REPUBLIC OF SOUTH AFRICA

Reportable

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JA 1/2012

In the matter between:

JAFTA NGEMA and 24 OTHERS **Appellants**

and

SCREENEX WIRE WARING

MANUFACTURERS (PTY) LTD **First Respondent**

SCREENEX MANUFACTURING (PTY) LTD

t/a JOHNSON SCREENEX **Second Respondent**

Delivered: 12 December 2012

JUDGMENT

DAVIS JA

Introduction

[1] This is an appeal, with the leave of the court *a quo,* against the judgment and order dismissing an application to substitute the second respondent as judgment debtor in an action which had been brought against the first respondent, the old employer.[1] The second respondent had never been joined in these proceedings which had been finally disposed of by this Court prior to the present application being launched.

[2] This dispute is best understood with reference to the chronology of relevant events, to which I now turn.

The factual chronology

[3] During July and August 2005, first respondent embarked on a retrenchment process with appellants. In December 2005, first respondent dismissed the appellants for operational requirements. Appellants referred the dispute against first respondent to the Labour Court. During March 2006, the business of the first respondent was sold as a going concern to the second respondent. During August 2007, the Labour Court ordered that the appellants be reinstated by the first respondent. During September 2007, the shareholding in the second respondent was sold to the current owner. Accordingly, from that time on, the second respondent traded as Johnson Screenex. In September 2009, this Court dismissed an appeal by the first respondent against the reinstatement order which had been made by the Labour Court against first respondent. During May 2010, the appellants brought an application in which they sought to substitute the second respondent as judgment debtor in this reinstatement order; hence the present proceedings.

[1] The judgment is cited as *Ngema and Others v Screenex Wire Weaving registered as Screenex Manufacturing (Pty) Ltd and Others* (2012) 33 ILJ 681 (LC).

[4] These facts therefore raise the following issues which require determination in this appeal.

1. Is the effect of s 197 of the Labour Relations Act 66 of 1995 ('LRA') to automatically effect a joinder or substitution of the new employer as a judgment debtor in relief obtained against the old employer?

2. Does s197 have an effect of trumping established principles relating to joinder as set out in *Amalgamated Engineering Union v Minister of Labour* 1946 (3) SA 637 (A)?

Section 197 of the LRA

[5] To the extent that it is relevant to this dispute, s197 of the LRA provides thus:

> '197 Transfer of contract of employment
>
> (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) <u>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;</u>

> (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 in 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.' (my emphasis)

[6] The effect of this section has been canvassed in numerous decisions of our highest courts. See, for example, *NEHAWU v University of Cape Town and Others* 2003 (2) BCLR 154 (CC) at paras 62 – 65. Jones AJA in *Telkom SA Ltd and Others v Blom and Others* set out the current position thus:

> '[This] section brings about a statutory assignment of the employment contracts. The result is similar to the situation where a new owner becomes *ex lege* the substituted lessor of leased premises.'[2]

[7] As the decisions make it clear, the very purpose of s 197 is to ensure an automatic transfer of employment contracts from the old to the new employer, in which the transfer of the business as a going concern takes place and existing workers are protected against a loss of employment when the business is so transferred. See, in particular, *NEHAWU v University of Cape Town and Others*, *supra* at para 62 – 63.

[8] It must follow, pursuant to this provision, that the employees who were dismissed before a transfer of the business took place may enforce their claims against the new employer. See *Anglo Office Supplies (Pty) Ltd v Lotz* (2008) 29 ILJ 953 (LAC) at paras 19 – 22.

[9] The present dispute sensibly does not concern a criticism of this jurisprudence. Rather it relates to a point that flows from the transfer of rights and obligations *ex lege* from the old employer to the new employer, namely, if

[2] 2005 (5) SA 532 (SCA) at para 8.

the new employer is automatically substituted in any litigation in place of the old employer so that the employees acquire a claim against the new employer, does it follow that this claim is enforced merely by operation of law or do the employees need to proceed against the new employer in order to enforce their claim?

[10] The court *a quo* answered these questions in the negative. It found in this case that the transfer of the business occurred after the dismissals but before the dispute was heard in the Labour Court. La Grange J pointed out that when the matter, brought by the first respondent against the reinstatement order, proceeded on appeal in this Court:

> '[i]t is apparent that by then the individual applicants have been made aware of the transfer which had taken place. At that point, even though it was at the appeal stage, they ought to have applied for second respondent to be joined in these proceedings but they did not… Even if the second respondent could not have disputed the fairness of the dismissals, it ought to have been heard on the question of relief which after all is something that could directly affect it and not merely in a financial sense.' at paras 21 and 24 of the judgment of the court *a quo*.

Evaluation

[11] Mr Nalane, who appeared on behalf of the appellants, submitted that if the old employer's obligations are transferred to the new employer *ex lege,* it must follow that they are automatically enforceable by the employees against the new employer. By contrast, Mr Redding who appeared with Mr Fourie on behalf of second respondent submitted that neither s 197 nor the authorities on point hold that, by operation of law, the new employer is automatically substituted in any litigation against the old employer. While the employees may acquire a claim against the new employer by operation of law it does not follow that the claim is enforced by operation of law.

[12] Mr Nalane's submission finds support in the approach which this Court adopted in the *Lotz* case *supra*. In that case, the court was confronted with a point *in limine* to the effect that as the respondent had transferred its business a month after an employee's contract of employment with respondent had been terminated in terms of s 197 (2) (c) of the LRA, it was not the respondent, who was liable to the applicant for the relief claimed, but rather the new employer who had taken over the business, subsequent to the termination of the employee's employment. In upholding this point, Tlaletsi JA (as he then was) said at para 22:

> 'Indeed all the rights that the dismissed employee had against the old employer at the time of the transfer of the business, including the right to institute all legal proceedings in a dismissal dispute, become a right that he has against the new employer. Accordingly such an employee must, where he has instituted proceedings against the old employer, pursue those proceedings against the new employer instead of the old employer. The result would be that if the dismissal is found, after the transfer of the business, to have been unfair, in any order of reinstatement would probably have to be made against the new employer.'

[13] That *dictum* is directly applicable to the present dispute. 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.

[14] 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 right to be heard with regard to the question of the appropriate remedy.

[15] While reinstatement may be the default position, pursuant to a finding that employees such as appellants had been unfairly dismissed, s 193 (2) of the Act provides for circumstances where the Labour Court may refuse to reinstate or reemploy the employees in question. Accordingly, second respondent, at the least, was entitled to be heard on the specific question of relief. The appellants' proper course of action should therefore have been to ensure that the second respondent 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.

[16] This conclusion follows the approach adopted by this Court in the *Lotz* case, *supra*, which judgment is, in my view, correct and must be followed in the present dispute.

Waiver

[17] In an alternative argument, the appellants contended that the second respondent had waived any rights that it might have had to be joined in the retrenchment proceedings because it was aware of these proceedings and chose not to react. The only evidence which appellants were able to produce

in this connection was a letter on 09 June 2009 which was generated by the old employer's attorneys. There is nothing in that letter which suggests that second respondent had waived its rights to be heard in the present dispute. The letter does not amount to a representation by the second respondent that it had agreed to submit to and be bound by any judgment which had been given by the Labour Court or the Labour Appeal Court in the earlier proceedings.

[18] Understandably much was made by the appellants that they have suffered as a result of the finding of the court *a quo*. There can be no question that the failure to join the second respondent has worked to the significant prejudice of the appellants. However in this case, the appellants were assisted by their union and thus had the benefit of legal advice. Furthermore, the business of the first respondent was sold as a going concern more than a year and a half before an order was granted by the Labour Court during August 2007 to the effect that the appellants must be reinstated by the first respondent. Appellant's and their representative had more than a fair opportunity to have properly joined the second respondent in proceedings in which it had a direct and substantial interest.

[18] For all of these reasons therefore, there is no basis by which appellants would be entitled to substitute the second respondent as judgment debtor. The appeal is dismissed with costs, including the costs of two counsel.

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Davis JA

Hlophe AJA and Landman AJA concurred with this judgment.

APPEARANCES:

FOR THE APPELLANTS:	Advocate F Nalane
INSTRUCTED BY:	Maserumule Inc
FOR THE SECOND RESPONDENT:	Advocate Redding SC
INSTRUCTED BY:	Glyn Marais Inc