer remains liable for all claims by "any trade unions relating to conditions of employment or other matters affecting the general body of the company's employees or any section thereof". When the court order was made in January 2008, "High Rustenburg Hydro" was cited as the respondent. It was that business, defined as "the HRH business", that had been sold as a going concern. At the time, unbeknownst to the court, the new employer (Estate) had taken over the liabilities of the old employer to its employees. Had the respondent's attorneys at the time disclosed this fact to the court, I have no doubt that Estate would have been joined as a respondent. At this interpleader stage, the new employer has entered the fray. It is well aware of its obligations towards the employees, even though it had not been joined in the review proceedings. It seems highly formalistic and artificial – and indeed, contrary to the very purpose of s 197, ie to protect the workers – to now interpose a further costly and potentially lengthy court intervention before the employees can execute their claim against the new employer.

[21] The judgement of the Labour Court upholding Nehawu's application for review of the arbitration award substituted that arbitration award. The arbitration award must then be read to hold that the dismissal of the workers was unfair and that the old employer had to pay them compensation. That obligation was transferred to the new employer in terms of section 197. The new employer has stepped into the shoes of the old employer. The judgement substituting the arbitration award is, in my view, enforceable against the new employer without the need for another step.

CONCLUSION

[22] The first claimants [Nehawu and the employees] are entitled to enforce the claim against the second claimant [High Rustenburg Estate (Pty) Ltd, the new employer].

[23] The Sheriff is authorised to execute the writ of execution and satisfy the claim of the execution creditor and first claimant.

[24] In the light of the ongoing relationship between Nehawu and the new employer, there is no order as to costs.

ANTON STEENKAMP

JUDGE OF THE LABOUR COURT

CAPE TOWN

Date of hearing: 12 November 2010

Date of judgment: 26 November 2010

For the second claimant: Adv Con Joubert

Instructed by: Werksmans

For the execution creditor and first claimant: Adv Cecil Tsegarie

Instructed by: Marius Abrahams attorneys