IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
[HELD AT JOHANNESBURG]

CASE NO: JA48/07
JA77/09

In the matter between:

HYDRO COLOUR INKS (PTY) LTD **APPELLANT**

AND

CHEMICAL, ENERGY, PAPER, PRINTING, WOOD AND ALLIED WORKERS' UNION **RESPONDENT**

Coram: Tlaletsi JA, Zondi AJA and Molemela AJA

JUDGMENT

Tlaletsi JA

Introduction

[1] This matter concerns two appeals which have been consolidated. The first appeal is brought by Hydro Colour Inks (Pty) Ltd against a judgment of Francis J sitting in the Labour Court at Johannesburg. Francis J made an order in the following terms:

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

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

1.3 It is declared that in terms of section 197A (2)(a) of the Labour Relations 66 of 1995 ("the Act"), the second respondent was substituted in the place of Keep Inks in the contracts of the respondent's members who were retrenched and are referred to in Annexure "A" to the respondent's statement of claim;

1.4 The appellant is to comply with the court order handed down under case number J5067/00; and

1.5 The appellant is to pay the costs of the application.

[2] The second appeal is against the judgment and order of Molahlehi J sitting in the labour court, Johannesburg in an application brought by Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union on behalf of its member, Molefe. The Union ("the respondent") sought an order varying the order of Francis J referred to above for it to reflect that Molefe is one of the employees referred to in Annexure 'A' in paragraph 1.3 above. Molahlehi J dismissed the application for variation with costs and granted leave to appeal in a subsequent application for leave to appeal brought by the respondent.

[3] During the hearing of the appeal, counsel's attention was drawn to the fact that notwithstanding an incorrect allegation in the agreed statement of facts that gives the impression that Molefe was granted an award of compensation only when he challenged the fairness of his dismissal, his name was reflected

in Annexure 'A' and as such stood to benefit together with the rest of the employees whose names appear in Annexure 'A'. The fact of the matter is that Molefe was granted an award for both compensation and reinstatement. The confusion arose from the statement of agreed facts in which an impression was created that Molefe was granted an award for compensation only. Strangely, the appellant took a stance that the respondent was bound by the incorrect recording in the statement of agreed facts and contended that Molefe was not entitled to be reinstated. The effect of this contention is that an incorrect recording is capable of rescinding an award which in this case has been made an order of court. This contention has no merit. Be that as it may, in essence the order sought to be varied for Molefe's benefit is not against but in his favour. Both counsel conceded that in light of what this Court drew to their attention, the application for variation ought not to have been instituted. The appeal on this leg was consequently not pursued further.

[4] The matter that served before Francis J was based on the agreed statement of facts. The facts agreed upon were the following:

"1. The applicant acts on its own behalf as well as on behalf of the individuals 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 and JS444/01.

2. The dismissed employees were employed by Keep Inks at the time of their dismissals.

3. *At that stage Keep Inks operated as a Close Corporation with the trading name Hydra Color.*

4. *The sole member of Keep Inks was Gerald Ralph Smail and his son Dwyne Smail managed the business.*

5. *Keep Inks produced Inks and varnish.*

6. *In 2003 Keep Inks CC was converted into a company, Keep Inks SA (Pty) Ltd but continued to trade under the name Hydra Color.*

7. *On 9 September 1999 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 Color as the applicant was unaware that the employer was incorporated as Keep Inks.*

8. *Keep Inks participated in the CCMA proceedings and did not, at any stage, raise the incorrect citation.*

9. *On 16 October the CCMA issued an award in terms of which Molefe was found to have been unfairly dismissed and was awarded compensation.*

10. *Keep Inks launched an application in the Labour Court to review the award under Case No J5067/00. Keep Inks cited itself as Hydra Color 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 No 66 of 1995 ("LRA") to make the award an order of Court.

11. *The Labour Court granted the relief sought in Case No J5067/00 on 5 June 2002.*

12. *Keep Inks launched a rescission application in respect of this order. The correct citation of Keep Inks was not raised. The application for rescission was refused on 15 January 2004.*

13. *A writ of attachment was issued in terms of the Court order under J5067/00. Due to the liquidation of Keep Inks a sale in execution could not proceed.*

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

15. *The applicant referred a dispute about this dismissal to the CCMA once again citing Hydro Color as the employer.*

16. *The dispute was eventually referred to the Labour Court for adjudication under Case No JS444/01. Default judgment was granted on 5 June 2002 ordering retrospective reinstatement.*

17. *Keep Inks brought an application to rescind the default judgment. The issue of the incorrect citation was not raised and the default judgment was rescinded.*

18. *The matter was enrolled for trial on 2 February 2004, following the conclusion of a pre-trial minute between the parties in which it was agreed that the identity of Keep Inks was Hydra Color.*

19. *On 2 February when the trial roll was called Keep Inks' attorney indicated that he had no opposition to 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 immanent liquidation. Default judgment was given.*

20. *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 voluntarily winding up. Keep Inks was in the end finally liquidated.*

21. *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.*

22. *At the time of the liquidation of Keep Inks G R Smail told Victor Bokaba one of the Keep Inks employees that alternative jobs would probably be found for them.*

23. *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.*

24. *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.*

25. *The second respondent manufactures ink and varnish, as Keep Inks once did.*

26. *Dwyne Smail managed Keep Inks and manages the second respondent.*

27. *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 as they were doing before, and their salaries were not reduced.*

28. *Although the second respondent now employs the workers, their payslips still reflect their 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.*

29. *The second respondent has completed new PAYE and UIF documentation on behalf of these employees.*

30. *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.*

31. The fax and phone numbers of the second respondent and Keep Inks are identical. The second respondent has a new account with Telkom.

32. 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 with these suppliers on a COD basis only.

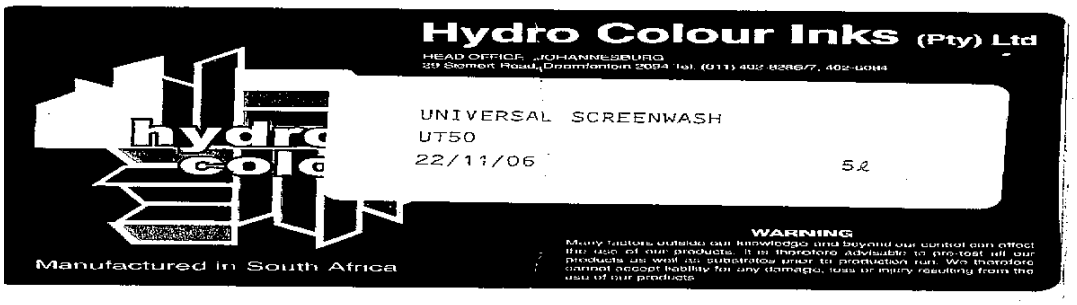
33. GR Smail, who was the sole director of Keep Inks, is not a director of the second respondent. Dwyne Smail is the sole director of the second respondent. The second respondent is a corporate entity and a legal persona distinct and separate from Keep Inks. The second respondent was never a party to 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.

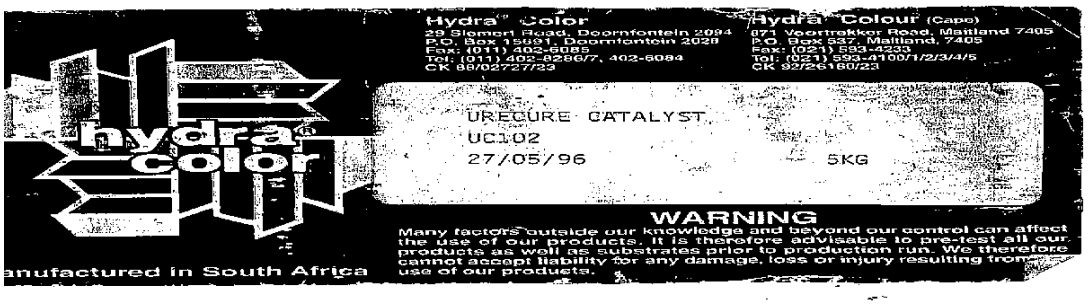
34. The logos of Keep Inks and the second respondent are attached as annexure A.

35. *There is a significant overlap between the customers of Keep Inks and those of the second respondent*."

[5] In addition to the above agreed facts, it is common cause that the logos of Keep Inks and Hydro Colour referred to above are as reflected hereunder. It is only proper for a better understanding of this issue that the logos be incorporated in

the judgement and not only a conclusion on whether they are substantially similar or not.





[6] The labour court in its judgment recorded that the parties were in agreement that the court had to decide:

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

6.2 If so, whether the consequences of such transfer are to be governed by section 197 or 197A of the Act.

6.3 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.

[7] The labour court after considering and analysing a number of decisions on the subject, found that the business of Keeps Inks had in fact transferred as a going concern to Hydro Colour Inks (Pty) Ltd and that in terms of section 197A(2)(a) of the Act

Hydro Colour Inks Pty Ltd (Pty) Ltd was substituted in the place of Keep Inks in the contracts of the union members who were retrenched.

The Appeal

[8] Before us, the appellant challenged the correctness of the findings of the court *a quo*. Mr Snyman who appeared on behalf of the appellant contended in the main that the labour court erred in finding that there had been a transfer of a business as a going concern. He argued that in considering whether there has been a transfer of a business as a going concern, the labour court ought to have taken into account the distinction between sections 197 and 197A and adopted an approach that the new owner should not be lightly burdened with the consequences of failures of the business of the insolvent owner. Mr Snyman argued further that the court order re-instating the rest of the employees was not in existence at the time of the old employer's winding up or sequestration and as such there were no contracts of employment that could automatically transfer to the new employer.

[9] Mr Orr who appeared on behalf of the respondent contended that the labour court made a correct finding both on the law and facts and that there is no basis for interfering with its order.

The Legal Framework

[10] The relevant provisions of section 197 read as follows:

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

(a) 'business' includes the whole or a part of any business, trade, undertaking or service; 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 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."

[11] Section 197A headed *"Transfer of contract of employment in circumstances of insolvency"* provides that:

"(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 if 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." (My emphasis).

[12] The meaning and effect of section 197 has been a subject of legal debate and judicial interpretation. The now authoritative and applicable interpretation is that enunciated in the minority judgment of Zondo JP in ***National Education Health and Allied Workers Union v University of Cape Town*** **and Others 2002 23 ILJ 306 (LAC)** as well as the subsequent decision of the Constitutional Court on appeal in the same matter, **National Education Health and Allied Workers Union v University of Cape Town Others (2003) 24 ILJ 95 (CC)**. The principles enunciated in these authorities may be summarised as hereunder:

(i) Since the phrase "going concern" is not defined in the Act, it must be given its ordinary meaning unless the context indicates otherwise;

(ii) What is transferred must be a business in operation so that the business remains the same but in different hands;

(iii) A determination of whether a business has been transferred as a going concern is a matter of objective

determination in the light of the circumstances of each transaction;

(iv) In deciding whether a business has been transferred as a going concern, regard must be had to the substance and not the form of the transaction,

(v) There are a number of factors that are relevant in determining whether or not a business has been transferred as going concern, such as, but not limited to: what will happen to the goodwill of the business, stock-in-trade, the premises of the business, contracts with clients or customers, the workforce, the assets of the business, the debts of the business, whether there has been interruption of the operation of the business and if so, the duration thereof, whether same or similar activities are continued after the transfer or not.

(vi) All the factors referred to above are not exhaustive and none of them is decisive individually.

(vii) These factors must all be considered in the overall assessment and should therefore not be considered in isolation.

See also **SA Municipal Workers Union and Others v Rand Airport Management Co (PTY) LTD and Others (2005) 26 ILJ 67 (LAC)**, **Ponties Panel Beaters Partnership v National Union of Metal Workers of South Africa and Others** (case no: JA 43/06)[2008] 12 (2 September 2008)

[13] The parties in this matter have accepted that Keep Inks was insolvent and for that purpose section 197A of the Act would apply. The authorities that I have referred to above dealt with a situation where section 197 was applicable. In my view the same principles would apply in determining whether a

business has been transferred as a going concern for the purposes of section 197A, save for the consequences of such transfer. Furthermore, section 197 (1) quoted above, defines the words "business" and "transfer" as having the meaning in both sections 197 and 197A. There is no indication in the Act that the two words in the same section were intended to have different meanings depending on the circumstances.

[14] In light of the above, it is in my view apposite to determine first whether there has been a transfer of business as a going concern from Keep Inks to Hydro Colour (Pty) Ltd. In the event of a finding that there was no transfer of business as a going concern, then it would be the end of the enquiry. A finding to the contrary would then require a determination of the consequences of such a transfer in terms of section 197A.

Was there a transfer in terms of section 197?

[15] The following facts extracted from the statement of agreed facts play an important role in an answer to this question.

15.1 The appellant operates from the same premise as Keep Inks albeit in terms of a new lease agreement.

15.2 The appellant uses the same equipment and furnishings as Keeps Inks and ownership of these items was acquired by the appellant from the liquidators of keeps Ink;

15.3 The appellant manufactures ink and vanish as Keep Ink did;

15.4 Dwayne Smail who manages Keeps Ink is now managing the appellant;

15.5 The appellant has and Keep Inks had a branch office at the same address (unit 2, 24 Ebony Fields, Springham

Park, Durban). The Durban office was acquired from the liquidators by way of a new agreement with the landlord.

15.6 The fax and phone numbers of the appellant and Keeps Inks are identical.

15.7 The appellant employs all 12 workers who were employed by Keeps Inks at the time of the liquidation. The employees are still doing exactly the same work they were doing before, and their salaries have remained the same;

15.8 Although it is now the appellant who has employed these workers, their payslips still reflect their date of engagement with Keeps Inks reflecting their uninterrupted service.

15.9 The workers are paid their 13th cheque on the anniversary of the date when they started with Keep Inks;

15.10 The appellant completed new Pay As You Earn (PAYE) and Unemployment Insurance Fund (UIF) documentation on behalf of these employees and they, according to the bundle of documents which is part of the record, began contributing to the UIF on 1 March 2004;

15.11 The main suppliers of chemicals to the appellant are the same as those who supplied chemicals to Keep Inks previously. The liquidators of Keep Inks settled all account with Keep Inks suppliers, and the appellant now works with these suppliers on a Cash on Delivery (COD) basis only;

15.12 There is a significant overlap between the customers of Keep Inks and those of the appellant;

15.13 GR Smail, who was the sole director of Keep Inks, is not a director of the appellant. Dwayne Smail is the sole director of second respondent. The appellant is a corporate entity with legal *persona* distinct and separate from Keep Inks. The appellant was never a party to the proceedings under case numbers J5067/00 and JS 4444/01 and did not conduct the business of Keep Inks at the time of such proceedings.

15.14 The trading name of Keep Inks was *"Hydra Color"*. The trading name of the appellant is *"Hydra Colour"*.

15.15 The logos of the two entities as they appear at paragraph 5 above are substantially similar.

[16] When one considers all the above factors, and regard being had to the authorities referred to above, there can only be one conclusion to be reached, that is that Keep Inks business was transferred to the appellant as a going concern. It is the same business but in different hands. It is not a matter of the appellant picking up "bits and pieces" of a dying business for himself to start a new business. Such a finding would not be a reasonable one given the extent of the overlap between the two entities. Furthermore, it is a fact that the employees' salaries were paid by appellant as early as 1 March 2004 when a resolution to wind up the business was taken on 2 February 2004. These employees are doing the same work that they did for Keep Inks. The finding of the Labour court that the business of Keep Inks was transferred as a going concern to the appellant is therefore correct. The question that remains to be considered is the legal consequences of such a transfer as a going concern.

Consequences of the transfer

[17] I have already mentioned that the fact that Keep Inks is insolvent is common cause. Section 197A in so far as it states 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 finds application. It must be emphasised that the automatic substitution only relates to all *"contracts of employment"* in existence immediately before the old employer's winding up or sequestration. This means that the new employer takes no responsibility for the actions of the old employer. By way of an example, any wrongful dismissal by the old employer remains a matter for the old employer.

[18] *In casu*, at the time of Keep Inks' winding up, both Molefe and the other retrenched employees had already obtained orders of reinstatement against Keep Inks. The effect of reinstatement order is to restore the contract of employment. For as long as Keep Inks did not obtain any order setting aside the reinstatement orders, these employees remained its employees as at or immediately before its winding up. The consequences of this finding is that the appellant having stepped into the proverbial shoes of Keep Inks is bound to remunerate Molefe and the rest of the employees reflected in Annexure "A" to the respondent's statement of claim, salaries from the 1 March 2004. There is no obligation on the appellant to take over other corresponding rights and obligations. This was also not the case that the respondent pursued.

[19] In the result, the appeal should fail and the order of the labour court should stand and be interpreted to include Molefe

as one of the employees as reflected in "Annexure A" of the respondent's statement of claim. It would be according to the requirements of the law and fairness that cost of the appeal against the judgment of Francis J be borne by the appellant on appeal. There shall be no order as to costs on appeal against the judgment of Molahlehi J.

Order

[20] In the result, the following order is made:

1. The appeal against the judgment and order of Francis J is dismissed with costs.

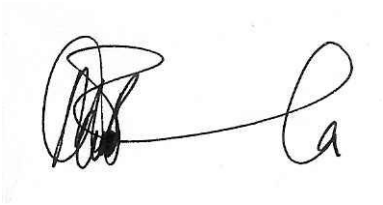
2. No order as to costs in the appeal against the judgment and order of Molahlehi J.

_____
Tlaletsi JA

I agree.

_____
Zondi AJA

I agree.



_____
Molemela AJA

Appearances:
For the Appellant: Mr S Snyman
Snyman Attorneys

For first Respondent: Adv C Orr
Instructed by: Cheadle Thompson & Haysom

Date of Judgment: 18 April 2011