



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: J2967/16

In the matter between:

BARLOWORLD TRANSPORT (PTY) LTD

Applicant

and

**UNITRANS SUPPLY CHAIN
SOLUTIONS (PTY) LTD**

First Respondent

SATAWU

Second Respondent

GARETH WARD AND 46 OTHERS

Third to Forty Seventh Respondents

XINERGISTIX (PTY) LTD

Forty Eighth Respondent

Heard: 19 January 2017

Delivered: 26 January 2017

**Summary: Review – Urgent application – Section 197 of the Labour Relations Act
66 of 1995.**

JUDGMENT

GUSH J

Introduction

[1]. The applicant in this matter applies for an order declaring the takeover by the—

“first or forty eight respondent, as the case may be, of the business activities presently conducted by the applicant at the premises of PPC Cement (Pty) LTD at 218 Ferguson Rd., Deal Party, Port Elizabeth and in the town called Slurry in the vicinity of Mahikeng, respectively, each constitutes the transfer of the business or part of a business as a going concern as contemplated in section 197 of the Labour Relations Act 66 of 1995; and ordering the 1st of 48 respondent to comply with its obligations in respect of each of the 3rd to 47th respondents in accordance with section 197 of the LRA as their new employer as contemplated in section 197 pursuant to such transfers”¹.

[2]. In the original application the applicants had not cited the forty eighth respondent. By agreement between the parties the applicants filed an application to join the forty eighth respondent and agreed that such joinder application should be granted.

[3]. At the commencement of the hearing I granted the application to join the forty eighth respondent. The parties were at *idem* that should the applicant succeed in its application the draft order as set out above was the appropriate order.

¹ Agreed draft order handed up by the applicant.

- [4]. In its founding affidavit the applicant explains that some 20 years ago PPC Cement (Pty) Ltd (a cement manufacturer) (PPC) outsourced the distribution of its products to Barloworld Logistics (Pty) Ltd and subsequently to the applicant. The applicant, Barloworld Transport (Pty) Ltd, was established as an entity as a result of a merger between a division of Barloworld Logistics (Pty) Ltd and Manline (Pty) Ltd.
- [5]. PPC has a number of manufacturing sites from which deliveries of its cement are made in accordance with a system the applicant describes in its affidavit.
- [6]. In order to give effect to these deliveries the applicant established business units at each site with dedicated fleets of vehicles and drivers and administrative and management staff. PPC provides office space parking facilities and at the Slurry site a workshop and refuelling facilities.
- [7]. In setting out the background to the matter the applicant records further that during this time a division of Barloworld Logistics called Transport Management Systems (TMS) (clearly a separate entity from the applicant) was established taking responsibility for managing the distribution of PPC's products to its customers.
- [8]. According to the applicant TMS receives an instruction from PPC to deliver consignment from her TMS determines with reference to proximity of the various PPC facilities to the customer, the availability of stock in the availability of transport, which of PPC's facilities will supply the customer. TMS instructs the appropriate unit to give effect to the delivery. The actual distribution of PPC's products was undertaken by the applicant from PPC's various sites from which it delivered the products in accordance with the instruction from TMS.

- [9]. The applicant explains that the “business unit” established in each of the PPC sites generates revenue from deliveries undertaken from that site and that these units are “self-contained revenue, cost and profit centres”.
- [10]. During April 2016 PPC invited tenders for the provision of transport services from its various factories. This was for the services the applicant was rendering to PPC at its various factories. The outcome of the tender process was that the applicant’s tender was unsuccessful in respect of two factories, namely, Port Elizabeth and Slurry and the first respondent was successful in its tender to distribute PPC’s products from the factories in Port Elizabeth and Slurry.
- [11]. It is the contract to supply transport from these factories that is the subject of this application.
- [12]. The effective date from which the first respondent/forty eighth respondent is to commence the distribution is 1 February 2017. It is for this reason that the applicant has brought this application as a matter of urgency.
- [13]. In its founding affidavit the applicant sets out in some detail the discussions that took place, from the time of its unsuccessful tender, with the first respondent regarding a “seamless transition” from the applicant to the first respondent. The applicant to a large extent relies on this as demonstrating that the transaction is covered by section 197 of the Labour Relations Act.²
- [14]. It is clear from the affidavit and the documents attached thereto that the first respondent expressed interest in taking over as many of the facilities currently operated by the applicant as it could in order to successfully provide the service.
- [15]. It is equally clear that despite the applicant’s insistence that this evidenced an appreciation on the part of the first respondent that the transfer was one

² 66 of 1995. (LRA)

envisaged by section 197 of the LRA, that the first respondent at all times made it clear that it did not regard the transaction as one falling within the provisions of that section. The papers show that the first respondent repeatedly denied that the employees would be transferred as envisage by section 197 of the LRA.

- [16]. The First respondent repeatedly responds to the applicant's insistence that the transaction is a transfer of a business as a going concern by emphasising that it does not regard it as such and whilst it is prepared to take on some or all of the employees they will not transfer in accordance with the section 197.
- [17]. What appears to have brought the matter to a head was the indication by the first respondent in November to the applicant that the forty eighth respondent would be responsible for assuming responsibility for giving effect to the contract awarded to the first respondent.
- [18]. The forty eighth respondent in its dealings with the applicant appears to have been more circumspect in its willingness to take over any of the applicants facilities at the two factories and in particular the employees.
- [19]. At all times it is apparent from the papers that no assets are to be transferred in terms of the contract and in particular **not** the vehicles.
- [20]. The first and forty eighth respondents in opposing the application basically record that they do not regard the awarding of the tender for the transport of PPC products from the two factories to be a transfer of a business or part thereof as a going concern. The respondents aver that all that is to be transferred is the delivery service rendered by the applicant.
- [21]. There is nothing in the papers to suggest that in terms of the contract the first or forty eighty respondent would be unable to render the service to PPC on

1 February 2017 in the absence of the transfer of the applicant's "business or part thereof".

Legal Principles

[22]. In the matter of *NEHAWU v University of Cape Town*³ the Constitutional Court set out the test that is now routinely applied in determining whether a business (including the whole or part of any business, trade, undertaking or service) has been transferred "by one employer to another employer as a going concern".⁴

[23]. The Court said the following:

"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 the 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 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 assessment and therefore should not be considered in isolation."⁵ (Footnotes omitted).

³ *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others* 2003 3 SA 1 (CC) para 56. (*NEHAWU*)

⁴ Section 197(1) of the LRA.

⁵ *NEHAWU* above n 3 at para 56.

- [24]. It is clear that the determination of whether or not a transfer has taken place is an objective exercise examining the facts of each matter and that this inquiry must be directed at the examining the substance of the transaction.
- [25]. Neither the applicant nor the respondents have provided the Court with any of the details of the contract or tender awarded to the first respondent. The affidavits simply suggest that the contract only requires the contractor to give effect to an instruction from TMS to undertake a delivery in accordance with TMS's system. The instruction requires the contractor to convey PPC products from the factory to the customer. This instruction is received not from PPC. TMS gives instruction on behalf of PPC to the service provider.
- [26]. There is no indication of any factor relating to the "substance" of the transaction that a business or part thereof is being transferred. Save for the requirement to give effect to the instruction to deliver and that the service provider must provide vehicles for this, there is no information regarding the number or nature of the vehicles required or any specific duties or services the service provider might be required by the contract to provide in giving effect to the instruction from TMS.
- [27]. What is apparently being transferred is the delivery service now rendered by the applicant and to be rendered by the first/forty eighth respondent.
- [28]. It is common cause that the vehicles are not being taken over by the first or forty-eighth respondents and in fact, despite the discussions between the applicant and the first respondent regarding furniture and the like, no assets are being transferred.
- [29]. The judgments of the Constitutional Court, the Labour Appeal Court and this Court emphasize that the determining factor in deciding whether a transfer of a business part thereof is taken place are the specific circumstances of each transaction.

[30]. In this matter, there is nothing in the papers to indicate that the specific circumstances of the transaction or the contract involves anything other than the responsibility for giving effect to deliveries in accordance with instructions from TMS.

[31]. The question that then arises from the facts of this matter is whether it is “the business that supplies a service” that is being transferred or “the service itself”. The Constitutional Court in the *Aviation Union*⁶ said the following:

“It must be emphasized that what is capable of being transferred is a business that supplies the service and not the service itself. Were it to be otherwise, the termination of a service contract by one party and its subsequent appointment of another service provider would constitute a transfer within the contemplation of the section. That is not what the section was designed to achieve as is apparent from its scheme, historical context and its purpose.”⁷

[32]. What is clear from the papers in this matter and in particular the absence of any further detail what is being taken over by the forty-eighth respondent (via the first respondent) is the obligation to provide a delivery service from the factory in question to its customers.

[33]. Equally clear is the fact that no assets are being transferred or required to be transferred to enable the forty-eighth respondent to perform the service. In the absence of the transfer of assets there is nothing in the papers to suggest that it would not be possible for the forty-eighth respondent to seamlessly continue to provide the service previously provided by the applicant, in accordance with the instructions from TMS, without any of the assets of the applicant.

⁶ *Aviation Union of SA v SA Airways (Pty) LTD & Others* 2012 (1) SA 321 (CC); 2012 (2) BCLR 117 (CC); [2012] 3 BLLR 211 (CC); (2011) 32 ILJ 2861. (*Aviation Union*)

⁷ *Id* at para 52.

- [34]. It is also equally clear that there is nothing to suggest that the nature of the transaction requires the transfer of either assets or employees as a precondition for the respondents to render the delivery service.
- [35]. It might well be so that the first respondent in particular in its discussions with the applicant created an impression that the transaction fell within the definition of section 197, particular insofar as it indicates that it was interested in employing the applicants' employees and acquiring some of the furniture. This however is not a determining factor.
- [36]. Taking the above into account I am not persuaded that the facts of this particular transaction constitutes a transfer of a distinct business or part thereof and accordingly the transaction does not fall within the ambit of section 197 of the LRA.
- [37]. There is no reason why costs should not follow the result. Both parties suggested that the costs should include the costs of two counsel.

Order

- [38]. I therefore make the following order:
1. The applicants' application is dismissed with costs, the costs to include the costs of two counsel.

D H Gush

Judge of the Labour Court of South Africa

Appearance:

For the Applicant: C Watt-Pringle SC and H van der Merwe

Instructed by: Redfern and Findlay (N Cluckie)

For the First and

Forty eighth Respondents:

A Redding SC and G Fourie

Instructed by: Cliffe Dekker Hofmeyr