IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA 11/2016

In the matter between:

HIGH RUSTENBURG ESTATE (PTY) LTD **Appellant**

and

NEHAWU OBO J CORNELIUS AND 17 OTHERS **First Respondent**

HIGH RUSTENBURG HYDRO (PTY) LTD **Second Respondent**

Heard: **02 March 2017**

Delivered: **23 March 2017**

JUDGMENT

DAVIS JA

Introduction

[1] This is an appeal against the following order of the Labour Court on 10 February 2016:

> 'The rights which the claimants had, following their unfair dismissal by Hydro, were rights which were transferred to appellant by virtue of s 197 of the Labour Relations Act 66 of 1995 ("the LRA").

> The writ of execution under case number C459/04 issued by the respondent, on behalf of the said members, was lawfully issued and the assets attached pursuant to such writ "*may be sold in order to satisfy the claimants of the appellant's members*".'

[2] This case has a regrettably long history. Briefly, first respondent, acting on behalf of 18 individual employees who were dismissed by the second respondent, High Rustenburg Hydro (Pty) Ltd t/a High Rustenburg Hydro ("HRH"), instituted proceedings in the CCMA against HRH on the basis that the dismissal of the 18 employees was unfair. When the proceedings before the CCMA were unsuccessful, the first respondent proceeded to apply for a review of the award before the Labour Court. The review application was issued on 12 November 2004. For a range of reasons, which were set out by Gush AJ (as he then was) in a judgment of 29 January 2008, the case took an extremely long time to be heard. Nonetheless the first respondent was successful before the Labour Court and Gush AJ ordered HRH to pay compensation to the dismissed employees in an amount equivalent to twelve months' remuneration. While the review proceedings were pending, HRH (Pty) Ltd sold the business of HRH as a going concern to iProp (Pty) Ltd ("iProp") in terms of a sale agreement of 17 May 2006. It appeared that iProp purchased 100% of the shares in the appellant, namely High Rustenburg Estate (Pty) Ltd, and then sold the HRH business as a going concern to appellant in which it held 100% of the shares. Hence, by the time that Gush AJ delivered judgment, the appellant had become the proprietor of HRH.

[3] Following the judgment of Gush AJ, the Sheriff attached property at HRH in execution of the judgment of the Labour Court. Appellant challenged the validity of this attachment in the Labour Court, which held that it was appropriate to apply interpleader proceedings in terms of High Court Rule 58 to this situation and further held that, by reason of s 197 of the LRA, the first respondent was entitled to enforce its claim against the appellant. On appeal to this Court, it was held that the appellant had not been afforded an opportunity of opposing the application which led to the attachment of its property. Therefore, it held that the matter

should be referred back to the Labour Court on the basis of a stated case. In this judgment the Labour Appeal Court summarised its finding thus:

> ''In the present dispute, the significant question for resolution is whether s 197 of the Act can be invoked against appellant, in circumstance where, it is common cause, it had no notice of the proceedings which gave rise to the application of this section and which were then used against it to its detriment by this issue of a writ against its property.
>
> In my view, once interpleader proceedings are initiated, and an issue is raised as to the applicability thereof. Rule 58 provides a basis by which to deal with this kind of dispute, particularly as appellant had not been joined in the proceedings which gave rise to the attachment of its property. Thus, appellant had not been afforded an opportunity to oppose the application of s 197 of the Act. Accordingly, in terms of Rule 58 (6) (c) of the Uniform Rules of the High Court, this dispute should be resolved in terms of a stated case to be brought before the Labour Court in which the question of the automatic application of s 197 is determined with the benefit of argument from all affected parties.'

[4] The stated case was heard by Rabin-Naicker J in the Labour Court. The learned Judge found that s 197 (5) of the LRA applies to an arbitration award which was reversed and then substituted by the Labour Court only after the transfer of the relevant undertaking has taken place. It is against this finding that the present appeal was lodged.

Appellant's case

[5] Mr Joubert, who appeared on behalf of the appellant, correctly noted that the issue for determination both before the court *a quo* and this Court was "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". Mr Joubert firstly referred to the previous judgment of this Court, to which I have already made reference, and contended that this Court had already made two critical findings, namely, that a writ cannot be issued against the property of a

person against whom there is no judgment, and further that the new employer would not have had an opportunity to oppose the application of s 197 nor would it have been able to join other parties that might be liable for an award made in terms of the judgment. He further contended that the old employer should have informed the Court to which the review application had been made that an agreement of sale had been concluded.

[6] On this basis, Mr Joubert submitted that by making these findings this Court had already, in effect, held that s 197 (5) of the LRA cannot apply to the circumstances of this case.

[7] Mr Joubert referred to the decision in *Anglo Office Supplies (Pty) Ltd v Roger Lotz* (2008) 29 ILJ 953 (LAC) and submitted that this decision had made clear that since the rights that an employee holds against the old employer become rights against the new employer, in cases where the employee has instituted proceedings against the old employer, these proceedings must be pursued against the new employer instead of the old employer. In short, as the LAC had held in that case:

> 'The result would be that if the dismissal is found after the transfer of the business, to have been unfair any order of reinstatement would have to be made against the new employer.' (para 22)

He further referred to the judgment in *Ngema and others v Screenex Wire Waring Manufacturers (Pty) Ltd and another* (2013) 34 ILJ 1470 (LAC) (*Ngema*) where it was held that the new employer could not be substituted as judgment debtor in a case where the business was transferred prior to a reinstatement order made against the old employer by the Labour Court due to the fact that the new employer had not been joined in those proceedings.

[8] In particular, Mr Joubert emphasised the following passages from the judgment in *Ngema* at paras 13-14:

> 'The appellants manifestly enjoyed the same rights against the new employer as they held against the old employer by operation of law, namely s 197 of the LRA. But that did not mean that there was no requirement that the employees as holders of these rights should not be required to pursue them against the new employer, if they wished to enforce them against the latter party. As Navsa JA stated in *Ex Parte Body Corporate of Caroline Court* 2001 (4) SA 1230 (SCA) at para 9:
>
> 'It is a principle of our law that interested parties should be afforded an opportunity to be heard in matters in which they have a direct and substantial interest.' See also *Amalgamated Engineering Union*, supra at 651.
>
> In this case, the second respondent must, save if there is an express exclusion of its rights in terms of the LRA, enjoy the same rights to be heard as is set out in these *dicta*. There is no express exclusion in the LRA that an interested party, such as second respondent, should not be afforded an opportunity to be heard in a matter where it has a direct and substantial interest. In this case, the dispute was no longer about whether the appellants had been unfairly dismissed. That issue had been disposed of by this Court in the judgment of Zondo JP who dismissed an appeal against the judgment and order of Hendricks AJ to the effect that the dismissal of the appellants was both procedurally and substantially unfair. That did not mean that the second respondent did not have the right to be heard with regard to the question of the appropriate remedy.'

[9] In short, the submission of Mr Joubert was to the effect that a new employer can and must be joined to the proceedings and an order obtained against an old employer cannot simply be executed against a new employer, even less so when the new employer was not made a party to the proceedings.

[10] Mr Joubert further sought recourse for this submission in the provision of s 197 (5) of the LRA. It provides:

> '(5) (a) For the purposes of this subsection, the collective agreements and arbitration awards referred to in paragraph (b) and 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

(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.'

[11] Mr Joubert submitted that this provision, by referring to arbitration awards which bound the old employer before the transfer of the business, meant that the legislature had made it clear that a favourable award subsequently set aside on review was not to be included. In his view, this was not the intention of the legislature as s 197 (5) of the LRA could simply have provided that a new employer is bound by arbitration awards adverse to the old employer. Adverse awards made pre the transfer as well as favourable awards set aside on review post the transfer would then be effected by s 197 (5) of the LRA. In order to guard against a breach of the *audi alteram partem* principle, the legislature had limited the operation of s 197 (5) of the LRA to awards that bound an old employer before the transfer of the business.

Evaluation

[12] As Mr Oosthuizen, who appeared together Ms Tsegarie on behalf of respondents noted, s 197 (5) of the LRA needs to be read in the context of the provision as a whole. In particular s 197 (2) provides thus:

'(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 respect of 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 new 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.'

[13] As Ngcobo J (as he then was) said in *Nehawu v University of Cape Town and Others* 2003 (24) ILJ 95 (CC) at paras 46-53:

> 'That an important purpose of s 197 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…
>
> The section aims at minimizing the tension and the resultant labour disputes that often arise from the sales of business 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 works against unfair job losses.'

[14] 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.

[15] 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.

[16] As noted Mr Joubert contended that this Court has already decided the question for determination by this Court in *Ngema*. In that case, the facts were briefly as follows. In July and August 2005 the old employer embarked on a retrenchment process with employees. In December 2005 the old employer dismissed the employees for operational requirements. This gave rise to a dispute with the old employer which was heard in the Labour Court. Some months later in March 2006, the business of the old employer was sold as a going concern to the new employer. In August 2007 the Labour Court ordered that the employees be reinstated by the old employer. A month later in September 2007 the shareholding in the new employer was sold to a third party. From that time on, the new employer traded in a form of a new company. In September 2009 this Court dismissed an appeal by the old employer against the reinstatement order which had been made by the Labour Court. A year later in May 2010 the employees brought an application in which they sought to substitute the new employer as judgment creditor in the reinstatement order.

[17] Two questions were raised, namely whether the effect of s 197 of the LRA automatically gives rise to a joinder or a substitution of the new employer as a judgment debtor in relief obtained against the old employer and, further, whether s 197 has an effect of trumping established principles relating to joinder. Critical to the finding in *Ngema* that the new employer had to be joined to the

proceedings was that, in *Ngema,* the disputed issue related to reinstatement based on s 193 (2) of the LRA which provides for circumstances where a court may refuse to reinstate or reemploy the employees in question. This Court found that the new employer, at the very least, was entitled to be heard on the specific question of relief. Thus, "the appellants proper cause of action should therefore be to ensure that the second respondent (new employer) was joined to the proceedings so that it could be heard on a matter in which it had a direct or substantial interest namely the appropriate relief". (para 15)

[18] In my view, this case is distinguishable from the present dispute. The present dispute turns on a different question, namely whether a substitution of an arbitration award made after the transfer of the business from an old employer to a new employer binds the new employer in that the award is deemed to have taken effect at the very least from the date on which it was made, albeit incorrectly, given the successful review decision by the Labour Court which substituted the correct order for the incorrect one.

[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 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.

[22] As the order or the Labour Court was that s 197 (5) applies to an arbitration award which was reversed by the Labour Court but only after the transfer of the relevant undertaking had taken place, it is that order which is the subject of this appeal. That order and not the issue of non joinder constituted the scope of the stated case.

[23] For the reasons that I have set out, there is no basis by which this finding can be held to be incorrect and accordingly the appeal is dismissed with costs, including the costs of two counsel.

_____

Davis JA

Hlophe and Kathree-Setiloane AJJA concurred.

APPEARANCES:

FOR THE APPELLANT:	Adv Con Joubert SC
	Instructed by Werksmans Attorneys
FOR THE RESPONDENTS:	Adv C Oosthuizen SC
	Instructed by Thaanwane Attorneys