REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J2022/2012

In the matter between:

GRINPAL ENERGY MANAGEMENT SERVICES (PTY) LIMITED Applicant

and

CITY POWER JOHANNESBURG (PTY) LIMITED First Respondent

NATIONAL UNION OF MINEWORKERS Second Respondent

EMPLOYEES WHOSE NAMES ARE LISTED IN ANNEXURE "A" TO THE NOTICE OF MOTION Third to Further Respondents

Heard: August 17 2012
Handed down: 31 August 31 2012
Summary: (application for a declaratory order in terms of section 197(2) of the LRA)

JUDGMENT

Rabkin-Naicker J

[1] This is an application for declaratory relief in terms of section 197 of the LRA.

It is brought in the wake of the cancellation of two service level agreements concluded between the Applicant (Grinpal) and First Respondent (City Power).

[2] Grinpal seeks an order declaring that the employment contracts of the Third and Further Respondents (the 41 affected employees) have transferred to City Power in terms of s197 (2) of the LRA with effect from 1 August 2012. The matter was brought on an urgent basis.

Background

[3] Grinpal manufactures, supplies, installs, operates and maintains smart metering systems and electrical infrastructure which it provides primarily to municipalities and power utility companies. In 2003, it was awarded the tender to supply a prepaid metering system to City Power and in that year a Project was launched in Alexandra Township.

[4] Two service agreements (the last agreements in the relationship between Grinpal and City Power) are an issue in this case. These are an 'installation' agreement and a 'maintenance' agreement. These service agreements were concluded to govern the manner in which Grinpal supplies, installs, operates and maintains the medium and low voltage systems, related infrastructure and smart metering systems that form the basis of the Project.

[5] During March 2012, City Power informed Grinpal that it was cancelling the service agreements having received information that Grinpal did not have a valid tax clearance certificate. Grinpal avers that despite the purported cancellation, from an operational and employment, perspective delivery in terms of the service agreements remained essentially unchanged until 31 July 2012.

[6] The founding papers detail a number of meetings held between Grinpal and City Power, allege that arising from these meetings, there had been a mutual cancellation of the service agreements, subject to the proviso that such cancellation would be reduced to writing and would address certain

outstanding issues. These issues included the question of the 'take over' of staff members. City power has denied that any "mutual cancellation" agreement has occurred.

[7] It is alleged by Grinpal that as from the moment of City Power's "purported cancellation" of the agreements during March 2012, City Power had stated its clear intention that it would take over all of the services rendered by Grinpal in terms of the service agreements. There was never any doubt whatsoever that the Project would continue after termination of the service agreements. The continued supply of electricity to tens of thousands of households in Alexandra depends on it. For this reason it was necessary to agree to and embark upon an orderly "handover process" from Grinpal to City Power.

[8] Essentially, City Power's case is that the consequences of the termination of the agreements must be found in the agreement themselves. The two contracts envisaged that when they had run their course, the old contractor exits the scene with all of its equipment and its employees, and a new contractor begins rendering the services with its own equipment and its own employees.

[9] City Power, an organ of state with the concomitant constitutional and statutory obligations, has, since the cancellation, had to make sure arrangements are made to ensure that the services to people are not interrupted. There is no "handover process" taking place but simply the introduction of interim measures until the usual measures have been finalized, namely that a new contractor has been appointed.

<u>Evaluation</u>

[10] The law as regards the reach of section 197 has been clarified by the judgment of the Constitutional Court in **Aviation Union of SA and another v SA Airways (Pty) Ltd and 2 others**[1] (the SAA case). In this court Van Niekerk J observed that the SAA case affirms:

"…that whether an outsourcing attracts the application of s 197 is to be

1(2011) 32 ILJ 2861 (CC)

determined in the same way as any other transfer. Section 197 is triggered when on the facts there is a transfer by one employer to another, in circumstances where the transferred entity is the whole or part of a business, and where the business (or part of it) is transferred as a going concern. If the transfer meets these criteria (a matter for objective determination), the transferee is substituted automatically and by operation of law for the transferor as the employer of those of the transferor's employees engaged in the business on the date of the transfer."[2]

[11] The proper approach to the interpretation of section 197 was considered by the Constitutional Court in the **NEHAWU** judgment[3] and identified as follows:

> "[52] What lies at the heart of disputes on transfers of businesses is a clash between, on the one hand, the employer's interest in the profitability, efficiency or survival of the business, or if need be its effective disposal of it, and the worker's interest in job security and the right to freely choose an employer on the other hand. The common law provided little protection to workers in these situations. Under common law the sale of a business, whether as a going concern or not, often resulted in the loss of employment. The new owner was under no obligation to employ the workers. The Industrial Court, acting under the unfair labour practice provisions of the 1956 LRA, did however attempt to remedy the situation. Van Dijkhorst AJA also recognized that under the common law 'the employees were the worst off'. They were confronted with a take-over and lost their employment'. Later the transferring employer incurred the statutory obligation to pay severance benefits. This obligation no doubt had an impact on the cost of the sale of businesses. In short, the situation led to the retrenchment of workers, the payment of severance benefits and escalated costs in a way that inhibited commercial transactions. On the whole, the situation had potential to impact negatively on economic development and the

2 Harsco Metals SA (Pty)Ltd & another v Arcelormittal SA Ltd & others (2012) 33 ILJ 901 (LC)
3 (2003)24 ILJ 95(CC)

promotion of labour peace.

[53] Section 197 strikes at the heart of this tension and relieves the employers and the workers of some of the consequences that the common law visited on them. Its purpose is to protect the employment of the workers and to facilitate the sale of businesses as going concerns by enabling the new employer to take over the workers as well as other assets in certain circumstances. The section aims at minimizing the tension and the resultant labour disputes that often arise from the sales of businesses and impact negatively on economic development and labour peace. In this sense, s 197 has a dual purpose, it facilitates the commercial transactions while at the same time protecting the workers against unfair job losses. “

[12] In **SAMWU v Rand Airport Management Co (Pty) Ltd & others** [4] the Labour Appeal Court approved the dictionary definition of “service” (included in the meaning of “business” in section 197 since the 2002 amendments) as being:
“.. the provision of a facility to meet the needs or for the use of a person or person’s interest or advantage; assistance or benefit provided to someone by a person or thing.” The LAC found that the outsourcing of gardening and security functions at an airport were businesses within the statutory definition capable of being transferred in terms of section 197, despite the fact that it did not appear that any assets, goodwill, operational resources or even workforce were to be transferred.

[13] It was submitted on behalf of Grinpal that its business (in terms of the contracts with City Power until 31 July 2012) was asset and technology intensive with relatively few employees employed in both skilled and semi-skilled positions. The business consists of the installation, rollout and maintenance of a complete pre-paid electricity network to tens of thousands of households in Alexandra. Further, it avers that the business is identifiable, discrete and has in fact been transferred to City Power.

[14] City Power in turn submits that the court must take into account all the relevant facts and circumstances of this matter and in particular all the

4 (2005) 26 ILJ 67 (LAC)

transactions between the parties. The initial transactions between the parties, it was submitted are decisive. Reliance was placed on the SAA case in which the majority stated:

> " [106] The final general observation is that, in determining whether contracting out amounts to the transfer of a business as a going concern, the substance of the initial transaction, more specifically whether what is outsourced is a business as a going concern rather than the provision of an outsourced service remains significant during subsequent transfers. If the outsourcing institution from the outset did not offer the service, that service cannot be said to be part of the business of the transferor. What happens here is simple contracting out of the service, nothing more, nothing less.
>
> [107] There is no transfer of the business as a going concern. The outsourcee is contracted to provide the service, and becomes obliged to do so. And it is the outsourcee's responsibility to make appropriate business infrastructure arrangements. These may include securing staff, letting appropriate property for office or other work space, and acquiring fixed assets, machinery and implements, computers, computer networks and the like. Cancellation of the contract in these circumstances entails only that the outsourcee forfeits the contractual right to provide the service. The whole infrastructure for conducting the business of providing the outsourced service would ordinarily remain the property of the outsourcee. As we shall see, that is not what happened here, either when the initial outsourcing contract was concluded between SAA and LGM, or when SAA cancelled it.
>
> [108] If, on the other hand, the first outsourcing exercise is really a transfer of part of the business of the outsourcer who has been carrying on the business of the provision of the service until transfer, the question whether the subsequent transfer is merely the transfer of the right to provide the outsourced service or the transfer of a business as a going concern would arise. And that would require an analysis of the terms of the transaction that gives rise to the subsequent event."

[15] In **Harsco**, the court dealt with the submission that the judgment in SAA necessarily requires the scrutiny of the initial transaction to determine whether there is simply a further contracting out of services, or the transfer of a business as a going concern. In that matter the initial transaction comprised a contracting out by the respondent company with Harsco in terms of which the latter would perform services, and that consistent with that, Harsco was required itself to establish the necessary business infrastructure. Since the initial transaction did not involve the transfer of a business as a going concern from AMSA to Harsco, then the cancellation of the service contracts in the present instance is just that - it does not attract the application of s 197. [5]

[15] In as far as the "initial transaction" dictum in SAA is concerned; Van Niekerk J had this to say in **Harsco**:

> "[20] What Yacoob J does not say, and could never be interpreted to say, is that unless there was a s 197 transfer from an outsourcing party to the first contractor there could never be a subsequent transfer from the first contractor to any second or subsequent contractor, regardless of the facts and the nature of the transaction. Such a general rule would be flawed, as can be seen from the example, inspired by the Rand Airport judgment. ACSA decides to build a new airport. It contracts with B to provide gardening services. B commences the provision of services in circumstances where ACSA has never regarded gardening as an integral component of its business operation. The contract with B terminates, and C is appointed to provide the services. It cannot be suggested, in principle, that there can never be a transfer from B to C only on account of the fact that there was no transfer from A to B. The correct approach, in my view, as recognized by the Labour Appeal Court in Rand Airport and the Constitutional Court in NEHAWU, is for the court to scrutinize the transaction in question and the factual circumstances surrounding it to determine whether on the applicable test the application of s 197 is triggered. This interpretation of the majority judgment in SAA is

5 At paragraph 18

consistent with the purpose of s 197, which is to ensure both continuity of employment within an economic entity irrespective of any change in ownership, and to facilitate the smooth transfer of businesses as going concerns.”

[16] Indeed, in dealing with this issue, Yacoob J referred to circumstances in which: “The whole infrastructure for conducting the business of providing the outsourced service would ordinarily remain the property of the outsourcee.”[6] It was submitted on behalf of City Power that in a contract that includes the installation of pre-paid meters, cancellation will always require a degree of cooperation between the old service provider and the new service provider. This would include confirmation that the installations are in working order and that they can be accessed by the new contractor. I note that in its answering papers, City Power avers that in this case: “City Power is required to make interim arrangements pending the appointment of a new service provider. The new arrangement may well require some involvement of City Power in a holding operation.”

[17] In my judgment, on the facts and circumstances of this case, the infrastructure for conducting the business in question does not remain in the hands of Grinpal, the outsourcee. It is, albeit temporarily, in the hands of the original outsourcer, City Power. The ‘holding operation” that City Power itself avers it is involved in, cannot be immune to the operation of section 197. This is the case, notwithstanding the reasons for the cancellation of the contract with Grinpal.

[18] Mr Soni, on behalf of City Power urged the court to consider the impact of the declaratory order sought on organs of state in general, who are subject to a myriad of regulations in respect of *inter alia* tendering for services. I did not understand these submissions to be suggesting that organs of state *qua* employers can be exempt from the operation of section 197 of the LRA. In my judgment, in entering into contracts with service providers such bodies must, as other employers do, make the necessary provision for the *ex lege*

6 At paragraph 107

eventualities of section 197. This approach necessarily takes into account the purpose of the section as referred to above.

[18] In all the particular circumstances of this case, I therefore find that a transfer in terms of section 197 of the LRA has indeed taken place, and make the following order:

Order

1. It is declared that with effect from August 01, 2012, the employment contracts of the employees listed in annexure "A" to the Notice of Motion were transferred to the First Respondent in terms of section 197(2) of the LRA 66 of 1995;

2. The First Respondent is directed to comply with the provisions of section 197 in relation to the said employees;

3. First Respondent to pay the costs of this application.

Rabkin-Naicker J
Judge of the Labour Court

Appearances:

On behalf of applicant: Adv. Ais Redding SC with GA Fourie

Instructed by: Webber Wentzel Attorneys

On behalf of First Respondent: Adv V. Soni SC Instructed by: Hewu Attorneys