IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Reportable

CASE NO J 2454/14

In the matter between:

JAN HENDRIK SWANEPOEL	**First Applicant**
PERSONS LISTED IN ANNEXURE A	**Second to further Applicants**
and	
LEICA GEOSYSTEMS AG	**First Respondent**
ACIEL GEOMATICS (PTY) LTD	**Second Respondent**
GEOSYSTEMS AFRICA (PTY) LTD	**Third respondent**

Application heard: 27 May 2014

Judgment delivered: 4 June 2014

Summary: Application of s 197 of the LRA in circumstances where a non-exclusive agency and distribution agreement is terminated. While s 197 is potentially applicable where such an agreement is cancelled and another agent appointed, in the present instance, there was no 'transfer' for the purposes of s 197, if only because on the date contended to be the date of transfer, no elements of what was alleged to be the transferor employer's business transferred to the transferee. On the facts, what occurred was the failure of the business of a competitor, leaving the party contended to be the transferee employer as the sole agent.

JUDGMENT

VAN NIEKERK J

Introduction

[1] The applicants were employed by the third respondent (GSA). They seek a declaratory order to the effect that s 197(2) of the Labour Relations Act (LRA) applies to a transaction in terms of which the first respondent (Leica) terminated a non-exclusive agency and distribution agreement with GSA in circumstances where another party, the second respondent (Aciel), had been granted the same rights to agency distribution in competition with GSA. Should s 197 apply, Aciel would by virtue of s 197 (3) be substituted for GSA as the applicants' employer. Indeed, the declaratory relief that the applicants seek is that with effect from 1 November 2013 (being the day after the agreement between Leica and GSA terminated), their employment contracts transferred from GSA to Aciel, on the same terms and conditions.

[2] The application initially came before court on 7 November 2013 as an urgent application. On 22 November 2013, the application was struck from the roll for lack of urgency. In addition to the sets of affidavits filed for the purposes of the urgent application, on 20 March 2014, GSA filed a supplementary affidavit. On 8 April 2014, Aciel filed an answering affidavit and on 10 April 2014, GSA filed a reply. On 16 April 2014, counsel for the applicants and for GSA were respectively notified that Aciel would object to the application being heard and decided on the basis of the affidavits filed by GSA, and that it would object to GSA claiming the relief which is claimed in the applicants' notice of motion when GSA has failed to intervene as an applicant. The application was thereafter heard in the ordinary course, with the papers supplemented as indicated.

The status of GSA's affidavits

[3] I deal first with the issue of the status of GSA's affidavits and its claim for relief. Aciel submits that in terms of practice in motion proceedings, it is incumbent on an applicant to make out its case in the founding affidavit which constitutes both the particulars of claim and the evidence in support of the relief that is sought. It follows, so it was submitted, that a respondent against whom relief is sought is obliged only to deal with the case in an applicant's founding affidavit. The rule ordinarily applicable is that established in *Plascon Evans*,[1] to the effect that an applicant can only succeed on the basis of the facts deposed to in its founding affidavit which are not disputed in the respondent's answering affidavit, read with additional facts deposed to in the respondent's answering affidavit. Since a respondent is obliged in its answering affidavit to deal with the case made out in the founding affidavit and no other, it follows that a respondent is not obliged to deal with allegations made in a co-respondent's affidavits which may happen to support the applicant's case, if only because there is no *lis* between respondent and its co-respondent.

[4] Mr. Watt-Pringle SC, who appeared on behalf of Aciel, submitted that having been cited as a respondent, GSA had three options. First, it was entitled to oppose the relief sought in which event it was entitled to file an answering affidavit refuting the applicant's case. Secondly, it could have elected not to oppose the application but to abide by the relief sought. Thirdly, GSA could have decided, if it was not content to have the applicants make out a case for the application of s 197, to be joined as a second applicant in order to make out its own case. In the latter instance, Aciel would have filed an answering affidavit to deal with the case presented by GSA as an applicant. What GSA was not permitted to do in the present proceedings was to file an answering affidavit, the sole purpose of which was to build the case for the relief sought by the applicants

[1] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

in their notice of motion, under the guise of a respondent which had elected not to join issue with Aciel.

[5] On this basis, Mr. Watt-Pringle submitted that the applicants are not entitled to rely in these proceedings on the untested evidence presented by GSA, since it formed no part of the founding affidavit and therefore no part of their case. Further, he submitted that GSA's counsel is not entitled to claim in argument on behalf of GSA the relief sought by the applicants in their notice of motion. In other words, GSA is not permitted to assume the role of a Trojan horse, acting in every way as if it is a co-applicant without claiming any relief in its own name, and thus seeking to avoid any liability for costs.

[6] Mr. Redding SC and Mr. Franklin SC (with him Mr. Boda), who appeared for the applicants and GSA respectively, did not dispute the validity of the submission as a general proposition; their concern related principally to the late stage at which the point was raised. In particular, they submitted that having acquiesced in the filing of an answering affidavit by GSA and having argued the urgent application on that basis, it is not open to Aciel to challenge the applicants' right to rely on the evidence presented by GSA, nor is it open to Aciel to challenge the right of GSA's counsel to present argument.

[7] While parties are ordinarily bound to the Rules of this court, the Rules are not an end in themselves and immune from more flexible application where the interests of justice and fairness so require. The court is entitled to exercise a discretion, on the basis of the facts of any particular case, and allow a departure from the generally applicable rules relating to the filing of affidavits. In the present instance, until mid-April 2014, these proceedings were conducted on the basis that GSA had filed an answering affidavit that broadly supported the applicants' case. Indeed, Aciel filed a replying affidavit and thereafter an answering affidavit to GSA's supplementary affidavit filed in March 2013. GSA has not attempted, at any stage of this litigation, to conceal where its sympathies lie, nor has it

displayed any of the deceit or guile ordinarily associated with a Trojan horse. To exclude the affidavits filed by GSA and the submission of its counsel, at this late stage and in the absence of prior objection, would in my view result in significant prejudice to the applicants. For this reason, a strict application of the Rules in this instance must yield to considerations of justice and fairness, and I intend therefore to have regard to the affidavits filed on GSA's behalf and the submissions made by its counsel.

Factual background

[8] The material facts are not in dispute. Leica manufactures surveying and measuring products, known as 'geomatics'. The products are manufactured in Switzerland and distributed throughout the world by distributors appointed by Leica. Distributors are responsible for pre and after sales services and are licensed for this purpose. Leica provides a warranty on all products in terms of which repairs and replacements are carried out by local distributors. Distributors are provided with tools, access to data and software and technical training.

[9] In 2004, the sole authorised distributor and service provider of Leica's products in South Africa was Set Point Technologies Ltd. During 2004, GSA acquired the business of Set Point as a going concern and concluded distributorship and service partner agreements, on a non-exclusive basis, with Leica. The parties accepted that s 197 applied to the transaction. GSA remained the sole distributor and service partner of the geomatics products until July or August 2011, when Leica appointed Aciel as a distributor and service partner, on a non-exclusive basis and in competition with GSA. GSA became aware of the appointment of Aciel during September 2011.

[10] On 31 July 2013, Leica gave three months' notice of termination of the agreements with GSA. From 1 November 2013, GSA was no longer licensed to sell or provide services in respect of Leica products. Events subsequent to the

filing of the urgent application disclose that as a consequence of the termination, GSA's business effectively ceased and that of the applicants' employment was terminated.

[11] At the time when the urgent application was filed, Aciel had employed nine former employees of GSA, including area service managers and key sales representatives. Approximately 30% of Aciel's current workforce comprises former GSA employees. One of the former GSA employees, Van Heerden, is Aciel's managing director.

[12] To the extent that the applicants' case is built on what GSA contends to be a strategy to supplant GSA's business of distributing and servicing Leica's products in South Africa and installing Aciel in its place, the case made out in the founding affidavit is to the effect that after Leica concluded a distribution agreement with Aciel in July 2011, it implemented a strategy of subverting the business conducted by GSA and installing Aciel in its place. The strategy, so the applicants contend, is evidenced by a meeting held in Milan in March 2011 when various options relating to the sale and distribution of geomatics products in South Africa was discussed (some of these contemplated the termination of the distribution arrangement with GSA), the signature on 7 July 2011 by Aciel of a distribution agreement with Leica, and the failure by Leica to inform GSA of the fact that Aciel had been appointed as a distributor in South Africa until confronted by GSA in September 2011.

[13] In short, the case that the applicants seek to make is that the most likely inference to be drawn from the series of events between March and September 2011, is that Leica embarked on a staged process of replacing GSA with Aciel. That staging was necessary to enable Aciel to build up its own business and to become sufficiently well-established before Leica terminated GSA's distribution and service agreements. The applicants allege now that the strategy has been

effected, Leica and Aciel wish to escape the consequences of what in effect was an acquisition of GSA's business, i.e. to avoid the effects of s 197.

[14] The existence of any such strategy or conspiracy is denied by the second respondent, albeit in terms that are bald and not particularly persuasive. However, in view of the conclusion to which I have come on the legal principles to be applied, it is not necessary for me to decide whether the strategy alleged by the applicants was conceived by Leica, or implemented in the terms that they allege.

Applicable principles

[15] Section 197 reads as follows:

> "(1) In this section and in section 197A –
>
> (a) 'business' includes the whole or 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 sub-section (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 transfer continue in force as if there 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 the new employer; and
>
> (d) the transfer does not interrupt and employee's continuity of

> employment, and an employee's contract of employment continues with the new employer as if with the old employer."

[16] It is now well established that the purpose of s 197 is to vary the common law consequence of the transfer of a business as a going concern, thus giving expression to the constitutional right to fair labour practices. Broadly speaking, the effect of s 197 is to preserve the continuity of employment and terms and conditions of those employees who are transferred to a new employer when a transfer as defined by s 197(1) takes place. This means that employees employed by the old employer (the 'transferor') when the transfer takes effect automatically become employees of the new employer (the 'transferee') on the same terms and conditions.

[17] Three conditions must be met before s 197 is triggered, and all of them must be met simultaneously. These are:

a. a transfer;
b. of a business (the transfer must be of the whole or part of a business);
c. as a going concern.

[18] The application or otherwise of s 197 is not to be determined by the label that parties attach to the transaction under scrutiny. As Jafta J stated in *Aviation Union of South Africa & another v SA Airways (Pty) Ltd & others* (2011) 32 *ILJ* 2861 (CC) at paragraph [44] :

> "It must be stressed that the event which brings s 197 into play is the transfer of business as a going concern. The question whether the section applies to a particular case cannot be determined, as the Supreme Court of Appeal did, with reference to the label of the transaction effecting transfer. The section does not cite transactions to which it applies. Nor does it refer to any labels. Instead, its application must always be determined with reference to three requisites, namely, business, transfer and going concern."

[19] The definition of a 'transfer' in s 197(1) (b) sheds little light on the kinds of transfers that potentially fall within the ambit of s 197. To suggest, as the definition does, that a 'transfer' is a transfer of a business as a going concern, begs the question of what precisely constitutes a transfer for the purposes of the section. The concept of a 'transfer' would appear to relate to the method of the transfer of a business, rather than to the content of the business bundle that is in fact transferred. (See N Smit 'The Labour Relations Act and Transfer of Undertakings: The Notion of Transfer' 2003 *De Jure* 328.)

[20] The Constitutional Court has made it clear that the mere loss of a contract to a competitor does not in itself indicate the existence of a transfer within the meaning of s 197; something more is required. At the least some of the components that go to make up the business of the transferor employer must be transferred as a functioning going concern. [2] In *Aviation Union of South Africa* Jafta J said the following:

> '[47] But whether a transfer as contemplated in s 197 has occurred or will occur is a factual question. It must be determined with reference to the object effect of each case. Speaking generally, a termination of a service contract and the subsequent award of it to a third party does not, in itself, constitute a transfer as envisaged in the section. In those circumstances, the service provider whose contract has been terminated loses the contract but retains its business. The service provider would be free to offer the same service to other clients with its workforce still intact.
>
> [48] For a transfer to be established there must be components of the original business which are passed onto the third party. These may be in the form of assets or the taking over of workers who were assigned to provide the service. '

[21] The existence of a transfer aside, whether or not a business is transferred as a going concern is a separate enquiry which, as the jurisprudence indicates, is directed at the extent to which the transferred business retains its identity after

[2] *See Fransmann Services v Simba (Pty) Ltd & another* (2013) 34 *ILJ* 897 (LC).

the transfer. A business is transferred as a going concern when it can be said that the entity that is the subject of the transfer retains its identity after the transfer as indicated, amongst other things, by the fact that its operation is continued or resumed.

[22] In *PE Rack 4100 CC v Sanders & others* (2013) 34 *ILJ* 1477 (LAC), the Labour Appeal Court recently adopted an approach in which the application or otherwise of s 197 was held to be dependent on the answers to two questions (at paragraph 14):

(i) Does the transaction concerned create rights and obligations that require one entity to transfer something in favour of or for the benefit of another or to another?

(ii) If the answer to (i) is in the affirmative, does the obligation imposed within the transaction contemplate a transferor who has the obligation to effect a transfer or allow transferred to happen and a transferee who received the transfer? If the answer to this question is in the affirmative, then the transaction constitutes a transfer for the purposes of s 197.

[23] In that case, the business model under scrutiny was that established by a franchise agreement. The LAC held that the termination of a franchise agreement and the appointment of a new franchisee did not constitute a transfer of a business as a going concern for the purposes of s 197. It did so on the basis that a franchise agreement gives rise, in effect, to a joint-venture business between the franchisor and franchisee. On termination of the franchise agreement, the JV business dissolves, with the franchisor retaining the assets. The franchisee's right to carry on the franchise business comes to an end and concomitantly the business of the franchisee comes to an end (at paragraph 24). In the case of a change in franchisees, the court held that as opposed to a change in contractor

in the outsourcing of services - (a) there is no client in the franchising context, it being a bilateral and not a tripartite relationship; (b) while the franchisor makes the use of assets available to the new franchisee, it does so after the first JV business is dissolved and as part of the formation of an entirely new and independent business with the new franchisee; and (c) there is no transfer of the use of the assets from the old to the new franchisee, instead the use of the assets is housed in an entirely new and independent business (at paragraph 25). What this analysis would seem to indicate is that for s 197 to apply, the underlying transaction must at least impose some requirement on the part of the transferor employer to transfer some element of its business to the transferee.

[24] In addition to a requirement that there be an underlying transaction (which need not be an agreement between the transferor and transferee) which requires one entity to transfer something in favour of or for the benefit of another which contemplates a transferor who has an obligation to effect a transfer and a transferee who has received it, it seems to me that the section contemplates a transaction in which the date of the transfer is readily identifiable i.e., the date on which the transaction is complete and the transferee employer takes unencumbered transfer.[3] This must necessarily be so, if only because the transfer date is the date on which the transferee employer assumes all of the employment-related rights and obligations of the transferor. The absence of any agreed or specified transfer date is likely to indicate the absence of any transfer for the purposes of s 197, especially in circumstances where the facts do not themselves disclose a transfer date with any degree of specificity.

Analysis

[25] The authorities are clear that any enquiry into whether a particular transaction attracts the provisions of s 197 entails an objective assessment of all of the relevant facts, regardless of the label that the parties attach to their transaction

[3] See *Business & Design Software (Pty) Ltd v Van der Velde* (2009) 30 *ILJ* 1277 (LAC).

and their motives in concluding it. In the present instance, it is not disputed that on 1 November 2013, which is contended by the applicants to be the date of the transfer, there was no takeover by Aciel of any of GSA's assets (either corporeal or incorporeal), that no employees were taken over by Aciel, and that there was no assignment or formal transfer of customers from GSA to Aciel. In these circumstances, Aciel contends that this is not an instance where all or some of the relevant components and elements which might constitute a business have been transferred by GSA to Aciel. Rather, the case concerns no more than a termination by Leica of one of its distribution agreements with an agent and distributor in South Africa.

[26] The jurisprudence referred to above requires an analysis of whether the three elements that trigger the application of s 197 were present as at the date of the transfer. The existence of the 'business' for the purposes of s 197 was not seriously disputed. The definition of 'business' in s 197(1) (a) extends to '*the whole or part of a business, trade or undertaking, or service*'. In the present instance, there was clearly a variety of components in GSA's hands that would ordinarily have served to make up a business. These included assets, goodwill, the workforce, management staff, organisational and operational resources and the like. To the extent that the courts have adopted the wording of the test applied in relation to European Community directives, it is clear that the business of GSA comprised an economic entity, at least in the form of an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective.[4]

[27] Whether it can be said that there was a transfer of a business for the purposes of s 197 is a rather more difficult question. A primary enquiry, as indicated by the LAC's decision in *PE Rack 4100 CC,* is whether the appointment of Aciel and the termination of GSA's agency imposed some requirement on GSA to transfer the

[4] See *Suzen v Zehnacker Gebaudereinigung GmbH Krankenhausservice* [1997] IRLR 255 (ECJ).

whole or part of its business to Aciel. The high watermark of the applicant's case is that since GSA's sole business is the distribution of Leica products and the provision of after-sales services, Aciel is the only other entity capable of fulfilling that need and with effect from 1 November 2013, the date on which the cancellation of the agreement as between Leica and GSA became operative, GSA's business will automatically devolve on Aciel. On the evidence, this is not a foregone conclusion. First, it is common cause that there are competitive products to the Leica range in the South African market. There is no evidence that customers of GSA will without more migrate to Aciel. Secondly, GSA was at all material times aware that was a non-exclusive agent, that its agreement with Leica was terminable on notice and that it was vulnerable to termination. Thirdly, since 1 November 2013, the date that the applicants contend to be the date of the transfer for the purposes of s 197, there has been no transfer of any identifiable economic entity from GSA to Aciel. There is no evidence that on that date, a single asset, tangible or intangible or a single employee was required by Aciel from GSA. The reality, as the evidence indicates, is the failure of the business of one competitor in an identifiable market, leaving the other to become the *de facto* sole agent and distributor. All that has occurred is that prior to 1 November 2013 there were two local distributors of Leica products in South Africa and after that date, there is one.

[28] To employ the two-stage test adopted by the LAC in the *PE Rack 4100 CC* judgment referred to above, for there to be a transfer in terms of s 197, it is incumbent on the applicants to demonstrate that the transaction on which they rely created rights and obligations that required GSA to transfer something in favour of or for the benefit of Aciel. The transactions on which they rely are the appointment of Aciel as Leica's agent and distributor in South Africa and the subsequent termination of Leica's agreement with GSA. On neither date, or at any stage in between (during which GSA and Aciel were both Leica distributors competing for the same business), can it be said that any rights and obligations were created that required GSA to transfer anything to Aciel, for its benefit or

otherwise. While it is not in dispute that a number of employees elected to assume employment with Aciel after Aciel was appointed an agent and distributor of Leica's products, and that a number of customers elected to place their business with Aciel rather than with GSA, none of this occurred out of any right or obligation on GSA to transfer anything to Aciel.

[29] Finally, the applicants have failed to establish with any degree of certainty the date of the transfer. As I have indicated, this is an important element of any transfer in terms of s 197, since it is on the transfer date that a myriad of rights and obligations are transferred, with profound consequences for all concerned. In essence, the applicants rely on a process which started in 2011 with the appointment of Aciel as an agent and distributor, and which culminated in the termination of GSA's contract by Leica. The statement that the effective date of the termination of the agreement constituted the date of the transfer, on the facts, is no more than a device of necessity. It was not a matter over which Aciel had any control or played any part. As I have found, it did not without more result in any change to Aciel's business or in the transfer or acquisition of anything at all. For the above reasons, in my view, the application stands to be dismissed.

[30] To the extent that the applicants rely on what they maintain to be a conspiracy between Leica and Aciel or a strategy by Leica to devolve GSA's business onto Aciel, for the reasons stated above, even if that were true, it would be insufficient to trigger the provisions of s 197. The applicants have not produced any concrete evidence of any deliberate attempt by Aciel to circumvent or otherwise subvert the provisions of s 197 and I am unable to find on the papers before me that they are entitled to the relief that they seek on this basis alone, and regardless of any of the preconditions for the application of s 197 having been met.

[31] For the above reasons, in my view, there was no transfer of a business for the purposes of s 197 consequent on the termination of the agency and distribution agreement as between Leica and GSA with effect from 31 October 2013.

Costs

[32] The court has a broad discretion in terms of s 162 of the LRA to make orders for costs according to the requirements of the law and fairness. The court has traditionally been reluctant to make orders for costs in circumstances where individual employees seek to pursue their rights, since they may be dissuaded from approaching the court if costs were always to follow the result. This case falls into that category. In any event, the case raises a novel point and it cannot be said that the claim was in any way frivolous or vexatious.

I make the following order:

1. The application is dismissed.

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicants: Adv. AIS Redding SC, instructed by Hogan Lovells SA
For the second respondent: Adv. C Watt-Pringle SC, instructed by Madlela Gwebu Mashamba Incorporated
For the third respondent: Adv. A Franklin SC, with him Adv F Boda, instructed by Norton Rose Fulbright