IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA87/2014

JAN KRUGER **First Appellant**

GEOSYSTEMS AFRICA (PTY) LTD **Second Appellant**

PERSONS LISTED IN ANNEXURE A **Third to further Appellants**

and

ACIEL GEOMATICS (PTY) LTD **Respondent**

Heard: **03 March 2016**

Delivered: **14 June 2016**

Summary: Practice and Procedure – co-respondent in a proceeding filing affidavit in support of the relief sought by the applicant – co-respondent then becomes an applicant in the proceedings. Allowing a co-respondent to become an applicant in motion proceedings is contrary to the Plascon-Evans rule which states that the respondent against whom relief is sought is only obliged to deal with the case in applicant's founding affidavit where the case is made out – no *lis* existing between the applicant and the co-respondent. Labour Court not having discretion for departing from this rule.

Transfer of business as a going concern in terms of s197 of the LRA – manufacturer company entering into a non-exclusive distribution agreement of its products with another company – manufacturer company unhappy with distributor company and entering into distribution agreement with another company and cancelling first agreement – first distributor company

contending that the cancellation of its agreement and the subsequent agreement with another company giving rise to a transfer of a business as a going concern - – cancellation of a non-exclusive agency agreement does not trigger the application of s 197 of the LRA – the employment of a few employees of the initial distributor does not mean that the new distributor is taking over employees of the initial distributor – no business is transferred from the initial to the new distributor – Appeal dismissed.

Coram: Waglay JP, Tlaletsi DJP et Davis JA

JUDGMENT

WAGLAY JP

[1] This is an appeal against the judgment of the Labour Court which held that there had been no transfer of the business of the second appellant, Grosystems Africa (Pty) Ltd ("GSA"), to the respondent Aciel Geomatrics (Pty) Ltd ("Aciel") as contemplated in section 197(2) of the Labour Relations Act no. 66 of 1995 ("the LRA").

[2] In this part of the judgment, I deal only with the point *in limine* raised by the respondent with respect to the status of GSA as an appellant in these proceedings and as a co-respondent in the application proceeding in the Labour Court, particularly, whether a co-respondent while remaining a respondent may support an applicant by raising facts and allegations in its affidavit in support of the applicant and praying for the relief sought by the applicants.

[3] For my part of the judgment, I did not see the need to set out the background and facts in this matter, my brother Davis JA deals with them as well as the merits and the other issues raised in the appeal.

[4] On 30 October 2013, the first and third to further appellants erstwhile employees of GSA (hereafter referred to as the "said appellants") launched the application which is now the subject of this appeal. The said appellants sought an order to declare that there had been a transfer of the business of GSA as a going concern to Aciel as provided in s197 of the LRA.

[5] In their application, the said appellants cited three respondents: Leica, Aciel, the company which purportedly was the new business and GSA the old business as contemplated by s197 of the LRA. At some point, Leica was removed as a respondent in the proceedings. There can be no doubt that GSA was cited as a respondent because it had an interest in the proceedings, no relief was sought against the GSA. Significantly, though, if the appellants fail in their application, GSA may be liable to the said appellants for payment of a severance by virtue of the fact that GSA has by reason of the cancellation of its agency agreement is no longer able to retain the said appellants as its employees.

[6] Notwithstanding the fact that GSA was a nominal respondent, it decided to involve itself, as it was entitled to do, in the application proceedings. However its involvement was not limited to placing evidence before the Court but it became involved as if it was an applicant in the proceedings arguing the case of the said appellants and asking for the relief sought by the said appellants.

[7] At the hearing of the application in the Labour Court, the respondent correctly objected to the court taking into account the affidavits filed by GSA effectively seeking its striking out on the basis that it constituted an irregularity and in violation of the accepted rules relating to motion proceedings.

[8] The Labour Court however, took the view that the court was entitled to depart from the rules in the interest of "justice and fairness" because (i) the exclusion of the affidavits by GSA could significantly prejudice the said appellants and (ii) the objection was raised at a very late stage in the proceedings.

[9] In my view, the Labour Court erred in allowing the GSA's affidavit to stand and more importantly allowing it to present argument as if it was an applicant in the relief sought by the said appellants.

[10] A respondent in a motion application cannot in my view simply decide to be another applicant. In this regard, the judgment of the Labour Court records the submissions made by counsel for the respondent:

> '[4] Mr. Watt-Pringle SC, who appeared on behalf of Aciel, submitted that having been cited as a respondent, GSA had three options. First, it was entitled to oppose the relief sought in which event it was entitled to file an answering affidavit refuting the applicant's case. Secondly, it could have elected not to oppose the application but to abide by the relief sought. Thirdly, GSA could have decided, if it was not content to have the applicants make out a case for the application of s 197, to be joined as a second applicant in order to make out its own case. In the latter instance, Aciel would have filed an answering affidavit to deal with the case presented by GSA as an applicant. What GSA was not permitted to do in the present proceedings was to file an answering affidavit, the sole purpose of which was to build the case for the relief sought by the applicants in their notice of motion, under the guise of a respondent which had elected not to join issue with Aciel.
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> [5] On this basis, Mr. Watt-Pringle submitted that the applicants are not entitled to rely in these proceedings on the untested evidence presented by GSA, since it formed no part of the founding affidavit and therefore no part of their case. Further, he submitted that GSA's counsel is not entitled to claim in argument on behalf of GSA the relief sought by the applicants in their notice of motion. In other words, GSA is not permitted to assume the role of a Trojan horse, acting in every way as if it is a co-applicant without claiming any relief in its own name, and thus seeking to avoid any liability for costs.'[1]

[11] In my view, the above submissions are indeed correct. I may add that in the affidavit filed by it GSA not only did it seek to support the said appellants' case but went on to ask for the "relief as prayed for in the notice of motion". Once GSA sought the relief asked for by the said appellants it was no longer placing evidence before the Court *a quo* it was making itself an applicant in the proceedings. In allowing the affidavits filed by GSA in the form they did the Court was, in effect allowing a further founding affidavit. The respondent in the Labour Court thus suddenly found itself fending itself not only against the

[1] *Swanepoel and Others v Leica Geosystems AG and Others* (2014) 35 ILJ 2877 (LC) at paras 4 and 5.

applicants but also against a co-respondent. What is it then to do: answer the applicant's papers and answer the co-respondents papers? This clearly goes against the fundamental principle in our law that it is the founding affidavit filed in support of a motion that makes the case which the respondent must meet. Allowing a co-respondent to file answering papers in which it seeks the relief sought by an applicant while not seeking to be an applicant in the proceedings cannot and is not permissible nor is it open to a court to allow such procedure on any grounds. The Court does not have a discretion to do so. Allowing the GSA affidavit not only prejudiced the respondent but placed the respondent in a position where it had to conduct a defence on two fronts; one against the applicants and one against a co-respondent. This is untenable because GSA and the applicant effectively formed a tag-team against the respondent.

[12] Since the affidavits constitute pleadings and evidence in motion proceedings, Counsel for the respondent set out the principles that apply to motion proceeding , although these principles should be trite, it is worth repeating them:

(a) An applicant in motion proceedings must make out its case in its founding affidavit, which constitutes both the particulars of claim and evidence in support of the relief claimed;

(b) it follows from the above principle that the respondent against whom relief is sought is only obliged and entitled to deal with the case in applicant's founding affidavit;

(c) The rule in **Plascon Evans** is that the applicant can only succeed on the basis of facts in its founding affidavit which is not disputed in the answering affidavit, read with additional facts deposed to in the respondent's answering affidavit;

(d) There is however a qualification to the rule in (c) above, which is that the applicant cannot seek to make out a cause of action based on allegations in the answering affidavit, which did not form part of its case in the founding affidavit. A corollary to the rule that the respondent is only obliged in its answering affidavit to deal with the case made out in the founding affidavit and no other.

(e) *A fortiori*, a respondent is not obliged to deal with allegations made in a co-respondent's affidavits which may happen to support the applicant's case. The reasons for this are twofold:

(ii) firstly, there is no *lis* between a respondent and its co-respondent. Since the co-respondent is not entitled to claim any relief unless it enters the fray as an applicant and files a notice of motion, there is nothing for the respondent to oppose.

(ii) secondly, the respondent is only obliged to deal with the case in applicant's founding affidavit.'

[13] In the circumstances, it was not open to GSA to intervene in the proceedings in the manner it did. It could have made its own application to make out a case for the section 197 relief, supported by a founding affidavit which Aciel would then be obliged to answer. There would then be a *lis* between GSA and Aciel. In the absence of such *lis*, Aciel had nothing to answer to GSA.

[14] In the result, the affidavits filed by GSA should have been struck off.

[15] This then brings us to GSA and this appeal. The appellants having failed to obtain the declaratory order and are before this Court on appeal. GSA has decided to be a co-appellant. Not only has it styled itself as a co-appellant it has launched two applications in this Court for this Court to accept further evidence. In my view, for reason stated above it cannot move such applications. In any event, my brother has considered these applications as if these were brought by the said appellants. This he did because the respondent has no objection for them to be considered as applications by the proper appellants.

[16] Finally, I have read the judgment by my brother Davis JA and agree with his reasons and order.

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Waglay JP

DAVIS JA

Introduction

[17] This case concerns the important question of whether a non-exclusive distribution agreement, entered into, in this case between Leica Geosystems AG ("Leica") and second appellant (GSA) in July 2011 but effective from 21 October 2010, can give rise to a transfer of an undertaking sufficient to trigger the provisions of s 197 of the Labour Relations Act 66 of 1995 ("LRA"), when the agreement is cancelled.

[18] GSA conducted a business as a distributer of surveying, measurement and geomatic products and accessories produced by Leica. It also provided after sale services in respect of these products supplied by it to its customers. Subsequent to its acquisition as a going concern of a business conducted by Setpoint in July 2004, GSA had distributed Leica products. GSA entered into an initial agreement with Leica for the distribution of Leica products in the construction, surveying and mapping markets in South Africa. Upon the cancellation of the first written distribution agreement, the parties continued on the same terms and conditions as those contained in the first agreement.

[19] A second agreement was then concluded as a result of which GSA continued to be the *de facto* sole authorised distributor of Leica geomatic products in South Africa. When this agreement ended, a further agreement, to which I have already made reference, effective from 1 October 2010, was concluded. It was the cancellation of this agreement which triggered the dispute with regard to the application of s 197 of the LRA.

[20] Absent any further facts, it appears to be accepted that s 197 could not be invoked in this case. But, it is the contention of appellants that the specific facts of this case justify the application of s 197 of the LRA. The facts which are alleged to alter the default position that a cancellation of non-exclusive distribution agreement does not trigger the application of s 197 of the LRA can be summarised thus: On 7 July 2011, Leica entered into a distribution

agreement with Kebrallor (Pty) Ltd (t/a Aciel). As a consequence of the appointment of Aciel, it and GSA became direct competitors in the relevant markets for Leica products. Upon the cancellation of the distribution agreement which GSA in July 2011, Aciel became the *de facto* sole distributor of Leica products in South Africa.

[21] Appellants were aware that the cancellation of non-exclusive distribution agreement and the appointment of a new distribution without more would, on its own, not trigger the application of s 197 of the LRA. Hence, the case of appellants goes further: they allege that a strategy was employed by Leica and Aciel to transfer the business, which had previously been conducted by GSA, to Aciel over a protracted period; that is a transfer culminating in Aciel operating the business previously conducted by GSA.

[22] In the initial application, appellants sought a declaratory order that there had been a transfer of the business as a going concern from GSA to Aciel. The employees of GSA (said appellants) sought a further declaration that, with effect from 1 November 2013, the employment contracts of individual employees had been transferred from GSA to Aciel on the same terms and conditions as they previously enjoyed pursuant to the operation of s 197 of the LRA.

[23] Sitting in the court *a quo,* Van Niekerk J held that the evidence presented indicated that in substance what had occurred was the failure of the business of one competitor in an identifiable market, leaving the other competitor as the *de facto* sole agent and distributor; that is prior to 1 November 2013 there were two local distributors of Leica products in South Africa but after that date there was only one. He held further that appellants had failed to demonstrate that the transaction, on which they relied, created rights and obligations which required GSA to transfer something in favour of or for the benefit of Aciel. Although it was correct that a number of employees elected to assume employment with Aciel after the latter had become the *de facto* distributor of Leica products and that a number of customers had elected to place their custom with Aciel, Van Niekerk J found that none of this had occurred out of

"any right or obligation" of GSA to transfer anything to Aciel, which was a requirement for the application of s 197 of the LRA.

In *limine* objection

[24] Before dealing with the merits of this dispute, this Court was invited by respondent to determine an *in limine* objection relating, in particular, to the legal status of GSA as the second appellant, and thus second respondent in the initial proceedings. This issue has been carefully considered by Waglay JP in his concurring judgment. I agree fully with the compelling reasoning employed therein and the conclusion that it was not open to GSA to intervene in the proceedings in the fashion of an applicant. It could have made its own application to make out a case for s 197 relief, supported by a founding affidavit which Aciel would have been obliged to answer. There would then have been a *lis* between GSA and Aciel. In the absence thereof, Aciel had nothing to answer to GSA. For this reason, the affidavits filed by GSA should have been struck out.

[25] In turn, this finding disposes of the application brought by GSA to have new evidence admitted before this Court. This evidence emerged through:

1. A discovery process in a dispute currently pending between GSA and Leica before the Competition Tribunal; and

2. Through e-mail correspondence addressed to Mr Huxley Reynolds of Imvelo Technologies (Pty) Ltd t/a PDD ('PDD').

[26] Mr Redding, on behalf of said appellants, submitted that, even if this Court refused the application of GSA to admit further evidence, his clients should be permitted to rely thereon as their case was based upon the allegations of a conspiracy between Aciel and Leica; a s 197 transfer took place pursuant to a strategy adopted by Leica, in concert with Aciel, which resulted in GSA's business being transferred to Aciel. In Mr Redding's view, this new evidence was important, arguably decisive, in establishing the existence of this strategy and hence providing a clear evidential justification that a transfer of GSA's business to Aciel had taken place in terms of s 197 of the LRA.

[27] This application was stoutly resisted by Aciel on a compelling basis including that there was no context given to the documents sought to be admitted in the affidavit deposed to in support of this application; that much of this material was hearsay and that, as most of all evidence involved Leica, who was not a party to the relief now sought, no answer was forthcoming from this source. This Court allowed Mr Redding to include the new material in his argument on the basis that this would enable this Court to determine whether it may prove decisive or even influential in the determination of the case.

The merits

Appellant's Case

[28] Mr Redding conceded that, in principle, s 197 of the LRA did not apply to a non-exclusive distribution agreement. However, he contended that the facts of the present dispute were similar to those which were present in the case of *Merckx and Neuhaus v Ford Motor Company Belgium SA (Merckx*)[2] which applied European law (Directive 77/187) which is similar to s 197 of the LRA. In that case, the appellants were employed as salesmen for an entity called Anfo Motors SA, a Ford dealer in Brussels. In 1987, Anfo decided to discontinue its activities as from 31 December 1987. Ford transferred the dealership to an independent dealer Novarobel SA with effect from 1 November 1987.

[29] There was no transfer of tangible assets from Anfo to Novarobel but the former sent a letter to its customers recommending the services of the new dealer. Although more than three quarters of the staff were dismissed, Anfo informed the appellants that Novarobel had agreed to take responsibility for hiring certain employees with a number of clearly defined duties and that these would be transferred to Novarobel in accordance with Belgium law which had incorporated European Directive 77/187. They would then retain their status, seniority and other contractual rights.

[2] (1996) ECR 1253.

[30] The appellants informed Anfo that they did not consent to being employed by Novarobel and refused to work for it because there was no provisions of a guarantee that their level of remuneration, which was dependent on the turn over achieved, would be maintained. They further contended that Anfo was in breach of the relevant contract and hence they claimed redundancy payments and other amounts due under the contract. During the course of the proceedings, Anfo was wound up and Ford took its place. The matter was ultimately referred for the following question to be determined by the European Court of Justice (ECJ):

> 'Is there a transfer of an undertaking within the meaning of Directive 77/187 of 14 February 1977 if an undertaking which has decided to discontinue its activities on 31 December 1987 dismisses most of its staff, keeping only 14 out of a total of over 60, and decides that those 14 persons, while retaining their acquired rights, must work from 1 November 1987 for an undertaking with which that first undertaking has no formal agreement, but which has since 15 October 1987 held the dealership previously held by the first undertaking, and if the first undertaking has not transferred any of its assets to the second?'

[31] The ECJ summarised the applicable law thus:

> 'It is from that case law that, for the Directive to apply, it is not necessary for there to be a direct contractual relationship between the transferor and the transferee. Consequently, where a motor vehicle dealership concluded with one undertaking is terminated and a new dealership is awarded to another undertaking pursuing the same activities, the transfer of undertaking is the result of a legal transfer for the purposes of the Directive as interpreted by the Court.'[3]

Applying this *dictum* to the facts, the court held:

> 'Furthermore, it is clear from the documents before the Court that the circumstances of the actions brought before the national court are that Ford, the principal shareholder of Anfo Motors, concluded an 'agreement and guarantee with Novarobel, by which it undertook, inter alia, to bear the

[3] At para 30.

> expenses relating to certain payments for breach of contract, unlawful dismissal or redundancy which might be payable by Novarobel to members of the staff previously employed by Anfo Motors. That fact confirms that there was a legal transfer within the meaning of the Directive.'[4]

For these reasons, the court concluded: 'all those factors taken as whole, support the view that the transfer of the dealership and the circumstances of the main proceedings is capable of falling within the scope of the Directive.'[5]

[32] According to Mr Redding, the facts, in many material respects between the *Merckx* case and the present dispute, were similar. This dispute concerned an agency for distributing and servicing Leica products which had rights taken away from it, resulting in Aciel being in sole possession of the distribution field. In *Merckx*, Anfo and Novarobel had the same roles as did GSA and Aciel in this case. It followed therefore, in Mr Redding's view, that the essential part of GSA's business, the economic activity, which comprised being the authorised distributor and servicer of Leica products ceased and was absorbed into Aciel's business. Hence, the finding of ECJ in *Merckx* stood to be followed in this case.

[33] In further support of appellants' case, Mr Boda, who appeared on behalf of GSA, submitted that the test for the application of s 197 was whether what was transferred was a business operation so that the business remains the same but was, subsequent to the transaction, located in different hands. In this regard, he referred to the decision in of *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and Others* [2015] 8 BLLR 757 (CC) at para 36, where the Constitutional Court placed considerable emphasis on the substance as opposed to the form of the relevant transaction. Mr Boda submitted that the mode used to achieve the transfer could be a cancellation of the contract, if the cancellation resulted in the transfer of key "components of the business" to a third party. In emphasising the idea of "components of

[4] At para 31.
[5] At paras 18-19.

the business", Mr Boda referred further to the judgment in *Aviation Union of SA and Another v SA Airways (Pty) Ltd* and others ('AUSA'):[6]

> 'In the circumstances, the cancellation clause of the agreement contemplated a transfer of the business as going concern. The only debate was about whether the business as a going concern was to be transferred to SAA or to an interim service provider. As long as there is a transferor, the identity of that entity or person is of no material significance. The agreement contemplates transfer by LGM to SAA or to the interim service provider. It requires a transfer by a transferor, the old employer, to the transferee, the new employer.'[7]

[34] Hence central to GSA's case was the argument that this was a case similar to that of *AUSA, supra,* in that there had been a gradual transfer of the business of distributing and servicing Leica products from GSA to Aciel which ultimately culminated in the cancellation of the agreement between Leica and Aciel. In support thereof, appellants contended that 30% of the personnel were taken over gradually by Aciel from GSA, including the area manager from Lesotho, Durban and Mpumalanga as well as the procurement officer and service manager. These transfers had taken place, because Aciel's managing director had represented in early 2011 that GSA would ultimately close down. Furthermore, GSA lost the right to conduct after sales service and to honour warranties of its clients, which included key customers being important players in the gold mining industry. By virtue of the triggering of the termination clauses and the distribution and service agreements, said appellants had lost their job security and were thus entitled to invoke s 197 of the LRA. The very purpose of the section was to protect employees in these circumstances.

Evaluation

[35] As indicated earlier in this judgment, s 197 of the LRA cannot, without more, be invoked in circumstances where a non-exclusive distribution is cancelled. This is critical to the evaluation of the case. This conclusion meant that this

[6] [2012] 3 BLLR 211 (CC).
[7] At para 124.

Court had to interrogate the facts of this case, particularly the alleged conspiracy which it was alleged provided a basis for the application of s 197 of the LRA. As noted, Mr Redding relied heavily upon the *Merckx* case to suggest that, given a particular factual matrix, it was possible for s 197 of the LRA to have application in the case of a distribution agreement.

[36] In *Merckx*, the court considered that there would be a transfer in terms of the question posed to the Court, as set out above. It held:

> 'Consequently, the answer to the first part of the question as reformulated above must be that Article 1(1) of the Directive must be interpreted as applying where an undertaking holding motor vehicle dealership for a particular territory discontinues its activities and the dealership is then transferred to another undertaking which takes on part of the staff and its recommended to customers, without any transfer of assets.'[8]

[37] The distinction between *Merckx* and the present dispute is that in *Merckx*, the transaction was expressly co-ordinated by the manufacturer, which was the principal shareholder of the "old dealer". The "new dealer" now assumed the role of the "old dealer" which was closed down and, in terms of which, its goodwill and personnel was transferred to the new dealer in terms of a clear set of contractual arrangements. In the present case, there is no evidence that Leica is the principal shareholder of Aciel nor are these contractual arrangements which provide for the "clear break" which took place in *Merckx*. It should also be noted that in *Süzen v Zehnacker Gebäudereingung GmbH,*[9] the ECJ qualified its reading of Directive 77/187 as follows:

> 'The mere fact that the services provided by the old and new awardees of the contract is similar does not therefore support that an economic entity has been transferred. An entity cannot be reduced to the activity entrusted to it. Its identity also emerges from other factors such as workforce, its management staff, the way in which its work is organized, its operating methods or indeed where appropriated, the operational resources available to it.'[10]

[8] At para 32.
[9] (1997) C-13/95.
[10] At para 15.

[38] Turning to *AUSA, supra,* the key question for determination was whether upon the termination of an outsourcing agreement between South African Airways (SAA) and LGM, the employees of the latter were transferred together with the business in which they were engaged to a new employer, in this case SAA.

[39] LGM had contracted to conduct a specific set of non-core SAA business pursuant to a decision by SAA to outsource all of its non-core business. SAA sold fixed assets to LGM together with certain other items concerned with the business of rendering these designated services. LGM became obliged in terms of this agreement to sell these assets back to SAA at a reasonable market price upon the termination of the agreement. The question for determination in the case was whether the transfer of the business from LGM to SAA triggered the provisions of s 197 of the LRA or, more generally and as has oft been stated; 'did a second generation transfer fall within the scope of s 197'.

[40] Manifestly, the present dispute is distinguishable from these facts. In this case, GSA entered into a non-exclusive distribution agreement with Leica. According to an answering affidavit deposed to by Mr Andrew Young of Leica, it experienced difficulties with the performance of GSA from 2008 to 2012; in particular that GSA had experienced a significant loss of market share. Mr Young claimed:

> 'Leica received numerous complaints from customer about the lack of technical knowledge of GSA staff members. For example, Huxley Reynolds, GSA's managing director, had previously worked in the motor vehicle spare parts industry and (to the best of my knowledge) had no prior experience in the geomatics industry;
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> A business model focussed on maximising profit margins rather than increasing its sales of Leica products. Leica believes that discounts and favourable prices given to GSA by Leica were not passed on by GSA to its customers in full or at all, resulting in customers paying GSA a higher price for Leica's products than would otherwise have been the case;

A failure to promote and develop sales of Leica's geomatics products to non-mining customers;

GSA's failure to meet its agreed targets for its purchases of products from Leica.'

Mr Young attributed this poor performance to numerous changes in the management of GSA, internal conflicts amongst management, the loss of key personnel, a lack of management sales and technical staff with skill and experience in the Geomatic industry. These concerns had been raised with GSA owner, Mr Himelsien, together with senior management of GSA on a number of occasions. Indeed, in March 2011, Mr Himelsien was informed that Leica was considering appointing a second distributor in competition with GSA to "incentivise" GSA to resolve its management problems and improve its performance.

[41] According to Mr Young, it was because of the continued inability of GSA to meet its performance targets that a distribution agreement was concluded between Aciel and Leica in August 2011. After considerable litigation, including GSA having initiating urgent interdictory relief against Aciel and Mr Page of Leica to prevent both from engaging in any alleged unlawful competition (an application which was not proceeded with by GSA for reasons which are unknown on the papers) as well as a referral by GSA of a complaint against Leica to the Competition Commission, Leica terminated GSA's agreement. Mr Young emphasised that among its reasons for termination was that sales performance had not improved, the existence of on-going disputes between GSA and Aciel and between GSA and itself had damaged the Leica brand in the South African market.

[42] These were the reasons provided as a justification for the cancellation of the non-exclusive distribution agreement. By contrast, GSA insisted that there was, in the ordinary course, a transfer of a business to Aciel, in that the latter now conducted the same exclusive business as had GSA upon the termination of the agreement. Invited by the court to provide evidence of what precisely was transferred from GSA to Aciel, counsel for the appellants

referred to the employment of certain GSA employees by Aciel and, further, the act of Aciel in providing warranties for Leica products, which warranties previously had been offered by GSA.

[43] As Mr Watt-Pringle, who appeared together with Ms McClean on behalf of the respondent, noted, between six to eight of the GSA employees "went over" to Aciel. Twenty-two employees remained behind in GSA. It was these employees who were the subject matter of this dispute. This evidence was hardly indicative of a transfer of a business structure from GSA to Aciel. In summary, unlike the *AUSA* case, *supra*, the evidence in the present dispute, did not point to a transfer of the business as a discrete entity. For this reason, the finding in *AUSA, supra* is unhelpful to appellants' case where the entire business structure was not transferred.

The conspiracy allegations

[44] Because of these difficulties, the core of appellant's case turned on a conspiracy; that is that, over a protracted period of time Aciel and Leica, had conspired to ensure the incremental transfer of the GSA business to Aciel. Appellant further argued that, over this period, the activities of both Aciel and Leica were designed to effect the gradual transfer of GSA's business to Aciel. This summary of the dispute again shows luminously that there is a major distinction between the *AUSA* case and the present dispute transfer. To repeat: in *AUSA*, the entire business structure was transferred to *SAA* between *SAA* and LGM pursuant to a defined contractual arrangement.

[45] Appellants sought to bolster their case by the application to admit further evidence. For the reasons advanced earlier in this judgment, the Court accepted that it would consider this evidence in terms of the broad argument about a conspiracy which had been advanced by appellants. Appellant's problem is that this documentation, is at best, ambiguous in its implications. To take but a few examples which were pressed by counsel. On 23 June 2011, Mr Page of Leica generated an e-mail to Mr West of Leica in which the following appears; "Patrick is hoping that LGS give GSA a final notice on 1 July 2011. Can the termination be copied to Leonard, Ian … so no one is left

out of the loop. Locksley and Helgard will start approaching GSA's staff from 11 July 2011." On its own, this document simply informs the reader that, on the basis that a cancellation of the GSA contract is to be initiated by Leica, an approach to GSA staff can be generated thereafter. I should again add that a small minority of staff were eventually employed by Aciel.

[46] A further document entitled "Business Plan: Representation of Leica in Southern Africa" dated June 2011 was referred to by counsel for the appellants. It provides information that a new company, which eventually turned out to be Aciel, would be formed, that Mr Helgard van Heerden would be appointed as the general manager, as he had worked previously for GSA until 2005. The document then says "due to confidentiality (there are names we cannot disclose) who we have approached key personnel in the industry who have committed to coming on board once we have secured the agency." Again, although this document reflects a strategy that selected staff would primarily be sourced from GSA all that this document, in effect, reveals is that a new competitor would be launched and that approaches would be made to GSA's staff to join after the launch.

[47] An e-mail of 1 November 2011 generated from Mr Cabrucci to Mr Concannon of Leica was also emphasised by counsel. An examination of this e-mail of 1 November 2011 indicates that a meeting took place between members of Leica and Mr Himelsein of GSA which was described as "open and friendly" and in which the author said "we believe that Aciel could deliver more business than GSA, better to offer GSA an exit way as quick as possible. I am confident that GSA will accept."

[48] I have cited these examples of this additional evidence which were sought to be admitted to illustrate a fundamental problem with this evidence. It is possible, on a generous interpretation, to suggest that this evidence, taken as a whole, illustrates that there was an intention on the part of Leica to ensure that there would be one *de facto* distributor, namely Aciel. But the evidence, particularly in that respect is not supported by any affidavit which gives context to the evidence sought to be admitted and where there are no confirmatory affidavits supplied, (most of which documents was procured as a

result of competition litigation), confirms that Leica, as the manufacturer, was concerned with the performance of GSA and therefore considered alternative business proposals, which included the cancellation of its non-exclusive distribution agreement with GSA. What the evidence does not show is that there was an on-going discrete economic activity which was conducted by the business structure of GSA and, which structure pursuant to a defined transaction/s, is now in the hands of Aciel.

[49] In summary, all of the evidence which was put up by appellants should be viewed through the prism of the following counter factual: Assume that the factual matrix confronting this Court was exactly as it is, save that GSA contended that there had been a transfer of an undertaking. The question would then arise whether Aciel could assert its right, based on s 197 of the LRA, to procure the transfer of employees and with them the knowledge, goodwill and the balance of the business structure of GSA. Manifestly there is nothing in the evidence which suggests that this "right" could be asserted.

[50] The evidence, on the probabilities, does not justify the existence of a conspiracy to transfer a defined business, structure from GSA to Aciel. Even were this Court to accept the additional evidence, to the effect that the conspiracy as alleged existed, the evidence read as a whole does not support the argument that a transfer of an undertaking in terms of s 197 of the LRA, has, on the probabilities, been proved. Absent such a finding, it cannot be that s 197 of the LRA applies to a non-exclusive distribution agreement of the kind concluded in this case.

[51] For these reasons, the appeal is dismissed with costs, including the costs of two counsel.

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Davis JA

Tlaletsi DJP agrees in the judgments of Waglay JP and Davis JA.

APPEARANCES:

FOR THE FIRST APPELLANT:	Adv Redding SC
	Instructed by Hogan Lovells
FOR THE SECOND APPELLANT:	Adv Boda SC
	Instructed by Nortan Rose Fulbright
FOR THE RESPONDENT:	Adv Watt-Pringle SC and Adv Mclean
	Instructed by MGM Inc