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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 410/2014

In the matter between:

Vukile GOMBA	**Applicant**
and	
CCMA	**First Respondent**
COMMISSIONER K KLEINOT	**Second Respondent**
NAMPAK TISSUE (PTY) LTD	**Third Respondent**
TWINSAVER HOLDINGS (PTY) LTD	**Fourth Respondent**

Heard: 1 June 2017

Delivered: 2 August 2017

Summary: LRA s 197 – transfer of business – joinder – application to join new employer and order new employer to give effect to order reinstating employee.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, Mr Vukile Gomba, was dismissed by his employer, Nampak Tissue (Pty) Ltd (the third respondent). He was reinstated by order of this Court, following a successful review of a CCMA award. But in the meantime, Nampak had been sold to Twinsaver Holdings (Pty) Ltd (the fourth respondent) as a going concern. Twinsaver refuses to reinstate him in its employ. The employee has brought an application to join Twinsaver and asks the Court to order it to give effect to the award that was imposed by the order of this Court.

Background facts and chronology

[2] Nampak dismissed the employee on 6 February 2014. He referred an unfair dismissal dispute to the CCMA. Commissioner Karen Kleinot (the second respondent) found in Nampak's favour on 29 April 2014, finding that the dismissal was fair.

[3] The employee brought an application to review that award. It was argued before Rabkin-Naicker J on 15 April 2015. Two weeks before, on 1 April 2015, Nampak's "tissue business" had been sold as a going concern to Twinsaver. The parties agreed that it was a transfer of a going concern as contemplated in s 197 of the Labour Relations Act.[1] That fact was not brought to the attention of the Court by Nampak's attorneys. (They are also Twinsaver's attorneys of record in these proceedings).

[4] Rabkin-Naicker J handed down her judgement on 20 August 2015. She reviewed and set aside the arbitration award and substituted it with the following award:

> "1. The dismissal of the applicant was substantively unfair;
>
> 2. The third respondent [Nampak] is ordered to reinstate the applicant into the position he held prior to his dismissal as from the date of dismissal;
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> 3. Such reinstatement is subject to a final written warning in respect of the taking of unauthorised leave, valid for a period of six months from the date of this order;

[1] Act 66 of 1995 (the LRA).

4. [Nampak] is to pay the costs of this application."

[5] Nampak applied for leave to appeal. It was dismissed on 30 October 2015. It petitioned the LAC. The petition was refused on 16 February 2016.

[6] On 20 May 2016, for the first time, Nampak's attorney, Ms Fiona Leppan of Cliffe Dekker Hofmeyr, told the employees then attorney, Mr Neels van Rooyen of Bagraims, that "the section 197 transfer of Nampak tissue to transfer occurred on 15 February 2015." She alleged that "we were not aware of this date when the matter was argued before the Labour Court and the appeal".[2]

[7] It subsequently transpired that that date was wrong and that the s 197 transfer had in fact occurred on 1 April 2015.

[8] Lengthy correspondence ensued between the parties and their respective attorneys. Twinsaver refused to reinstate the employee. Ms Leppan pointed out that Nampak had paid the employee an amount of R 327 457, 99. That amount equated to the back pay owing to him only from his dismissal to the date of judgement in the review application, namely 20 August 2015. He has still not been reinstated.

[9] In August and again in October 2016 Nampak offered the employee the option of a vacancy at its Bevcan operation. It told him to take up the offer by 21 October 2016 "and to provide his updated CV and personal details upon doing so". It also required proof of his qualifications as an electrician. He did not take up that offer, arguing that he was entitled to be reinstated by the new employer (Twinsaver) without more, and without having to provide any updated details or proof of qualifications.

Evaluation / Analysis

[10] Sadly, common sense has not prevailed in this matter. Both parties have been intransigent. Twinsaver has steadfastly refused to accept that it was under an obligation to reinstate the employee pursuant to the provisions of section 197 of the LRA. The employee refused to accept the sensible offer

[2] In these proceedings, Ms Leppan and Cliffe Dekker Hofmeyr are the attorneys of record for the fourth respondent, Twinsaver. The employee is now represented by Mr Wayne Field of Bernadt Vukic Potash & Getz.

of an equivalent position at Nampak's Bevcan operation. And Nampak insisted on him providing an updated CV and proof of his qualifications, despite the fact that it must have had those details of its former employee. The intransigence of both parties has given rise to this litigation and has resulted in a lengthy delay and significant legal costs, to the benefit only of their attorneys.

[11] Twinsaver now argues that the employee has compromised its claim because he has accepted the money paid to him by Nampak; and because he, on its version, had in fact accepted the alternative position at Bevcan. It also argues that the employee remained dismissed at the time of the section 197 transfer on 1 April 2015, and that this contract of employment could not be transferred to Twinsaver. And finally Mr *Van As* submitted that there are no live proceedings before court and that the application for joinder should fail on that basis.

The legal position

[12] The legal position is covered by s 197 of the LRA. The relevant subsections read as follows:

> "(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 –
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> (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."

[13] Clearly, in this case, the new employer (Twinsaver) is bound by the arbitration award against the old employer (Nampak). It was not "otherwise agreed" between them.

[14] To argue, as Twinsaver does, that it is not bound because Gomba was not an employee at the time of the transfer (he was dismissed at the time), would make a mockery of the intention of the legislature. This Court ordered his retrospective reinstatement, i.e. to a date before the transfer. The new employer is bound by that court order and the award, as substituted by this Court.

[15] Mr *Field* referred in this regard to *Transport Fleet Maintenance v NUMSA*[3]. In that case, the transfer of the business from the old employer to the new employer took place before the arbitration award was issued. The LAC nevertheless held that the award was binding on the new employer. And in *Edgars Consolidated Stores (Pty) Ltd v SACCAWU*[4] it was held that the term "immediately" includes two factors, namely the arbitration award and the transfer of the business. The provision is not concerned with the date when the award was issued; it is concerned with the question whether the old employer "immediately before" the transfer was bound by the award. In this case, the initial award was issued a year before the transfer. That award was substituted by a new one by this court, but it applied retrospectively. It therefore bound the old employer immediately before the transfer, and it binds the new employer subsequently.

[16] The Labour Appeal Court very recently dealt with the application of s 197(5) in *High Rustenburg Estate (Pty) Ltd v NEHAWU*[5]. The issue was – as it is in this case -- "whether s 197 (5) of the LRA applies to an arbitration award which is reversed by the Labour Court but only after the transfer of the relevant undertaking had taken place". Davis JA noted:

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[3] (2004) 25 *ILJ* 104 (LAC).

[4] (2010) 31 *ILJ* 2578 (LC).

[5] [2017] ZALAC 20; (2017) 38 *ILJ* 1758 (LAC) (23 March 2017) paras 11 and 14-15.

"It is clear that the purpose of the section was intended to ensure that all rights and obligations between the employer selling the business and each employee at the time of the transfer to the purchaser continue in force as if they were rights and obligations between the purchaser, being the new employer, and each employee. It is the former who then bears a duty to fulfil the relevant obligations.

The question which arises is whether a decision by the Labour Court to set aside an award and substitute it with a finding that an unfair dismissal had occurred, which would justify the payment of compensation, takes place at the time of the breach or, at least, at the time of the finding of the arbitrator which has now been set aside. If that is the case, then clearly the arbitration award would be binding on the old employer in respect of employees to be transferred and accordingly would be binding upon the new employer."

[17] He concluded:[6]

"[19] It cannot be that the right which the employees hold over a new employer, pursuant to a transfer of an undertaking as a going concern, depends on the stage of the appeal or review at which the litigation finds itself at the point of transfer. The wording of the section is clear, an arbitration award that can bind the old employer immediately before the date of transfer in respect of the employees to be transferred binds the new employer.

[20] The arbitration award must bind the old employer in the circumstances of this dispute because all that has occurred is that the Labour Court substituted a correct award, in its view, for the incorrect award which had previously been made. That the Labour Court has substituted the award does not detract from the conclusion that this was an award which bound the old employer immediately before the date of transfer because the substituted award must be deemed to take effect from that date.

[21] Mr Joubert made much of the argument that the new employer, being the appellant, had to be joined to proceedings certainly before the attachment of its property to be effected. This was the basis of the previous decision of this Court to which I have made reference. The purpose of the

[6] Paras 19-21.

> initial order of this Court, was that because the new employer had not been heard, a stated case should be decided by the court a quo in circumstances where the appellant, being the new employer, would have an opportunity to present its case. If an attachment of property takes place, it does appear that the new employer has to be joined to such proceedings. However, the question of joinder cannot on its own trump the wording of s 197 (5) of the LRA, read in terms of its purpose, namely that if an award is binding on the old employer it is deemed to be binding on the new employer. The fact that the Labour Court substitutes the formulation of the award for the one which is set aside cannot detract from this conclusion, for, if it did, it would ultimately damage the very purpose of s 197, namely to protect employee rights in the context of a sale of a business as a going concern. These rights flowed from an arbitration award, albeit one that required substitution by the Labour Court."

[18] It is for precisely those reasons that this application for joinder should be granted. The arbitration award – as substituted by this Court – bond the old employer immediately before the date of transfer and therefore it binds the new employer, Twinsaver.

Did the employee compromise his claim?

[19] But even if this is the correct legal position, Mr *Van As* argued, it does not find application on the facts of this case as the employee has compromised his position. Firstly, he argued, Nampak had paid him back pay and had therefore complied with the monetary part of the judgement. And secondly, there is a material dispute of fact on the papers as to whether the employee accepted the alternative position offered to him at Bevcan. If he did, it would compromise his claim and constitute a waiver of any entitlement to reinstatement.

[20] It is common cause that Nampak paid the employee R327 457, 99. But that only covers his backpay from the date of his dismissal to the date of the judgment in the review application, 20 August 2015. It does not compromise his entitlement to reinstatement.

[21] The offer of alternative employment at Bevcan is also not in dispute. What is in dispute, is whether the employee accepted it. He denies accepting it

in his replying affidavit. But the fact is that he did not report for duty at Bevcan. And in any event, he is entitled to be reinstated by Twinsaver (the new employer). The offer if alternative employment at Bevcan, subject to his providing it with an updated CV and proof of his qualifications, was made by Nampak. It did not extinguish or compromise his claim against Twinsaver.

No live dispute?

[22] Shortly before this matter was argued, Mr *Van As* submitted supplementary heads of argument to the effect that the application to join Twinsaver should be refused as there is no live dispute before the parties. He argued that the relief the employee seeks is compliance with a court order; that there are no live proceedings before this Court; and the applicant should rather have sought to substitute Twinsaver for Nampak. He relied for these submissions on a judgment of Prinsloo J in *GIWUSA v Johannesburg Foundry cc.*[7] In considering an application for joinder, the Court held:

> "[16] It is trite and in accordance with the provisions of rule 22 of the Rules of this Court that in order for parties to be joined to particular proceedings, they must have a direct and substantial legal interest in the matter such as to make them necessary parties to the proceedings. Whether a section 197 transfer indeed took place is relevant to decide whether the Company has a direct and substantial interest and whether it would be directly affected by the outcome of the trial and the Court's order.
>
> [17] In my view the question whether or not there was a transfer as contemplated in section 197 of the Act, should only be considered after the question whether there are proceedings to which the Company could be joined, has been decided.
>
> [18] The question whether the Company has a direct and substantial interest, only becomes relevant if it is competent to join the Company to the pending proceedings.
>
> <u>Joinder</u>

[7] [2017] ZALCJHB 57 (17 February 2017) paras 16-21.

[19] Rule 22 of the Rules of this Court provides for joinder 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 and 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.

(b) When making an order in terms of paragraph (a), the court may give such directions as to the further procedure in the proceedings as it deems fit, and may make an order as to costs."

[20] This Court may join 'persons as parties in proceedings' and in considering any application for joinder, the point of departure is to establish whether there are proceedings to which parties could be joined.

[21] In *Du Preez v LS Pressings CC & Another* this Court has confirmed that joinder in terms of rule 22 is in respect of proceedings before Court and that the purpose of a joinder is to allow participation in live proceedings."

[23] I take no issue with the legal principles as summarised by the learned judge. But the facts of that case are to be distinguished from the one before me. In that case, there was a dispute over the question whether or not there had been a s 197 transfer; and the employer that had retrenched the employees had been liquidated. The facts in this case are more in line with those in *High Rustenburg Hydro.* The s 197 transfer is undisputed; so is the fact that the effect of this Court's earlier order is an award of reinstatement. the employee has never abandoned his claim – a far cry from *Johannesburg Foundry* where, the Court noted, "the status of the proceedings before this Court is and remains 'abandoned'."[8]

Conclusion

[24] The applicant must be reinstated by the new employer, Twinsaver, in order to give effect to the arbitration award in his favour (as substituted by

[8] Par 26.

this Court on review) against the old employer, Nampak, in order to give effect to the provisions of s 197 of the LRA. And in order to give effect to that order, Twinsaver must be joined to these proceedings.

Costs

[25] The applicant has been successful. In law, he should be entitled to his costs. But, as I noted above, both parties have been intransigent. The applicant could have gone back to work at another division of his old employer on the same terms and conditions. All he had to do was to provide proof of his qualifications and an updated CV. And although it seems petty of Nampak to ask for details that it presumably had, it was not much to ask of someone who, according to him, was desperate to get back to work. The subsequent legal costs were largely preventable and unnecessary. In fairness, as contemplated by s 162 of the LRA, I do not believe that a costs order is appropriate.

Order

[26] I therefore make the following order:

26.1 Twinsaver Holdings (Pty) Ltd is joined as the fourth respondent in this application.

26.2 The fourth respondent, Twinsaver, is ordered to comply with the order of this Court [Rabkin-Naicker J] of 20 August 2015 under this case number by no later than 18 August 2017.

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Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Wayne Field of Bernadt Vukic Potash & Getz.
FOURTH RESPONDENT:	M J van As Instructed by Cliffe Dekker Hofmeyr Inc.