IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C145/14

In the matter between

NATIONAL UNION OF MINEWORKERS **Applicant**

and

PETRA DIAMOND MINE PTY LTD
(FINSCH MINE) **Respondent**

Heard: Trial heard by Everett AJ on 26-27 November 2015; Argument heard by Rabkin-Naicker J on the 5 December 2018.
Delivered: 23 April 2019.

JUDGMENT

RABKIN-NAICKER J

[1] The trial in this matter was heard by Everett AJ in November 2015. I am not privy to the reasons for the long delay in delivering a judgment in the matter. Suffice to say it was set down for the hearing of argument before me in December 2018. I was presented with the pleadings in the matter as well as the transcript of the trial.

[2] I intend to deal with the matter in a robust manner in order that the members of the Applicant on whose behalf the claim was made and the respondent employer in this matter, are able to have the matter finalised. I am able to do that because there is a crisp legal point which disposes of the matter, one which I canvassed with the parties when legal argument was presented before me.

[3] The NUM brought a claim in terms of section 197 of the LRA. In its statement of claim it pleads as follows:

> "5.1 On or about 14 September 2011, Respondent's business (Finch Mine) was transferred from De Beers Consolidated Mines (De Beers), the old employer of Claimant's members, to Respondent, the new employer (Petra).
>
> 5.2 Such transfer took place in terms of the provisions of sect 197 of the LRA, and Respondent has failed to comply with sect 197, more particularly sects 197(2) and (3), in that Respondent has unilaterally introduced terms and conditions of employment that are on the whole less favourable than those on which the transferred employees were employed by the old employer.
>
> 5.3 Such less favourable conditions apply as a condition precedent to an immediately upon the promotion of all employees of Respondent, who are also members of Claimant…."

[4] The following conditions are listed as the "changed and/or newly introduced Conditions of Service": Medical Benefits, Maternity Leave, Sick Leave, Educational Benefit, Pension Fund Contributions, Polygraphing, Underground Risk Allowance. The changes affected individuals who applied for 'promotion'

and in effect meant that for those individuals who did, and who signed a contract to that effect, the new employer's conditions under the categories above applied.

[5] The legal issues for the Court to determine were pleaded as follows:

"7.1 Whether the dispute is governed by sect 197 of the LRA, i.e., whether the transfer of a business as a going concern has taken place;

7.2 Whether Respondent has changed the conditions of service of Claimant's members, more particularly those members whose names appear on Annexure 'A';

7.3 Whether such changes, if found to be effected, comply with the requirements of section 197(3) of the LRA, i.e. whether the terms and conditions of service were on the whole no less favourable after the changes."

[6] On a perusal of the documents filed of record and the transcript of the trial, it was evident that at the time of the transfer of the business on 14 September 2011 the NUM and the old employer, De Beers, were parties to a substantive collective agreement. The said agreement covered the period 01 July 2011- 30 June 2013.

[7] Section 197 of the LRA provides as follows:

"197 Transfer of contract of employment

(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;

(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.

(3) (a) The new employer complies with subsection (2) if that employer employs transferred employees on terms and conditions that are on the whole not less favourable to the employees than those on which they were employed by the old employer.

(b) Paragraph (a) does not apply to employees if any of their conditions of employment are determined by a collective agreement.

(4) Subsection (2) does not prevent an employee from being transferred to a pension, provident, retirement or similar fund other than the fund to which the employee belonged prior to the transfer, if the criteria in section 14 (1) (c) of the Pension Funds Act, 1956 (Act 24 of 1956), are satisfied.

(5) (a) For the purposes of this subsection, the collective agreements and arbitration awards referred to in paragraph (b) are agreements and awards that bound the old employer in respect of the employees to be transferred, immediately before the date of transfer.

(b) Unless otherwise agreed in terms of subsection (6), the new employer is bound by-

(i) any arbitration award made in terms of this Act, the common law or any other law;

(ii) any collective agreement binding in terms of section 23; and

(iii) any collective agreement binding in terms of section 32 unless a commissioner acting in terms of section 62 decides otherwise."(emphasis mine)

[8] On a reading of section 197, the issue of whether conditions of employment are on the whole not less favourable after the transfer of a business as a going concern, simply does not arise where a collective agreement is in place before and after transfer as it was in casu. Such agreement is binding on the new employer unless an agreement has been entered into in terms of section 197(6). This was not the case in this matter.

[9] It follows therefore, that the route to be taken by the NUM in circumstances in which there was an alleged change to terms and conditions of employment by the new employer after the transfer, was one premised on collective bargaining. In effect this route would involve either a referral for interpretation of the collective agreement(s) or industrial action. I was informed by the parties that they previously obtained an advisory arbitration award which found that section 197 was not applicable to their dispute. There was no copy of this in the record before me.

[10] Another issue that needs traversing is the jurisdictional question raised in the pleadings. Everett AJ dealt with it at the start of the trial. This involved whether section 197 disputes have to be conciliated before coming to the labour court. If they do, then it was submitted that the Labour Court did not have jurisdiction. Everett AJ made a ruling on this issue i.e. that the Court had jurisdiction and said she would give reasons for it in her judgment. The ruling was correct as conciliation is not prescribed for such disputes.[1]

[1] University of the Witwatersrand Johannesburg v Commissioner Hutchinson & others (2001) 22 ILJ 2496 (LC)

[11] Having raised and canvassed the question of the implications of the collective agreement binding the union and the old employer at time of transfer with the party's representatives, I have found that the dispute between the parties had to be resolved through the interpretation of a collective agreement(s) or through industrial action. Thus, I mero motu raised a different jurisdictional issue to that placed before Everett AJ, and find that the Labour Court had no jurisdiction to hear the matter. The claim therefore stands to be dismissed. There is an ongoing relationship between the parties and I will not make a costs order in this matter.

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

Order

1. The Claim is dismissed.
2. There is no order as to costs.

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H RABKIN-NAICKER

Judge of the Labour Court of South Africa

Appearances

For the Applicant: NUM Official

For the Respondent: Mervyn Taback Attorneys