



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA47/2017

In matter between

SPAR GROUP LIMITED

Appellant

and

SEA SPIRIT TRADING 162 CC T/A PALEDI

First Respondent

GREENVILLE TRADING 543 CC T/A PALEDI TOPS

Second Respondent

CORNELIUS MARTHINUS VERMAAK

Third Respondent

MARLENE DAPHNE VERMAAK

Fourth Respondent

Heard: 24 May 2018

Delivered: 07 June 2018

Summary: Transfer as a going concern – in terms of the notarial bonds concluded by the appellant and first and second respondents, in the event of default by the first and second respondent, the appellant takes over the business and exercises all rights including selling the business - Whether the perfection of the notarial bonds by the appellant led to the transfer of business as a going concern when the first and second respondents could not meet their financial obligations –

Held A creditor perfecting a notarial bond over movable property of its debtor normally does not intend to acquire responsibility for conducting the business

of the debtor for the purpose of making profits on an ongoing basis. The limited purpose of the transaction from the creditor's perspective is usually to recover the debts owing by the debtor and to withdraw from the arrangement once that object is accomplished. Requiring a creditor perfecting a notarial bond to assume responsibility for the employment contracts of the debtor will render this form of security unduly burdensome and less effective. Although the appellant assumed responsibility for conducting the business of the corporations, it did so temporarily with the limited purpose of recovering its debt. Labour Judgment set aside and appeal upheld.

Coram: Waglay JP, Jappie and Murphy AJJA

JUDGMENT

MURPHY AJA

[1] This is an appeal against the decision of the Labour Court (Prinsloo J) which found that the perfection of a notarial bond by the appellant, the Spar Group Ltd, ("Spar") over the movable property of the first and second respondents constituted a transfer of a business as a going concern with the result that the contracts of employment of the third and fourth respondents, Mr and Mrs Vermaak, were transferred to Spar on 1 July 2015 in terms section 197 of the Labour Relations Act¹ ("the LRA"). Spar contends additionally that the Labour Court erred in finding that the dismissal of the Vermaaks was automatically unfair² and in awarding compensation to the Vermaaks in an amount equivalent to 12 months' remuneration together with costs.

[2] The first and second respondents, two close corporations, ("Paledi Superspar" and "Paledi Tops" respectively) operated a supermarket and a bottle store. Mr Vermaak acquired a 50% member's interest in the two close corporations during November 2013. The Vermaaks were employed by the close corporations to manage the businesses.

¹ Act 66 of 1995.

² As contemplated in section 187(1)(g) of the LRA.

[3] Spar supplied the two businesses with trading stock on credit. On 4 December 2013, two general notarial covering bonds were registered by the Registrar of Deeds in Pretoria over the movable property of the close corporations in favour of Spar in terms of which the first and second respondents bound and hypothecated generally all of their movable property as security for their acknowledged indebtedness to Spar. In the event of default, Spar was entitled under the bonds, *inter alia*, to take possession of and retain all or any of the movable property and to sell and dispose of it. In addition, in terms of clause 8.2.3 of the bonds, Spar was entitled to "carry on the business of the Mortgagor relating to the movable property in the name of and at the expense of the Mortgagor and for that purpose to purchase goods and do whatever else the Mortgagees deem necessary." At the end of June 2015, the businesses were indebted to Spar in the sum of R6 510 032.

[4] As a result of Paledi Superspar and Paledi Tops being unable to meet their financial obligations, Mr Vermaak, on 24 June 2015, sent an e-mail to the Senior Retail Operations Manager of Spar, Mr Freeman, stating as follows:

'We regret that we have no alternative but to close down Paledi Superspar and the Tops at the end of this month as we cannot meet our expense obligations and we will not be able to meet our wage obligations at month end.'

[5] On 30 June 2015, Spar sought and obtained an order from the Gauteng Division of the High Court perfecting the notarial bonds. In paragraph 9.3 of the founding affidavit, the Divisional Credit Manager for Spar's Northern Region explained Spar's purpose in seeking perfection of the notarial bonds as follows:

'By granting the relief sought by the Applicant (Spar), this Honourable Court would permit the Applicant to take possession of the Respondents' businesses and trade them in order to preserve the businesses and value as a going concern until a purchaser is found to acquire the businesses at a market-related price. The trading and sale would be for the account of the Respondents and operate to their benefit by raising the maximum amounts to settle all of their creditors. Should it please the Court to grant the perfection

order, the Applicant will inject sufficient funds in order to ensure that the stores remain open and trading under normal circumstances. It is in the Applicant's best interest to avoid the demise of stores which serve as distribution points for the Applicant's products.'

- [6] After perfecting the notarial bond, Spar took possession of the businesses and started to run them from 1 July 2015. It completed a stock take of the stock on hand, credited the stock back to its account and deducted that amount from the total amount owing to it by the close corporations.
- [7] On 13 July 2015, Spar presented a draft management agreement to Mr Vermaak, in terms of which he would be appointed by Paledi Superspar as the store manager of the business at a lower salary for an initial three-month period commencing on 1 July 2015 and terminating on 30 September 2015. A similar management agreement was offered to Mrs Vermaak, in terms of which she would be employed as the manager of Paledi Tops for a three-month period commencing on 1 July 2015 and ending on 30 September 2015. The Vermaaks were not happy with the terms of the proposed agreements and rejected the offers. On 22 July 2015, Spar appointed a new store manager, Mr Human, and informed the Vermaaks that they were released from duty and requested them to leave the premises.
- [8] On the following day, Spar's attorneys addressed a letter to Mr Vermaak. After setting out the key terms of the court order perfecting the bond, they stated:

'We understand that you and your wife were employed by the corporations to manage/assist in the management of the business.

In terms of clauses 1.3 and 2.3 of the court order our client is vested with the right to manage the businesses. In this regard we advise that our client has appointed managers to run the businesses and the presence of you and your wife at the businesses is not required.

We point out that you remain employed by the corporations and insofar as you have any claims whether for salary or otherwise, such claims must be made against the corporations.'

- [9] Clauses 1.4.1 and 2.4.1 of the order of court perfecting the notarial bonds authorised Spar to sell and dispose of the businesses in such a manner and on such terms as Spar preferred and to convey valid title to the buyer. Therefore, when it was unable to make the businesses profitable, Spar sold them to a third party, Erasmus Group Holdings (Pty) Ltd (“Erasmus”). Appendix 3 of the sale of business agreement provided for the businesses to be transferred as going concerns and for Erasmus to be automatically substituted in the place of the close corporations in respect of all existing contracts of employment. The sale of business agreement therefore explicitly gave effect to a section 197 transfer of the contracts of employment from Paledi Superspar and Paledi Tops to Erasmus.
- [10] The Vermaaks contend that the perfection of the notarial bonds by Spar led to a transfer of business from Paledi Superspar and Paledi Tops to Spar in terms of section 197 of the LRA and that their dismissals were consequently automatically unfair under section 187(1)(g) of the LRA.³
- [11] In general terms, section 197 of the LRA provides that where there is a transfer of business as a going concern by one employer (the old employer) to another employer (the new employer), the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence and all the rights and obligations between the old employer and the employee continue in force as if they had been rights and obligations between the new employer and the employee.
- [12] The Labour Court held that Spar’s perfection of its notarial bond and its taking control of the businesses was a transfer of business as a going concern as contemplated in section 197 of the LRA. In reaching its conclusion, the Labour Court considered that the court order authorised and empowered Spar to enter upon the premises of the businesses to take possession of all movable property for the purpose of perfecting its security, to retain possession of the movable property as security for the debts and to carry on the business in the name of and at the expense of the corporations and for that purpose to

³ Section 187(1)(g) of the LRA provides that a dismissal is automatically unfair if the reason for the dismissal is a transfer, or a reason related to a transfer, contemplated in section 197 of the LRA.

purchase goods and do whatever else it deemed necessary. The stores did not close but continued to trade under the same name and from the same premises, and, as mentioned, Spar appointed its own store manager to run the show. Notwithstanding that Spar was never the owner or lessee of the business premises and the furniture and fittings on the premises never belonged to Spar, the learned judge concluded:

'I have difficulty to accept that in doing all this, Spar did no more than to act as a creditor to secure indebtedness, as submitted by Mr van As. I alluded to the factors to be considered and based on the evidence that was adduced I am convinced that *in casu* there was a transfer of assets as Spar has taken over two stores with whatever furniture, fittings or infrastructure they had. All the employees of Paledi Super Spar and Paledi Tops, except the [Vermaaks] were taken over and the same business with the same or similar activities carried on without any interruption and retained its identity after 1 July 2015. In my view there was indeed a transfer of the business of Paledi Super Spar and Paledi Tops from [them] to [Spar] and such transfer took place on 1 July 2015.'

- [13] Spar submitted that in arriving at this conclusion, the Labour Court failed to recognise that the court order authorised it to take control of the two businesses for a specific and limited purpose, namely to sell movable property (i.e. stock) to customers in order to realise their indebtedness.
- [14] The respondents, however, argued that the key determinant was the fact that Spar had become responsible for the carrying on of the businesses and operated the undertakings. They maintain that a transfer of business occurs where there is a change in the person responsible for carrying on the business who by virtue of that fact incurs the obligations of an employer *vis-à-vis* the employees of the undertaking regardless of whether ownership of the undertaking is transferred.⁴ They submitted that after the perfection of the notarial bond, Spar became the person responsible for carrying on the businesses and thus incurred the obligations of a new employer.

⁴ *Allen v Amalgamated Construction Co Ltd* (2000) ICR 436 (ECJ) at paras 16 and 17; *Kelman v Care Services Ltd* (1995) ICR 261 (EAT) at 267; and *Landorganisationen i Danmark v NY Molle Kro* [1989] IRLR 37.

- [15] The primary issue for consideration on appeal therefore is whether the perfecting of the notarial bond in the present circumstances constituted a transfer of business. The appraisal is by its nature context specific. Nonetheless, the definition of the word “transfer” in section 197(1)(b) of the LRA requires that there be a transfer of the business from one employer to another. The decisive criterion is whether, after the alleged transfer, the undertaking has retained its identity, so that employment in the undertaking is continued or resumed in the different hands of the transferee.⁵ The inquiry requires examination of all the facts relating both to the identity of the undertaking and the relevant transaction in order to assess their cumulative effect, looking at the substance, not at the form of the arrangements. The emphasis is on a comparison between the actual activities of and actual employment situation in an undertaking before and after the alleged transfer. The purpose of the relevant transaction often will be an important relevant consideration.
- [16] Although Spar assumed responsibility for conducting the business of the corporations, it did so temporarily with the limited purpose of recovering its debt. The court order did not authorise Spar to take possession of the movable property for any purpose other than the realisation of its security for the debt. More importantly, the court order did not authorise Spar to sell the movables in its own name. Spar continued to conduct the businesses in the names of the two close corporations, and for their account. Nor did the court order authorise Spar to dispose of any immovable property belonging to the corporations or to retain movable or immovable property belonging to them after the indebtedness had been realised. The leases in the names of the corporations were not transferred or ceded to Spar and all the employees of the close corporations became employees of Erasmus when, in order to recover the debt owing to Spar, the businesses were subsequently sold as going concerns in April 2016.
- [17] Moreover, Mr Freeman gave unchallenged evidence on behalf of Spar that responsibility for the two businesses would have been handed back if the

⁵ *COSAWU v Zikhethale Trade (Pty) Ltd and Another* (2005) 26 ILJ 1056 (LC); and *Kelman v Care Services Ltd* (1995) ICR 261 (EAT) at 267.

indebtedness to Spar had been settled whilst it was managing them. In addition, the owners of the close corporations were given the opportunity to produce other potential buyers before the sale to Erasmus. Counsel for the respondents also conceded before us that any revenue recovered in excess of the indebtedness would have been for the account and benefit of the two corporations and not Spar.

[18] A creditor perfecting a notarial bond over movable property of its debtor normally does not intend to acquire responsibility for conducting the business of the debtor for the purpose of making profits on an ongoing basis. The limited purpose of the transaction from the creditor's perspective is usually to recover the debts owing by the debtor and to withdraw from the arrangement once that object is accomplished. Requiring a creditor perfecting a notarial bond to assume responsibility for the employment contracts of the debtor will render this form of security unduly burdensome and less effective. That is not to say that a creditor perfecting a notarial bond may not in certain instances exceptionally assume ongoing responsibility for a business for reasons other than the recovery of its debt. It will depend on the circumstances. However, in this case there is no evidence that Spar sought to achieve anything other than the realisation of the indebtedness, as is evident from what ultimately transpired.

[19] There was therefore no transfer from an old employer to a new employer in this instance.⁶ It is clear from the wording of section 197 that the old and the new employers must be two separate entities.⁷ On the facts, the employees remained employed by the two corporations and were ultimately transferred from them to Erasmus. Before the transfer to Erasmus, there was only ever the original employer – Paledi Superspar and Paledi Tops, with Spar acting *qua* creditor and not *qua* employer.

[20] The present situation bears resemblance, in a limited respect, to a change in shareholders through the sale of shares, where the new shareholder gains

⁶ Section 197(1)(b) defines "transfer" to mean "the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern".

⁷ *Todd et al, Business Transfers and Employment Rights in South Africa*; cited with approval in *Long v Prism Holdings Ltd and Another* [2012] 7 BLLR 672 (LAC) at para 33.

control of a business, but the business (i.e. the employer) remains intact and does not transfer to the new shareholder. In such cases control or responsibility for the business may be shifted, but the legal identity of the employer remains the same, as do the contractual relationships between the employer and employees. Section 197 of the LRA does not apply in these circumstances.⁸

[21] The Labour Court therefore erred in finding there was a transfer of business and that section 197 of the LRA was applicable in these circumstances. There is accordingly no basis for the third and fourth respondents' claim of an automatically unfair dismissal in terms of section 187(1)(g) of the LRA, and Spar's appeal must succeed.

[22] Spar does not seek costs.

[23] The following order is made:

23.1 The judgment of the Labour Court is set aside.

23.2 The claim of the third and fourth respondents is dismissed.

23.3 There is no order as to costs.

JR Murphy AJA

I agree

⁸ *Ndima and Others v Waverley Blankets Ltd* [1999] 6 BLLR 577 (LC).

I agree

A Jappie AJA

APPEARANCES:

FOR THE APPELLANT:

Adv AT Myburgh SC and Adv MJ van As

Instructed by: Moss, Marsh and Georgiev

FOR THE FIRST RESPONDENT:

Adv G Fourie and Adv S Nakhjavani

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