THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: J 464/20

COMMUNICATION WORKERS UNION **Applicant**

and

MOBILE TELEPHONE NETWORKS SOUTH AFRICA (MTN SA) **Respondent**

Heard: **27 May 2020**

Delivered: **1 June 2020**

In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be 01 June 2020.

JUDGMENT

PRINSLOO, J

<u>Background</u>

[1] The Applicant is the majority trade union at the Respondent's (MTN) workplace.

[2] It is common cause that MTN adopted its 'BRC Store Transformation 2020' (BRC) and that around September 2019 it published a document titled "BRC Store Transformation Journey FAQ's'. Through the adoption and implementation of the BRC, MTN took a decision to sell some of its stores as a going concern, obviously triggering the provisions of section 197 of the Labour Relations Act[1] (LRA). The process is to be done in three different phases and the first phase is due to be implemented on 1 June 2020.

[3] The Applicant was invited to a meeting with MTN on 17 February 2020, when the BRC document was presented and the Applicant was invited to comment on it. The Applicant conveyed its displeasure with the meeting in that it was expected to comment and make submissions without being afforded the opportunity to interrogate the document and to engage with its members. MTN made it clear that the BRC implementation will go ahead, with or without the Applicant's consultation.

[4] The Applicant was invited to another meeting with MTN on 11 March 2020 and during the meeting the Applicant was *inter alia,* informed that the first phase of the project is to be implemented on 1 June 2020 and that seven stores have been identified for that purpose. The Applicant was also informed that the objective of the BRC was to look at MTN's current store footprint and to decide strategically how to position the portfolio. The Applicant proposed that the implementation of the BRC be postponed until such a time that MTN has furnished the Applicant with all the information it had requested and that the Applicant had consulted with its members.

[5] On 20 April 202, the Applicant received a response from MTN, however according to the Applicant, this response was unsatisfactory. The Applicant once again indicated that it needed time to consult with its members in order to receive a mandate. The Applicant indicated that due to the national lock down, it would be impossible to consult with all of its members.

[6] On 13 May 2020, MTN responded in a letter to the Applicant stating that the engagements it had held with the Applicant were held as a matter of courtesy.

[1] Act 66 of 1995, as amended.

The purpose of the engagement was merely to advise the Applicant of the fact that the intended transfer could affect some of its members and it was to equip the Applicant with information to enable it to respond to queries from its members regarding to the sale of the stores and the matters incidental thereto.

[7] MTN made it clear that section 197 of the LRA does not envisage any consultation and that the Applicant does not have a right to consultation under section 197. MTN stated that the decision to sell part of the business is a commercial one and falls squarely within the prerogative of MTN and does not require the Applicant's consent. The decision to sell seven stores was to be implemented without further notice.

[8] On 22 May 2020, the Applicant filed an urgent application, which MTN opposed.

[9] The matter was set down for hearing on 27 May 2020 and due to the Covid-19 lock down measures, the parties presented arguments via Zoom.

<u>Urgency and authority</u>

[10] MTN raised two points *in limine.*

[11] The first point is that the matter is not urgent as the catalyst for the bringing of this application should have been the meeting of 17 February 2020 when MTN indicated that the implementation of the BRC would go ahead with or without further consultation of the Applicant. Instead of approaching this Court, the Applicant waited for three months to bring this application and no cogent reasons are given as to why no urgent proceedings were instituted immediately after 17 February 2020.

[12] There is no merit in the Respondent's arguments on the issue of urgency and in the ordinary course, the Applicant would not have crossed the hurdle of urgency. However, I am inclined to deal with this matter notwithstanding the lack of urgency. This matter was enrolled for hearing in Court on 27 May 2020, when it was fully argued and received judicial attention. If it is struck off

the roll for lack of urgency, as it should, it will in all probability be enrolled in the normal course, meaning that another judge would have spent time on this matter and another Court day will be allocated for it. Judicial resources are scarce and limited and in my view, this matter lacks merit to the extent that it should be put out of its misery sooner rather than later and it should not make its way back to Court, be it on an urgent basis or in the ordinary course. No other Court should be burdened to deal with it, therefore I will deal with this matter, despite the lack of urgency.

[13] The second point *in limine* is that the deponent to the founding affidavit has no authority as the resolution was not signed by the Applicant's general secretary and his name does not appear on the resolution.

[14] In argument before me, it was submitted that the resolution was valid as it was signed by an executive member of the Applicant on behalf of the general secretary. It was also explained in the replying affidavit that due to the current lock down, it is impossible to expect the general secretary to sign the resolution as only executive members are in office and that the general secretary is aware of this application. Mr Ndlovu for the Applicant submitted that the fact that the general secretary's name does not appear on the resolution, does not render it invalid.

[15] I have no intention of spending material portion of this judgment on the point of authority. I accept that due to the lock down, entities are unable to function and operate as normal and *in casu,* I have no reason to doubt that the Applicant before me is the Communication Workers Union (CWU). I am satisfied that the said union indeed instituted these legal proceedings.

<u>The relief sought</u>

[16] The Applicant seeks an order that MTN be interdicted from the implementation of the BRC, pending full disclosure of all requested information to enable the Applicant to consult with affected members and / or relevant stakeholders.

[17] It is trite than in order to succeed in obtaining an interim interdict, the Applicant has to satisfy the following requirements namely to demonstrate a *prima facie* right, a well-grounded apprehension of irreparable harm, that the balance of convenience favours the granting of the relief sought and the absence of any alternative remedy.

Prima facie right

[18] Whether or not the Applicant has a right is a matter of substantive law and the onus is on the Applicant to establish on the facts and evidence placed before this Court that it has a *prima facie* right in terms of the substantive law. The Applicant also has to prove that the right is a legal right and a right which can be protected[2].

[19] It is evident from the facts placed before me that the implementation of the BRC is to happen within the context of section 197 of the LRA and that the Applicant has approached this Court within the ambit of the provisions of section 197.

[20] MTN's case is that section 197 of the LRA does not envisage any consultation and that the Applicant does not have a right to consultation under section 197. The decision to sell part of the business is a commercial one and does not require any consensus-seeking exercise or engagement with the Applicant.

[21] In its founding affidavit, it is evident that the Applicant's case is that MTN has 'misinterpreted the intended purpose of consultation within the ambit of section 197 of the LRA.' The Applicant placed specific reliance on the provisions of section 197(6) of the LRA and made it clear that based on the provisions of the said section, it insists on being provided with all the relevant information and to be afforded an opportunity to make submissions during the consultation process. The Applicant's case is that it is not allowed sufficient opportunity to consult with its members, which goes against the very fabric of section 197(6) of the LRA.

---

[2] The Civil Practice of the High Courts of South Africa, Herbstein & Van Winsen, 5th edition, page 1457– 1463.

[22] The right which the Applicant seeks to enforce and protect, as is apparent from its pleaded case, is to be found in section 197(6)(b) of the LRA.

[23] The question thus is whether the Applicant has a legal right to full disclosure of the information it has requested and whether it has a right to consult with affected members and / or relevant stakeholders.

[24] The question calls for a closer consideration of the provisions of section 197(6) of the LRA, which reads as follows:

> '(6)(a) An agreement contemplated in subsection (2) must be in writing and concluded between –
>
> (i) either the old employer, the new employer, or the old and new employers acting jointly, on the one hand; and
>
> (ii) the appropriate person or body referred to in section 189(1), on the other.
>
> (b) In any negotiations to conclude an agreement contemplated by paragraph (a), the employer or employers contemplated in subparagraph (i), all relevant information that will allow it to engage effectively in the negotiations.
>
> (c) Section 16(4) to (14) applies, read with the changes required by the context, to the disclosure of information in terms of paragraph (b).'

[25] It is evident from the wording of section 197(6) that it cannot and should not be read in isolation as it clearly refers to an agreement as contemplated in section 197(2). The negotiations contemplated in section 197(6)(b) are for the purpose of concluding an agreement as provided for in section 197(2). Thus the starting point should be section 197(2).

[26] Section 197(2) of the LRA provides that:

> '(2) If a transfer of a business takes place, <u>unless otherwise agreed in terms of subsection (6)</u> -
>
> *(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 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'. (My emphasis)

[27] Section 197(2) provides for the default position that would apply in the event of a section 197 transfer, unless the parties agreed otherwise in terms of a written agreement, as contemplated in section 197(6). It is evident from a proper reading of section 197 that parties are not compelled to enter into any written agreement in respect of a section 197 transfer, but in the event they elect to do so, the provisions of section 197(6) would apply.

[28] *In casu,* MTN made it clear that there is no agreement and that there is no intention to enter into any agreement, which position was not disputed by the Applicant. That being the case means that the provisions of section 197(6) do not find any application.

[29] There is no general right to consultation or to information in a section 197 transfer process. Section 197(6) specifically provides for negotiation to conclude an agreement, should the parties elect to do so, and for the disclosure of information that would allow parties to engage effectively in the negotiations.

[30] The Applicant's reliance on section 197(6) is misplaced. The Applicant does not have a right to consult or to negotiate or to request information in a section 197 transfer process where there is no agreement as contemplated in section

197(6), of which there is none *in casu.* In fact, it was conceded by Mr Ndlovu that section 197(6) finds no application in this matter.

[31] The Applicant dismally failed to cross the first hurdle for an interim interdict.

<u>Irreparable harm</u>

[32] The Applicant has to show that there is a well-grounded apprehension of irreparable harm that it stands to suffer in the event that the relief it seeks is not granted.

[33] In the founding affidavit, the Applicant did no more than to state that it would suffer irreparable harm because MTN is hell-bent on implementing the BRC without disclosing the relevant requested information and without further engagement with the Applicant, who is unable to consult with its members due to the national lock down.

[34] The irreparable harm alleged by the Applicant is directly related to the rights which the Applicant believes it has namely to be provided with information and to consult with its members. Those rights do not exist and the Applicant failed to allege any other harm.

[35] I am not convinced that the Applicant made out a case in respect of this requirement for an interim interdict as the harm alleged is dependent on the existence of the rights which the Applicant seeks to protect, which do not exist.

<u>No alternative remedy and balance of convenience</u>

[36] The Applicant's case is that it has no alternative remedy available but to approach this Court. Furthermore, the prejudice likely to be suffered by the Applicant far outweighs the prejudice to be suffered by MTN, should the relief sought not be granted.

[37] Insofar as the Applicant's case is that its members may be affected by the section 197 transfer in that their terms and conditions of employment may be

less favourable compared to what they are entitled to in the employ of MTN, there are alternative remedies available should this be the case.

[38] The balance of convenience does not favour the granting of the relief sought by the Applicant.

[39] MTN is implementing a business decision, which it is entitled to do in the running of its operations. Section 197 does not envisage a consultative process with a trade union and its members and absent an agreement as contemplated in section 197(6), MTN cannot be interdicted from implementing the BRC and cannot be ordered to consult or to furnish information when there is no basis in law to do so. The prejudice that MTN stands to suffer if the relief is granted with no sound basis in law, is obvious.

[40] The Applicant failed to satisfy the requirements for an interim interdict and the relief it seeks. It follows that the Applicant is not entitled to the relief it seeks.

<u>Costs</u>

[41] The last issue to be decided is the issue of costs.

[42] Insofar as costs are concerned, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness.

[43] In *Zungu v Premier of Kwa Zulu-Natal and Others*[3] the Constitutional Court confirmed the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand allowing those parties to bring to this Court cases that should not have been brought to Court in the first place.

[44] This is a case where the Court has to strike a balance, considering the requirements of law and fairness. The general accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been unjustly compelled to initiate or defend

[3] (2018) 39 ILJ 523 (CC) at para 24.

litigation. In *Public Servants Association of SA on behalf of Khan v Tsabadi NO and Others*[4] it was emphasized that:

> '…unless there are sound reasons which dictate a different approach, it is fair that the successful party be awarded its costs. The successful party has been compelled to engage in litigation and incur legal costs. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in the Labour Court, whether as applicant in launching proceedings or as respondent opposing proceedings.'

[45] Mr July on behalf of MTN submitted that costs should follow the result.

[46] Mr Ndlovu on behalf of the Applicant submitted that there should be no order as to costs because the Applicant came to Court with clean hands and with the aim of protecting its members against the adverse effects of a section 197 transfer. Furthermore, the application was not frivolous as the Applicant was merely asserting its rights as the majority union.

[47] In my view, this is a case where it is appropriate to make a cost order. A cost order is a method of ensuring that decisions to litigate in this Court are taken with due consideration of the law and the prospects of success, more so where an application is filed on an urgent basis.

[48] In the letter addressed to the Applicant on 13 May 2020, MTN stated clearly that section 197 of the LRA does not envisage any consultation and that the Applicant does not have a right to consultation under section 197. Notwithstanding the letter, the Applicant persisted with this application on the basis that MTN misinterpreted the purpose of consultation within the ambit of section 197. This is astonishing as the entire section 197 does not provide for any consultation process. At best, section 197(6) provides for negotiation in circumstances where the parties agreed to enter into a written agreement.

[49] In its answering affidavit, MTN once again set out the law and made it clear that the Applicant's reliance on section 197(6) of the LRA is misguided. Instead of considering the legal position, the Applicant persisted and

[4] (2012) 33 ILJ 2117 (LC) at 2119 I-J.

responded by stating that MTN's allegation that the Applicant is not entitled to be consulted or be provided with information is misplaced and unfounded.

[50] The Applicant's reading of section 197(6) of the LRA in isolation and as a basis for this urgent application is opportunistic and ill-advised and indicative of a lack of understanding of the provisions of section 197 of the LRA. The Applicant never took a minute to consider the law and MTN's attempts to set out what the legal position is, were ignored and regarded as misplaced and misguided.

[51] *In casu,* the application was wholly misguided and meritless and the Applicant dismally failed to satisfy the requirements for the interdict it was seeking and to place facts before this Court to support its case. If the aim is to protect employees in a section 197 of the LRA transfer, this application was certainly not the way to achieve it.

[52] The Respondent had to defend a meritless urgent application and fairness dictates that it cannot be expected to endure enormous costs defending litigation that ought not to have been brought in the first place. Ultimately, the Applicant is the author of its own misfortune. CWU is a well-established trade union quite capable of considering the consequences of instituting meritless litigation and it had to put in some earnest thought and consideration into the merits of this case before filing this urgent application. It is not open to trade unions to file meritless urgent applications and for them to escape costs simply because there is an ongoing relationship. When the collective bargaining relationship is not threatened by a cost order, there is no reason why a cost order cannot and should not be imposed. No argument was put up by Mr Ndlovu as to how a cost order would threaten the relationship and I cannot see any reason not to award costs against the Applicant.

[53] In the premises, I make the following order:

<u>Order:</u>

1. The application is dismissed with costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate Ndlovu

Instructed by: Peter Zwane Attorneys

For the Respondent: Mr S July of Werksmans Attorneys