IN THE LABOUR COURT OF SOUTH AFRICA **REPORTABLE**

HELD AT JOHANNESBURG

CASE NO: J 1112/1999

In the matter between:

RONALD MOKOENA & OTHERS Applicants

and

MOTOR COMPONENT INDUSTRY (PTY) LIMITED First Respondent

Z L LEMFORDER (PTY) LIMITED Second Respondent
AUTO INDUSTRIAL SPARTAN (PTY) LIMITED Third Respondent
MR DEAN CATALDO FRAGALE Fourth Respondent

JUDGMENT

The Applicants and the First Respondent are, respectively, Applicants and Respondent in certain unfair dismissal proceedings currently pending before this Court (hereinafter referred to as "*the principal action*"). These arise from the allegedly unfair retrenchment of the Applicants. The Applicants have now sought to join the Second, Third and Fourth Respondents as Respondents in the principal action.

The Second, Third and Fourth Respondents were not cited in the dispute referral documentation submitted by the Applicant to the CCMA in terms of Section 191(1) of the Labour Relations Act, No 66 of 1995 as amended ("*the Act*"), nor were they party to the conciliation proceedings held in terms of Section 135 of the Act. It is argued on behalf of Respondents that this constitutes a bar to the Second to Fourth Respondents being joined to the principal action.

Labour Court Rule 22 provides as follows:

> **"** *1. The Court may join any number of persons, whether jointly, jointly and severally, separately or in the alternative, as parties in proceedings, if the right to relief depends on the determination of substantially the same question of law or facts*.
>
> *2(a) The Court may, of its own motion or on application or on notice to every other party, make an order joining any person as a party in the proceedings if the party to be joined has a substantial interest in the subject matter of the proceedings*".

It is immediately apparent that the court's powers of joinder would, in dismissal proceedings, only be exercised after the conciliation proceedings in terms of Section 134 of the Act have been exhausted. Before that occurs, the Labour Court is not seized with the matter at all. Rule 22 therefore clearly allows for applications for joinder after conciliation proceedings, and it is significant that Rule 22 nowhere specifies that a party may only be joined if that party was also a participant in the conciliation proceedings.

In my view, this Court has a discretion to join parties to a matter, even if they did not participate in the preceding conciliation proceedings (**Selala & Another v Rand Water, (2000) 21 ILJ 2102 (LC)** at **2104 - 2105**). While statutory conciliation is one of the jurisdictional facts that must be present before an unfair dismissal dispute may be dealt with by the Labour Court, or by arbitration, one must not regard the dispute and the parties to the dispute in synonymous terms. Situations may be conceived where there is a dispute between the immediate disputant parties, in which other parties also have an interest. As long as the dispute has been the subject of proper conciliation, even if all the parties thereto did not participate in such conciliation proceedings, the aforesaid jurisdictional requirement is satisfied.

If the party joined after conciliation wishes to avail himself of an opportunity to attempt to resolve the matter through conciliation, there is no reason why that attempt cannot be made at the pre-trial conference. Rule 8, which regulates such conferences, specifically stipulates that the issue of settlement is one of the aspects that may be addressed at such a conference. The court may even be asked to give appropriate direction relative thereto. Alternatively, the party joined may persuade the court to exercise the discretion which it has under Section 157(4)(a) of the Act, and to not deal with the dispute on its merits until there have been further endeavours to conciliate the matter, in which such party has an opportunity of participating.

It is also necessary to consider the situation which might arise if an applicant wishes to join further parties but is precluded from doing so because such parties did not participate in the conciliation proceedings. That applicant would have to commence fresh dispute proceedings against such other parties, by referring a dispute in which these parties are cited, to the CCMA. If that dispute is not resolved, it will be referred to arbitration or to the Labour Court, as the case may be. This creates the possibility that two separate court cases or arbitrations will be conducted, in which different tribunals might arrive at different conclusions in relation to the same dispute. I do not believe the legislature intended to create such a potentially disorderly state of affairs.

I therefore find that there is nothing in the Act which prevents the joinder of a party who did not participate in the statutory conciliation proceedings before the Labour Court, as long as the dispute has itself been properly conciliated, and the requirements imposed by Rule 22 for the joinder of the parties, ie that they must have a substantial interest and be subject to the same relief on the same questions of law or fact, are met.

I now proceed to consider whether a case is made out for the joinder of the Second to Fourth Respondents.

Fourth Respondent's joinder is sought because, according to the Applicants, he was one of the main directors and shareholders of the other Respondents. This is not a ground for Fourth Respondent's joinder. In South African law, the claim of a party dealing with a company is to be enforced in that company, save in exceptional circumstances. No such circumstances are presented in the evidence before me.

As regards Second Respondent, the application for joinder avers that, during February 1997, there were negotiations between First Respondent's employees, and between First and Second Respondents. During those negotiations it was agreed that the employees of the First Respondent would be transferred to the Second Respondent. Six employees (who are not Applicants in these proceedings) were employed, but the remainder were never employed as agreed. The Applicants do not allege that Second Respondent took over the business of the First Respondent as a going concern. The answering papers aver that the business of the Second Respondent was to assemble and supply axles to a certain motor manufacturer, while First Respondent at no stage did business in the assembly and supply of axels. Second Respondent alleges that, during negotiations between the parties, it was agreed that Second Respondent would offer employment to the First Respondent's employees, after the First Respondent had shut down its operations. The employees in question initially accepted this offer and subsequently advised that they had changed their minds, and did not wish to take up such employment.

On the facts as summarised above, Applicants have not made out a case that the business of First Respondent was transferred to Second Respondent as a going concern. The provisions of Section 197 do not apply. Applicants have also not sought, as against Second Respondent, to make out a case of simple contractual repudiation, ie a failure on its part to take the relevant

Applicants into its employ, as agreed. Such a dispute would, in any event, not amount to an operational requirements dismissal and would, in all probability, not be capable of adjudication in the Labour Court.

No proper case is therefore made out for the joinder of Second Respondent.

As against Third Respondent, the Applicants aver that, after their retrenchment, most of First Respondent's machinery was transferred to Third Respondent, which continued the same business operation formerly conducted by the First Respondent. From the allegations in the answering affidavits, it is clear that Third Respondent took over what is termed "*First Respondent's more viable customer contracts*" and that some of the machinery and contracts were taken over by Third Respondent. It is also clear that Applicants were offered jobs at Third Respondent, as well as a subsidiary of Second Respondent, Elastmetall, although Respondents allege that such offers were declined. (That is disputed and will, depending on the averments ultimately raised in the pleadings, be one of the issues for the trial court to decide).

Section 197 of the Act applies to the transfer of a business from one party to another as a going concern. A business is transferred as a going concern when, following upon the transfer, the transferee is able to continue substantially the same business, without interruption and without having to alter the nature thereof (**Schutte & Another v Powerplus Performance (Pty) Ltd, (1999) 2 BLLR 169 (LC)**) . The factors to be taken into account in deciding whether such a transfer does constitute a going concern transfer are obviously many and varied. It is not a prerequisite that the transferee must take over all the assets, all the liabilities, all the customers or all the existing contractual obligations of the transferor. That much is *inter alia* clear from Section 197(1)(a) which defines the term "*business*" for purposes of the implementation of the section as including "*the whole or any part of any business, trade, undertaking or service*".

From the facts put up by the Applicant relating to Third Respondent's takeover of the First Respondent's business, which do not appear to be in dispute and which are substantially confirmed by the Respondents in the answering affidavits, it appears that the business of First Respondent was transferred to Third Respondent as a going concern. Section 197 therefore applies.

Section 197(9) of the Act stipulates that, in such a transfer situation, the old and new employer are jointly and severally liable in respect of any claim concerning any term or condition of employment that arose prior to the transfer. Section 197(2(a) provides that 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. If the Applicants, in the instant matter, succeed in proving that they were unfairly dismissed, any reinstatement order or compensation order made in their favour would be enforceable against the transferee, the Third Respondent. In those circumstances, the Third Respondent is an interested party (**Halgang Properties CC v Western Cape Workers Association, (2002) 10 BLLR 919 (LAC)** at **927 J - 928 (C)**) and should be joined to the proceedings.

The application for joinder as against Third Respondent succeeds.

One further point arises for consideration. Respondents point out, in the supplementary answering affidavit of one Andrea Moz, that certain employees, listed in paragraphs 4.3 and 4.6 of this affidavit, were not among the Applicants mentioned in the original dispute referral form submitted to the CCMA. They were not party to the conciliation proceedings conducted by the CCMA. These assertions are not disputed by the Applicants.

I am of the view that the employees who were not identified in the dispute referral form, and did not participate in the conciliation proceedings, are not properly before the court. Firstly, there is no application for their joinder. Secondly, a distinction exists between the situation where necessary parties are joined in terms of Rule 22 to what is essentially a single dispute, which has already been conciliated, and the situation which exists when there are two or more disputes, which might have certain facts in common, but which have not all been referred to the CCMA and/or gone through the conciliation process prescribed by Section 135 of the Act. Although the claims of the various Applicants, and the other employees referred to in the aforesaid affidavit of Ms Moz, arise from the same retrenchment, they are in my view different disputes. It is conceivable that particular Applicants may rely on facts and circumstances peculiar to their situation, which they contend make their dismissal unfair. A particular employee might also seek relief quite different from that of the other employees, not only in respect to compensation as opposed to retrenchment, but also as regards the amount of such compensation and the basis for calculation. It is moreover necessary that there should be clarity, at the conciliation stage, as to how many Applicants are involved, and what each of them are claiming. In the absence of such information, the employer would find it extremely difficult to formulate any settlement proposals.

What remains to be decided is the question of costs. Both Applicants and Respondents have been partially successful in regard to the joinder application. In addition, I am advised that most, if not all, of the Applicants are unemployed, which factor makes me somewhat reluctant to make a costs order against them. The Respondents have contended that the Applicants have, in the course of the principal action, taken various ill-conceived procedural steps, some of which the Respondents submit were of a frivolous nature. I am unable, on the material before me, to find whether this is so or not. Obviously, if in future any ill-conceived or unnecessary steps are taken by the Applicants, which further escalate the costs, then the history of the matter, including of the instant application, can be brought to the attention of the court considering such future application. The Applicants would therefore be well advised to ensure that they conduct the principal action speedily, and efficiently. I do not, however, consider it appropriate in the circumstances outlined to make any costs order adverse to any of the parties.

In the circumstances, I make the following order:

[1] The application for the joinder of Second and Fourth Respondents is refused.

[2] The application for the joinder of the Third Respondent is granted.

[3] Applicants are to file an amended Statement of Claim, incorporating such allegations as they may deem necessary in respect of Third Respondent, within fourteen days of date of this Order. The further progress of the matter will thereafter be governed by the Rules of this Court.

[4] A finding is made that the persons referred to in paragraphs 4.3 and 4.6 of the affidavit of Andrea Moz *jurat* 8 November 2004 are not parties to the proceedings instituted under case number J1112/1999.

[5] Each party is to bear their own costs relating to the joinder application.

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AC OOSTHUIZEN A.J.

Date of judgment: 25 February 2005