

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: J421/07

In the matter between:

STEPHEN JOHN CARTON-BARBER

1ST APPLICANT

SHARON ELIZABETH DENNIS

2ND APPLICANT

THEOPHILUS FRANK HURFORD

3RD APPLICANT

JOHN RONALD HENRY DUNGEY

4TH APPLICANT

JOHAN VON WEIDTS

5TH APPLICANT

AND

EKURHULENI METROPOLITAN

MUNICIPALITY

RESPONDENT

JUDGMENT

Molahlehi J

Introduction

[1] The applicants in this application seek an order in the following terms:

- “1. To declare that Applicants are all employees of Respondent;*
- 2. To order Respondent to employ Applicants forthwith with retrospective effect from 1 March 2004 on the same terms and conditions that governed their employment with Benoni Fire and Emergency Services (Pty) Ltd on 29 February 2004.*

3. *To order Respondent to pay all accumulated arrear remuneration of the Applicants within 7 (seven) days of this order.*
4. *Costs of the application.*
5. *Further and/or alternative relief.”*

The parties

- [2] The applicants occupied various management positions in Benoni Fire and Emergency Service (Pty) Ltd (Benoni Fire & Emergency) before the services rendered by it were taken over by the Greater Benoni Municipality as at February 2004.
- [3] The Benoni Fire & Emergency is a private company, duly registered in terms of the laws of South Africa. According to the applicants this is not cited in this matter as it has no interest but is referred to as their former employer. The respondent is a municipality created and established in terms of laws of South Africa.

Background facts

- [4] The relief which the applicants are seeking is essentially based on the case of two former employees who obtained a declarator that there existed a transfer as a going concern between the Greater Benoni Town Council and Benoni Fire & Emergency in the Labour Court under case JS 1499/02, in terms of section 197 of the Labour Relations Act 66 of 1995 (the LRA).
- [5] The Benoni Fire & Emergency got involved in the unfair dismissal dispute because prior to September 1991, the Town Council of Benoni rendered fire and

emergency services to the general public that fell within the general municipal structure and boundaries of the Town Council of Benoni.

- [6] In September 1991 the Benoni town Council privatized its emergency services and outsourced it to through an agreement with the Benoni Fire & Emergency. That agreement regulated the standard of the fire and emergency services which were to be rendered to the general public that fell under the sphere of the Town Council of Benoni starting from 27th September 1991.
- [7] In terms of the agreement the Benoni Fire & Emergency had to lease the fixed properties of the Town Council of Benoni, purchase the movable assets and take over the employees, then employed by the town council.
- [8] The agreement between the parties was renegotiated in 1996. That agreement was only signed on 28 September 1998 and to be amended on 8 September 2000.
- [9] The respondent, Ekurhuleni Municipality, came into existence towards the later part of 2000 and was essentially the amalgamation into one combined Metropolitan Council of City Councils of the Greater Benoni with the then existing councils of amongst others Germiston, Boksburg and Brakpan. The Benoni Fire and Emergency Services continued to provide the fire and emergency services to the general public even after the amalgamation of the various town councils. There was however an attempt by the respondent to terminate the agreement in 2003. The Benoni Fire and Emergency Services successfully challenged the attempt at cancelling of the contract in the High Court. The decision of the High Court was challenged on appeal but the parties

concluded a negotiated settlement before the matter could be considered. In terms of the settlement agreement the respondent took over the rendering of emergency services in the Benoni area from Benoni Fire and Emergency Services with effect from 1st March 2004. The important aspect in as far as the contention of the applicants in this matter is concerned is that the whole of the business of the Benoni Fire and Emergency Services was handed over to respondent on 1 March 2004.

[10] The applicants contend that despite the provisions of clause 7 of the said settlement agreement, the respondent subsequently provided employment positions for all the 147 (hundred and forty seven) employees except for the 7 (seven) others including the first and second applicants. Those employees who were taken over were placed on temporary employment contract and subsequently appointed after applying for those positions.

[11] Turning to what happened in case JS 1499/02, it is apparent that the Benoni Fire & Emergency Services, which was the first respondent in that matter brought an interlocutory application in terms of which it sought to be substituted by the second respondent which was Ekurhuleni Municipality. The interlocutory application was successful and accordingly Benoni Fire and Emergency was substituted by Ekurhuleni Municipality.

[12] The other important aspect of the outcome of case number JS1499/02, is that the court held that the transfer of the business of the Benoni Fire and Emergency Services to the Ekurhuleni Metropolitan Municipality on 1st March 2004

constituted a transfer of a business as a going concern in terms of section 197(1)(b) of the LRA.

[13] The respondent was clearly unhappy with the decision of the court and thus filed an application for leave to appeal the decision on the 8th June 2005, which was successful and was granted on 19th April 2006. However, the Ekurhuleni Metropolitan Municipality never progressed the matter any further. On the 15th January 2007, Benoni Fire and Emergency Services brought an application in the following terms against respondent under case number JS 1499/02

- “1. To order Second Respondent to proceed with the appeal against the whole of the judgment of Modise, AJ dated 19 April 2006 within 7 (seven) day from the date of this order, failing which the Registrar may enroll the matter to complete the trial hearing of the matter;*
- 2. Costs of the application.*
- 3. Further and/or alternative relief.”*

[14] On 1st February 2007, the respondent filed a notice to oppose the application and has to date failed to file any answering affidavits in support thereof and whereof the *dies* to do so, expired on 30th January 2007. However, to date the respondent has failed to file any answering affidavits in support of its opposition to the case under number JS 1499/02.

[15] It is on the basis of the above that the applicants contend that they were all employed by Benoni Fire and Emergency Services on 29th February 2004, when the respondent took over the services of Benoni Fire and Emergency Services under circumstances that constitute a transfer of a business as a going concern in

terms of section 197(1)(b) of the LRA. It is also for this reason that the applicants further contend that the Ekurhuleni Municipality is obliged in law to appoint them as its employees with effect from 1st March 2004.

[16] The respondent raised as a point *in limine* in its defence the issue of non-joinder. It is trite that all parties who have material and direct interest in the outcome of the proceedings should be joined in such litigation. See *Gordon v Department of Health: KwaZulu-Natal* [2008] 11 BLLR 1023 (SCA).

[17] In the present instance there can be no doubt that the Benoni Fire and Essential Services had an interest in the matter. Its interest is revealed even by the fact that they brought an application to compel the respondent to take further steps in the prosecution of its appeal. The applicants have not joined the Benoni Fire and Essential Services in the present matter. In my view for this reason alone the applicants' application stand to fail.

[18] The other reason why the applicants' case should fail is because of the basis upon which they relied on in support of their claim. In this regard the applicants relied on the declaration in the judgment of Modise AJ, which was referred to earlier in this judgment. The applicants were never a party to the proceedings nor did they ever sought to join the proceedings that finally led to the declarator.

[19] In *SA Mutual Life Assurance Society v Durban City Council* 1948 (1) SA 1 (D), the Court held that the declaratory order is conclusive only in as regards the grounds with which it deals with, and cannot affect the right of persons who

were not party to the proceedings. See also *Ex Parte Van Schalkwyk N.O. and Hay N.O. 1952 (2) SA 407 (AD)*.

[20] As indicated above the applicants were not party to the proceedings that resulted in the order issued by Modise AJ, neither did they ever seek to be joined therein. Thus the applicants are not entitled to approach this Court on that basis. In my view, based on the above reasons the applicant's application stand to fail. The applicants have failed to make out the case to support the relief they are seeking in their notice of motion.

[21] I see no reason in fairness and law why the costs should not follow the results.

[22] In the premises the applicants' application is struck of the roll with costs.

Molahlehi J

Date of Hearing : 27th October 2009

Date of Judgment : 22nd December 2009

Appearances

For the Applicant : Adv F Venter

Instructed by : Alan C. Knight Attorney

For the Respondent: Adv West

Instructed by : Du Plessis De Heus & Van Wyk Attorneys