IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. JS 52/05

In the matter between:

ROGER LOTZ Applicant

And

ANGLO OFFICE SUPPLIES Respondent

JUDGMENT

MUSI AJ

[1] This is a judgement on a point ***in limine*** raised by the respondent to the effect that the applicant has brought a wrong party to court. The essence of the point ***in limine***, as I see it, is that where an employee has been dismissed by his\her employer (the old employer) for a reason related to a transfer of the employer's business or part thereof as set out in section 197 of the Labour Relations Act 66 of 1995 (the LRA), any action that the employee takes in connection with the dismissal can only be brought against the person or entity to whom/which the business has been transferred (the new employer). Put otherwise, it is contended that

under no circumstances can the employee have recourse against the old employer. The issue concerns the interpretation of section 197.

[2] The factual background to the dispute is based on facts that are not disputed (save in one respect which I shall indicate) and is briefly as set out hereunder. The respondent is a company duly incorporated in terms of the company laws of the Republic of South Africa and which conducts the business of supplying paper and stationery products with wholesale and retail components. The applicant was employed by the respondent in its retail division as a sale representative. During August 2004 the respondent made known its intention to sell its retail division to a company called Makulu Time Office Products (Pty) Ltd (Makulu). Discussions were held between the applicant and a representative of the respondent in connection with the contemplated sale with a view to the applicant's employment contract being transferred to Makulu. The applicant objected to what he perceived as less favourable terms and conditions of employment offered by Makulu and the move to transfer the applicant appears to have been abandoned. Now this is not a proven fact or common cause but I make this conclusion on the basis of the fact that the negotiations in that direction were not pursued but instead alternative proposals were made to the applicant. When the negotiations around these failed to bear fruit, the respondent simply dismissed the applicant. The applicant then declared a dispute with the CCMA and conciliation having failed, he instituted action in this court seeking

compensation on the basis that this was an automatically unfair dismissal as set out in section 187 (1) (g) of the LRA.

[3] The dismissal took place on 1 September 2004. Subsequently, and on 8 September 2004, the respondent and Makulu concluded an agreement in terms of which the respondent's retail unit was sold and transferred to Makulu as a going concern, which agreement took effect on 1 October 2004.

[4] The gist of the respondent's case is that since the applicant avers that his dismissal was for a reason related to the transfer and therefore automatically unfair, he has triggered the provisions of the entire section 197. It is pointed out that in terms of subsection

2 (a) Makulu has been substituted for the respondent and emphasis is placed on the provision of subsection 2 (c) which stipulates:

> "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".

It is contended that the applicant could have recourse only against Makulu, the new employer.

[5] Mr. Graham for the respondent referred to ***Transport Fleet Maintenance (Pty) Ltd and Another v National Union of Metal Workers of South Africa and Others (2004) 25 ILJ 104 (LAC)***, especially the passage in paragraph 25 where Zondo JP stated the following in relation to the old section 197:

> " It can also be said that because 197 (2) (a) provides that anything done by the business transferor in relation to an employee before the

> transfer of the business, must be regarded as having been done by the business transferee. The business transferee is regarded after the transfer of the business, as the one who dismissed the employee and is therefore, the person against whom the employee is entitled to pursue arbitration or legal proceedings to enforce his rights not to be dismissed unfairly"

Counsel submitted that this statement clearly indicates that Makulu is the entity that the applicant should have sued and not the respondent.

[6] Mr. Lennox, for the applicant, submitted in essence that the instant case is distinguishable from the situation that obtained in cases like ***Transport Fleet Maintenance*** where the entire business was sold as a going concern and that that is a typical case for which section 197 was meant. In such cases, an employee dismissed prior to the transfer will be remediless if he/she could not proceed against the new employer and that is precisely the sort of hardship that the section was meant to prevent, so counsel submitted. He went on to say that the instant matter is complicated by the fact that where only a portion of the business is transferred, the employees to be transferred should be identified as not necessarily all the people who worked in the particular unit would be transferred. Mr. Lennox pointed out that in fact the respondent and Makulu identified the employees to be transferred by way of a list annexed to the contract. Significantly, the applicant is not one of those. Counsel referred to ***NEHAWU v University of Cape Town and Others (2002) 23 ILJ 306 (LAC)*** at 338F where Zondo JP stated the following:

> "Accordingly, each transaction must, in my view, be considered on its own merits in the light of all the surrounding circumstances of the transaction before a determination can be made whether they constitute the transfer of a business as a going concern"

Counsel pointed out that this approach was approved in a further appeal to the Constitutional Court in ***NEHAWU v University of Cape Town and Others (2003) 24 ILJ 95 (CC)***, paragraph [7].

[7] As both counsel pointed out in argument, there is no direct authority on the point in issue. However, in my view, there are sufficient indications in the reported cases that not in every case of a transfer in terms of section 197 would an employee be obliged to have recourse against the new employer. It is clearly a matter to be determined with reference to the particular facts of each case, as was indeed stated in the two cases of ***NEHAWU v University of Cape Town*** (supra).

[8] In my view, an aspect that is critical and renders the instant case distinguishable is that, on the papers, the applicant appears to have been withdrawn from the transfer process as I have already indicated. That this is so further confirmed by the fact that he was not included in the list of the employees to be transferred. Significantly, one particular employee, McCann, who had been transferred and in respect of whom there appears to have been a pending dispute, was singled out and provision made in the contract for the handling of his case, whereas no such provision

was made in respect of the applicant.

[9] The Constitutional Court in the ***NEHAWU v University of Cape Town*** case, endorsed the view expressed by Zondo JP in his minority judgement in the LAC, that it is not a ***sine qua non*** that the employment contracts of employees be transferred as well for a transaction to qualify as a transfer of a business as a going concern within the meaning of section 197. Cf ***SA Municipal Workers Union and Others v Rand Airport Management Co (Pty) Ltd and Others (2005) 26 ILJ 67 (LAC),*** paragraphs (22) to (24); ***NEHAWU v University of Cape Town and Others (2000) 21 ILJ 1618(LC).***

[10] Mr. Graham also suggested that the applicant cannot claim that his dismissal was for a reason related to the transfer and therefore automatically unfair within the meaning of section 189 (1) (g) if he was not part of the transfer. In my view, the test in this regard is not whether he was ultimately transferred or not but whether his dismissal was for a reason related to the contemplated transfer. A contemplated transfer may fail to materialise but if an employee is dismissed for a reason related thereto, such dismissal would be an automatically unfair one. Compare ***SA Municipal Workers Union and Others*** (supra), especially at 83F-J. In this case it was held that transfer in terms of section 197 had not taken place, yet the dismissal of the employees was held to have been automatically unfair as the reason therefor related to the contemplated transfer.

[11] I should indicate that I am not hereby making any finding that the dismissal ***in casu*** was an automatically unfair one within the context of section 187 (1) (g). That is an issue to be decided at the trial.

[12] In conclusion, I should point out that the larger part of the day of hearing was devoted to oral argument on the point, the parties having previously arranged to set aside the 8th November 2005 for same, as it had been thought that its determination might dispose of the entire case. It is therefore only proper that the respondent should carry the costs of the day.

[13] In the result, the point ***in limine*** is dismissed with costs.

H. M. MUSI

Acting Judge of the Labour Court

For the Applicant	Advocate M A Lennox Instructed by Natasha Moni
For the Respondents	Advocate D G Graham Instructed by Marshall Attorneys
Date of Hearing	08 November 2005
Date of Judgment	01 December 2005