IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JS 546/2005

In the matter between:

CHEMICAL, ENERGY, PAPER, PRINTING,
WOOD AND ALLIED WORKERS UNION

Applicant

and

LT CORDERO

First Respondent

HYDRO COLOUR INKS (PTY) LTD Second Respondent

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JUDGMENT

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FRANCIS J

Introduction

1. The applicant is the Chemical, Energy, Paper, Printing, Wood and Allied Workers Union (CEPPWAWU) which is acting on behalf of seven of its members who were employed at the time of their dismissals by Keeps Inks. The seven members are Henry Molefe, Johannes Chepape, Lawrence Dinake, Edward Maluleke, Joseph Maluleke, David Matsau and Johannes Poto. In respect of Henry Molefe an arbitration award for compensation was made an order of court in terms of section 158(1)(c) of the Labour Relations Act 66 of 1995 (the Act) under case number J5067/00. In respect of the other six members (the retrenched employees) default judgment was granted by this court under case number JS444/01. The court ordered that they be reinstated.

2. The applicant is seeking an order that it be declared that there has been a transfer of the business of Keep Inks to the second respondent (Hydro Colour Inks (Pty) Ltd as a going concern. Further that in terms of section 197A(2)(a) of the Act, the second respondent was substituted in the place of Keep Inks in the contracts of employment of the applicant's members. It is further seeking an order that the second respondent comply with the Court orders handed down under case number J5067/00 and J5067/00.

3. The referral is opposed by the second respondent on the basis that there was no transfer of a business as a going concern from the first respondent to the second respondent. The second respondent is not liable to the applicant since the second respondent was not a party to, or in any way involved in the proceedings referred to in paragraph 1 above. The second respondent had acquired from the liquidator (the first respondent) only the assets of the business.

The agreed statement of facts

4. This is the agreed statement of facts reached between the parties:

"4.1 The applicant acts on its own behalf as well as on behalf of the individual listed in annexure A to the applicant's statement of case ('the dismissed employees"). The applicant represented the dismissed members in Labour Court case Nos J5067/00 and JS444/01.

4.2. The dismissed employees were employed by Keep Inks at the time of their dismissals. At that stage Keep Inks operated as a Closed Corporation with the trading name Hydra Color. The sole member of Keep Inks was Gerald

Ralph Smail and his son Dwayne Smail managed the business. Keep Inks produced inks and varnish. In 2003 Keep Inks CC was converted into a company, Keep Inks SA (Pty) Ltd but continued to trade under the name Hydra Color.

4.3 On 9 September Keep Inks dismissed one of the dismissed employees, Molefe. The dismissal was referred to the Commission for Conciliation, Mediation and Arbitration ("CCMA"). The referral reflected the employer as Hydra Colour as the applicant was unaware that the employer was incorporated as Keeps Inks. Keep Inks participated in the CCMA proceedings and did not, at any stage, raise the incorrect citation. On 16 October the CCMA issued an award in terms of which Molefe was found to have been unfairly dismissed and was awarded compensation.

4.4 Keep Inks launched and application in the Labour Court to review the award under Case number J5067/00. Keep Inks cited itself as Hydro Colour CC in the application. As Keep Inks failed to furnish the record, the applicant launched an application in terms of section 158(1)(c) of the Labour Relations Act 66 of 1995 ("the LRA") to make the award an order of Court. The Labour Court granted the relief sought in case no J5067/00 on 5 June 2002.

4.5 Keep Inks launched a rescission application in respect of this order. The incorrect citation of Keep Inks was not raised. The application for rescission was refused on 15 January 2004. A writ of attachment was issued in terms of the Court order under J5067. Due to the liquidation of Keep Inks a sale in execution could not proceed.

4.6 On 8 December 2000 the remaining dismissed employees were dismissed by Keep Inks, ostensibly on the basis of Keep Inks' operational requirements.

The applicant referred a dispute about this dismissal to the CCMA once again citing Hydro Color as the employer. The dispute was eventually referred to the Labour Court for adjudication under Case No JS 444/01.

4.7 *Default judgment was granted on 5 June 2002 ordering retrospective reinstatement. Keep Inks brought an application to rescind the default judgment. The issue of the incorrect citation was not raised and the default judgement was rescinded. On 2 February when the trial roll was called Keeps Inks' attorney indicated that he had no opposition to the default judgment being taken against Keep Inks. Keep Inks attorney informed the Court that there was no opposition to default judgment because Keep Inks faced imminent liquidation. Default judgment was given.*

4.8 *On 2 February 2004, GR Smail the sole shareholder of Keep Inks passed a special resolution that the company be wound up voluntarily and that the winding up be a creditors voluntary winding up. Keep Inks was in the end finally liquidated. Keep Inks had assets of R80 000,00 and liabilities of R598 794,03.*

4.9 *On 3 February 2004 the Sheriff served a copy of the order on Keep Inks. Due to its liquidation Keep Inks did not comply with the order. At the time of the liquidation of Keep Inks GR Smail told Victor Bokaba one of the Keep Inks employees that alternative jobs would probably be found for them.*

4.10 *The second respondent operates from the same premises (at 29 Siemert Road, Doornfontein, Johannesburg) that Keep Inks did. The second respondent concluded a new lease with the landlord of the premises. The second respondent uses the same equipment and furnishings that were previously used by Keep Inks. The second respondent purchased the equipment from the*

liquidators of Keep Inks during May 2005, in terms of the agreement which is annexure "B" hereto. The second respondent manufacturers ink and varnish, as Keep Inks once did. Dwayne Smith managed Keep Inks and manages the second respondent.

4.11 *The second respondent employs all 12 workers who were employed by Keep Inks at the time of its liquidation. All of these workers are still doing exactly the same work as they were doing before, and their salaries were not reduced. Although the second respondent now employs the workers, their payslips still reflect their date of engagement with Keep Inks, reflecting their uninterrupted service. The workers are paid their 13th cheques on the anniversary of the date when they started with Keep Inks. The respondent has completed new PAYE and UIF documentation on behalf of these employees. The second respondent has, and Keep Inks had, a branch office at the same address (unit 2, 24 Ebony Fields, Springham Park Durban). The office in Durban was acquired from the liquidator by way of a new agreement with the landlord. The fax and phone numbers of the second respondent and Keep Inks are identical. The second respondent has a new account with Telkom. The main suppliers of chemicals to Hydro Colour Inks are the same as those who supplied chemicals to Keep Inks previously. The liquidator of Keep Inks settled all accounts with Keep Inks suppliers, and the second respondent now works these suppliers on a COD basis only.*

4.12 *GR Smail, who was the sole director of Keep Inks, is not a director of the second respondent. Dwayne Smail is the sole director of the second respondent. The second respondent is a corporate entity and legal persona distinct and separate from Keep Inks. The second respondent was never a*

party to the proceedings under case numbers J5067/00 and JS444/01 and did not conduct the business of Keep Inks at the time of such proceedings.

4.13 The logos of Keep Inks and the second respondent are attached as annexure A. There is a significant overlap between the customers of Keep Inks and those of the second respondent".

The application to amend

5. At the commencement of the proceedings the applicant applied to amend its statement of claim to include and order declaring that in terms of section 197A(2)(a) of the Act, the second respondent was substituted in place of Keep Inks in the contracts of employment of the applicant members numbered 2 to 7 in Annexure A to the applicant's statement of claim. Further for an order ordering the second respondent to comply with the Court order handed down under case number J5067/00.

6. The application was unopposed and was granted.

The Issues that the Court is required to decide

7. The parties agreed that the court must decide the following issues:

7.1 Whether there was a transfer as a going concern of the business of Keep Inks to the second respondent;

7.2 If so, whether the consequences of such a transfer are to be governed by section 197 or 197A of the Act;

7.3 If the consequences are to be governed by section 197A of the Act, whether this precludes the relief sought or any relief at all, being granted to the dismissed employees.

Analysis of the facts and arguments raised

8. The second respondent submitted that the only issue at stake is whether or not section 197 of the Act applies. The question is whether or not there was a transfer of a business as a going concern from the first respondent to the second respondent. If there was no transfer of such a business as a going concern that is the end of the matter. The sale agreement between the first and second respondents was clearly one only of a sale of assets, without any goodwill or any other aspects of the business, and not the sale of a business as a going concern. As such, section 197 of the Act cannot apply and that this should be the end of the enquiry. Section 197A of the Act precludes the granting of any relief against the second respondent and that the applicant should have pursued its claim against the first respondent as the liquidator of Keep Inks.

9. The second respondent agreed that the citation in case numbers J5067/00 and JS444/01 be altered from Hydra Colour to Keep Inks SA (Pty) Ltd.

10. Section 197 of the Act deals with a transfer of a contract of employment and provides as follows:

"(1) In this section and in section 197A -

(a) 'business' includes the whole or a part of any business, trade, undertaking or services; 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) -

(a) the new employer is automatically substituted in the place of the old employer in 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 old 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) .....

(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) .....

(7) .....

(8) .....

(9) .....

(10) .....".

11. Section 197A of the Act deals with transfer of contracts of employment in circumstances of insolvency and provides as follows:

"(1) This section applies to a transfer of a business -

(a) if the old employer is insolvent; or

(b) if a scheme of arrangement or compromise is being entered into to avoid winding-up or sequestration for reasons of insolvency.

(2) Despite the Insolvency Act, 1936 (Act 24 of 1936), if a transfer of a business takes place in the circumstances contemplated in subsection (1), unless otherwise agreed in terms of section 197 (6) -

(a) the new employer is automatically substituted in the place of the old employer in all contracts of employment in existence immediately before the old employer's provisional winding-up or sequestration;

(b) all the rights and obligations between the old employer and each employee at the time of the transfer remain rights and obligations between the old employer and each employee;

(c) anything done before the transfer by the old employer in respect of each employee is considered to have been done by the old employer;

(d) the transfer does not interrupt the employee's continuity of employment and the employee's contract of employment continues with the new employer as it with the old employer.

(3) Section 197(3), (4), (5) and (10) applies to a transfer in terms of this section and any reference to an agreement in that section must be read as a reference to an agreement contemplated in section 197(6).

(4) Section 197(5) applies to a collective agreement or arbitration binding on the employer immediately before the employer's provisional winding-up or sequestration.

(5) Section 197(7), (8) and (9) does not apply to a transfer in accordance with this section."

12. A transfer of a business must take place between two employers. The transfer agreement must be reduced to writing. In *National Education Health & Allied Workers Union v University of Cape Town & Others* (2003) 24 ILJ 95 (CC) the Court dealt with the issue of transfers and section 197 at page 115 as follows:

"There is divergence of opinion among the members of the LAC and the Labour Court on the purpose of s 197. The one view, represented by the majority of the LAC in this case, is that its primary purpose is to facilitate the transfer of businesses. The other view, represented by the minority judgment in the LAC in this case, maintains that the primary purpose of s197 is the protection of workers in the event of the transfer of the business. The latter view seeks support in comparable foreign instruments and cases construing such instruments.

It seems to me that the answer lies somewhere in between. That an important purpose of s197 is to protect the workers against the loss of employment in the event of a transfer of a business cannot be gainsaid. This conclusion is fortified not only by the effect of the section, but also by the very fact that the section was inserted in a chapter that deals with unfair dismissal. As pointed out earlier, at the core of this chapter is the right of the workers not to be dismissed unfairly. In addition, further support for this view can be found in comparable foreign instruments and foreign case law construing these instruments.

.....

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 safe 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 minimizing 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."

And further at pages 121 - 122.

"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 the 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'."

13. It is trite that the phrase "going concern" is not defined in the Act. It must therefore

be given its ordinary meaning unless the context shows otherwise. What is transferred must be a business in operation so that the business remains the same but in different hands. This must be determined objectively in the light of the circumstances of each transaction. It is further trite that whether a business has been transferred as a going concern, regard must be had to 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. This list of factors is not exhaustive and that none of them is decisive individually. They must all be considered in the overall assessment and therefore should not be considered in isolation.

14. In the *Nehawu* matter it was stated at page 120 at paragraph 58 that:

"The fact that the seller and the purchaser of the business have not agreed on the transfer of the workforce as part of the transaction does not disqualify the transaction from being a transfer of a business as going concern within the meaning of s 197. Each transaction must be considered on its own merit regard being had to the circumstances of the transaction in question. Only then can a determination be made as to whether the transaction constitutes the transfer of a business as a going concern.

15. This brings me to the question whether there was a transfer of the business of Keep Inks to the second respondent as a going concern. If no transfer of a business took place, the provisions of section 197A and 197 of the Act are not applicable and the

claim stands to be dismissed. The second respondent contended that there was no transfer whereas the applicant contended that there was a transfer.

16. It is clear from the statement of agreed facts that the second respondent operates from the same premises as Keeps Inks albeit in terms of a new lease agreement. It uses the same equipment and furnishings as Keep Inks. These were acquired by the second respondent from the liquidators of Keep Inks. The second respondent manufactures ink and varnish as Keep Inks did. Dwayne Smail managed Keep Inks and manages the second respondent. The second respondent employs all 12 workers who were employed by Keep Inks at the time of the liquidation. All of these workers are still doing the same work as they were doing before, and all their salaries were not reduced. Although the second respondent now employs the workers, their pay slips still reflect their date of engagement with Keep Inks reflecting their uninterrupted service. Furthermore, these workers are paid their 13th cheques on the anniversary of the date when they started with Keep Inks. The second respondent has completed new PAYE and UIF documentation on behalf of these employees. The second respondent has, and Keep Inks had, a branch office at the same address (Unit 2, 24 Ebony Fields, Springham Park, Durban). The office in Durban was acquired from the liquidator by way of a new agreement with the landlord. The fax and phone numbers of the second respondent and Keep Inks are identical. The second respondent has a new account with Telkom. The main suppliers of chemicals to the second respondent are the same as those who supplied chemicals to Keep Inks previously. The liquidator of Keep Inks settled all accounts with Keep Inks suppliers, and the second respondent now works with these supplies on a COD basis only. There is a significant overlap

between the customers of Keep Inks and those of the second respondent. GR Smail, who was the sole director of Keeps Inks, is not a director of the second respondent. Dwayne Smail is the sole director of the second respondent. The second respondent is a corporate entity and legal persona distinct and separate from Keep Inks. The second respondent was never a party to the proceedings under case number J5067/00 and JS444/01 and did not conduct the business of Keep Inks at the time of such proceedings.

17. The only factual issue in dispute on the pleadings in relation to the transfer is the applicant's allegations about the trading names and logos of Keep Inks and the second respondent. The logos are attached to the agreed statement of facts and appear to be substantially similar. However the trading names are for all intents and purposes, Hydra Color for Keep Inks and Hydra Colour for the second respondent.

18. As stated above it is trite that in dealing with the question of whether there has been a transfer of a business as a going concern it is a factual enquiry. Some factors that need to be considered in making this determination are:

    18.1 What happened to the goodwill of the business, the stock in trade, the premises, contacts with clients or customers, the workforce and the assets of the business;

    18.2 Whether there has been an interruption of the operation of the business and if so the duration thereof;

    18.3 Whether the same or similar activities are continued after the transfer.

19. The critical question here is essentially whether the business remained the same but in

different hands. I am of the view that the common cause facts point in the direction of the second respondent being the same business as Keep Inks in the hands of Dwayne Smail as opposed to GR Smail. For the reasons listed above I am satisfied that the business of Keeps Inks was transferred as a going concern to the second respondent.

20. It is common cause between the parties that Keeps Inks is insolvent. In determining the implications of the transfers as a going concern the provisions of section 197A and in particulars 197A(2)(a) of the Act must be considered which provides that the new employer is automatically substituted in the place of the old employer in all contracts of employment in existence immediately before the old employer's winding up or sequestration.

21. It is common cause that at the time of Keeps Inks winding up the retrenched employees had obtained orders of reinstatement. It is trite that reinstatement restores the contract of employment. The effect of section 197A(2)(a) in these circumstances is that in respect of the contracts of employment of the retrenched employees, revived by the reinstatement orders, the second respondent is automatically substituted for Keep Inks.

22. The second respondent had sought to rely on the provisions of section 197A(2)(b) and (c). I agree with the applicant that the reliance on the said section is entirely misplaced. The section deals with the rights and obligations and actions of the old employer *vis a vis* the new employer and have no bearing on the automatic transfer of contracts of employment. The second respondent would have had recourse to those section were the facts of this matter similar to those of *Transport Fleet Maintenance*

(Pty) Ltd v NUMSA [2003] 10 BLLR 975 (LAC). In that matter employees had obtained a non retrospective reinstatement award after a transfer in terms of section 197, as opposed to section 197A, had taken place. The facts of the present matter are different.

23. In the Molefe dismissal, he was awarded compensation rather than reinstatement and section 197A(2)(a) is not applicable. However it is clear from the provisions of section 197A(3) read with section 197(5)(b)(i) of the Act that the arbitration award which Molefe obtained in his favour is binding on the second respondent.

24. The application stands to be granted.

25. There is no reason why costs should not follow the result.

26. In the circumstances I make the following order:

26.1 The altering of the citation in case number J5067/00 and JS444/01 from Hydra Colour to Keep Inks SA (Pty) Ltd is granted.

26.2 It is declared that there has been a transfer of the business of Keep Inks to the second respondent as a going concern.

26.3 It is declared that in terms of section 197A(2)(a) of the Act, the second respondent was substituted in the place of Keep Inks in the contracts of the applicant's members who were retrenched and are referred to in Annexure A

to the applicant's statement of claim.

26.4 The second respondent is to comply with the Court order handed down under case number J5067/00.

26.5 The second respondent is to pay the costs of the application.

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FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT	:	C ORR INSTRUCTED BY CHEADLE THOMPSON HAYSOM
FOR THE RESPONDENT	:	ATTORNEY S SNYMAN
DATE OF JUDGMENT	:	8 NOVEMBER 2007