IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: **J 1368/17**

In the matter between:

FRASER ALEXANDER (PTY) LTD	Applicant
and	
TSWELOPELE BENEFICIATION OPERATION (PTY) LTD	First Respondent
AMCU	Second Respondent
NUM	Third Respondent
PERSONS LISTED IN ANNEXURE "A" TO NOTICE OF MOTION	Fourth to Sixty-Eighth Respondents
INTASOL TAILINGS (PTY) LTD	Sixty-Ninth Respondent

Heard: 25 July 2017

Delivered: 16 August 2017

Summary: Transfer of a business - Section 197 of the LRA - Motion proceedings - Final relief sought - *Plascon-Evans* applied

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JUDGMENT

WHITCHER J

Introduction

[1] This is an urgent application for an order, *inter alia*, that the termination of the tailings dam agreement ("the agreement") between the applicant and the first respondent constitutes the transfer of a business from the applicant to the first respondent, *alternatively* Intasol, with effect from 1 June 2017, *alternatively* 8 June 2017, as contemplated in terms of section 197 of the LRA. (This relief is sought in terms of the amended notice of motion). The application is opposed by the first and sixty ninth respondent.

Background Facts

[2] Fraser Alexander was contracted by Tswelopele to perform maintenance and management work at a tailings dam in terms of a Tailings Dam Agreement. This two year contract came to an end on 30 June 2017.

[3] The functions that Fraser Alexander was obliged to perform in terms of the Tailings Dam Agreement encompassed general maintenance work on – and management of – the dam.

[4] Before termination of the Tailings Dam Agreement, Tswelopele put the future maintenance and management work out to tender.

[5] However, on Intasol's version, given the failing condition of the tailings dam, the tender process was put on hold. This remained the position at the time of the present application. For a week after Frazer Alexander left the site, limited remedial work was carried out by Tswelopele's foreman and a few labour broker employees. Intasol was then commissioned to do remedial work on the tailings dam.

[6] Fraser Alexander alleges that “this so-called “*remedial work*” forms part of the general maintenance work at the Tailings Dam and therefore fell within the scope of the work contemplated in the Tailings Dam Agreement”.

[7] Fraser Alexander further states that, in any event, “it would still be necessary for Tswelopele or Intasol to continue with such general maintenance work and management for as long as the Mine remained operational.” They contend that routine maintenance and operation of the tailings dam must continue for as long as slurry is flowing into it.

[8] Fraser Alexander conclude “accordingly, the so-called “*remedial work*” currently being done by Intasol is nothing more than the maintenance and management of the Tailings Dam it previously performed.

[9] Both Intasol and Tswelopele contend, as respondents, that the work Intasol has been contracted to do is not the work contemplated in the Tailings Dam Agreement. It is not the normal management and maintenance work the Applicant did. Rather, it is short-term repair and remedial work aimed at restoring the tailings dam to a normal operating condition and standard. Indeed, Intasol points out that it is not in a position to perform routine maintenance work with half the key machinery necessary to operate the dam (the cyclones) being broken.

[10] Intasol states that whatever work other than remedial work it may be performing is entirely incidental to and a tiny fraction of its remedial work it is performing. This extra-remedial work will also cease once the remedial work is concluded. When the problems with the tailings dam are remedied by Intasol, its work will be finished.

[11] Intasol contests the allegation that it manages the flow of slurry into the tailings dam in the same manner that Frazer Alexander did. The slurry is used to repair defects and gaps in the dam wall and not for the normal construction of the wall of the dam. Intasol goes into considerable detail to distinguish the uses to which it puts the slurry as compared Frazer Alexander.

[12] The business conducted by Fraser Alexander comprised the construction of the tailings dam, in particular the dam wall, on a long-term and ongoing basis according to a planned schedule. The goal of this was to ensure that the wall rose consistently and evenly over time. This, if properly done, would prevent the dam from overflowing.

[13] This is achieved principally by the correct placement, movement and utilization of "cyclones" in a co-ordinated, scheduled and planned manner. The cyclones separate the slurry or tailings pumped into the cyclones into coarse particles – which are used to construct the wall; and fine particles and liquid - which are deposited into the inside of the dam. The cyclones deposit the coarse particles onto the perimeter of the dam and then onto the dam wall in order to construct the gradually rising dam wall.

[14] As the material in the dam rises, the wall must continue to be built to contain that content adequately. This is a long-term process which will ultimately result in a structure which may be referred to as a mine dump. The work described above is done according to strict specifications as set out in an operating manual.

[15] This manual prescribes a host of other activities that the applicant was required to undertake in discharge of its duties in terms of the Tailings Dam Agreement. In performing these functions according to specifications, it was necessary for Frazer Alexander to monitor operations, retain data and plan the movement and deployment of cyclones in "banks".

[16] Intasol states that, on the contrary, its work is to repair the defects it identified in the existing structure and composition of the dam. For example, there were parts of the dam perimeter where the wall had not been constructed to specifications contained in the operating manual; parts of the wall which had been constructed mechanically (not with cyclones) which had to be removed and properly constructed using cyclones and coarse particles; parts of the wall which contained inappropriate fine material, the extent of which is still unknown. This remedial work is the essence and focus of Intasol's business at the tailings dam.

[17] The nub of the respondents' case is that whereas Fraser Alexander's remedial work, minor as it was, was incidental to its main business, remedial work is practically speaking, the totality and essence of Intasol's business. When this remedial work is done, Intasol's business will be complete and it will leave the site. In summary, the purpose of routine maintenance is to prevent defects or problems occurring. The purpose of remedial work is to repair defects or address problems that should not have occurred in the first place.

[18] Both respondents contend that, only once the remedial work is done, will the future of the tailings dam be determined. If it is viable, the work contemplated in the Tailings Dam Agreement may, dependent upon the circumstances then present, be once again put out to tender. According to the Tswelopele, there is no certainty who the successful tenderer may be.

[19] Intasol states that when Fraser Alexander's contract ended no tools, machinery or other assets of Fraser Alexander's business were transferred to Tswelopele and then onwards to Intasol.

[20] Intasol disputes that data relevant and necessary to conduct and continue the business contemplated in the Tailings Dam Agreement was transferred to Intasol from any source.

[21] No personnel of Fraser Alexander of whatever seniority have been transferred to Intasol. Intasol has deployed 17 labour staff and 8 management staff to undertake what it contends is the strictly remedial tasks it is required to perform on a short-term basis. It points out that Fraser Alexander seeks to transfer the employment of approximately 65 personnel, who constitute part of the work-force it employed to execute the Tailings Dam Agreement.

<u>Accepted Facts</u>

[22] Frazer Alexander elected to advance its case for a transfer of business by way of motion proceedings. Given that Fraser Alexander seeks final relief, the

principles established in *Plascon-Evans Paints Ltd v Van Riebeeck Paint (Pty) Ltd*[1] apply to the resolution of disputes of fact on the papers.

[23] As such, final relief can be granted to Fraser Alexander against the respondents only if the facts alleged by Tswelopele and Intasol, together with the facts alleged by Fraser Alexander and admitted by the Respondents, justify the grant of such relief.

[24] The affidavits before the court reveal that Fraser Alexander based its case in its founding papers on the premise that Tswelopele insourced the maintenance and management of the dam, engaged personnel from a local rigging company to perform the functions of the employees, and that the dam has been ordinarily operational *"on a daily basis"*. It subsequently expanded its case to include the contention that its maintenance and management business at the tailings dam was transferred to Intasol.

[25] However, the facts which the court must accept, on the application of the *Plascon-Evans* principle, are that the dam was not left in an operable condition by Fraser Alexander when it departed, thus necessitating remedial work and the dam has therefore not been in routine operation since 1 June 2017, with more than half of the key machinery at the dam (the cyclones) being dysfunctional.

[26] Further to this, the court must accept that limited remedial work was carried out from 1 to 6 June 2017 by Tswelopele's foreman and a few labour broker employees. As from 8 June 2017, Intasol performed essentially remedial work at the dam, and has been performing such remedial work to the date of the application in terms of a short-term appointment.

[27] The court must also accept that Tswelopele will not be taking over the maintenance and management functions at the dam after the remedial work is

[1] 1984 (3) SA 623 (A) at 634D-635C.

complete, and these will be contracted to a third party yet to be identified through a tender process.

[28] There is nothing before the court, besides a leap of suspicion, to suggest that the new service provider to do the work contemplated in the Tailings Dam Agreement will be appointed by Tswelopele in a manner designed to evade the provisions of s197 of the LRA. While such an inference is not impossible to draw, it cannot be drawn on the evidence before this court.

<u>The Law as applied to the facts</u>

[29] In *Rural Maintenance*, the Constitutional Court[2] endorsed the approach to transfers of business of the European Court of Justice in *Sodexho*, the logic of which is also present in *Aviation Union*. The general test remains:

> 'In deciding whether a 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 of a 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.'[3]

[30] In the present matter no assets of Fraser Alexander have been transferred, no data, necessary to continue the implementation of the Tailings Dam Agreement as a going concern, has been transferred and no employees have been transferred.

[31] On the papers, the "business" being conducted by Intasol is not the same work that Fraser Alexander was conducting in terms of the Tailings Dam Agreement and the applicable operating manual.

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[2] *Rural Maintenance (Pty) Ltd v Maluti-A-Phofung Local Municipality* [2017] 3 BLLR 258 (CC).

[3] See; Rural (CC) at para [33].

[32] Any similarities in work, such as Intasol's necessary handling of the slurry, is a matter of form and not substance. The coarse particles of slurry are needed to rebuild walls as opposed to maintaining and expanding them. Intasol's right of use of the dam infrastructure, transferred from Frazer Alexander, was functional to Intasol performing an overlapping but substantively different line of work and thus business for Tswelopele.

[33] Moreover, as pleaded by the respondents, the arrangement between Tswelopele and Intasol is a once-off engagement of short-term duration.

[34] I agree with counsel for Intasol that where a contract is cancelled for non-performance to the extent present in this case, it cannot be said that any business or service is transferred as "a going concern". It was not possible on the termination of the Tailings Dam Agreement to continue the operation of the business contemplated in that agreement in a seamless or "as-is" fashion, or at all. On the evidence before this court, extensive work was and is required to restore the tailings dam to a state where its routine functioning can commence or continue at a future date.

[35] I agree that the applicant's contentions in favour of a transfer of business are unworkable. In its schema, there would have had to be a transfer of employees to Tswelopele for approximately one week, thereafter a transfer of employees to Intasol for approximately 3 months and thereafter an anticipated transfer of those same employees to a new service provider, once Intasol leaves the site and if indeed a new service provider is appointed. To seek a transfer of contracts of employment to a remote and theoretical future employer who might resume the work of the Frazer Alexander and whose operations at that point might justify the employment of the full complement of transferred employees, in my view, stretches the obligationary chain beyond the point intended by the legislature. This underscores a criticism made during argument by counsel for Intasol that this application is, in addition to its factual deficiencies, also premature.

[36] In the above circumstances I find that S197 is not applicable. Where a contract is cancelled for non-performance of the nature and extent present in this case, it cannot be said that any business or service is transferred as "a going concern". It was not possible on the termination of the Tailings Dam Agreement for either of the respondents to continue the operation of the business in a seamless or "as-is" fashion, or at all. Before this can possibly occur extensive work is required to restore the tailings dam to a state where its routine functioning can commence or continue.

[37] It remains to distinguish a decision of Van Niekerk, J, relied upon the applicant involving two of the same parties, namely, *Fraser Alexander (Pty) Ltd v Intasol Tailings (Pty) Ltd and the others.*[4]

[38] In Fraser Alexander (1) 84 employees were contemplated to be taken over by Intasol, limited assets were taken over by Intasol and the work done by Intasol was materially the same as that previously done by Fraser Alexander and in terms of a similar agreement. The court noted that the business transferred to Intasol was not "one-off or short-term".[5]

[39] In Fraser Alexander (1), the court stated:[6]

> "[28] On these admitted facts, there are already strong indications that s 197 is applicable – <u>the same services</u> are to be conducted on the same premises for the same client. In the words of the authorities referred to above, <u>the operation that comprises the management of tailings dams and the hydraulic re-mining of slimes dams previously conducted by the applicant continues in the hands of the transferee employer, Intasol</u>. In other words, there is an organised group of employees dedicated to a contract and activity prior to the transfer <u>in circumstances where the contract award is not a one-off or short term</u>, nor does it relate to the supply of goods. What remains to be determined is whether after any transfer, there exists an economic

[4] (unreported, case number J2718/2016)(Fraser Alexander (1)).
[5] See; paragraph [28] of Fraser Alexander (1).
[6] See; para [22] of the judgement.

entity which despite changes, remains identifiable though not necessarily identical"
(own emphasis)

[40] The accepted facts in Frazer Alexander (1) are thus insufficiently similar to persuade me that the previous finding of this court that a transfer of business between Frazer Alexander and Intasol occurred should be followed in the matter at hand.

Conclusion

[41] For the reasons set out above, there has been no transfer in terms of S197. Accordingly, the application should be dismissed. However, an adverse cost order is not appropriate considering the importance of the matter and the application was aimed at securing the employment of many employees.

Order

[42] The application is dismissed with no order as to costs.

B Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: A Myburgh SC and M Van As instructed by Webber Wentzel

For the First Respondent: R Itzkin instructed by Edward Nathan Sonnenberg

For the Sixty Ninth Respondent: P.J. Pretorius SC, A Snider and N Thokoane instructed by Cliffe Dekker Hofmeyr Inc