



REPUBLIC OF SOUTH AFRICA

Reportable

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Case no: P412/12

In the matter between:-

VUSUMZI MAPHONGWANA

1st Applicant

BONGIWE BOYA

2nd Applicant

NOGOLIDE MAQHOLO

3rd Applicant

NELISWA CONSTANCE MAHLATHI-MANKAYI

4th Applicant

THEMBEKA LOUISA MLILWANA

5th Applicant

KHOLELWA SIGNORIA MBHIYOZO

6th Applicant

ZANDISILE NTELEZA

7th Applicant

THANDEKA SIBONGILE SOGA

8th Applicant

XOLELWA PATRICIA MAGOGO

9th Applicant

NOSIMKO NKANJINI-NGQINJANA

10th Applicant

SINOVUYO PAMELA SOMHLAHLA

11th Applicant

MLUNGISI ISHMAEL DLOMO	12th Applicant
LULAMA XOZWA	13th Applicant
NOKHONA BEATRICE MPAKA	14th Applicant
PRINCESS NOMKHITHA NTULI	15th Applicant
NTOMBIZIMBINI MAVIS QHINA	16th Applicant
THEMBEKA MQAMELO	17th Applicant
NOLUTHANDO PATIENCE BOOI	18th Applicant
KHOLISWA NKALA	19th Applicant
THANDISWA NDAMASE	20th Applicant
NCUMISA DIPHU	21st Applicant
NOMAGAMA DLOMO	22nd Applicant
NOSIPHO SIGWILI	23rd Applicant
NOSICHUMISO MGXUMEKI	24th Applicant
BULELWA GHU	25th Applicant
PHUMEAZA NXITYWA	26th Applicant
YOLISA BLAAI	27th Applicant
DORAH GABUZA	28th Applicant
NONTLHLA JANUARY	29th Applicant
NOVANGELI SUSAN MAJEKE	30th Applicant
LIZEKA MAGCAKINI	31st Applicant

NOKUBONGA SINTO-GUNUZA	32 nd Applicant
DUMISILE MAGWAZA	33 rd Applicant
NOMBHEDESHO MAKAULA	34 th Applicant
NOKULINA MNTUMNI	35 th Applicant
NOLWANDLE MAVIS MDEMKA	36 th Applicant
ZUKISWA NAKUMBA	37 th Applicant
FEZEKA MBALEKI	38 th Applicant
NOMTHETHO SIHEWULA	39 th Applicant
VIWE HLABAHLABA-MELAMANE	40 th Applicant
VUYOKAZI MNYAMANA	41 st Applicant
PHUMZA PHYLLIS MTHONGANA	42 nd Applicant
and	
KSD MUNICIPALITY & OTHERS	Respondents

Heard:

Delivered: 12 November 2012

Summary: There is no obligation on the employer to seek the employees' agreement before transferring their contracts of employment in terms of section 197(2) of the LRA

Transfer of contracts of employment in terms of section 197(2) of the LRA

JUDGMENT

LALLIE J

- [1] The applicants brought an urgent application for an order declaring unlawful the first respondent's failure to pay their normal full salaries on 25 August 2012 in terms of their contracts of employment with the first respondent (the municipality). They also seek this Court to order the municipality to pay their salaries for August 2012 in full and to continue doing so until their contracts of employment with the municipality are transferred to the second and third respondents, the department in full compliance with all the applicable law. They further seek an order interdicting the respondents from effecting the applicants' transfer from the employ of the municipality into the employ of the second and third respondents' department without full compliance with section 197 of the Labour Relations Act¹ (the LRA) and other applicable legislation. The application was opposed by the respondents.
- [2] As the applicants are seeking an interim interdict, they are required to prove that they have a *prima facie* right, although open to some doubt, apprehension of irreparable harm if the interim relief is not granted, a balance of convenience in their favour and the absence of other satisfactory relief.
- [3] The factual background of this matter is that the Department of Health took a decision to transfer the responsibility of primary health care services from municipalities to the Provincial Departments of Health. This process is referred to as provincialisation. The applicants were employees of the first respondent as they are primary health care workers rendering services in clinics around Mthatha. In 2005, the applicants were informed in a meeting by officials of the Eastern Cape Department of Health (the Department) of the provincialisation process. They were further informed that employees of municipal clinics in the Eastern Cape, including themselves, would be absorbed into the Department. The applicants were opposed to the provincialisation as they did not wish to be employees of the Department, which has serious problems, unless they had been given certain assurances to safeguard their positions. This meeting was

¹ Act 66 of 1995

followed by further interaction on the issue of provincialisation between the applicants and their trade unions and officials of the Department. One of the meetings was held around September or October 2010. It was attended by officials of the Department, the applicants and representatives of their trade unions. The applicants again expressed their unwillingness to be absorbed before their concerns were addressed. After a series of meetings, the applicants forwarded an unequivocal communication to the municipality in February 2012 that they were objecting to the transfer until the sources of their dissatisfaction were addressed in compliance with the resolution of the Mayoral Committee of 19 May 2011, the relevant portions of which are the following:

'RESOLVED

- (a) That Council **APPROVES** the provincialisation process should continue, as this is the unfunded mandate to the Municipality. Provincial Government last funded primary health care services in December 2010;
- (b) That the Transfer Agreement be signed by the Municipality, on condition that the Department of Health indicates in writing, in a form attachment to the transfer on how the concerns raised by the KDS Municipality regarding conditions of service would be resolved or would be dealt with during the transfer process;'

- [4] One of the developments which the applicants became aware of in February 2012 was the existence of the agreement of the transfer of their contracts of employment to the Eastern Cape Department of Health. On 13 July 2012, the applicants received through their bank accounts salaries from the Department which were less than their usual remuneration. On 17 July 2012, the applicants were served with letters informing them that they had been absorbed into the Department in terms of section 197 of the LRA and the Public Service Act of 1994 and its regulations. On 15 August 2012, the applicants again received from the Department remuneration which was less than their usual salaries. When they did not receive their usual salaries from the municipality on 25 August 2012, they considered bringing this application which they filed on 7 September 2012.

[5] The applicants mainly seek an order interdicting the respondents from effecting their transfer from the employ of the municipality to the employ of the department without complying fully with section 197 of the LRA and other applicable legislation. The prayers for the payment of their salaries in full until their transfer has been effected lawfully flow from the interdict. One of the grounds the respondents sought to rely on in opposing the application is that the applicants do not have a right to be protected by the interim interdict they are seeking. The applicants submitted that they are still in the employ of the municipality and an attempt is being made by the respondents to transfer them unlawfully without complying with the provisions of section 197 of the LRA. The applicants' basis for their argument of unlawfulness is that the purported agreement of transfer of their contracts of employment (the agreement) is invalid because it does not comply with section 197 in that, *inter alia*, it has not been signed by the applicants' trade unions. The applicants further submitted that it is after all their areas of concern have been properly and adequately addressed and they have accepted the transfer that their transfer will be lawful. From these submissions it is clear that the applicants' claim that they have a right not to have their contracts of employment transferred without consent.

[6] Section 197(2) provides as follows:

'If a transfer of a business takes place, unless otherwise agreed in terms of section subsection 6-

(a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;'

Section 197(6) provides that an agreement contemplated in subsection (2) must be in writing. The parties to the agreement must either be the old employer, the new employer or the old employer and the new employer acting jointly, on the one hand and the appropriate person or body the employer party is required to consult with in terms of section 189(1) of the LRA.

- [7] The relationship between section 197(2) and (6) is aptly illustrated by Van Niekerk J in *SAMWU & IMATU v SALGA and Others*² as follows:

'In my view, section 197(2) clearly establishes a "default" position. In other words, provided that the nature of a transaction is such that it falls within the ambit of section 197, the consequences of an automatic and obligatory automatic substitution of employer for the transferee can be avoided or varied only by an agreement that complies with section 197(6)."

The court also relied on *NEHAWU v University of Cape Town*³ in finding that the fact that a seller and a purchaser of a business have not agreed on the transfer of the workforce as part of a transaction does not disqualify the transaction from being a business for purposes of section 197. It was further held that the new employer substituted the old employer on transfer of the contracts of employment by operation of law.

- [8] It is common cause that the respondents attempted to reach an agreement as envisaged in section 197(6) with the applicants and their unions. The attempts were unsuccessful in that no agreement was ever concluded. The applicants would have acquired the right to consent to the transfer of their contracts of employment had the agreement been reached. Absent the agreement, nothing prevented the respondents from transferring the applicants' contracts of employment as envisaged in section 197(2) of the LRA which did not require the municipality to consult with or seek the consent of the applicants before they could be transferred. As the applicants' transfer on 1 July 2012 is lawful, the applicants therefore have no right which can be protected by the interim order they are seeking.
- [9] In prayer 2.1 of their notice of motion, the applicants seek an order declaring unlawful the first respondent's failure to pay them their normal full monthly salaries on 25 August 2012 in terms of their contracts of employment with the municipality. As the applicants' contracts of employment were transferred on 1

² [2010] 8 BLLR 882 (LC).

³ 2003 (3) SA 1 (CC).

July 2012 to the Eastern Cape Department of Health, the applicants were no longer employees of the municipality in August 2012. There was therefore no obligation on the municipality to pay them salaries on 25 August 2012 because the obligation to pay a salary stems from the employment relationship.

- [10] Section 197(2)(a) provides that if a transfer of business takes place other than as agreed in terms of subsection (6), the new employer automatically substitutes the old employer in respect of all contracts of employment in existence immediately before the date of the transfer. When the applicants' contracts of employment were transferred on 1 July 2012, the Department automatically became the applicants' employer and the obligation to pay the applicants' salaries was automatically transferred. As the municipality had no obligation to pay the applicants' salaries, failure to pay such salaries cannot be declared unlawful. For these reasons there was no obligation on the municipality to continue paying the applicants' salaries until their employment has been terminated in full compliance with all the applicable law, because the applicants' contracts of employment with the municipality were lawfully terminated on 1 July 2012 when they were transferred to the Department. This ground alone justifies the dismissal of this application.
- [11] Having decided that the applicants have no *prima facie* right to be protected by an interim interdict, the only aspect to be dealt with is urgency. The respondents argued that this application is not urgent as the applicants conceded that they have been aware for years of the plan to transfer them in terms of the provincialisation decision. They should have brought this application before their transfer took place. While there is truth in the respondents' submission, it however loses sight of the reality that for years the parties had been attempting to effect the transfer by agreement as envisaged in section 197(6). When the respondents took a decision to abandon the attempts to reach an agreement, they failed to communicate their decision to the applicants. The applicants could not have known of the respondents' change of heart as one of the Department's officials continued engaging the applicants on their transfer, even after the

transfer had taken place. Although the applicants were served on 17 July 2012 with letters advising them of their absorption into the Department, they received the amount of remuneration they earned from the municipality on 25 July 2012. The payment is consistent with their version that they had not been transferred on 25 July 2012 and that time was ripe for them to approach this court when they did not receive their remuneration from the municipality on 25 August 2012. For these reasons the applicants were justified in approaching this Court on an urgent basis.

Costs

- [12] The respondents sought a costs order against the applicants. Section 162 of the LRA provides that an order for the payment of costs may be made according to requirements of law and fairness. At the time the applicants launched this application, they were labouring under the incorrect impression that their contracts of employment had not been transferred. They were led by the respondents to believe that the parties were still in the process of trying to reach an agreement on their transfer. This the respondents did by pursuing discussions on their transfer even after the transfer had taken place. The respondents paid them the same salaries they received from the municipality even after they had been served with letters of their absorption into the Department. Although the respondents submitted that the payments were made in error, the reality is that the payment evinced to the applicants the thought that they were still employees of the municipality. The respondents did not, before 25 August 2012, unequivocally inform the applicants of their transfer. In the circumstances, it would be unfair to grant a costs order against the applicants although their application has been unsuccessful.

Order

[13] In the premises, the following order is made:

13.1 The application is dismissed,

13.2 No order is made as to costs

Lallie J

Judge of the Labour Court

APPEARANCES:

FOR THE APPLICANTS:

Adv. Zilwa

Instructed by S Booie & Sons Attorneys

FOR THE FIRST RESPONDENT:

Adv. Quinn SC and Adv Kunju

Instructed by XM Petse

FOR THE SECOND AND THIRD

RESPONDENTS:

Adv. Gqamana

Instructed by State Attorney