REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

CASE NO: P408/15

In the matter between

ENVIROSERV WASTE MANAGEMENT **Applicant**

and

INTERWASTE (PTY) LTD t/a INTERWASTE ENVIRONMENTAL SOLUTIONS **First Respondent**

GENERAL MOTORS SOUTH AFRICA (PTY) LTD **Second Respondent**

V.O' CONNEL AND 21 OTHERS **Third Respondent**

Heard: 11 December 2015

Delivered: 18 December 2015

Summary: The termination of a service agreement on its own does not entitle employees to have their contracts of employment to be transferred in terms of section 197 of the LRA.

JUDGMENT

Lallie J

[1] The applicant conducts business in the waste management industry. It has a number of competitors which include the first respondent. In the industry, businesses compete for contracts to render their services. Those contracts are generally put out to tender. In the course of the competition businesses win contracts from and lose others to competitors. In the course of performing their obligations in terms of the contracts businesses appoint employees on fixed term contracts of employment for the duration of each contact the business has secured. Both the applicant and the first respondent currently have hundreds of contracts in which they have employed over 2000 employees throughout South Africa. In 2012 the second respondent advertised a tender for waste management. The applicant's bid was successful and the applicant and the second respondent entered into a three year waste management service agreement ("the service agreement") for the period 1 October 2012 to 31 December 2015.

[2] The second respondent manufactures motor vehicles at a number of sites in the country some of which are in Port Elizabeth. It holds a licence to operate waste facilities at its sites. As the service agreement was approaching its end, the second respondent invited tenders for waste management in August 2015. The first respondent's bid was successful and the applicant was informed of the outcome of the tender on 22 October 2015. The first

respondent's contract with the second respondent will commence on 1 January 2016. Having lost the tender, the applicant addressed a letter to the first respondent as the successful bidder and requested it to be substituted for the applicant as the new employer of its 22 employees who are performing their duties at the second respondent in terms of the service agreement. The employees form about 1.1% of the parties' workforce nationally. The first respondent refused the applicant's request and intimated that the employees were entitled to apply for positions which the first respondent intended to advertise. It is the refusal which prompted the applicant to bring this urgent application in which it seeks the following order:

> 'Declaring that as a result of the cancellation of the contract between the Applicant and the Second Respondent for the on-site management of waste at the Second Respondent, and the subsequent contract entered into between the Second Respondent and the First Respondent for the on-site management of waste, the first respondent; by operation of section 197 of the Labour Relations Act, 66 of 1995; will automatically be substituted in place of the Applicant in respect of all contracts of employment in existence between the applicant and those employees listed in Annexure "A" hereto (being the employees engaged by the Applicant for the purposes of performing its obligations in terms of the said contract), as from 31 December 2015'.

[3] The applicant gave a detailed account of the manner in which it carries out its obligations in terms of the service agreement. Part of the detail is that the applicant manages the relationship between the second respondent and the recycling companies who have contracts with the second respondent. It developed, created, maintained and reviewed plans, programs and systems to improve waste management practices and efficiency in waste management. It provided expert and qualified staff part of which was trained by the second respondent to train the second respondent's staff. The second respondent provided the applicant with office space, furniture and telecommunication systems on its premises. The applicant submitted that it operates a business at the second respondent's sites which forms part of its business. Another salient part of the service agreement is that the applicant was required to return to the second respondent all the property that the

applicant acquired to perform its obligations. The property includes both tangible and intellectual property. At the termination of the service agreement the applicant is required to vacate the second respondent's facilities and to provide termination assistance services for the first and second respondent. The applicant submitted that from 1 January 2016 the first respondent will provide the same services to the second respondent although in a different manner. In addition to its equipment, the respondent will use the second respondent equipment which was previously used and procured by the applicant and returned to the second respondent. The first respondent will use the same office space which is being used by the applicant.

[4] The applicant submitted that it operated site-specific business operation which is an economic entity capable of being transferred at the second respondent's sites. Its transfer as a going concern will take place when the service agreement terminates and the first respondent's contract with the second respondent commences. As components of its business will be transferred to the first respondent, the applicant's employees should also be transferred. The employees were trained to perform site-specific duties. They have reasonable expectation to be transferred to the first respondent and carry on with their work at the second respondent on renewed fixed term contracts with a new service provider. The termination terms of the service agreement indicate the intention for continuity and a seamless transfer from the old to the new service provider. The first respondent will use the intellectual property generated by the applicant and returned to the second respondent at the end of the service agreement. The first respondent's right to use and control the infrastructure will trigger the application of section 197 of the LRA. The applicant further submitted that on 1 January 2016 when the first respondent's contract with the second respondent commences, the applicant's business will change hands and be transferred as a going concern to the first respondent.

[5] The first respondent denied that on 1 January 2016, when its contract with the second respondent commences a transfer of business as a going concern as contemplated in section 197 of the LRA will take place. Some submissions it sought to rely on are that the service agreement will come to an end on 31

December 2015 and the fixed term contracts of employment of 20 the applicant's employees will expire as a result of effluxion of time. There will therefore be no employees to be transferred to the first respondent and provisions of section 197 of the LRA will not be applicable. The first respondent denied that the termination of the service agreement necessarily constitutes a transfer of business as a going concern. It submitted that on 31 December 2015 the service agreement will come to an end but the applicant will retain its whole business. Its position is affirmed by the fact that no assets, goodwill or property of the applicant would be transferred to the first respondent at the end of the service agreement and the second respondent never outsourced the waste management service as a business as a going concern. The second respondent only contracted out the business without transferring its employees. The first respondent further denied that the work done at the second respondent is site-specific. It submitted that all the applicant does is to fulfil its obligations in terms of the service agreement and legislation. The first respondent denied that it was under a legal obligation to employ the third to further respondents. It needs no assistance from the applicant including the programs, systems, plans, and practices it developed and reviewed in executing the service agreement. It will utilise its own strategies, plans and protocols. The service that the first respondent will be rendering for the second respondent will be different from the one the applicant renderes. It offered a zero to landfill solution and will not be dealing with the companies with contracts with the second respondents. Work will not be carried out by expert and qualified staff but by unskilled employees.

[6] When this application was argued it was common cause that it was urgent. Section 197 of the LRA provides as follows:

> "(1) In this section and in Section 197 A-
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> (a) '**business'** includes the whole or a part of any business, trade, undertaking or service; and

(b) **'transfer'** means the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern.

(2) If a transfer of a business takes place, unless otherwise agreed in terms of 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 the transfer;

(b) all the rights and obligations between the old employer and an *employee* at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the *employee*;

(c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and

(d) the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer'.

[7] The applicant submitted that its operations at the second respondent constitute a business as envisaged in section 197 (1) (a) of the LRA. It sought to rely on *Aviation* Union *of SA & another v SA Airways (Pty) Ltd & others*[1] where the circumstances in which provisions of section 197 apply were clarified as follows:

[1] (2011) 32 ILJ 2861 (CC) at para 44 (SAA)

> 'It must be stressed that the key event which brings s 197 into play is the transfer of a business as a going concern. The question whether the section applies to a particular case cannot be determined, as the Supreme Court of Appeal did, with reference to the label of the transaction effecting transfer. The section does not cite transactions to which it applies. Nor does it refer to any labels. Instead, its application must always be determined with reference to three requisites, namely, business, transfer and going concern'.

[8] The applicant further relied on *National Education Health & Allied Workers* Union *v University OF Cape Town & others*[2] where the SAA decision was referred to with approval with the court further clarifying the requirement of a simultaneous transfer by one employer to another, of an economic entity capable of being transferred. The economic entity must retain its identity after the transfer. The applicant submitted, based on *SAMWU & others v Rand Airport Management Company (Pty) Ltd & others*[3] where it was held that the existence of a business capable of being transferred does not require the transfer of assets, goodwill, operational resources and workforce.

[9] In deciding whether there will be a transfer of business as a going concern when the first respondent commences its contract with the second respondent on 1 January 2016, I will firstly consider whether the activities of the applicant at the second respondent constitute a business as envisaged in section 197. The applicant submitted that its activities at the second respondent constituted a business and sought to rely on *Harsco Metals SA (Pty) L td & another v Arcelormittal SA Ltd & others*[4] where the court, relied on the SAMWU judgement and found that in the context of an outsourcing transaction of an economic entity Harsco conducted an economic entity which was capable of transfer in terms of section 197 of the LRA. The facts of the matter at hand are distinguishable from those on which the Harcso Metals decision is based. In the latter, Harsco had been a service provider to AMSA for 40 years and had employed 890 employees. In giving an account of its activities at the second respondent the applicant made a number of

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[2] (2003) 24 ILJ 95 (CC) (NEHAWU v CCT)
[3] (SAMWU) [2005] 3 BLLR 241 (LAC)
[4] (2012) 33 ILJ 901 (LC) (Harsco Metals)

concessions that it was performing its obligations in terms of the service agreement and legislation in conducting the activities it sought to rely on to prove that it is conducting part of its business at the second respondent. The applicant has a three year contract with the second respondent. It employed 22 employees 20 of whom are on fixed term contracts. The applicant has about 1500 to 2000 employees nationwide and manages hundreds of projects. It is in the nature of the industry that the applicant and the first respondent operate in that businesses win and lose tenders to provide services for a limited period. When the activities of the applicant at the second respondent are scrutinised the only conclusion that can be reached is that the applicant was performing its obligations in terms of a service agreement which was intended to last for a limited period of three years. Performing obligations in terms of a service agreement does not on its own constitute business as envisaged in section 197 of the LRA.

[10] The applicant argued that when the first respondent commences its contract with the second respondent, its business as a going concern will be transferred to the first respondent. It relied on HEHAWU where it was held that what must be transferred must be a business operation so that the business remains the same but in different hands. Although the applicant conceded that the manner in which the first respondent will perform its obligations in terms of the contract with the second respondent is different from the manner in which it is carring out its current obligations, it was adamant that on 1 January 2016 the business will remain the same but will only be in different hands. I have already rejected the applicant's submission that its activities at the second respondent constitute a part of its business. If those activities constituted its business, based on the concessions made by the applicant a conclusion cannot be reached that from 1 January 2016 the business will remain the same. It is common cause that unlike the applicant the first respondent will use its own telecommunications and offers a zero to landfill solution. The first respondent will not use expect and qualified staff but unskilled employees. It has been in the waste management business for a considerable time and will use different methods in executing its obligations in terms of the contract with the second respondent. I accept the first

respondent's submissions that it does not need and will not use the intellectual property which includes plans and strategies which the applicant will leave as the property of the second respondent when the service agreement comes to an end. The first respondent will no longer be required to deal with recycling companies with contracts with the second respondent which the applicant presently spends time and expertise to manage. It will not be required to train the second respondent's staff. From 1 January 2016 the manner in which waste will be managed at the second respondent will be totally different from the manner in which it is presently managed. The operations will not be the same in different hands.

[11] When the change is viewed from an employment specific it reflects that the applicant has 20 employees on fixed term contracts which will be terminated by effluxion of time on 31 December 2015. The applicant's argument that the employees have a reasonable expectation to be transferred to the first respondent is not supported by the circumstances of this matter. If the employees have an expectation, it is unreasonable because when they entered into fixed term contracts for the duration of the service agreement, they were aware that they would come to an end with the service agreement. By employing the other two employees on permanent contracts knowing that the service agreement was for a period of three years the applicant created the problem of their possible unemployment at the end of the service agreement and must take responsibility for it. The applicant has not established that the third to further respondents' contracts of employment should be transferred to the first respondent in terms of section 197 of the LRA on 1 January 2016.

[12] I could find no reason for costs not to follow the result.

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

13.1 The application is dismissed.

13.2 The applicant pay the first respondent's costs.

Lallie J

Judge of the Labour Court of South Africa

Appearance

For the applicant: Advocate Gerber

Instructed by Erika Bester Attorneys

For the respondent: Advocate Hutchinsin

Instructed by Fluxmans Incorporated