

SOUTH AFRICA / JUDGMENT

Mokhele and Others v Schmidt NO and Another (JS564/11) [2016] ZALCJHB 196; (2016) 37 (ILJ) 2662 (LC) (19 May 2016)

[2016] ZALCJHB 196

COURT

Labour Court Johannesburg

BEFORE

Everett

CASE / FILE NUMBER

JS564/11

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JS 564/11

DATE: 19 MAY 2016

Reportable

In the matter between:

EDGAR THIBIRI MOKHELE and 7 OTHERS.....Applicant

And

MALCOLM SCHMIDT N.O.....First Respondent

PAVING WAREHOUSE CC.....Second Respondent

Heard: 12 – 14 October 2015

Delivered: 19 May 2016

EVERETT AJ;

Introduction

- [1] The applicants claim that their dismissal was automatically unfair in terms of section 187(g) of the Labour Relations Act – that is, dismissal related to transfer of a business as a going concern as per section 197, alternatively in insolvent circumstances as per section 197A. They contend that the business of Archstone Manufacturing (Pty) Ltd was transferred as a going concern and that their employment contracts ought to have transferred to the second respondent in accordance with either section 197(2)(a) or 197A(2). Alternatively, they claimed that their dismissals due to the employer's operational requirements were unfair.
- [2] The matter is opposed by the second respondent. The first respondent, the liquidator, had passed away by the time of the trial and had, in any event, not opposed the matter.

Background

and summary of evidence

- [3] The eight applicants were all employed by Wonder Rock in about 1999, although the business was apparently only registered in February 2001. The business produced artificial stone paving and related products.
- [4] The workers reported to Handre Venter, who in turn reported to Andrew and Frazer Carey, the directors of Wonder Rock. In 2008, Wonder Rock went into voluntary liquidation in about 2008 and in March 2009, the business was transferred as a going concern. The applicant workers continued to work for the business at the same premises. At this stage, the business operated as Archstone Manufacturers (Pty) Ltd t/a Wonder Rock.
- [5] The applicants contend that Andrew and Frazer Carey continued to run the company and that Neil Sterley reported to them. This is in dispute. The Register of Companies reflects Neil Sterley and Lee Nienaber as the directors of Archstone Manufacturing (Pty) Ltd. The second respondent's evidence was that they (Andrew and Frazer Carey) were involved in the business, Palazzo, involving bath products on the same premises, which had nothing to do with Archstone Manufacturers. Whatever the exact role of the Careys in Archstone Manufacturers, Fraser Carey conceded that he played the role of advisor and he was aware of the financial situation of Archstone Manufacturers.
- [6] By mid-2010, Archstone Manufacturers had, according to Carey, got into serious financial difficulties and it went into voluntary liquidation on 4 February 2011 following a special resolution on 28 January 2011.

[7] In the meantime, Archstone Manufacturing t/a Wonder Rock terminated the services of all eight employees on 10 January 2011 when they returned from leave. They were informed that the business had gone into liquidation and been declared bankrupt, and that this had resulted in their contracts of employment coming to an end as of 10 December 2010. They were advised to contact the liquidator, the first respondent, if they had any claims against Archstone Manufacturing (Pty) Ltd.

[8] The workers claimed they were informed of their dismissals by Andrew Carey (which is disputed). The letter advising them of their termination was dated 10 January 2011 and addressed to all employees, signed by the director Neil Sterley. The eight applicants also received reference letters dated 10 January 2011, signed by Handre Venter, the production manager. The letters were handed to them by Elizabeth Makgale, the Human Resources manager. The workers received certificates of service a few days later, signed by Ms Makgale. All the letters were on the Archstone Manufacturing (Pty) Ltd t/a Wonder Rock letterheads.

[9] Both Elizabeth Makgale and Handre Venter continued to work for the business. The applicant's evidence was that their former

colleagues were working there and the same management was present at the time (around 15 January 2011) being Andrew Carey, his assistant Jimmy, Elizabeth Makgale and Handre Venter. The applicants were not paid any amounts in lieu of notice, accrued leave nor severance pay.

[10] The eight applicants asked for their jobs back and they were told that if they came back to work, it would be at a much lower salary. They refused the offer although one of them, Mr Novele worked for a short time in February 2011.

[11] The applicants' evidence was that Venter was, and still is, employed in the same position at Paving Warehouse; the equipment was the same and the work being conducted was the same. At least eight former colleagues were employed by Paving Warehouse but on lower wages than they earned at Wonder Rock.

[12] The second respondent did not deny that the business of Paving Warehouse is essentially the same as that of Archstone Manufacturing

but he denied that it was transferred as a going concern. Fraser Carey explained that he was deeply concerned by the liquidation of Archstone Manufacturing because he had signed surety on a machine Archstone Manufacturing was using. Given his precarious situation, he went to see the liquidator in early February and asked if it was possible to buy the assets. According to him, the business had ceased trading from mid-December 2010 until 4 or 5 February 2011. He started production again as Paving Warehouse CC later in February.

[13] Carey's evidence was that he purchased the assets which included the machinery and the moulds and therefore he carried on producing the same product lines that Archstone Manufacturers had produced. "The business was that". He insisted that he did not negotiate to take over the business as a going concern and take over the employees – and that at that

stage there were no employees. The applicants produced the results of a LexisNexis search which showed that a company by the name of Exaclox CC commenced on 5 July 2010 and both Andrew and Frazer Carey were registered as directors.

- [14] It is common cause that The Paving Warehouse markets itself as “the home of Wonder Rock” which was also the slogan used by Archstone Manufacturers.
- [15] On 1 April 2011, the eight applicants referred an automatically unfair dismissal dispute to the CCMA and applied for condonation for late referral. Condonation was granted and a certificate of non-resolution was issued by the commissioner.

Evaluation

- [16] The first issue to determine is whether the business of Archstone Manufacturing was transferred as a going concern to Paving Warehouse. In this regard, the decision of the Constitutional Court in *NEHAWU v University of Cape Town*[1] is instructive. The Constitutional Court held that the term “going concern” must be given its ordinary meaning - essentially that ‘the business remains the same but in different hands’. The court stated:

‘Whether that has in fact occurred is a matter of fact to be determined objectively in the light of the circumstances of each transaction. 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. A number of factors will be relevant to the question whether a transfer of a business as a going concern has occurred,

such as the transfer or otherwise of assets both tangible and intangible, whether or not workers are taken over by the new employer, whether customers are transferred and whether or not the same business is being carried on by the new employer. What must be stressed is that the list of factors is not exhaustive and that none of them is decisive individually. They must all be considered in the

overall assessment and therefore should not be considered in isolation.’[2] (Footnotes omitted)

- [17] The Labour Appeal Court, in *SAMWU v Rand Airport Management Co (Pty) Ltd*,[3] followed a similar approach and listed some of the relevant factors as the intention of the parties, the impact on the goodwill of the business, its stock-in-trade, contracts with clients and customers, the workforce, as well as the premises, assets and debts of the business. The court emphasised that a transfer as a going concern is not a mere transfer of assets.

- [18] In *Hydro Colour Inks (Pty) Ltd v CEPPWAWU*,[4] Tlaletsi, JA summed up the meaning of “transfer as a going concern” as follows:

‘(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 a 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.'

[19] Applying this test, there is no question that the business was 'the same but in different hands'. Frazer Carey agreed that Paving Warehouse used the same moulds and produced the same products in the same colours with the same machinery on the same premises and, as he said, 'the business was that'. The Wonder Rock logo and slogan was incorporated into the Paving Warehouse logo because, Carey explained, Wonder Rock had a name in the industry. Hence the goodwill carried forward and customers would expect the same product. Half of the workers went over to Paving Warehouse and the other half (the eight applicants) were also offered their 'jobs back' (in Carey's words) but at lower wages.

[20] Importantly, '(i)n 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' (NEHAWU decision, above). The company went into voluntary liquidation and Carey was insistent that he did not negotiate to buy the business and take over the workers. Carey was fully aware of the implications of a transfer as a going concern as he had been involved in such a transaction when Archstone Manufacturing took over the original business. He sought to avoid these consequences. Whatever his intention, Carey could not avoid the 'automatic' transfer of contracts of employment provided for in section 197A if the business was transferred as a going concern.

[21] Some of Carey's own statements are telling: He said the same moulds and machinery were used because 'that was the business. The moulds and machinery is the business'. He added that if the business were taken over as a going concern with all the problems, it would be

insanity. Carey testified: 'We were willing to take them back.' He stated that the workers were phoned and offered jobs and they refused and that the others who were employed started on new contracts. That some workers accepted new contracts at lower wages does not imply that the contracts of employment ought not to have transferred automatically to the new employer.

- [22] The problems were bad management and financial difficulties. Clearly, the financial difficulties were sorted out by voluntary liquidation and cutting costs going forward.
- [23] The only logical conclusion is that the purported purchase of assets and not the business was deliberate and contrived precisely to avoid the consequences of a transfer as a going concern, even though that it is fact what it amounted to. The business of Paving Warehouse is exactly the same as the business of Archstone Manufacturers. Regard must be had to the substance and not the form of the contract. The substance of the deal was a transfer as a going concern even though the form was the purchase merely of assets for R246 000.
- [24] The only factor that favours the second respondent is that there may have been an interruption in the operation of the business. There is no requirement that there cannot be an interruption. Part of the interruption was the normal leave period at year-end. And had the workers accepted the offer of their jobs back, they would have started working as soon as the others who continued to work after returning from leave. The employer insisted that the workers who accepted their jobs back only returned in mid-February when the business started operating again but it is clear that some workers, such as Handre Venter and Elizabeth Makgale, worked throughout the period of the transfer or interruption in the operations.
- [25] For the above reasons, I find that the business was transferred as a going concern.

The alleged automatically unfair dismissals

- [26] The dismissals took place in January, purporting to be backdated to 10 December 2010. The workers were dismissed by the liquidator for a reason related to the transfer. That reason was to avoid the consequences of section 197A. As such the dismissals were automatically unfair. Although the point was not argued, the dismissals were also unlawful because the requirements of section 197B were not fulfilled. Had it not been for the dismissals, the eight applicants would have been in the employ of the old employer at the time it was liquidated on 4 February 2011 which is also when the transfer took place.

The consequences of section 197A

- [27] The business went into voluntary liquidation. It is not for this court to determine if the liabilities in fact exceeded the assets. The special resolution was passed and the application went through the High Court. This court, accordingly, accepts that the transfer as a going concern took place in circumstances of insolvency. Accordingly, section 197A applies.

[28] Section 197A(2)(a) regulates the transfer of employment contracts in circumstances of insolvency. It provides 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 provisional winding up or sequestration’.

[29] As stated above, I am of the view that the dismissals were automatically unfair. They were also unlawful because they were

intended to avoid the consequences of section 197A(2)(a) which are intended to be “automatic”. They also did not comply with the provisions for consultation contained in section 196B. As such, the dismissals were invalid and the employees should be regarded as having been in the employ of the old employer immediately before liquidation, meaning that their contracts transferred automatically to the new employer.

[30] In the event that I am wrong in finding that the dismissals were unlawful and invalid, I turn now to consider the position on the assumptions that the dismissals were not invalid; that they took place before the date of the transfer. The question that arises is whether the old employer (now liquidated) remains responsible in terms of section 197A(2)(b).

[31] The starting point is that, whereas section 197 provides that the new employer should be held liable for the actions of the old employer, in terms of section 197A, the same liability does not arise and only the old employer is responsible.

[32] In the *Hydro Colour Inks* case (above) Tlaletsi, JA pointed out that section 197A provides 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. ‘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.’[5]

[33] The circumstances in *casu* are quite different. In that case, the dismissals had taken place long before the transfer as a going concern and the question was whether the reinstatement orders could be enforced against the new employer. I am of the view that the words ‘immediately before’ in section 197A do not mean that the contracts of employment must be in existence right up to the very day of the employer’s winding up. The purpose of section 197 and section 197A is to protect the employees’ employment in situations where businesses change hands and this purpose would be totally undermined if the word immediately were to be interpreted literally. The eight applicants were told that the business had gone into liquidation and had been declared bankrupt. It is clear that the

dismissals took place to avoid the consequences of section 197A. The word immediately cannot be interpreted literally or any old employer could simply terminate its workers' contracts a week or two before the transfer and avoid the consequences of section 197A.

[34] In conclusion, the dismissals of the eight applicants were automatically unfair because they were dismissed for a reason related

to a transfer contemplated in section 197A. In fact, they were dismissed to avoid the consequences of the transfer.

[35] Section 197A(2)(a) applied and the contracts of employment ought to have been transferred to the second respondent on terms and conditions of employment that were no less favourable than applied at Archstone Manufacturing.

Relief

[36] The applicants submitted that an order of reinstatement for the automatically unfair dismissal is necessary so that the eight

applicants can then be said to have been employed immediately before the voluntary liquidation. I have explained above the word

'immediately' in section 197A should be interpreted purposively and not literally. Moreover, with the liquidator deceased

and the old employer liquidated, an order of reinstatement would be impracticable.

[37] The appropriate remedy is that the applicants' contracts of employment are transferred to the second respondent as provided for by section 197A as if the applicants were never dismissed and were employed immediately before liquidation. This gives effect to the purpose and provisions of section 197A and this is what ought to have occurred at the time of the transfer as a going concern.

[38] I have taken into account that about five years have elapsed since the transfer and it would be overly harsh to require the second respondent to remunerate the eight applicants for the whole period. It is also not wise to cripple the business, placing all the jobs at risk. In the circumstances, the applicants must be paid retrospective remuneration equivalent to two years' remuneration each, as per the annexure to the applicants' heads of argument presented in court. The total for the eight applicants for 24 months amounts to R645 089. 76.

Costs

[39] There is no compelling reason why costs associated with the trial should not follow the result. The costs associated with previous

court appearances and applications are excluded.

Order

[40] In the premises, I make the following order:

1. The dismissals of the eight applicants by the first respondent were automatically unfair in terms of section 187(1)(g).
2. The applicants' contracts of employment are to be transferred to the second respondent with effect from 4 February 2011.
3. The applicants must be paid retrospective remuneration equivalent to 24 months' remuneration each.
4. The applicants' terms and conditions of employment must be no less favourable than those that applied at the time of dismissal.
5. The applicants' service must be reflected as unbroken.
6. The second respondent must pay costs of the trial.

Everett, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Ms Lameeze Jean-Pierre

Instructed by: Fasken Martineau

For the Second Respondent: Advocate Chris Orr

Instructed by: De Villiers & Du Plessis Attorneys

[1] 2003 (2) BCLR 154 (CC).

[2] Ibid at para 56.

[3]

[2007] ZALC 93; [2005] 3 BLLR 241 (LAC) at para 21.

[4]

[2011] 7 BLLR 637 (LAC) at para 12.

[5] Hydro Colour Inks (supra) at para 17.

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