IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

CASE No: J2158/18

In the matter between:

WESTDAWN INVESTMENTS (PTY) LTD t/a
JIC MINING SERVICES **Applicant**

and

NEWRAK MINING (PTY) LTD **First Respondent**

IMPALA PLATINUM LTD **Second Respondent**

ASSOCIATION OF MINE AND CONSTRUCTION
WORKERS UNION (AMCU) **Third Respondent**

NATIONAL UNION OF MINEWORKERS **Fourth Respondent**

UASA-THE UNION **Fifth Respondent**

Heard:27 June 2018

Order:27 June 2018

Delivered: 09 July 2018

Summary: [Section 197 of the LRA]

JUDGMENT-REASONS FOR ORDER

MABASO, AJ:

Introduction

[1] This matter came before me on 26 June 2018. After hearing arguments and having considered the matter, I made the following order:

> "1. The First Respondent's preliminary points are dismissed with no order as to costs,
>
> 2. The matters heard as one of urgency in accordance with Rule 8 of the Labour Court Rules and the normal form and precedents prescribed by the rules are dispensed with,
>
> 3. The employees of Applicant employed no.1 shaft of the Rustenburg operations of Second Respondent as at 30 June 2018, will become the employees of the First Respondent on 1 July 2018, in terms of the provisions of section 197 of the Labour Relations Act, 66 of 1995,
>
> 4. There is no order as to costs."

These are the reasons for the order.

Parties

[2] The applicant is Westdawn Investments (Pty) Ltd t/a JIC Mining Services, the first respondent is Newrak Mining (Pty) Ltd, the Second Respondent is Impala Platinum Ltd, the third respondent is Association of Mining Construction Workers Union (AMCU), the fourth respondent is the National Union of Mineworkers (NUM), and the fifth respondent is UASA- the Union. Only the first respondent opposed this application.

Preliminary points raised by the first respondent *(a) Why today, not yesterday or tomorrow?*

[3] This matter was heard on a Wednesday, and this led to the first respondent, in the answering affidavit, raising a point that this matter should have been heard either on a Tuesday or Thursday. Relying on clause 12 of the Practice Manual of this Court, the first respondent contends that as much as an urgent application of this nature may be heard on any other day of the week at any time, in order for this to happen, an applicant has to set out facts which justify such set down.

[4] The applicant in the replying affidavit, stated the reason why this matter had to be set down on a Wednesday by submitting that the applicant's attorney received the date directly from the registrar of the Labour Court before delivering this application. Mr Pieter Johannes Van Der Merwe in the service affidavit indicates that he communicated with the registrar on 18 June 2018 wherein he explained to the registrar the nature of the application and that the matter might be opposed. That is when the registrar issued the date of the 27th which was a Wednesday. Based on the satisfactory explanation provided herein by Mr Van Der Merwe and the principle mentioned, in paragraph 9 below, I am inclined to dismiss this point.

(b) Why now, not later and urgency?

[5] The first respondent asserted that the applicant failed to comply with clause 12.9 of the Practice Manual and alleged that it was not given a reasonable time within which to file an answering affidavit. In the same affidavit, the first respondent stated that it received the application on 19 June 2018, and in terms of the notice of motion it was given until close of business on 22 June 2018 to deliver the opposing papers.

[6] The first respondent further confirmed that the hearing was to be held on 27 June 2018 and that "*the applicant has provided for three days for [it] to deliver its notice of intention to oppose and answering affidavit and thereafter a further three days for the applicant to file a replying affidavit if necessary*". It

further contends that three days is not a reasonable time, taking into account that the application that was received by it consisted of 130 pages. Despite making this assertion, the applicant avers that the period provided for in the notice of motion is not a reasonable time.

[7] The first respondent confirmed that it sent correspondence to the applicant's attorneys asking for an extension in order to deliver its opposing papers by no later than 25 June 2018. The response that was received by the applicant was that *"the applicant did not wish to be obstructive in the hearing of the matter and would not oppose the filing of the answering affidavit on technicalities. It was also indicated that the applicant appreciated the logistical problems the first respondent might face and that it was willing to accommodate it"*.

[8] Indeed the first respondent proceeded to deliver the answering affidavit, and in the same answering affidavit it raises the point that it did not have reasonable time to deliver opposing papers. The first respondent further states that this Court should not to grant an order of urgency as the facts and circumstances in the founding affidavit do not justify condonation of failure to comply with Rule 7(4) and (5)".

[9] *Kirk-Cohen AJ*, in *Sikwe v S A Mutual Fire and General Insurance*[1] explained what an affidavit has to contain, in an urgent application and said,

> "It is correct that the affidavit makes no mention of specific facts alleged to constitute urgency; in fact there is no allegation whatsoever that the matter is urgent. In my opinion, an applicant who wishes to rely on the procedure provided for in Rule 6 (12) must set out sufficient facts in the founding affidavit to enable the Court to decide whether urgent relief should be granted. Specific averments of urgency must be made and facts upon which such averments are based must be set out in the affidavit where it is not otherwise apparent that the matter is urgent. It does not follow that an application is necessarily defective if the form referred to in the Rule is not strictly adhered to. In my opinion, it is the substance of the affidavit, and not its form, which

[1] [1977] 3 All SA 231 (W).

> will weigh with a Court; if an affidavit sets out facts upon which a Court can decide that an applicant is entitled to relief in terms of the sub-rule, the Court will entertain the application. If the only reasonable inference from the facts set out in the affidavit is that the matter is one of urgency, then an applicant will have complied with the requirements of the sub-rule, even though he does not make a specific averment that it is urgent.

[10] I share the same approach by Kirk-Cohen AJ herein. The first respondent upon receiving the application asked for an extension, which was granted, and it proceeded to deliver a detailed affidavit, and there was no objection by either of the parties for the late delivery of such answering affidavit. I do not understand how and why the first respondent is of the view that a matter of this nature can be dismissed solely because the applicant did not comply with certain procedural requirements in bringing the urgent application. Moreover, the first respondent's representative confirmed, in argument, that the facts of this matter justify urgency. Also taking into account that following the applicant's delivery of the replying affidavit, the first respondent had an opportunity to deliver heads of argument (which are not mandatory in urgent applications).

[11] The first respondent further submitted that the applicant has failed to set out the facts which justify urgency, in line with *Sikwe's* matter I proceed to set out what is contained in the affidavit which in my view justifies urgency. Mr Loius Botha Lourens for the applicant among others, set out in the founding affidavit that the only time he learned that the first respondent had been the successful tenderer for shaft 1 was on 13 June 2018. On 15 June 2018 the applicant sent an email to the first respondent with an intention to inquire as to whether the applicant's employees on shaft 1 would be taken over. However, the first respondent responded on 18 June 2018. This application was lodged on 19 June 2018. Moreover, this is an application which involved more than a hundred employees and 101 of these employees are from neighbouring countries, and the corporate worker authorisation certificate terminates automatically when the services of employees concerned are terminated and

had to be repatriated within 48 hours thereafter. Based on this I was satisfied that the applicant met the requirements for urgency.

Brief Background:

[12] The applicant was providing outsourced underground mining services at the Rustenburg operations of the second respondent. The applicant asked this Court to declare that its employees employed at shaft No.1 of the Rustenburg operations of the second respondent be transferred to the first respondent in terms of section 197 of the Labour Relations Act[2] (LRA). The applicant developed uprising and constructs secondary support for the works, it also supplies labour for emergency work, sweepings, vamping and the reclamation of usable materials. In executing its duties, it supplies its drop race meetings, hand equipment for employees, then the second respondent supplies the rock drilling machines and all consumables for the rendering of the said services. The applicant has been providing outsourced mining services to the second respondent for more than two decades.

[13] The work that was being done by the applicant was put out to tender in May 2018. In terms of the tender document, the description of the work that was to be provided is "precisely the same by the applicant, *inter alia*, the No. 1 Shaft".

[14] Following the issuing of the tender, Mr Laurens attended the briefing wherein one Ms Stephens of the first respondent addressed the meeting wherein he said that the successful tenderer would do exactly the same work that was done by the applicant at shaft No. 1. Later the second respondent was appointed as the successful tenderer for shaft No. 1. Following this appointment, he then proceeded to dispatch an email to the first respondent seeking confirmation that the employees in shaft No.1 would be taken over by the first respondent in terms of section 197 of the LRA. He later received the reply to this email which reads thus

[2] Act 66 of 1995 as amended.

> "Morning [Mr Lourens]
> this is a reply to your letter below, [the first respondent] have been in discussion with the employees of JCI Mining at Impala 1#concerning the opportunity of being employed by [the first respondent]. It was stated to them that employment can only commence after the period of termination has expired which is 30. June 2018. It was also categorically stated to them that No transfer of business/services for employees will take place in terms of section 197".

Principles and application thereof

[16] Section 197 of the LRA provides that if a transfer of the business takes place, the new employer substitutes the old employer in respect of all contracts of employment, taking into account the provision of this section, one of the purposes of section 197 is to protect the employment of the workers. In order for this section to apply, three requirements that have to be met namely the must be (a) a business (b) which has been transferred and(c) as a going concern.

[17] The test for determining a transfer as a going concern was laid down by the Constitutional Court, in the matter of *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town and Others*[3] where it was held that;

> "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 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

[3] 2003 (2) BCLR 154; 2003 (3) SA 1 (CC).

> 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 overall assessment and therefore should not be considered in isolation.[4]

[18] In *Rural Maintenance (Pty) Ltd and Another v Maluti-A-Phofung Local Municipality* [5], the Constitutional Court reiterated that the purpose of section 197 in that *"is to protect the employment of workers through the hands of whom a service or goods are supplied. Their contracts of employment get transferred together with the business or entity that provided a particular service"*[6]. In the *Rural Maintenance* case the court acknowledging that to determine the matter at hand, regarding "transfer" one has to assess the circumstances of each case objectively, it refers to the minority judgement in *Aviation Union* where it was held that,

> "for a transfer to be established there must be components of the original business which are passed on that party. This may be in the form of assets or the taking over of workers who were assigned to provide the service. The taking over of workers may be occasioned by the fact that the transferred workers **possess particular skills and expertise necessary for providing the service** or the new owner may require the workers simply because they did not have the workforce to do the work……"[7]

[19] The principle above is summarised in the Rural Maintenance matter in the following manner: the enquiry is a factual one,[8] such virtual evaluation must be based on the substance that the form of the transaction,[9] in determining whether certain factors were present.

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[4] Ibid at para 56.

[5] 2017 (1) BCLR 64 (CC). (2017) 38 ILJ 295 (CC).

[6] Ibid at para 99.
[7] Ibid at para 100.(Own emphasis)
[8] Ibid at para 111.
[9] Ibid at para 112.

[20] *In casu*, I conclude that there was a transfer as a going concern which is covered by section 197 of the LRA taking into account what is stated in the following paragraphs, and paragraphs [12] to [14] above.

[21] In the founding affidavit, paragraph 10.2, the applicant stated the following undisputed evidence:

> "the precise nature of services rendered by applicant at No.1 Shaft requires some education. Whilst applicant does not do action mining or development of mining stopes, it does develop drop raising an constructs second in support for the works. It also supplies labour for emergency work, sweepings vamping and the reclamation of usable materials. In performing these duties the Applicant supplies its own drop raise machines and hand equipment for employees, but Second Respondent supplies the rock drill machines and all consumables for the rendering of the said service."

[22] In June 2018 the first respondent was already in contact with the employees of the applicant with the intention of employing them, however, not willing to accept them in line with section 197 of the LRA, as per the email cited in paragraph 15 above.

[23] The applicant asserted that during the briefing that took place in May 2018 it was stated that the work that was subsequently taken by the first respondent, was to be the same as the one that it was doing in shafts 1 and 10.

[24] The applicant, being a party having a burden to set out in the affidavit what work its employees are doing, and if there are other additional employees to state as to what the latter employees will be doing, in paragraph 10.1 says,

> *" suffice it to say that, as at May and June 2018 Applicant rendered those services at Second Respondent's 1,9, and 10 Shafts. Second Respondent is in the process of closing its No.9 Shaft and the Applicant's employees that do not form part of this application. An entity other than First Respondent has been awarded the contract at*

No. 10 Shaft and it has agreed to a transfer of employees in terms of the provisions of Section 197 of the Labour Relations Act. This shaft thus does not feature here".

[25] As the Constitutional Court stated that "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". Following the concessions that were made by the first respondent in its answering affidavit and the undisputed evidence of the applicant, the order that I made above is in line with the evidence that was presented before this court by way of the affidavits. The only inference that can be drawn in this matter is that, despite the first respondent having its 350 employees and 25 supervisors, it approached the applicant's employees as stated above, in paragraph 15, because they "possess particular skills and expertise necessary for providing the service" .I am satisfied that the transfer in this matter is a transfer of part of the applicant's business, as a going concern, to the first respondent.

[26] It is for the above reasons, that I gave the order in paragraph [1] above.

S Mabaso

Acting Judge of the Labour Court of South Africa

<u>Appearances</u>

For the Applicants:	Advocate R G Beaton SC
Instructed by*:*	Van Der Merwe & Van Der Merwe Attorneys
For the Respondent:	Advocate M Edwards
Instructed by :	E D Ras Burger & Partners