CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 44/03

WESTERN CAPE WORKERS ASSOCIATION Applicant

versus

HALGANG PROPERTIES CC Respondent

Decided on : 14 November 2003

JUDGMENT

THE COURT:

[1] The applicant is a trade union, acting on behalf of two of its members, Ms Ivy Kona and Mr Lungile Bhusakhwe (the workers). The workers were, until the dispute giving rise to the present proceedings, employees of the respondent, Halgang Properties CC (the employer). The applicant seeks leave to appeal against the decision of the Labour Appeal Court handed down on 8 August 2002. In that decision, the Labour Appeal Court (LAC) upheld an appeal against the decision of the Labour Court which had ordered the reinstatement of the workers.

[2] The facts are largely common cause and appear from the judgments of the Labour Appeal Court[1] and the Labour Court[2]. On 24 June 1999, the employer sold its business of a mini-mall to Wembley Investment Pty Ltd (Wembley). The business was to be transferred to Wembley on 29 September 1999. That is the date when, according to the deed of sale, all benefits and risks of ownership in respect of the business were to pass to Wembley.

[3] Commencing on or about 17 August 1999, several meetings were held between the workers and Mr Wagiet, representing Wembley, to resolve the question of the transfer of the contracts of employment of the workers. These meetings were held with the assistance of an isiXhosa interpreter. The workers were told that their contracts of employment would be transferred to Wembley, that their years of service would be recognised, that the same conditions of employment would apply, but that for administrative purposes new contracts would have to be entered into with Wembley. The workers insisted that they should be paid for their years of service with the employer and that they be kept in employment by the employer. The explanation given to the workers that this was not possible, in view of the sale of the business and its pending transfer, did not help persuade them otherwise.

[4] In view of the attitude of the workers, the employer considered that the only option open to it was to retrench the workers for operational reasons. The underlying

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[1] *Halgang Properties CC v Western Cape Workers Association* [2002] 10 BLLR 919 (LAC) at paras 1 - 5.

[2] *Western Cape Workers Association v Halgang Properties CC* (2001) 22 ILJ 1421 (LC) at paras 1 - 3.

reason was the sale of the major asset of the employer. The employer accordingly invited the workers and the applicant, who had entered the scene by then, to make representations on the issues relating to the retrenchment, such as possible ways of avoiding retrenchments, retrenchment benefits and other matters. The applicant and the workers declined to make any representations, taking the view that the employer was "still alive and kicking". A dispute ensued and this was subsequently referred to the Commission for Conciliation, Mediation and Arbitration (CCMA).

[5] However, discussions continued culminating in an offer of a one year contract by Wembley and a demand for an indefinite contract by the workers. The demand for an indefinite contract was rejected by Wembley. Then, on 20 September 1999, the employer addressed a letter to the workers recording their dismissal for operational reasons, tendering four weeks written notice, and indicating that their refusal of the offer of employment disentitled them to severance pay.

[6] The sequel was the proceedings in the Labour Court in which the workers sought an order for reinstatement. That court found that the workers had been unfairly dismissed by the employer on 20 September 1999 and directed the employer to reinstate them.

[7] On appeal, the LAC found that the business had been transferred to Wembley as a going concern and that as a result the reinstatement of the workers by the employer was no longer possible. It held, therefore, that if the workers sought a

reinstatement order which would be binding on Wembley, they should have joined Wembley as a party to the proceedings. It accordingly upheld the appeal for want of joinder. In view of this conclusion, the LAC found it unnecessary to consider the question whether the dismissal of the workers on 20 September had been substantively or procedurally unfair.

[8] The applicant is now seeking to appeal against the order of the LAC. It appears from the response of the employer that the applicant applied for a certificate in terms of Rule 18 and that on 16 July 2003, the LAC declined a certificate on the basis that no proper case had been made for the condonation of the late application for such a certificate. The application for leave to appeal to this Court is also out of time. In the notice of application, the applicant intimates that it will seek condonation. No such application has been received. However, in the view we take of the merits of the application for leave to appeal, we consider it desirable in the interests of justice to deal with the matter at once.

[9] This Court has jurisdiction to hear the application. The applicant alleges that the decision of the LAC infringed the rights of the workers to fair labour practices. That allegation raises a constitutional matter.[3] The question is whether it is in the interests of justice to grant leave to appeal. It is trite that in determining whether leave

[3] *National Education Health & Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at para 14; *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and Another* 2003 (3) SA 513 (CC); 2003 (2) BCLR 182 (CC) at para 15; *Alexkor Limited and Another v The Richtersveld Community and Others* CCT 19/03, 14 October 2003, as yet unreported, at para 23.

to appeal should be granted, prospects of success are a relevant consideration though not decisive.[4]

[10] The applicant is seeking an order for reinstatement. It is by now common cause that the employer's business was transferred as a going concern to Wembley on 29 September 1999. Both the Labour Court and the LAC found that the business was sold "as a going concern" within the meaning of section 197 of the Labour Relations Act.[5] The applicant does not challenge this finding in the Court. In this regard the applicant alleges that as "from 29 September members should have been working for Wembley Investments." But the applicant nevertheless contends that the unfair dismissal by the employer must be deemed to have been committed by Wembley and that a reinstatement order against the employer must, consequently, be deemed to be a reinstatement order against Wembley.

[11] The hurdle that blocks the applicant's path to the order for reinstatement is the fact that the business has since been transferred to Wembley. What the applicant

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[4] *Fraser v Naude* 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at para 10; *Boesak v The State* 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 at para 12; *Minister of Health and Others v Treatment Action Campaign and Others (No 1)* 2002 (5) SA 703 (CC) at para 10; *NEHAWU* above n 3 at para 25; *NUMSA* above n 3 at para 17.

[5] Act 66 of 1995. The decision of the Labour Court, in the present matter, was handed down prior to the appeal against the decision of the Labour Court in the matter of *National Education Health & Allied Workers Union v University of Cape Town and Others* (2000) 21 ILJ 1618 (LC). In the *Western Cape Workers Association* case (above n 2) the Labour Court declined to follow the Labour Court's decision in the *NEHAWU* case as to the proper interpretation and meaning of section 197 of the Labour Relations Act. However, by the time the present case came on appeal to the LAC, that court had already decided the appeal in *National Education Health & Allied Workers Union v University of Cape Town & Others* [2002] 4 BLLR 311 (LAC); (2002) 23 ILJ 306 (LAC), but before the *NEHAWU* case was heard by this Court. The Labour Appeal Court was nevertheless satisfied that on the basis of the majority decision of the LAC in the *NEHAWU* case, the business had nevertheless been transferred "as a going concern" within the meaning of section 197. Nothing turns on this for present purposes.

contemplates are further proceedings against Wembley in which it will seek a declarator or some similar relief to the effect that Wembley is bound by the order for reinstatement against the employer. Such procedure was apparently sanctioned by the LAC in *Success Panel Beaters & Service Centre CC v NUMSA and Another.*[6]

[12] The LAC found that the *Success Panel Beaters* case was distinguishable from the present case because there was no waiver of the right to be joined in these proceedings. In *Success Panel Beaters* case there had been such a waiver. It was in this context that the LAC held that if the applicant were seeking an order for reinstatement that would be binding on Wembley, the correct procedure was to join Wembley as a party in the proceedings. In our view, this holding by the LAC cannot be faulted.

[13] In view of the transfer of the business to Wembley, it is no longer possible for the employer to reinstate the workers. For the purposes of section 193(2)(c) of the Labour Relations Act, 1995, "it is not reasonably practicable for the employer to re-instate or re-employ the [workers]". It is not necessary for us to express any opinion on the procedure contemplated in the *Success Panel Beaters* case.

[14] In the light of this, the applicant has no prospects of persuading this Court that it is entitled to an order for reinstatement. It is therefore not in the interests of justice

[6] [2000] 6 BLLR 635 (LAC).

to grant leave to appeal. It follows that the application for leave to appeal must be and is dismissed. There is no order for costs.

By the Court: Chaskalson CJ, Langa DCJ, Ackermann J, Madala J, Mokgoro J, Moseneke J, Ngcobo J, O'Regan J, Sachs J, Yacoob J.

For the applicant:	Western Cape Workers Association
For the respondent:	Hofmeyr Herbstein Gihwala Inc