IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN Reportable

CASE No. D 914/08

In the matter between:-

RICHARD JENKIN **Applicant**

And

KHUMBULA MEDIA CONNEXION (PTY) LTD **Respondent**

JUDGMENT

GUSH, J

1.

On the 17th August 1981 the Applicant commenced employment with a division of Transnet which was referred to as the Transnet Production House. The applicant in his evidence explained that he was employed as a printer and that his duties involved making copies of documents and manuals for customers which he would then bind.

2.

Whilst so employed, in January 1991, the business operated by his then employer, the Transnet Production House, was acquired by a company, Linkallash (Pty) Ltd trading as Skotaville Press. In 2002 Skotaville Press became African Impression Media (Pty) Ltd. The Applicants evidence was that when these changes occurred his employment had continued as before and that he continued performing his duties as if nothing had changed. His duties, salary and terms and conditions of employment remained the same as did the nature of the work he performed.

3.

During 2006 the name of the company changed again, this time from African Impression Media to Khumbula Media Connexion. The Applicant's evidence was that at the end of September 2006 he received his usual salary and pay slip. From the beginning of October 2006 everything remained the same and he continued working as before save that at the end of the month the name of his employer as it appeared on his pay slip was now that of the Respondent. As had happened with the name changes before, all remained the same. The applicant continued to perform the same duties from the same office for the same customers. The Applicant explained that his manager was the same person who had managed him and that Mr Khumbula Siphiwe Christopher Ngcobo was still the CEO as far as he was aware. At the end of October 2006 he received his pay slip as usual which now reflected his employer as being the Respondent.

4.

The Applicant did not apply for any position with the new company nor was he approached to sign any contract. His employment simply continued uninterrupted, he sat in the same office and he believed that it was simply a change of name.

5.

The applicant explained that his problems had started in March 2007 when people had arrived at the office and commenced removing the furniture. He was concerned and on the advice of his attorneys wrote to the Respondent on the 12th March advising that he would continue to report for work until told otherwise. On the 13th April he received a reply telling him that as the lease on the premises had expired and as the company was looking "elsewhere" that he should "stay at home with full pay and benefits" until further notice.

6.

During the latter part of 2007 the Applicant was advised by his medical aid that his membership had lapsed due to the non payment of his premiums by the Respondent. He had queried this with the Respondent and on the 4th December 2007 he had met with Mr Khumbula Ngcobo. During this meeting he had asked for the pay slips that he had not received and asked that the premiums for the medical aid be paid. His evidence was that Mr Ngcobo had told him that he would look into the matter and revert to him. Mr Ngcobo had in addition said to him that he would "come back" to him with a retrenchment proposal and that they would meet again in January 2008.

7.

No meeting took place in January. The Applicant said that he had tried to contact Mr Ngcobo but he had been unavailable. He continued to receive his usual salary for December and January. It appears from the Applicant's bank statements which formed part of the bundle that he received a payment from the Respondent in the amount of R16,224 in February 2008, which was later explained as having been the payment of the arrear medical aid contributions. In April 2008 the Applicant, having not received a salary for March, telephoned the Respondent to ascertain why, and was told that his contract had come to an end.

8.

He was asked about the unsigned contract of employment the Respondents had included in the bundle of documents which purported to have placed him on a one year fixed term contract of employment commencing the 18th October 2006 and ending on the 30th September 2007. His evidence was that he had not entered into such a contract and that the first time he had seen the contract was when it was submitted by the Respondent Attorneys in preparation for the case. The Applicant's evidence concerning the unsigned "Severance/Retrenchment Package" document which the Respondent had also included in the bundle was that he had, as with the unsigned contract of employment, never seen

the document prior to this matter commencing. He was adamant that not only had he not agreed to accept a package but that the amounts and detail had not been discussed. He concluded his evidence by explaining that he remains unemployed having been unsuccessful in obtaining employment. He also denied that he had been offered a position in Johannesburg. He said that had such an offer been made he would have accepted it.

9.

Mr Khumbula Siphiwe Christopher Ngcobo gave evidence for the respondent. He was the owner and Chief Executive Officer of African Impression Media (Pty) Ltd. In May 2006 African Impression Media (Pty) Ltd, was placed in provisional liquidation. At this time Mr Ngcobo became a consultant to the respondent in this matter, Khumbula Media Connexion (Pty) Ltd, a company owned by his wife.

10.

It is clear from the evidence that after the liquidation of African Impression Media (Pty) Ltd, the business conducted in the Durban office where the Applicant had worked since 1981, continued its operations until the furniture was removed in March 2007. The only change appears to have been that with effect from the 1st October 206 the office was run and operated by the Respondent. This is evidenced by the pay slips issued to the Applicant. Mr Ngcobo confirmed that at the end of September 2006 the Applicant received from African Impression Media (Pty) Ltd his usual pay slip reflecting the details of his employment by African Impression Media (Pty) Ltd. At the end of October 2006, however, the Applicant was issued with a pay slip reflecting his employer as being "Khumbula Media Connexion". The format of the pay slip, the address of the employer, and the salary details were all identical. The date of his engagement however was reflected as 1st October 2006 as opposed to the previous months pay slip which recorded his date of employment as the 17th August 1981.

11.

Mr Ngcobo was at pains to explain that the contracts African Impression Media (Pty) Ltd had had with Transnet had come to an end and that it was simply a convenience for the Respondent to move into the same premises continue the printing business and use the, albeit outdated, equipment. He confirmed that the Durban office in addition to the contracts also provided a service to walk in customers and that this service continued. Save for the above, Mr Ngcobo was unable to gainsay the Applicant's evidence that the work that the Applicant had been doing and the customers he was doing it for remained the same over the period of the change in proprietorship of the Durban office. Mr Ngcobo offered no explanation or documentation to establish:

1. what had transpired with the liquidation;
2. any agreement if any with the liquidators; and
3. any detail regarding the contracts and the customers that he suggested were different from those his company African Impression Media (Pty) Ltd had dealt with

Neither did the owner of the Respondent give evidence.

12.

Ngcobo's evidence was to the effect that he did not consider the continuation of the printing centre in Durban to be a transfer of the business or a part thereof as a going concern. Accordingly the length of service applicable to the Applicant's retrenchment package should not take into account the Applicant's previous employment.

13.

As far as the fairness of the retrenchment procedure was concerned, Ngcobo maintained that he had not only discussed the retrenchment in some detail with the applicant at the meeting in December but that at the conclusion of the meeting the Applicant had agreed to the retrenchment package although he had asked for time to take it home and consider

it (sic). Ngcobo relied on the unsigned "Severance/Retrenchment Package" letter as evidence of the agreement he had reached with the Applicant, but was unable to explain why the Respondent had not complied with the terms of the purported agreement.

14.

In addition in his evidence Ngcobo suggested that not only had the Applicant applied for employment with the respondent after the liquidation of African Impression Media (Pty) Ltd, but that he had entered into a fixed term contract with the Applicant, also unsigned, that was to run from the 18th October 2006. He suggested that during his meeting with he Applicant in December 2006 he had offered the Applicant employment in Johannesburg but that the Applicant had turned it down.

15.

The Applicant gave his evidence is a simple and clear manner. He is clearly not a sophisticated man and one gained the distinct impression that he was being entirely honest. His explanation that he had not seen either of the unsigned documents was entirely plausible given the Respondents evidence surrounding them. Whilst it is so that the Applicant during cross examination made certain concessions it was abundantly clear that he did not understand the questions. His evidence in chief was clear and credible and the cross examination did not negate it. Somewhat opportunistically it was put to the Applicant in cross examination, regarding the validity of the fixed term contract, that the job description in the contract differed from the Applicants previous job description which confused the Applicant but this submission was abandoned when it was pointed out that the job title was in fact the same. His denial that he had been offered a position in Johannesburg was plausible. Had this offer been made one would have expected the matter to have been dealt with in the documentation. In the absence of any documentary record of the offer, taking into account the fact that the meeting took place in a Steers restaurant in the absence of offices, either the so called agreement was pre-prepared in which case the it is improbable that the offer of alternative employment in Johannesburg

was made, or the so called severance agreement was prepared after the meeting. Neither of these possibilities accord with the evidence of the Respondent.

16.

On the other hand the Respondent's Ngcobo in his evidence was vague as to the details of the sequence of events after the liquidation of the company African Impression Media (Pty) Ltd, and he was unable to substantiate his evidence with any documentation either from the liquidators or the Respondent company. The only two documents which the Respondent put up were both unsigned agreements and when dealing with the documents Ngcobo failed to explain why:

1. if the Applicant had agreed to a fixed term contract the Respondent did not invoke the terms thereof when at its purported expiry the Applicant was being paid to stay at home;
2. if the Applicant had agreed to the terms of the retrenchment it was necessary to take the document home to think about it;
3. if the severance package had been agreed, the Respondent did not pay the Applicant the agreed amount when it was supposedly due. (the amount which appeared in the Applicants bank statement for February was explained to have been the medical aid contribution payment)

17.

At the commencement of the trial the parties filed a supplementary pretrial minute, which succinctly set out what the parties required the court to decide. It was agreed that the court was to decide:

1. firstly, "if the applicant's dismissal was procedurally fair";
2. secondly, if the dismissal "was procedurally unfair", what compensation should be paid to the applicant; and
3. whether the business of African Impression Media was transferred to the Respondent as a going concern as contemplated by section 197A of the Labour Relations Act 66 of 1995. If the transfer was a section 197 transfer then the quantum of the severance pay was agreed in the amount of R35,153.82.

18.

Dealing firstly with the procedural fairness of the dismissal it is pertinent to record that it was common cause that the applicant had been dismissed for operational reasons and that only one meeting had taken place, namely the meeting in Durban on the 4th December 2007. Despite Ngcobo's insistence that there had been communication with the staff regarding the pending retrenchment he was unable to produce any documentation to support this contention. This was despite his acknowledgement that he was aware of the requirements of the Labour Relations Act when dealing with retrenchments and his insistence that he had followed the Act to the best of his ability.

19.

I have no hesitation in accepting the evidence of the Applicant that whilst the issue of retrenchment was mentioned during the fateful meeting, Ngcobo had in fact not made an

offer but had undertaken to revert to the Applicant regarding the offer that was to be made. As mentioned above the Respondent if it had concluded the agreement as was suggested there would be no reason for the Respondent having failed themselves to comply with it.

20.

In **JOHNSON & JOHNSON (PTY) LTD v CHEMICAL WORKERS INDUSTRIAL UNION (1999) 20 ILJ 89 (LAC)** the Labour Appeal Court set out clearly the requirements for compliance with the procedural aspects of section 189 of the Labour Relations Act. The court held:

> *"The important implication of this is that a mechanical, 'checklist' kind of approach to determine whether s 189 has been complied with is inappropriate. The proper approach is to ascertain whether the purpose of the section (the occurrence of a joint consensus seeking process) has been achieved (cf Maharaj & others v Rampersad 1964 (4) SA 638 (A) at 464; Ceramic Industries Ltd t/a Betta Sanitaryware & another at 701G-702H (BLLR), 676B-677C (ILJ); Ex parte Mohuloe (Law Society Transvaal intervening) 1996 (4) SA 1131 (T) at 1137H-1138D)."*
>
> *"Mention has already been made that s 189 is inextricably linked to the issue whether a dismissal based on operational requirements is fair or not. In testing compliance with its provisions by determining whether the purpose of the occurrence of a joint consensus seeking process has been achieved or frustrated, a finding of non-compliance by the employer will almost invariably result also in the dismissal being unfair for failure to follow proper procedure. It is difficult to envisage a situation where the result could be different."*(at page 96/7 paras 29 and 31)

21.

Given the overall circumstances of the matter the meeting held with the applicant was not sufficient to constitute consultations as required by section 189, specifically if the objects of the consultation process are taken into account. The Respondent did not even attempt "*a mechanical, 'checklist' kind of approach"* but merely convened a single meeting without even setting out in writing its intentions or bothering to properly consult with the Applicant as is required by the Labour Relations Act (LRA). I am satisfied that the respondents did not comply with the procedural requirements of the LRA, particularly section 189 and that their failure to do so was unfair.

22.

The second issue to be decide is whether or not the Respondent took over the business of the previous company as a going concern as envisaged in Section 197A of the Labour Relations Ac. The Labour relations act defines a **business** as:

"*including the whole the part of any business trade undertaking or service"*; and **transfer** as:

meaning the transfer of the business by one employer to another employer as a going concern.

Section 197A applies in cases of insolvency. The section specifically provides that if the old employer is insolvent the contract of employment does not automatically terminate as provided for in the Insolvency Act where a transfer of a business takes place. In such circumstances the "*new employer"*, is automatically substituted in the place of the "*old employer"*.

23.

It is necessary to consider exactly what constitutes a transfer of a business or part thereof in the circumstances of this matter. There is no doubt that the operation performed by

African Impression Media (Pty) Ltd simply continued under the control and direction of the Respondent. The enquiry is a factual one. It matters not that the proprietor or "former employer" that went insolvent was a company owned by the husband of the owner of the respondent and is not necessary in this matter to consider "piercing the corporate veil". The enquiry must be limited to whether or not there was a transfer of the part of the business or service that operated in Durban as a going concern from the insolvent company to the respondent. In this matter the issue in question is the consequence of the take over of the part of the business or service for the purposes of calculating severance pay. In other words whether the Applicants length of service commenced with the take over or whether his previous service should be taken into account.

24.

The facts are as follows. The Applicants evidence was that during 2006 the entity that employed him changed from African Impression Media to Khumbula Media Connexion. He was not aware of the insolvency of African Impression Media. He continued to perform his duties in exactly the same manner and for the same customers through the transition. This evidence was not challenged. Prima facie the Applicants evidence established that the Respondent continued the business of the "old employer". The Applicant cannot be required to prove the underlying causa or contract underpinning the "transfer". It must be sufficient to establish a factual situation which gives rise to a prima facie conclusion that a transfer of the business or part thereof has taken place. In the circumstances where the Applicant's evidence has clearly demonstrates that the "business or part thereof" has continued uninterrupted it is incumbent upon the Respondent to establish that the situation was not one envisaged by S197A of the LRA.

25.

What the Respondent offered in rebuttal of the Applicants evidence was a vague explanation that ranged from the assertion that the Respondent had existed prior to 2006 to the suggestion that contracts dealt with by African Impression Media, which had been placed in liquidation, had come to an end. Neither averment, in the absence of any further evidence or documentation, or comment from the liquidators, satisfactorily answered the evidence of the Applicant. What is clear is that the Applicant was employed continuously doing the same work from his original employment by Transnet to his retrenchment by the Respondent. The question is whether the facts as described by the Applicant established:

"…a transfer of a business-

(a) if the old employer is insolvent…"

26.

The decision in **AVIATION UNION OF SA on behalf of BARNES & OTHERS v SA AIRWAYS (PTY) LTD & OTHERS (2009) 30 ILJ 2849 (LAC)** deals extensively with the provisions of section 197. Applying a purposive interpretation the court considered firstly the constitutional right to fair labour practices contained in section 23(1) of the Constitution. Referring to the matter of **National Education Health & Allied Workers Union v University of Cape Town & others 2003 (3) SA 1 (CC); (2003) 24 ILJ 95 (CC)** the court held**:**

"In terms of the jurisprudence of the European Court of Justice it seems that the principle underlying Directive 77/187 is that if the business moves, the workers move with it."

In the **"MEMORANDUM ON ACQUIRED RIGHTS OF WORKERS IN CASES OF TRANSFERS OF UNDERTAKINGS; GUIDELINES ON THE APPLICATION OF COUNCIL DIRECTIVE 77/187/EEC OF 14 FEBRUARY 1977; BASED ON THE CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES"** (published by the ILO) it is said:

> *"First of all, it should be noted that the Court of Justice of the European Communities has ruled that the Directive applies to all transfers resulting from a contract, an administrative or legislative act, or a court decision.*
>
> *The Court has also held that the essential criterion for the recognition of a transfer is whether the transferee has received an existing undertaking so as to be able to continue its activities or, at least, activities of the same type. It follows that the decisive criterion for establishing whether there is a transfer for the purposes of the Directive is whether the economic unit retains its identity. The assessments necessary in order to establish whether or not there is a transfer in the sense indicated are a matter for the national courts, in view of the specific interpretation factors involved:*
>
> - *type of undertaking or business,*
> - *whether or not tangible assets such as buildings and movable property are transferred,*
> - *the value of intangible assets at the time of transfer,*
> - *whether or not the majority of employees are taken over by the new employer,*
> - *whether or not the customers are transferred,*
> - *the degree of similarity between the activities carried on before and after the transfer,*
> - *the period, if any, for which those activities were suspended."*; and
>
> *"The Court has ruled that the Directive applies to all situations in which there is a change in the legal or natural person responsible for carrying on the business.*

As soon as the economic unit continues its activity, the mere fact of the change in the natural or legal person who is responsible for carrying on the business is sufficient to make the Directive applicable, regardless of whether or not ownership of the undertaking is transferred."

28.

The issue as to whether or not there has been a transfer should not only depend on the existence of an agreement but on the facts. In National Education Health & Allied Workers Union v University of Cape Town & others (supra) at 2003 (3) SA 1 (CC); (2003) 24 ILJ 95 (CC) where the test is set out as follows:

"'Going concern'

The phrase 'going concern' is not defined in the LRA. It must therefore be given its ordinary meaning unless the context indicates otherwise. What is transferred must be a business in operation 'so that the business remains the same but in different hands'. Whether that has occurred is a matter of fact which must be determined objectively in the light of the circumstances of each transaction. In deciding whether a business has been transferred as a going concern regard must be had to the substance and not the form of the transaction. A number of factors will be relevant to the question whether a transfer of a business as a going concern has occurred, such as the transfer or otherwise of assets both tangible and intangible, whether or not the workers are taken over by the new employer, whether customers are transferred and whether or not the same business is being carried on by the new employer. What must be stressed is that this list of factors is not exhaustive and none of them is decisive individually. They must be considered in the overall assessment and therefore should not be considered in isolation."

Insofar as the court was referring specifically to the term "going concern" the same logic must apply to the question of whether or not there has been a "transfer".

29.

In **FOOD & ALLIED WORKERS UNION v COLD CHAIN (PTY) LTD & *ANOTHER (2009) 30 ILJ 2919 (LC)*** *Francis J held that*

> *"The next question that is to be decided is whether there will be a transfer as a going concern. In NEHAWU, the Constitutional Court, referring to the jurisprudence of the European Court of Justice, said that this leg of the test is best summarized by asking whether there has been a transfer of an economic entity that retains its identity after the transfer has taken place. This would be indicated inter alia by the fact that the operation was actually continued or resumed by the new employer, with the same or similar activity… whether or not the majority of its employees are taken over by the new employer; whether or not its customers are transferred; the degree of similarity between the activities carried on before and after the transfer;…"*(at page 2929 para 26)

29.

I am satisfied, having taken into account the evidence of the parties, that the assumption of the business operated African Impression Media (Pty) Ltd by the Respondent constituted a "transfer" as envisaged by section 197A of the LRA and that accordingly section 197A(2)(d) is of application to the Applicants employment for the purposes of calculating the Applicant's completed years of service as provided for in section 41 of the Basic Conditions of Employment Act No. 75 of 1997. The applicable commencement date of Applicants employment is therefore the 17th August 1981. The parties agreed that if section 197A applied the Applicant would be entitled to payment of the sum of R35,153.82.

In the circumstances I make the following order:

30.1 The Respondent's dismissal of the applicant was procedurally unfair;

30.2 The Respondent is ordered to pay the Applicant compensation in an amount equivalent to 8 months salary;

30.3 The assumption of the business operated African Impression Media (Pty) Ltd by the Respondent constituted a transfer as envisaged by section 197A of the LRA and the respondent is ordered to pay the Applicant the amount of R35,153.82;

30.4 The Respondent is ordered to pay the Applicants costs.

GUSH, J

Date of Hearing: 6th and 7th May 2010

Date of Judgment: 02nd June 2010.

Appearances:

For the Applicant: Advocate A Boulle, instructed by J. H. Nicolson Stiller and Geshen;

For the Respondent: Advocate S Madlala instructed by Makaula Zilwa Inc.