IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: J 420/08

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS UNION	**Applicant**
And	
NORTH WEST HOUSING CORPORATION	**1st Respondent**
MEC FOR LOCAL GOVERNMENT, HOUSING, PLANNING AND DEVELOPMENT (NORTH WEST PROVINCE)	**2nd Respondent**

JUDGMENT

MOLAHLEHI J

Introduction

[1] On the 31st March 2008, this Court issued an interim order interdicting the first and second respondents from terminating the employment of the applicant's members for operational reasons.

The factual dispute that had arisen from the papers before the court was referred to oral evidence. The nature of the dispute to be determined was as follows:

> *"Whether the first respondent intends to transfer its powers, functions, assets and liabilities to the Department of Development and Local Government and Housing".*

[2] The applicant had also prayed for a declarator on the following terms:

> *" Declaring that the winding up of the first respondent and the transfer of its powers, functions assets and liabilities to the North west Province Department of Development Local Government and Housing or any other statutory body constitutes a transfer of a business, or part thereof, as a going concern as contemplated in section 197 read with section 197A of the LRA."*

[3] The return date for the interim order was the 15th April 2008. On that day although the former acting Chief Executive Officer (CEO) of NWHC, who was subpoenaed by the applicant, was in Court he was not called as a witness by any of the parties.

[4] Mr Van Der Riet SC, counsel for the applicant, indicated that it had been decided not to call the former acting CEO because he was uncooperative. He accordingly closed the case of the applicant without leading any oral evidence on the disputed fact. The respondents also closed their case without calling any witness.

Background facts

[5] The first respondent, North West Housing Corporation (NWHC) is a statutory body established by the North West Housing Corporation Act of 1982. Its portfolio consists of instalment sale and rental housing. Presently it employs about 105 employees of whom 92 are members of the applicant. It is governed by a board of directors which reports to the second respondent, the Member of the Executive Committee (MEC) for Local Government Housing Planning and Development.

[6] At some point in the late 90's the Provincial Legislature began in a substantial way reducing the funding of the NWHC, and advised during that period that NWHC should develop strategies to ensure that it is self-sustainable. Following this announcement, the Provincial Legislature expressed a desire to disestablish the NWHC and this was to be done through the North West Repeal Bill of 2001. To date this has not been carried forward.

[7] Subsequent to an audit and investigation into the financial affairs of NHWC, the MEC issued a policy statement in the Provincial Legislature in terms of which he indicated that NHWC would be wound up because of its precarious financial position.

[8] The financial situation of the NWHC became worst resulting in it not being able to pay its employees on time. During May 2007 the department of housing planning and development (the department) began channelling money to the NHWC to ensure payment of future wages.

[9] During June 2007 the NHWC established a task team consisting of employee representatives, union delegates, including the applicant and senior management, for the purpose of finding a solution to the challenge facing the NHWC.

[10] After its formation, the task team requested and NHWC agreed to the appointment of an independent facilitator to facilitate the process of engagement between the parties with the view to finding an amicable solution to the challenge facing the NHWC.

[11] The task team under the facilitation of the independent attorney appointed by consensus focused on the possible retrenchments. In this regard by the end of 2007, NWHC had secure alternative jobs of 18 (eighteen) employees with the North West Provincial Government but 8 (eight) of these employees declined the offer.

[12] A meeting was convened between the parties during January 2007, the main agenda item being, and severance packages for the employees who were to be retrenched. The parties were unable to reach an agreement on this issue. This was then followed by a letter dated 18 February 2008 where in the applicant requested certain information including copies of the resolution regarding the winding up of NHWC. This included information concerning which company or institution would perform the statutory duties of the NHWC after the 31 March 2008.

[13] The issue of the requested information regarding the transfer of the powers, functions, assets and liabilities of the NHWC was raised again by the attorneys of the applicant on the 21 February 2008 after the NHWC failed to respond to the letter of the applicant dated the 18 February 2008.

[14] In as far as this matter is concerned the key paragraph of this letter is paragraph 4.4 which reads as follows:

> "*4.4 Is it intended that the powers, functions, assets and liabilities will be transferred to the Provincial Government, local authority or a housing infrastructure and delivery company that has been or will established? If so, kindly provide us with the full details of such transfer".*

[15] The NWHC, responded to the applicant's letter on the 26 February 2008 where in amongst others the then acting CEO said:

> "*4 It is intended that the powers, functions, assets and liabilities will only be transferred to the department of developmental local government and housing at the time the corporation is wound up".*

[16] The letter also indicated that the Act that established the NWHC would be repealed.

[17] The applicant's attorneys sent another letter to the respondent dated 27 February 2008, wherein it demanded that:

> "*5 Accordingly, we are instructed to demand an unconditional written undertaking by 12:00 on 3rd*

March 2008 that non of the corporation's employees will be retrenched but transferred to the department.

6 If we do not receive the undertaking reflected in paragraph 5 above, we are instructed to apply to the Labour Court for an urgent interdict to seek an order, amongst other things, interdicting the corporation from dismissing its employees".

The interim relief

[18] The test to be applied in an urgent interdict is to establish on the papers before the court a *prima facie* right, which may though be in doubt, **see CB Prest, Law and Practice of Interdicts, Juta 1996 Page 57.**

[19] The requirements for an urgent interdict are: a well grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he or she ultimately succeeds in establishing the right; and the balance of convenience favours the granting of interim relief and the applicant has no alternative remedy. For details consideration of this requirement see **LF Boshoff Investment (Pty) Ltd v Cape Town Municipality 1969 (2) SA 256 (LPD) at page 267 A-F.**

[20] In the present case whilst I was mindful of the dispute of fact which had arisen as a result of the averment in the respondents' papers and conceded to by the applicant, I was satisfied that the applicant had established a *prima facie* case warranting the granting of an interim relief. I did have some doubts in my mind about the rights that were sought to be protected by the applicant but what tilted the case in favour of the applicant for an interim relief was the contents of the letter from the then acting CEO. In this letter as indicated above he stated that the assets and function of NHWC would be transferred to the department.

[21] Although the phrase "*as a going concern*" was not used in the letter this is not conclusive that business would not be transferred as such. Based on the objective facts, and circumstances of the case, this Court was satisfied that *prima facie* there existed a reasonable apprehension on the part of the applicant that the respondent intended to retrench its members by the end of 31st March 2006 and thereafter transfer the assets and functions of NWHC as a going concern to the department.

[22] Whilst mindful of the dispute of fact that had arisen I was of the view that the balance of convenience favoured the granting of the

interim relief taking into account the fact that the disputed fact would be resolved through the referral to oral evidence. In taking this approach, the Court was influenced more particularly by the contents of the letter written by the then acting CEO who at the time was the most senior employee of the NWHC who was also an *ex officio* member of the board. Failure to respond to the letter of demand tilted the scales even further at the level of the *prema facie* case.

[23] In summary the interim relief was granted for two basic reasons. The first being that a *prima facie* right which admittedly had some doubts was established, largely because of what was said by the then acting CEO and failure to respond to the letter of demand by the respondents. There was secondly a manifestly serious question to be tried and could only be resolved through oral evidence.

Final interdict

[24] In the case of a final interdict the onus of showing on a balance of probabilities the existence of a clear right which is sought to be protected rests on the applicant. The other prerequisite for the granting of a final interdict is for the applicant to prove that there is no other satisfactory remedy available. See **Numsa & Others v Comark Holdings (Pty) Ltd (997) 18 ILJ 516 (LC).**

[25] As indicated earlier on the return day the issue of the disputed fact remained, both parties having closed their cases on this issue without calling any witnesses. In this regard this Court found itself in no different position then it was when it considered the urgent application. Thus in absence of oral evidence the rights which the applicant sought to protect remained in doubt as they were at the end of the urgent application.

[26] The applicant argued that in the absence of evidence rebutting its averments, set out in its papers, the court must accept its version and grant the final relief prayed for. It argued further that the issue arising from the letter of the then acting CEO was not whether he had authority to write the letter but whether he had the requisite knowledge about the information which he provided regarding the transfer of functions and assets of NHWC to the department.

[27] Before dealing with the issue of the dispute of facts and failure to address it through the oral evidence, I need to point out that I agree with Mr van der Reit SC that the fact that a business is

insolvent does not mean that it cannot be transferred as a going concern.

[28] In relation to the issue of leading witnesses to deal with the disputed fact, Mr van Riet argued that a negative inference should be drawn from the fact that the respondent failed to call witnesses, either the then acting CEO or the acting Deputy Director General (DDG), now the acting Director General (DG), to rebut the averment in the applicant's papers that the respondent intended to embark on a transfer of business as a going concern in terms of s197 of the LRA.

[29] The respondents in their answering affidavit contended that it was always envisaged that after the process of placement of employees and the retrenchment of those that they could not place the second respondent depending on the legal advice, would either wound up or disestablish the NWHC by liquidation or by legislative disestablishment. The applicant's application came before this stage was reached.

[30] The respondent further contended that it is not the intention of the second respondent to take over the affairs of NWHC after the

disestablishment or liquidation. The second respondent being the main shareholder is according to the respondents responsible for liquidating or disestablishing the NWHC and ensuring that creditors are paid whatever is due to them.

[31] In as far as the contents of the letter written by the then acting CEO during February 2008 the respondents contended that the interpretation of the letter that the transfer will take place as a going concern was incorrect as this was never the intention of the second respondent.

[32] Mr Vally, counsel for the respondents argued that the assessment whether or not there exists an intention to transfer a business as a going concern must be done within the context and the circumstances where parties had engaged in extensive consultation which had reached a stage where a draft agreement had already been prepared and sent to the applicant for consideration.

[33] In support of his argument regarding failure to present oral evidence by the respondents, Mr Van der Riet relied on the decision in **Galante v Dickenson 1950 (2) SA 460 (A) 465** where in dealing with failure of a driver of a vehicle to testify in an

action resulting from an accident in which he was involve in, Schreiner JA said:

> *"In the case of the party himself who is available, as was the defendant here, it seems to me that the inference is, at least, obvious and strong that the party and its legal advices are satisfied that, although he was obviously able to give very material evidence as to the case of the accident, he could not benefit and might well, because of the facts known to himself, damage his case by giving evidence and subjecting himself to cross examination."*

[34] The approach which was adopted in Galante's case does not constitute a rule which should be followed in every given situation where a party fails to give evidence on the issues that are within his or her knowledge. In relation to the facts of this case Mr van der Riet relied on that part of the dicta in Galente's case which says:

> *"That it seems fair at all event to say that in an accident case where the defendant was himself the driver of the vehicle the driving of which the plaintiff alleges was negligence and cause the accident, the court is entitled, in the absence of evidence from the defendant to select out of*

the two alternate explanation of the cause of the accident which are more or less equally upon on the evidence, that one which favours the plaintiff as opposed to the defendant".

[35] I understand the argument of the applicant to be that an adverse inference should be drawn because the respondent has failed to call either the former acting CEO or the acting DG both of whom were available to testify about the fact in dispute on the day this matter came before this court. In essence the argument was that the respondents should have presented oral evidence to rebut the version of the applicant that they intended transferring the assets and functions of NWHC as a going concern.

[36] I do not with due respect agree with this approach. The facts and circumstances of the present case are distinguishable from those in Galante's case and as Zeffert *et all* in the South African Law of Evidence (5th edition Juta) page 129, cautioned that the fundamental consideration as set out in **Titus v Shield Insurance company Ltd 1980(3) 119 (a) 133 E-F** was that**:**

"It is clearly not an invariable rule that an adverse inference be drawn; in the final result the decision must depend in large measure upon: the particular circumstances of the

litigation in which the question arises. And one of the circumstances that must be taken into account and given to weight, is the strength of weaknesses of the case which faces the party who refrain from calling the witness".

[37] The key difference between Galente and the present case is that in that case the matter came before the court as a trial case and the defendant failed to call the driver to refute the evidence of the plaintiff. In the present case on the other hand the matter came before this court on motion proceedings. Thus, the evidence of the parties was by way of affidavits and other supporting documentation.

[38] The aspect of these motion proceedings which would have taken the form of trial proceedings failed when the parties closed their cases without calling any witnesses. As indicated earlier the issue which was referred to oral evidence arose when the respondent in the answering affidavit categorically denied the intention to transfer the assets and functions of NWHC as a going concern.

[39] The allegations that the respondents intended to engage in a transfer of business as a going concern in terms of s197 of the

LRA was made by the applicant and therefore the burden of proof rested with it.

[40] The fundamental question that has arisen in this matter is whether the applicant at the point of closing its case (regarding the oral evidence) had discharged its onus or it had made a prima facie case which called upon the respondent to reply.

[41] The Galente's principle as explained in Zeffert (at page 129) includes the notion that:

> *"The failure of the respondent to reply or lead evidence in rebuttal of a fact peculiar within his knowledge is taken in account when one decides whether the prima facie case has been made out".*

See **Hasselbacher Papier Import & Export *"Body Corporate"* & Another v Staff Stavroul 1987 (1) SA 75 9(C) at 79 F.** In the present case the issue must be understood within the context in which the applicant stated in his heads of argument that:

> *"9 It is respectfully submitted that there is (sic) clear dispute of fact between the parties relating to whether the first respondent intends to transfer its business within the contemplation of section 197 (read with section 197A) of the LRA. In the circumstances, this issue should be referred to*

oral evidence so that the matter can be resolved after the relevant witnesses have been cross examined".

[42] In my view at the time the applicant closed its case it had not discharged the onus which rested on it in the sense of showing the existence of the intention on the part of the respondents to engage in a transfer of business as a going concern. Therefore there was no case for the respondent to answer or explain its failure to lead evidence on this issue.

[43] In the light of the above what remains before this court for consideration is what the parties have pleaded on their respective papers. Thus as the saying goes, the parties must stand or fall on their own papers. The dispute of fact which had arisen as a result of the answering papers of the respondents and conceded to by the applicant, still remains.

[44] The approach to be adopted when confronted by a dispute of facts in motion proceedings was set out in **Plascon- Evans Paints v Van Riebeck Pains 1984 (3) SA 623 at page 634 H-I** by Corbett JA as follows:

> *"It is corrected that, where in proceedings on notice of motion disputes of fact have arisen on the affidavit, a final*

order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavit which have been admitted by the respondent, together with the facts allege by the respondent justify such an order. The power of the Court to give such final relief on papers before it is, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact."

[45] In the light of the above I am satisfied that a genuine dispute of fact exists. It is for this reason alone that the application of the applicant stands to be dismissed.

[46] I accept that should the respondents fail to comply with the provision of s197 of the LRA the applicant's members may suffer financial harm. The Court in **University of the Western Cape Academic Staff Union & Others v University of the Western Cape (1999) 20 ILJ 1300 (LC) at 1304,** the case which Mr Van der Riet relied on in seeking to pursued this Court that special circumstances exist in this case for an interdict, Mlambo J as he then was, held that:

"*With regard to the notion of irreparable harm it needs to mentioned that loss of income as a result of dismissal is inevitable consequence and as such provides no good ground for granting of urgent interim relief. Special circumstances must be advanced to persuade a court to oblige. Loss of accommodation has been found to be a special feature accepted by the courts in order to grant urgent interim relief.* **…***In considering the issue of irreparable harm the court will also consider the adequacy or not of any alternative remedy that may be available.*

[47] In the first instance I am not persuaded that special circumstances exist in this case requiring the granting of the interdict and secondly the applicant's members would have alternative remedies should the respondents act in breach of the provisions of s197 of the LRA.

The declarator

[48] The applicant prayed for a declarator that upon the transfer of a business by NWHC to the department or any other statutory body the applicant's members' contracts of employment be regarded as automatically transferred to the department or any other statutory body.

[49] In my view what the applicant seeks to achieve with this prayer is already provided for by the law. The determination whether a transfer has taken place in terms of s197 read with s187 (1) (g) of the LRA, entails both a legal and factual enquiry. In order to ascertain whether a dismissal constitutes an automatically unfair dismissal in terms of s187 of the LRA, one must ascertain the true reason for such a dismissal. See ***Kroukam v SA Airlink (Pty) Ltd* [2005] 12 ILJ 2153 (LAC) at 2162F; .*NUMSA & Others v Driveline Technologies (Pty) Ltd & Another* 2000 ILJ 142 (LAC) at 152J; *SA Chemical Workers Union (SACWU) & Others v Afrox Ltd* 1999 ILJ 1718 (LAC) at 17260; *Van der Velde v Business Design Software (Pty) Ltd & Another* (2) 2006 ILJ 1738 (LC) at 1745 I; *Jabari v Telkom SA (Pty) Ltd* 2006 ILJ 1854 (LC) at 927A-B.**

[50] The approach that has been adopted in dealing with automatically unfair dismissal is one in which an objective inquiry is conducted into the reasons for the dismissal. This inquiry as stated above entails both a factual and legal causation**.** See ***Kroukam(supra) and SA Chemical Workers Union & others v Afrox Ltd* (1999) 20 ILJ 1718 (LAC) (at para 32),**

[51] The starting point in this inquiry according Davis AJA, ***Kroukam(supra)*** is to determine whether the employee has produced sufficient evidence to raise a credible possibility that an automatically unfair dismissal has taken place. Having discharged the evidentiary burden of showing that the dismissal was for an impermissible reason, it is upon the employer to discharge its onus of proving as provided for in terms of s192 of the LRA that the dismissal was for a permissible reason as provided for in terms of s188 of the LRA.

[52] The employee discharges his/her evidentiary burden by: (a) advancing evidence pertaining to the existence of the dismissal in terms of s192 (1) of the LRA; (b) showing that the transfer of the whole or part of the business was a going concern in terms of s197 and; (c) presenting evidence that points to a causal connection between the dismissal and the transfer.

[53] All relevant facts and circumstances must be taken into account in conducting the objective test of determining the causal connection between the dismissal and the transfer as a going concern, and the enquiry into the factual causation entails answering the question;

would the dismissal have taken place but for the transfer as a going concern-the *"but for"* test. In the absence of cancellation by the employer, this enquiry can only be conducted through hearing of oral evidence.

[54] The legal causation is applied once the factual causation is satisfied. The legal causation is established through an objective test of determining whether the transfer is the *"main," "dominant," "prominent," "proximate likely cause" of the dismissal.*

[55] In my view granting a declarator in the circumstances of this case would not only amount to anticipating and probably prejudging the above enquiry but also would deny the respondents an opportunity to ventilate their case once the transfer has taken place if it ever does. It would seem to me also that the applicant would be given an unfair advantage in that its evidentiary burden would be discharged through the declarator.

[56] It is evidently clear from the papers that NWHC is bound to be liquidated or disestablished through legislation in the near future. What remains uncertain is how the respondents will deal with the function, assets and liabilities of NWHC. It can only but be

expected that when such an event occurs, the respondents as government and as a statutory body will lead by example by ensuring compliance with the law. Should there be failure to comply with the law as stated earlier the applicant would have alternative remedies to challenge such unlawful conduct.

[57] In the light of the above reasons I am of the view that the applicant's application stands to be dismissed. I do not however believe that it will be fair to allow the costs to follow the results. In this regard I am of the view that this matter would not have gone so far but for the failure of the respondents to respond promptly to the applicant's letter of demand.

[58] In the premises the following order is made:

1. The interim order issued on the 31st March 2008 is discharged.
2. The application for a declarator is dismissed.
3. There is no order as to costs.

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Molahlehi J

Date of Hearing: 15 April 2008

Date of Judgment: 29 April 2008

APPEARANCES

For the Applicant: Advocate J G Van der Riet SC

Instructedby: CHEADLE THOMPSON & HAYSON

For the Respondent: Advocate B Vally

Instructed by: THE STATE ATTORNEY