**REPUBLIC OF SOUTH AFRICA**

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG**

**Reportable**

**LAC Case No: JA 55/2012**

In the matter between:

**CITY POWER (PTY) LIMITED** **Appellant**

and

**GRINPAL ENERGY MANAGEMENT SERVICES (PTY) LTD** **First Respondent**

**NATIONAL UNION OF MINEWORKERS** **Second Respondent**

**EMPLOYEES LISTED IN ANNEXURE "A" TO NoM** **Third and Further Respondents**

**Heard:** **14 March 2014**

**Delivered:** **29 May 2014**

**Coram: Tlaletsi DJP, Davis et Ndlovu JJA**

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**JUDGMENT**

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DAVIS JA

Introduction

[1] This is an appeal against the judgment of the Labour Court which held that the cancellation of two service level agreements concluded between appellant and first respondent triggered an application of s 197 of the Labour Relations Act 66 of 1995 ('LRA'), as a result of which the employment contracts of third and further respondents (41 affected employees) were transferred to appellant in terms of s 197(2) of the LRA, with effect from 1 August 2012.

Background

[2] First respondent manufactures, supplies and installs, operates and maintains smart metering systems and electrical infrastructure which it provides primarily to municipalities and power utility companies. In 2003 it was awarded a tender to supply a prepaid metering system to appellant. In that year a Project was launched in Alexander Township.

[3] Two service agreements, the last of which governs the relationship between appellant and first respondent, are in issue in this dispute. These are an installation agreement and a maintenance agreement. These service agreements were concluded to govern the manner in which first respondent supplied, installed, operated and maintained the medium and low voltage systems, related infrastructure and smart metering systems that formed the basis of the Project.

[4] In March 2012 appellant purported to cancel the service agreements with first respondent. According to Mr Mbuso Dlamini, whose version is not contradicted in appellant's answering affidavit deposed to by Mr Andrew Lishivha, appellant was not in a position, as at 14 March 2012, when the first respondent received an email from Mr Lishivha in which appellant cancelled the service agreement, to take over the project and to run the operations which hitherto had been conducted by first respondent. According to Mr Dlamini, he gave instructions, that notwithstanding the purported cancellation, first respondent should continue with the performance of its

obligations under the service agreement at its own risk, until a proper and complete handover of all the necessary aspects of the Project had been conducted. Correspondence was then generated by first respondent's attorneys to appellant on 4 May 2012 in which it was stated:

> "[o]ur client continues to provide the necessary personnel on-sight as required in terms of the (contracts) and also continues at his own cost to provide the vital communication services which were required to maintain the integrity of the project, thereby ensuring a continuity of services to the end-users… Unfortunately this is no longer viable from a financial point of view, given the fact that you have not yet paid (Grinpal's) outstanding invoices…"

[5] On 10 May 2012 first respondent terminated its operations pursuant to these service agreements, as it had received no meaningful response to the previous correspondence. On 11 May 2012 appellant replied to first respondent's attorneys and undertook "to settle all Grinpal's' outstanding invoices by close of business on Wednesday 16th day of May 2012 and all other matters to be decided by a meeting next week. In the meantime, we have been informed by the Alexander residents that (Grinpal) has indeed embarked in acts of switching off the system and thereby leaving the area in darkness. We believe that for genuine negotiations to take place in this matter, you should call on (Grinpal) to restore the system back to its proper working conditions whilst we are arranging for a meeting … This restoration must be done as a matter of extreme urgency to avoid a service delivery uprising by the residents".

[6] On 15 May 2012 appellant confirmed that payment of the invoices, which had been generated by first respondent for the services that it rendered, had been made. A letter requested further that first respondent, in the light of these payments, restore the services according to the maintenance agreement in the affected areas in order to avoid a service delivery protest.

[7] First respondent continued to articulate dissatisfaction with regard to nonpayment of the services which it had supplied. On 3 July 2012 first respondent's attorneys wrote to appellant thus:

> "I last communicated with you in connection with this matter in terms of my email of 1 June 2012. That email was preceded by a number of earlier emails… in which regard I now record that you have not responded to any of these emails, despite the tenor thereof and despite having been requested to do so.
>
> This state of affairs is quite unacceptable to (Grinpal) which now finds itself in the invidious position where it has continued to render services to City Power in terms of the interim reinstatement (of the maintenance agreement) at the specific instance and request of City Power under circumstances where, for whatever reason, City Power, has not yet issued the relevant purchase orders in respect of such services to facilitate payment in respect thereof …"

The letter continues

> "The upshot of the aforegoing is that in the absence of the long awaited meeting between (our client), ourselves and City Power to discuss the matter, and in the absence of any response to my emails aforesaid and the purchase orders which have been requested, my instructions are to notify you as I hereby do, that should City Power now not issue the relevant purchase orders as set out more fully in terms of my communication to you of 1 June 2012 by noon on Thursday 5 July 2012, (my client) will once again terminate all its services to City Power in terms of the (Maintenance Agreement) with immediate effect, and those services will not be reinstated under any circumstances, until such time as the relevant purchase orders have been forthcoming."

[8] Further correspondence was then exchanged. Ultimately, on 16 July 2012 a meeting was held at appellant's offices between representatives of first respondent and appellant. According to Mr Dlamini the following occurred at the meeting:

"At this meeting various aspects of the termination of the relationship were discussed, as detailed below, and it was agreed that there would be a mutual cancellation of the Service Agreements, effective 31 July 2012. The issue of the handover to City Power was discussed in some detail. I mentioned that the affected employees' employment contracts would need to be transferred to City Power as part of the handover process. There was no objection raised. Xulu (appellant's attorney) merely asked me to provide details of these employees, including salary details. These details were provided to City Power under cover of an email dated 26 July 2012 to which I refer elsewhere in this affidavit."

[9] This version is supported by a detailed letter generated by first respondent's attorney on 17 July 2012 which set out the contents of the meeting of 16 July 2012 as well as what had been agreed at that meeting. It was clear that, pursuant to this meeting:

"1. the termination of the Maintenance Agreement would take effect, by mutual agreement on 31 July 2012, subject to the conclusion of a comprehensive termination (or 'cancellation agreement'), to be drafted by City Power's attorney;

2. in the light of the proposed termination date of 31 July 2012, a full handover process would take place;

2.1 Grinpal would provide City Power with, inter alia:

2.1.1 customer databases, bearing numbers, customer details, stand numbers and transformer linkages/connectivity to customers;

2.1.2 the vending platform and the server;

2.1.3 the telecommunication platform, sim cards and contracts with service providers; and

2.1.4 the names, identity numbers and contact numbers of all front-end used staff and CLOs on its payroll for absorption by City Power;

2.2 Grinpal would continue to provide system training as part of the handover process at cost, as and when the need arose; and

2.3 a competent person's team ("the CPT") with representation from both parties would be established."

[10] Pursuant to this agreement, the details of the handover process, as set out, were confirmed in a minute of a meeting which took place between representatives of first respondent and appellant on 18 July 2012, the minute of which meeting is attached to the founding affidavit.

[11] Significantly, in the founding affidavit, Mr Dlamini summarizes the case of first respondent as follows:

"1. The entire business relating to all aspects of the Project is being transferred to City Power in terms of the handover process;

2. the bulk of the steps in the handover process have already taken place;

3. the Project will continue after termination of the Service Agreements and completion of the handover process;

4. all of the assets, both tangible and intangible, required to operate the project, have already been transferred to City Power, with the only exceptions being the outstanding 'communications issues and the confirmation by City Power of the transfer of the affected employees;

5. City Power cannot operate the Project without using all or most of the affected employees – they have the necessary expertise, built up over years, to implement, maintain and operate the Project. City Power does not have this expertise available in its pool of employees. The training provided by Grinpal to City Power employees is by no means intended to replace the

> services of any of the affected employees – rather it is required in order for City Power to better understand the Project, so that in due course, after a full handover (including the affected employees), City Power will be able to run the Project with the minimum continued support from Grinpal."

[12] In the answering affidavit none of these averments were disputed. All that Mr Lishivha said in his answering affidavit is the following:

> "I deny the allegations and contentions in this paragraph. In light of the fact that this is mainly a legal issue, I reserve City Power's right to deal more fully with the allegations and contentions during the hearing of the matter."

Court *a quo*

[13] Appellant's case before the court *a quo* was essentially the following: the consequences of the termination of the two agreements was that the old contractor (first respondent) would exit the scene with all its equipment and its employees. A new contractor would then render similar services with its own equipment and its own employees. This argument was rejected by Rabkin-Naicker J in the court *a quo* as follows:

> "In my judgment, on the facts and circumstances of this case, the infrastructure for conducting the business in question does not remain in the hands of Grinpal the outsourcee. It is, albeit temporarily, in the hands of the original outsourcer, City Power. The 'holding operation' that City Power itself avers it is involved in, cannot be immune to the operation of s 197. This is the case, notwithstanding the reasons for the cancellation of the contract with Grinpal." (para 17)

The appeal

[14] On appeal, appellant contended that when the learned judge in the court *a quo* employed the phrase 'holding operation', she did so because appellant could not run the relevant service previously provided by first respondent. Therefore the business of providing power in the manner which hitherto had been performed by

first respondent could not have been transferred to appellant. Accordingly, there could not have been a transfer of a business as a going concern from first respondent to appellant to justify the application of s 197 of the LRA.

Section 197 of LRA

[15] Section 197 of the LRA to the extent that it is relevant to this dispute reads thus:

"(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."

[16] This provision was subjected to a careful and definitive scrutiny by the Constitutional Court in **Aviation Union of South Africa and another v South African Airways (Pty) Ltd and others** 2012 (1) SA 321 (CC). As the facts of **Aviation** are relevant to the present dispute they require recitation.

[17] In 2000, South African Airways (SAA) took a decision to outsource certain of its non-core business in order to reduce its maintenance costs which were in excess of R 130 million per annum. It put its facilities management operation out to tender. The tender was awarded to LGM. Following the award of the tender, LGM and SAA concluded an outsourcing agreement in terms of which the facilities management operations were transferred from SAA to LGM. The agreement was to endure for ten years, terminating on 31 March 2010. In terms of the agreement, LGM would provide services for a fee. The assets and inventory relating to these services were sold to LGM, but on termination of the agreement, SAA would be entitled to repurchase these assets, LGM would be afforded the use of office space, workshops, airport, aprons, computers and the SAA network at all designated airports. Upon termination of the agreement, SAA would be entitled to have the services transferred back to it or to a third party and to obtain assignment of all third party contracts of the LGM. Employees of SAA, who were engaged in the performance of these services, were automatically transferred to LGM in terms of s 197 of LRA.

[18] In June 2007 SAA terminated the agreement, owing to a breach committed by LGM. Two months later it put out to tender certain of the services performed by LGM. According to LGM, employees who had been employed by LGM, pursuant to its obligations under the outsourcing agreement with SAA, were now to be retrenched. The appellant sought from assurance of SAA that, upon termination of the outsourcing agreement, LGM's employees would be retransferred to SAA.

SAA's stance was that there was no legal obligation requiring it to take the workers back. It was within this context that appellant launched an application for declaratory relief against SAA and LGM pursuant to s 197 of LRA.

[19] The dispute was heard in the Labour Court, this Court and the Supreme Court of Appeal. Suffice to note that it finally reached the Constitutional Court where two judgments were delivered, one by Jafta J, on behalf of a minority, and one by Yacoob J, on behalf of the majority of the court. Of particular relevance is the approach adopted by Yacoob J to the proper enquiry to be conducted to determine whether the transaction in issue contemplates a transfer of business by an old employer to a new employer.

> "Does the transaction concerned create rights and obligations that require one entity to transfer something in favour or for the benefit of another or to another? If so, does the obligation imposed within a transaction, fairly read, contemplate a transferor who has the obligation to effect a transfer or allow a transfer to happen, and a transferee who receives the transfer? If the answer to both these questions is in the affirmative, then the transaction contemplates transfer by the transferor to the transferee. Provided that this transfer is that of a business as a going concern, for purposes of s 197, the transferee is the new employer and the transferor the old. The transaction attracts the section and the workers will enjoy its protection." (para 113)

[20] Applying this approach to the facts of SAA, Yacoob J found that LGM had received the transfer of fixed assets, inventory, the use of space at airport, SAA computers, computer network service and lease of property all of which was necessary to conduct the services to be supplied by LGM. Thus,

> "[a]s the agreement rightly states LGM acquired the whole of the infrastructure necessary for the conduct of the business. It did not have to secure a property or computers or network services or anything of the kind." (para 120)

The question that vexed the Constitutional Court concerned the effect of the termination of the outsourcing agreement between LGM and SAA. This required the court to examine the so-called second generation transfer, that is, one from the original outsourcee to the outsourcer. Yacoob J found that the answer to whether s 197 of LRA applies in this case, to a large extent, depended on whether once the contract was cancelled LGM would be entitled to continue to use the computers, airport space, lease the property and return the fixed assets and inventory. Thus,

> "if the assets necessary to operate the business stay with LGM, then the business would not be transferred. If they do not stay with LGM but go back to SAA, or to another service provider, there is a transfer of business." (para 121)

[21] On the basis of this conclusion, the majority of the court found that the effected termination of the agreement contemplated a transfer of the business as a going concern. The only question remained as to whether the business as a going concern was to be transferred to SAA or to an interim service provider. So long as there was a transferor, the identity of that entity or person was of no material significance to the issuing of the declarator sought by the appellant.

[22] Given that the difference of approach between the minority and majority judgments turned essentially on the appropriate remedy, it is significant for the purposes of this dispute that Jafta J reiterated the test for determining whether a business was transferred as a going concern, as being that which had been adopted by the Constitutional Court in **National Education Health and Allied Workers Union v UCT and others** 2003 (3) SA (CC) at para 56:

> "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."

[23] All of these factors indicate that a court is required to examine the substance of the agreement to terminate the outsourcing, in this case between appellant and first respondent. In essence, the approach adopted in **Nehawu**, *supra* follows that of the European Court of Justice in the application of the Business Transfers Directive (2001/23/EC) which is applicable in the European Union, and dictates that a transfer must relate to an autonomous economic entity (defined to mean an organized group of persons and assets facilitating the pursuit of an economic activity that promotes a specific objective). In turn this involves a determination whether that entity retains its identity after the transfers; that is, the transferor must carry on the same or similar activities with the personnel and/or the business assets without substantial interruption. See in this connection **Spijkers v Gebroeders Benedik Abbatoir** CV (1986) CMLR 296 and the instructive judgment of Van Niekerk J in **Unitrans Supply Chains Solutions (Pty) and others v Nampak Glass (Pty) Ltd and others** [2014] ZALCJHB 61 at para 15.

[24] The transfer of a going concern does not mean that, upon the termination of a service contract by one party and a subsequent appointment of another service provider, a transfer of the contract is sufficient to satisfy the requirements of s 197 has been effected. The question is whether the activities conducted by a party, such as first respondent, constitute a defined set of activities which represents an identifiable business undertaking so that when a termination of an agreement between first respondent and appellant takes place, it can be said that this set of activities, which constitutes a discrete business undertaking has now been taken over by another party.

Application to the facts

[25] The uncontested facts in this case are that the assets, both tangible and intangible, were required to operate the Project, that is, for the installation and maintenance of a prepaid metering system for electricity in Alexandra. This entire operation was transferred to appellant in terms of the handover process between appellant and first respondent described in this judgment. It is clear from the evidence that the business of providing prepaid electrical services to residents of Alexandra was handed over by first respondent to appellant, upon termination of the contracts which they had previously concluded and the arrangements agreed upon as set out in the subsequent correspondence and meetings which took place to effect termination. The business is identifiable and it is discrete. It involves equipment and expertise which is required to continue the Project of providing electricity. According to the uncontested version of Mr Dlamini, training was to be provided by first respondent to appellant specifically to ensure that appellant would have the necessary expertise and know how 'to be able to run the project'.

[26] Ultimately what occurred was that a business of providing a system of prepaid electricity to residents of Alexandra continued, save that it was now conducted by a different entity. In similar fashion to the decision of the majority in **Aviation Union**, *supra* the only debate concerned whether the business, as a going concern, was transferred to first appellant or ultimately to a third party. When the court *a quo* referred to appellant acting in a 'holding operation', it clearly meant that appellant would run the business in the interim, until such time as a new contract was concluded with a third party.

Conclusion

[27] I reach this decision with some anxiety. The implication of the jurisprudence of the Constitutional Court in **Aviation Union** *supra,* means that where an organ of State such as the municipality enters into an outsourcing agreements for a defined period, it runs the risk, upon the termination of that contract, that the municipality is

required to assume the obligation of financing the ongoing employment contracts of those who had previously been employed by the initial service provider. This concern is raised within the specific context of a second generation transfer as applied both in **Aviation**, *supra* and in this case. The consequences of the application of s 197 of the LRA to second generation transfers may be to impose significant financial burdens on municipalities which are already constrained by limited available public resources to fulfill their important obligations of providing services to all residents who fall within their jurisdiction.

[28] It may be that consideration should be given by the legislature as to whether s 197, viewed within the specific context of a second generation transfer, should be applicable to such contracts. For this reason, a copy of this judgment will be delivered to the Minister of Labour for her consideration.

[29] In my view however, the law has been set out clearly by the Constitutional Court in **Aviation Union**. The principles set out therein are applicable to this case and I accept that the only reason available on the record as to why there was no transfer of employees to appellant was because of the latter's refusal to assume the role of employer. On the papers as presented to the court *a quo* the provisions of s 197 were manifestly applicable to this case.

For these reasons, therefore, the appeal is dismissed with costs.

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Davis JA

Judge of the Labour Appeal Court

Tlaletsi DJP and Ndlovu JA concur in the judgment of Davis JA

Appearances:

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|---|---|
| For the Appellant: | Adv R. Ramashia |
| Instructed by: | Hewu Attorneys |
| For the First Respondent: | Adv G. Fourie |
| Instructed by: | Webber Wentzel Attorneys |