



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA95/13

In the matter between

TAWUSA obo OTHERS

Appellants

and

TANSNAT (PTY) LTD & 2 OTHERS

Respondents

Heard: 26 February 2015

EX TEMPORE JUDGMENT

DAVIS JA

[1] This is an appeal against a judgment of Cele, J, on the 20th of June 2013. In his judgment, Cele J, was required to deal with the question as to whether the decision by third respondent to appoint first respondent as a substitute bus operator to perform public transport passenger services in the greater Durban area, albeit on a month-to-month basis, amounted to a transfer of a business as a going concern in terms of section 197 of the Labour Relations Act, No. 66 of 1995 (the Act).

[2] The Appellants approached the court for relief in the following terms:

1. Declaring that the bus service was and is the whole or part of a business undertaking or services contemplated by section 197(1)(a) of the Act, accordingly a business for purposes of section 197.
2. Declaring that each of the successive outsourced arrangements constitutes the transfer of the second respondent's bus service as a going concern as contemplated by section 197 of the Act.

3. Declaring that the appellants' members were formally employed by the second respondent or deemed to have been transferred from on service provider to the next on the same terms and conditions of service as they enjoyed whilst employed by the second respondent.

[4 Ordering the first respondent, alternatively the second respondent or any other party who has been appointed by the second respondent to allow the appellant's members, whose names are appearing in annexure ZM5 to resume their employment in the bus service.”

[3] Having been unsuccessful before the court, appellant approached this court on appeal. There are a number of difficulties with the appeal, many of which concern the late filing of a replying affidavit, heads of argument and a record.

[4] I do not intend to traverse the luminous debate which ensued pursuant to these delays. My reason is that, if the substance of the relief has no basis in law, there is really no need to proceed to deal with these particular questions.

[5] Mr Mane, who appears on behalf of the appellant, submitted that the business was undertaken, that of a public transport passenger service was transferred to the first respondent as a going concern. Faced with the problem that the business was only transferred on a month-to-month basis, Mr Mane submitted that this particular qualification did not, disturb the principle submission that section 197 applied directly to the facts.

[6] To the extent that is relevant, section 197 of the Act provides as follows:

‘1. (1) In this section and in section 197A-

(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 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*.¹

[7] The concept of a transfer of a going concern and the test therefore has been the subject of a considerable body of litigation. Suffice to say that in *Aviation Union of South Africa and Another v South African Airways (Pty) Ltd and Others*¹ the Constitutional Court said:

'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'.²

At paragraph 53, the court then continued:

'Consistent with this approach is the fact that the operation of the same business by the transferee is in and of itself not determinative of the question whether a transfer as a going concern has taken place. There

¹ 2012 (1) SA 321 (CC).

² At para 50. Citing *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC) at para 56.

must be other indicators that support the conclusion that when a business passed to the new owner, it was transferred as a going concern. These indicators include whether assets, employees or customers were taken over by the new owner.'

[8] In terms of this jurisprudence, a transfer of a going concern means that the business, as a whole, is transferred from entity A to entity B; in other words, entity B takes over the business and operates it in the same fashion as would have been the case, had it been operated by Entity A. The assets, the employees, the customers are taken over and the business seamlessly continues, but now under the control of a new employer.

[9] The question in this case, is whether this concept is applicable. Of particular relevance, are the following:

9.1 Prior to 2003, the Durban Transport Management Board established by the predecessor, The EThekweni Municipality, provided public passenger transport services in the greater Durban area. In order to give effect to the provisions of the National Land and Transport Transition Act, 2000, a decision was made to de-establish the Durban Transport Management Board and to appoint an outside contractor to operate a passenger bus service for Durban.

9.2 On the 13th of March 2003, an agreement was concluded between the Municipality, being second respondent, the South African Municipal Workers Union and the Independent Municipal and Allied Trade Union, the agreement being known as a rob-roy agreement. In terms of this agreement, employees, who do appear in annexure ZM5, to which reference has already been made, were retrenched. In terms of the provision of the National Land Transport Transition Act, Remant Alton Land Transport (Pty) Ltd ('REMANT') was appointed to provide public passenger transport services in Durban.

9.3 It appears from the second respondent's answering affidavit, that many of the retrenched employees, to whom I have already made reference were then employed by REMANT, who, in terms of an agreement with the second respondent, was obliged to provide passenger services for the period 1 October 2003 to 30 September 2010.

However, on 1 June 2009, REMANT gave notice of termination of the agreement in terms of the provisions of the National Land Transport Transition Act. The third respondent was then appointed by the first respondent and substituted as bus operator with effect from 22 July 2009.

[10] What is vital to the disposition of this case is that, this appointment was set aside by the KwaZulu Natal High Court (Case number 60564/2009). An appeal against this judgment to the Supreme Court of Appeal proved to be unsuccessful. Thereafter, first respondent formed a public transport business in Durban in a fashion referred to as a caretaker operator on a month-to-month basis, pending the appointment of a new operator/s of public tender.

[11] In my view, in terms of the *jurisprudence* as set out in *Aviation Union of South Africa, supra*, a month-to-month contract on a *pro tem* basis does not constitute the transfer of a going concern. To be a going concern, the entire business has to be taken over. It then is operated seamlessly by entity B as opposed to entity A in terms of the illustration that I provided earlier in this judgment. A month-to-month contract cannot be considered to be a transfer of a business as a going concern, particularly when a further requirement is evident, that the month-to-month contract would only operate, pending a new operator taking over of the tender. This arrangement cannot be a going concern as contemplated in section 197 or in terms of the interpretation given to that section by the Constitutional Court.

[12] There is, however, a further difficulty. Even if it was possible to argue

that a month-to-month contract constituted a transfer of a going concern, there is a problem as to which employees would be affected by any positive relief that could be granted by this Court. In the founding affidavit, which instituted these proceedings, the following appears:

- [13] On 30 June 2009, REMANT effectively terminated the contract and seized operations. Annexed thereto (marked ZM5) is a list of the appellant's members who were employed by REMANT as at 30 June 2009. It is evident, both from the examination of the rob-roy agreement, which is attached to these papers, as well as the second respondent's answering affidavit, that this list of employees were retrenched in accordance with the rob-roy agreement and, therefore, were not employed by REMANT.
- [14] It is so that some of these employers were taken over by REMANT, but what is not apparent from these papers is, which of these individual employees was employed by REMANT on its last day of operation. It is suggested that this difficulty could be circumvented by way of the argument that the *onus* was borne by the respondents to show that these employees were not so employed.
- [15] This cannot be. An applicant must come to court to show which employees are affected by a transfer in order for the court to be able to give clear and definitive relief pursuant to section 197. As I indicated earlier, there are further difficulties with this litigation, mostly relating to questions of delay. For the reasons that I have already mentioned I am not required to definitively judge on these questions.

Order

- [16] For all of these reasons, therefore, I would dismiss this appeal with costs.

Davis JA

Sutherland JA and Mngqibisa-Thusi AJA concur in the judgment of Davis JA

LABOUR APPEAL COURT