

Reportable and of interest to other Judges

**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD IN BRAAMFONTEIN)**

CASE NUMBER: J1346/2010

In the matter between:

CHEMICAL ENERGY PAPER PRINTING WOOD

AND ALLIED WORKERS UNION

on behalf of its members

APPLICANT

and

HYDRO COLOUR INKS (PTY) LTD

1ST RESPONDENT

EVERGREEN COATINGS (PTY) LTD

2ND RESPONDENT

JUDGEMENT

AC BASSON, J

- [1] This is an application for an order that there has been a transfer of a business of the 1st respondent (Hydro Colour Inks (Pty) Ltd – hereinafter also referred to as “Hydro”) to the 2nd respondent (Evergreen Coatings (Pty) Ltd – hereinafter also referred to as “Evergreen”) as a going concern in terms of section 197 of the Labour Relations Act 66 of 1995 (“the LRA”). Where necessary I will refer to the 1st and 2nd respondents collectively as “the respondents”.
- [2] The application is opposed by the respondents primarily on the basis that, according to them, there has not been a transfer in terms of section 197 of the LRA because Hydro ceased doing business and Evergreen merely started a new business. In addition hereto the respondents argued that the degree of urgency with which this application has been brought is not warranted and that it constitutes an abuse of process to bring an application of this nature by way of motion. Lastly it was submitted that there is a fundamental dispute of fact in the matter which means it cannot be determined on the papers.

Relevant facts

- [3] The individual applicants were employed by Hydro since 2004. On 9 April 2010 Mr. Smail (“Smail”), the owner and director of Hydro issued a letter to all customers of Hydro advising them that Evergreen Coatings (Pty) Ltd

would take over the manufacture of the products of Hydro and that it would *“offer you the same service you’ve come to expect from Hydro Colour Inks”*. The letter further states that *“..the new company is taking over the staff and premises of Hydro Colour Inks and has purchased the rights to manufacture the exiting product range just as Hydro Colour Inks did. So, for you, the customer, all that will really change is the name on the bucket. Everything else stays the same, including your terms of payment. Please note that you will still be contracted to settle your Hydro Colour Inks accounts. We will be forwarding you the new bank details with your next invoice.*

We will be invoicing from the new company from today. We expect some glitches in the beginning, as it always the case with change. But we should be running smoothly in no time. We appeal to you to work with us in this transition and we expect greater thinks in the future and look forward to working with you for the foreseeable future.”

- [4] When comparing the first and the second respondent, the following is common cause:
- (i) Evergreen operates from the same premises as Hydro.
 - (ii) Evergreen has the same fax and telephone numbers as Hydro.
 - (iii) Evergreen has the same employees as Hydro. They do the same work at the same rate of pay and working the same hours.

- (iv) Evergreen produces the same products as the Hydro at the same prices.
- (v) There was no interval between the time Hydro stopped trading and Evergreen started trading.

The Respondents' version

[5] According to the respondents' papers the individuals' employment in fact terminated on 31 May 2010 because of the serious financial difficulties suffered by Smail. Smail therefore decided to close and liquidate the business. According to the papers, by the end of the first quarter of 2010, Hydro was in a state of virtual insolvency. A certain Mr. Zimdahl, who was a customer of Hydro, saw an opportunity in the misfortune of Hydro and decided to establish his own and new business – the business of the 2nd respondent. After some discussion between Smail and Zimdahl a mutual agreement was reached between the two. Smail would close the business of Hydro and remain in the 1st respondent of the next few months in order to consolidate the debts of the 1st respondent, wind it up and then, ultimately liquidate it. Zimdahl would then start a business *de novo* in the stead and place of the business of the 1st respondent. In terms of this agreement, Smail then wrote to all of the customers on 9 April 2010 advising them of the fact that Hydro would cease to exist and that a new entrant in the industry (Evergreen) would take over the manufacture of the products. According to Smail he informed the staff that a new company

namely Evergreen had been established and that this new company would be starting a new business doing what Hydro used to do. Smail informed the staff that it had been arranged that they could be offered employment with the new company and that it was up to them to accept employment or not. If they do not accept employment they would probably lose their employment as Hydro would ultimately liquidate as it was no longer trading. Smail further explained to the staff that employment with Evergreen would be new employment on the same terms they had with Hydro but subject to a six months' probation as this was what Evergreen wanted.

The respondents' argument

- [6] The argument on behalf of the respondents was that the business of the 1st respondent was never transferred to the 2nd respondent. The 2nd respondent acquired no business from the 1st respondent – the 2nd respondent merely started its own and a new business.

The applicant's argument

- [7] On behalf of the applicant it was argued, with reference to decisions of this court and the Constitutional Court that whether or not a transfer as a going concern had taken place is a factual consideration. The court will in considering the factual issues, *inter alia* (because this is by no means a closed list), take into account the following:

(i) What happened to the goodwill of the business, the stock in trade, the premises, contacts with clients or customers, the workforce and the assets of the business.

(ii) Whether there has been an interruption to the operation of the business and if so the duration thereof.

(iii) Whether the same or similar activities are continued after the transfer.¹

[8] In essence, the question will be whether or not the business remains the same but in different hands.

Evaluation

[9] The Constitutional Court in *National Education Health & Allied Workers Union v University of Cape Town & others* (2003) 24 ILJ 95 (CC) per Ngcobo J, stated the following in respect of what is meant by a transfer as a going concern:

¹ *National Education Health & Allied Workers Union v University of Cape Town & others* (2002) 23 ILJ 306 (LAC) Zondo JP stated the following with regard to the phrase "a going concern", as it appeared in [section 197](#) of the Act prior to the amendment of 2002: "[64] Furthermore I am of the view that the question of whether in a particular case a business has been transferred as a going concern is a matter for objective determination. This does not mean that the intentions of the parties are irrelevant but it does mean that the say-so of the parties cannot be conclusive. In my view there are a number of factors that are relevant in determining whether or not a business has been transferred as a going concern. These may include what will happen to the goodwill of the business, the 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 and others. I do not think that the absence of any one of these will on its own mean that the transfer of the business has not been one as a going concern."

“[56] The phrase 'going concern' is not defined in the LRA. It must therefore be given its ordinary meaning unless the context indicates otherwise. What is transferred must be a business in operation 'so that the business remains the same but in different hands'. Whether that has occurred is a matter of fact which must 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 this 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.

[57] There is nothing either in the context or the language of s 197 to suggest that the phrase 'going concern' must be given the meaning assigned to it by the majority. On the contrary, the

purpose of the section and the context in which that phrase occurs suggests otherwise.

[58] The fact that the seller and the purchaser of the business have not agreed on the transfer of the workforce as part of the transaction does not disqualify the transaction from being a transfer of a business as a going concern within the meaning of s 197. Each transaction must be considered on its own merit regard being had to the circumstances of the transaction in question. Only then can a determination be made as to whether the transaction constitutes the transfer of a business as a going concern. In this regard I agree with Zondo JP.”

[10] For purposes of this judgment, the following important principles emerge from the decision of the Constitutional Court:

- (i) What is transferred must be a business in operation so that the business remains the same but in different hands.
- (ii) Whether or not the transfer has occurred is a matter of fact which must be determined objectively in the light of the circumstances of each transaction.
- (iii) 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.

- (iv) Although there is not an exhaustive list of factors, factors such as 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 will be relevant.

[11] It is common cause on the facts that the business of Hydro is now in the hands of Evergreen. According to Hydro's own letter everything will stay the same and the only thing that will really change is "*the name on the bucket*". In other words, the business of Evergreen is the same business as that of Hydro. I did not understand the respondents' case to be that they deny that it is the same business. In any event this much is clear from the letter. What the respondents are saying is that Evergreen did not acquire a business from Hydro: the business of Evergreen is a new business and a separate company. I am in agreement with the submission on behalf of the applicant that this argument does not take the matter any further. There will always be two separate entities involved in a section 197 transfer: the one entity takes over the business of the other entity as a going concern.

[12] The fact that Evergreen, according to the argument, started a new business, also takes the argument no further. The fact of the matter is the business remains exactly the same but only in the hands of another.

- [13] The main argument on behalf of the respondents therefore appears to be that the business was never transferred simply because Hydro came to an end and Evergreen started out as a new business. Again, if the substance of this whole process is considered, it is clear that the business did in fact transfer. To argue that the old one “*closed*” and the new one started “*its own and new business*” is overly technical. The fact of the matter is: Hydro is now in the hands of another entity (Evergreen). It carries on as if nothing had happened: The same business, the same product, the same premises, the same client base, the same client numbers: “*So for you, the customer, all that will really change is the name on the bucket. Everything else stays the same, including your terms of payment*” (Letter from Smail to customers). Francis, J in *FAWU v The Cold Chain (Pty) Ltd & Another* [2010] 1 BLLR 49 (LC) held that what should be done in determining whether or not a transfer has taken place is to take a “*a snapshot of the entity before the transfer and assessing its components*” and comparing the picture with the one of the business after the transfer “*to establish whether it is substantially the same business but in different hands*”. There is no doubt on the facts of the present case that what was exchanged is the same business.
- [14] One last point. On behalf of the respondents it was argued that Evergreen procured nothing from Hydro: It did not buy the business nor did it take over the assets nor did it assume any of its liabilities. This may be so.

However, in my view this fact does not alter the fact that the business stays the same but only in the hands of another entity. A case in point is the decision in *Sanders v Cell C Provider Company (Pty) Ltd & Others* [2010] 9 BLLR 973 (LC). The applicant was employed as a general manager of a Cell C franchise. Cell C gave the Cell C franchise (in fact there were two) notice that their franchise contracts would terminate. They were advised to retrench their employees. The applicant's attorney requested the first respondent to acknowledge that the contracts of the franchises' employees would transfer automatically to the new franchise holder when it commenced operating. Cell C denied that [section 197](#) of the LRA applied because the existing franchises were merely being cancelled not bought back from the third and fourth respondents. After the second respondent commenced business the applicant launched an urgent application for an order declaring that his contract had transferred to the second respondent. It was argued that the mere fact that the second respondent will run a business from the same premises does not mean that there has been a transfer of a going concern. The Court held as follows:

*"Whether one adopts the aforesaid "snapshot" test as formulated by Francis J, or the concept of an economic entity that changed hands, there clearly has been a transfer of the businesses from one person/entity to another. **The fact that the stock or goodwill did***

not find its way to the new owner, does not in my view detract from the fact that the businesses changed hands as going concerns, nor does the fact that all of the employees' employment contracts have not been transferred.² Employment contracts were clearly not transferred, because the second respondent (and Cell C for that matter) laboured under the mistaken impression that third and fourth respondents had to retrench the employees. On an overall conspectus of the prevailing facts and circumstances, there appears to have been a seamless change of proprietor in respect of the Cell C outlets concerned.

It is clear that on a literal interpretation of [section 197](#) there has not been any transfer of a business from the third or fourth respondents to the second respondent.

The franchise agreements pertaining to the third and fourth respondents were simply terminated and a new franchise agreement was concluded, or is in the process of being concluded, with the second respondent.

It is equally clear that if a literal interpretation were to be adopted, the purpose of [section 197](#), to the extent that it is aimed at safeguarding the jobs of employees, would be defeated. The

² Court's emphasis.

employees who had been employed by third and fourth respondents would fall to be retrenched. Moreover, not only would the second respondent be able to avoid the provisions of section 197, but any franchisee would be able to jettison troublesome workers with impunity, or would be able to place a successor in title in a position to “cherry pick” employees. To borrow a phrase from Zondo JP, a franchise arrangement would provide the perfect “vehicle on which to load the workers and a place where to dump them” if an employer wished to sell his business as a going concern to someone else (see Aviation Union of SA obo Barnes, supra, at 2892D). Such an interpretation would neither give effect to the right to fair labour practices which has been enshrined in the Constitution nor would it accord with the aims and objects of the Act.”

- [15] I am in agreement with the statement by the court that the fact that stock or goodwill did not find its way to the new owner does not detract from the fact that the business changed hands as a going concern. It is furthermore clear from this decision that the mere fact that one business (the first franchise) came to an end and was replaced by another business, also does not detract from the fact that there was a transfer as contemplated by section 197 of the LRA. To hold otherwise would defeat

the objects of this section which is to guard against the termination of the employment of employees where a business changes hands.

- [16] In the event I am satisfied that there was a transfer as a going concern as contemplated by section 197 of the LRA. The whole purpose of 197 is to protect workers against the loss of employment in the event of a transfer.

Is this application an abuse of process?

- [17] On behalf of the respondents it was also argued that it is inappropriate to raise this point in motion proceedings and as a matter of urgency. In fact, the respondents argued that this amounted to an “abuse of process”.

- [18] I am in agreement with the submission that there is nothing in either the Rules of this court or the LRA which prohibits an applicant from approaching this court with an application of this nature. Of course a party who decides on motion proceedings runs the risk of having an irresolvable conflict of fact on the papers.

- [19] I am not persuaded that this application constitutes an abuse of process. This dispute (which is whether or not there was a transfer as a going concern) is capable of being decided now. There may be a dispute of fact relating to the manner in which the new contracts has been concluded but is, in my view, irrelevant in determining the issue before this court. There is, in my view, no reason why employees must wait until they are dismissed by their employer before they approach this court in respect of whether or not there was a transfer.

[20] In the event the following order is made:

- “1. The First Respondent transferred its business to the Second Respondent as a going concern in terms of section 197 of the Labour Relations Act 66 of 1995.
2. The employment contracts entered into between the individuals listed in Annexure A and the second respondent are void and of no force and effect.
3. The second respondent is substituted in the place of the first respondent in respect of the employment contracts previously concluded between the individuals listed in Annexure A and the first respondent in accordance with the provisions of section 197(2)(a) of the Labour Relations Act 66 of 1995.
4. The first and second respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved.”

AC BASSON, J

Date of judgment: 11 February 2011

Date of proceedings: 28 October 2010

For the Applicant: Adv C Orr instructed by Cheadle Thompson and
Haysom

For the Respondent: Mr S Snyman of Snyman Attorneys.