



REPUBLIC OF SOUTH AFRICA

THE REPUBLIC OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J 2660/12

In the matter between:

GENERAL INDUSTRIES WORKERS

UNION OF SOUTH AFRICA AND OTHERS

Applicants

and

LLM TRADING AND DEVELOPMENT CC

First Respondent

Heard 06 June 2013

Delivered 20 June 2013

Summary: Section 197 – transfer of employees – necessary factual contentions to establish that a business or part of a business has been transferred as a going concern

JUDGMENT

GAIBIE, AJ

Introduction

- [1] The applicants launched this application on an urgent basis on or about 11 October 2012. Given the nature of the relief sought by the applicants, a *rule nisi* was initially granted on 11 October 2012, and was extended on five occasions until the matter was heard on 6 June 2013, the return date.
- [2] On 6 June 2013, the only issue left for determination was whether the Ekurhuleni Municipality's ("the third respondent") cleaning services, and in particular that part of the services which was focussed on cleaning the streets of the magisterial district of Germiston ("the cleaning service"), had been transferred in terms of section 197 of the Labour Relations Act¹ from LLM Trading and Development CC ("the first respondent") to Bvumi Investment CC ("the second respondent") and or to Makhala Ekuseni Trading and Project CC ("the fourth respondent"), and consequentially whether the employees of the first respondent were employed by the second and or the fourth respondents.
- [3] The story in this matter begins with an account of the employment relationship between the 92 individual applicants ("the employees") and their previous employer in the first instance, and their relationship with their current employer, the first respondent, in the second instance. In respect of the latter relationship, the deponent of the founding affidavit explains that -
- 3.1 The employees were² employed by the first respondent as general workers to clean the streets of Germiston for a fixed period from September 2009 to June 2012;
- 3.2 On 25 May 2012, the first respondent informed the employees that their fixed term employment contracts would terminate at the end of June 2012 when the contractual arrangements between it and the third respondent would come to an end. The first respondent also informed them that if the contractual arrangements with the third respondent was extended, they reserved the right to extend the contracts of employment with those employees that they required, on a month to month basis;

¹ 66 of 1995.

² I use the past tense given the date on which this matter was heard. The deponent of the founding affidavit however explains the issues in the current tense.

3.3 The individuals continued to be employed by the first respondent for the period after June 2012, on a month to month basis and subject to the ongoing contractual relationship between the first and the third respondent;

3.4 At some stage during August 2012, the employees declared a dispute of mutual interest in terms of which they demanded that their employer, the first respondent, should facilitate the transfer of their contracts of employment to the third respondent. In the referral of the dispute to the CCMA, the dispute with the first respondent is formulated in the following terms:

'Workers are demanding that the company that employs us negotiate with the Ekurhuleni Municipality to employ us directly as municipal workers';

3.5 The dispute was not resolved at conciliation, and on 28 September 2012, their employer exercised a pre-emptive lock-out prior to them embarking on strike action.

[4] At this stage, the employees were clearly bewildered by the impact of the lock-out and in the circumstances, they embarked on a program of picketing that resulted in unfortunate circumstances that are documented at length in the founding affidavit. The deponent then gets immersed in a detailed, vivid and extremely descriptive account of the employees encounter with the police and their inability to picket peacefully. It is in those circumstances, that they approached this court on 11 October 2012 with a view to secure protection for their picket and to establish picketing rules with the assistance of the CCMA.

[5] Precisely when or for how long the strike action continued is unclear from the founding affidavit. Perhaps most significantly, the deponent does not explain how or in what circumstances the employment relationship between the employees and their employer, the first respondent, was severed. What is clear, however, is that the applicants understood that their employment relationship with their employer was for a fixed period and that the relationship would come to an end either in June 2012 or soon thereafter, but by no later than the date of termination of the contractual relationship between their

employer and the third respondent. Given the imminent expiration of the contracts of employment with their employer, the employees foolishly embarked on strike action aimed at securing employment with the third respondent but seeking a declaration from this court that the second respondent was their employer. This confusion is not only apparent from the pleadings under consideration, but also from the remarks of the employees' legal representative, Mr Cartwright, who contended, in argument, that the employees were still on strike and that they required a declaration from this court about the identity of their employer so that they could tender their services and return to work.

- [6] Given the context of the facts set out above, on what legal basis did the applicants seek a declaration that the second respondent, and or the fourth respondent, is their employer?

Is the second respondent and or the fourth respondent the employer?

- [7] In the founding affidavit and based only on the contents of paragraph 76 thereof the applicants contend, in the midst of strike action directed against their current employer, that the second respondent must be declared to be their new employer. In paragraph 76 the applicants state the following:

'I am advised that if the service contract has, which all the circumstances seem to confirm, now been transferred to the second respondent, then the second to further applicants must in terms of section 197 of the LRA be regarded as the employees of the second respondent.'

- [8] The contents of paragraph 76 are speculative. In addition, they are based on an assumption that is simply unsubstantiated. The applicants do not indicate if, when, how, for what period or indeed to what extent the cleaning service was transferred to the second respondent.
- [9] Given the paucity of the contentions relied upon by the applicants (in the founding affidavit) for the declaration they seek in respect of the second respondent, they also seek to capitalise on the information contained in the second respondent's answering affidavit for the same purpose. In the

circumstances, it is necessary to turn to an assessment of the contentions made by the second respondent.

[10] The second respondent denies that the third respondent had transferred its cleaning services to it in terms of section 197 of the LRA, and to the extent that it sheds any light on its contractual relationship with the third respondent, the deponent to the answering papers, indicates the following:

10.1 First, that it had a limited duration contract for the period 1 to 31 October 2012 to do 'additional cleaning work' for the third respondent;

10.2 Second, that it concluded a longer term contract with the third respondent for the period 6 December 2012 to 30 June 2015 for the 'cleaning of area 1 (which requires around 40 employees to do cleaning) of Germiston Customer Care Centre's central business district'; and

10.3 Third, that the third respondent had appointed the fourth respondent, Makhala Ekuseni Projects CC, to clean area 2 of Germiston Customer Care Centre which is an area bigger than area 1.

[11] Based on these contentions, the applicants contend the following in their replying papers:

11.1 In relation to whether and when the employment relationship with the first respondent was severed, the applicants contend that this is simply not an issue of any relevance because "the individual applicants were employed beyond the end date of these contracts and consequently it can be legally inferred that at the time that the first respondent's contract with the third respondent terminated they were employed permanently".³ Apart from being a legally unsound proposition, the applicants do not indicate: 1) precisely when the contractual relationship between the first and the third respondent came to an end; 2) who employed the employees at this point; and 3) precisely when it is contended they were transferred to the second or the fourth

³ Para 11 of the replying affidavit.

respondents or indeed by whom they had been transferred to the latter respondents. Perhaps most importantly, the applicants do not provide any factual basis for the assumption that the cleaning services performed by the first respondent were in fact performed by the second respondent or the fourth respondent apart from a bald assertion to that effect.

11.2 That notwithstanding the absence of necessary and material averments regarding the alleged transfer of the third respondent's cleaning services, the applicants nonetheless contend that "the second respondent was and is required to employ the second and further applicants as they are now consequent to the 197 transfer the employees of the second respondent".⁴ This assertion is made in the context of the applicants' concession that the second respondent may not have taken over the whole of the cleaning service but only a part of it.⁵

11.3 Based on the information contained in the second respondent's answering affidavit, the applicants contend in their affidavit in which they seek the joinder of the fourth respondent, that a *prima facie* case exists to declare the second and the fourth respondents the employers of the employees. For the purposes of this application, however, the applicants must establish a 'clear right' to the relief sought failing which this application must be dismissed.

Clear right

[12] Based on the pleadings before this court, it is not clear whether there was in fact a transfer of the whole or part of the cleaning service of the third respondent as a going concern, let alone whether the whole or part of that business had indeed been transferred by the first respondent to the second and or the fourth respondents in the first instance, or to the latter by the third respondent.

⁴ Para 12 of the replying affidavit.

⁵ Para 13 of the replying affidavit.

- [13] It is not apparent from the pleadings whether the cleaning services were rendered by the third respondent, and thereafter rendered by the first respondent. What is apparent from the pleadings is that the second respondent was responsible for rendering 'cleaning services' that the third respondent may or may not have rendered itself. In the circumstances, this court must assume that the first respondent was responsible for making its own appropriate business infrastructure arrangements, for acquiring its own assets and equipment, for securing its own staff, for acquiring administrative support, office space and relevant equipment for that purpose, in order to render the services. In the absence of the necessary averments - particularly in respect of the date of the termination of the contractual arrangements between the first and the third respondent, and the details of the contractual arrangements between the third respondent on the one hand and the second and or the fourth respondents on the other hand - the only conclusion that can be reached is that upon the termination of the contractual arrangements between the first and the third respondent, the first respondent forfeited the right to render the service, and the infrastructure for rendering the service remained the property of the first respondent. Consequentially, the first respondent was responsible for any issues, legal or otherwise, emanating from the termination of the employment relationship with the employees.
- [14] If the applicants had, on the basis of the necessary averments, established that the first transaction, that between the third respondent and the first respondent amounted to a transfer of the service as a going concern, the next question would be whether the services, if any, rendered by the second and or the fourth respondents amounted to a transfer of the service as a going concern. And that would require an analysis of the terms of the transaction between the third respondent on the one hand, and the second and or the fourth respondents on the other hand. It is quite impossible on the basis of this application, to determine in the air,⁶ the nature of the latter transactions.

⁶ *Aviation Union of SA v SA Airways (Pty) Ltd* [2012] 3 BLLR 211 (CC) at para 111.

[15] As indicated by the Constitutional Court in *NEHAWU V University of Cape Town and Others*,⁷ the determination as to whether the service has been transferred as a going concern is wholly dependent on the facts and circumstances of the particular case and in light of the circumstances of each transaction. In the absence of these details, the applicants have not established a clear right to the relief sought.

[16] In the circumstances, it is not necessary to determine whether the applicants have satisfied the other requirements for final relief.

[17] In the circumstances, I make the following order:

1. The application is dismissed with costs.

GAIBIE AJ

Acting Judge of the Labour Court

Appearances:

For the Applicants: D Cartwright from Cartwright Attorneys

For the Second Respondent: Adv: Mphahlani Instructed by Baloyi Attorneys

⁷ 2003 (3) SA 1 (CC) at paras 56-58.