



REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 1571/13

In the matter between:

JAMAFO

First applicant

SIBIYA & OTHERS

Second and further applicants

and

PICK 'N PAY RETAILERS (PTY) LTD

First Respondent

**PICK 'N PAY SUPPLY CHAIN (PTY)
LTD**

Second Respondent

Heard: 30 July 2013

Delivered: 2 August 2013

Summary: Urgent application to declare transfer subject to LRA s 197.

Struck from roll for lack of urgency.

JUDGMENT

STEENKAMP J

Introduction

- [1] This is an urgent application to declare that the transfer of employees' contracts of employment from the first respondent, Pick 'n Pay Retailers (Pty) Ltd, to the second respondent, Pick 'n Pay Supply Chain (Pty) Ltd, is a transfer of part of a business as a going concern in terms of s 197 of the Labour Relations Act¹.

Background facts

- [2] The background facts are largely common cause. Where there are disputes of fact, they must be resolved in terms of the rule in *Plascon-Evans*.²
- [3] The applicant, Joint Affirmative Action Management Forum (JAMAFO), is a registered trade union that represents 2 463 members out of a possible 5 390 employees in the "junior management bargaining unit" of the first respondent ("Retail"). The majority trade union in Retail is SACCAWU. Retail has concluded a recognition agreement with JAMAFO granting it the right to display union literature; to access the company's premises; and to elect shop stewards, but not to bargain collectively.
- [4] Pick 'n Pay built a centralised distribution centre in Gauteng in 2007. Because Retail was not an expert in the operation of centralised distribution systems, logistics, warehousing and distribution it engaged an expert service provider, Costa Logistics (Pty) Ltd, to manage and operate the distribution centre on its behalf. Costa was replaced by Unitrans from 2009 until 1 July 2012. In July 2012 the respondents established Pick 'n Pay Supply Chain (Pty) Ltd ("Supply Chain"), the second respondent in this application, to do the logistics and distribution for Retail and other Pick 'n Pay and Boxer stores in Africa. Supply Chain took over the management and operation of the distribution centre in Gauteng in July 2012.

¹ Act 66 of 1995 (the LRA).

² *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] 2 AllSA 366 (A).

- [5] The operation of Retail warehouses in the regions (including KwaZulu Natal and the Western Cape) was transferred from the managerial control of Retail to the managerial control of Supply Chain. This necessitated that the employees employed in the warehouses in the regions would no longer report to regional management but to the management of Supply Chain. However, the ownership of the assets in the warehouses would remain with Retail; there would be no change in the arrangements with suppliers and in ownership of stock. There would be no transfer of any of the operating systems and assets in the warehouse. The only issue would be that the employees would be asked to transfer from Retail to Supply Chain in order that managerial control could be exercised by Supply Chain management.
- [6] The contracts of employment of employees in the Eastern Cape region were transferred with effect from 1 September 2012. On 1 March 2013, the 29 employees employed in the KwaZulu Natal warehouse were transferred from Retail to Supply Chain. There were no changes to their terms and conditions of employment. They all consented to the transfer. In the Western Cape, all affected employees bar two have consented to be transferred to Supply Chain.
- [7] JAMAFO claims that it was not consulted with respect to the transfer. The respondents dispute that there was any need to consult. The affected employees consented to a transfer. And in any event, the respondent averred that the transfer does not constitute a transfer within the meaning of section 197 of the LRA.

Evaluation / Analysis

- [8] The respondents contend that there has been no transfer within the meaning of section 197; that, in any event, all but two employees have consented to the transfer; and that the affected employees' terms and conditions of employment are no less favourable to them after the transfer. As a preliminary point, though, they argue that the application is not urgent and that the applicants have made out no case for urgency on the papers. I shall consider that preliminary point upfront.

Urgency

- [9] This application was delivered on 23 July 2013 to be heard on 30 July 2013. Mr Moqechane, JAMAFO's legal officer, claimed that the union only became aware of the intended transfers "sometime in July". That is not borne out by the history of the dispute.
- [10] The contracts of employment of the 29 affected employees in KwaZulu Natal were transferred five months ago, on 1 March 2013. In early June 2013 the general secretary of JAMAFO, Mr Jonathan Mphahlele (who deposed to the founding affidavit) telephoned the first respondent's national industrial relations manager, Ms Helen DeLight, to enquire about the transfer of employees to Supply Chain in KwaZulu Natal and in the Western Cape. The head of human resources for Supply Chain, Ms Haidee Mofokeng, contacted the general secretary and invited him to a meeting on 10 June 2013. The general secretary, accompanied by the union's national office bearers, attended the meeting. The respondents were represented by Ms Mofokeng and by the distribution centre general manager and by its national IR manager, Mike Twala. Mofokeng advised JAMAFO that employees at the KwaZulu Natal distribution centre had transferred to Supply Chain with effect from 1 March 2013 and that it was Retail's intention to transfer the Western Cape employees with effect from 1 July 2013.
- [11] A further meeting was arranged between Supply Chain and the Western Cape employees on 14 June 2013. The union's general secretary was informed of the meeting and he indicated he would attend it. He did not do so. Three other JAMAFO officials did attend the meeting. They raised the contention for the first time that the transfer of employees was a section 197 transfer. The company disputed this on 14 June 2013. On 21 June 2013 the JAMAFO shop steward in the Western Cape, Edwin Frasenburg, informed the JAMAFO that the Western Cape employees did not want JAMAFO to represent them at the next meeting with Supply Chain.
- [12] Further meetings were held in the Western Cape between management and employees directly on 18 and 24 June and 9 July 2013. On 27 June 2013 JAMAFO addressed a letter to Retail alleging that what the company

was doing was “unlawful and illegal”. The union called for a meeting and asked that the matter be held in abeyance. The meeting was held on 3 July 2013. The company advised the union that it would take legal advice on the question whether there was a section 197 transfer. On a July 2013 the company wrote to the union and conveyed its legal advice that the process is not a section 197 transfer. On 10 July 2013 the union’s general secretary advised the company that it intended “to exercise our rights in order to address these issues”.

- [13] On 10 and 11 July 2013 Supply Chain distributed letters of employment to all employees in the Western Cape. All but two of them signed acceptance of the letters pertaining to their transfer.
- [14] On 23 July 2013 the union launched this application on four days’ notice.
- [15] It is clear from this sequence of events that JAMAFO has not made out a case for the application to be heard on an urgent basis. All 29 employees in KwaZulu Natal have already transferred on 1 March 2013 and all Western Cape employees apart from shop stewards have consented to their transfer with effect from 1 July 2013. Apart from those two individuals, all of the transfers have already occurred on a consensual basis. Furthermore, on the evidence before me and based on the rule in *Plascon-Evans*, the employees who have transferred of all consented to the change and they will not be treated less favourably by Supply Chain.
- [16] The union’s members and shop stewards in KwaZulu Natal were aware of the transfer in that province since February 2013. On the evidence of the general secretary, he was aware of the transfers at the latest when he telephoned Helen DeLight in early June 2013. The union was also aware from the meeting on 14 June 2013 that the respondents disputed that the transfer fell within section 197 of the LRA. Despite this they only launched this application on 23 July 2013.
- [17] The union has given no adequate explanation for this delay. Any urgency is self-created. The application falls to be struck from the roll for this reason alone.

[18] In any event, were I to consider the application on its merits, it is doubtful that the applicants would have succeeded in proving a clear right to the relief sought.

[19] The transfers have taken place with the consent of the employees. No further consultation was necessary. In any event, though, it is doubtful that the transfer falls within the situation contemplated by section 197. The ownership of the assets in the warehouses remains with Retail. There is no change in the arrangements with suppliers and in ownership of stock. There is no transfer of any of the operating systems and assets in the warehouse. Only the affected employees were asked to consent to the transfer of the contract of employment to bring them under the managerial control of Supply Chain. They consented.

[20] On these facts, it does not appear to me that there was a transfer of business as a going concern for purposes of section 197 in terms of the test set out by this court in *Franmann Services (Pty) Ltd v Simba (Pty) Ltd*.³ No economic entity has been transferred. And in any event, even if there was a transfer of business as a going concern, the employees were transferred on terms and conditions that are on the whole not less favourable than those they enjoyed before the transfer.

[21] With regard to costs, both parties asked for costs to follow the result. I see no reason to disagree.

Order

[22] The application is struck from the roll for lack of urgency. The first applicant is ordered to pay the respondents' costs.

Anton Steenkamp
Judge of the Labour Court of South Africa

³ (2013) 34 ILJ 897 LC at 900, following *Aviation Union of SA v SAA* (2011) 32 ILJ 2861 (CC) and *HARSCO Metals SA (Pty) Ltd v ArcelorMittal SA Ltd* (2012) 33 ILJ 901 (LC).

APPEARANCES

APPLICANT: TJ Moqechane (trade union official, JAMAFO).

RESPONDENTS: RM Carr of Bowman Gilfillan Inc.

LABOUR COURT