REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG)

JUDGMENT

Reportable

Case no: J175/2011

In the matter between:

TRANSPORT AND ALLIED WORKERS UNION

OF SOUTH AFRICA **Applicant**

and

TRANSNET (PTY) LIMITED **First Respondent**

ETHEKWINI METROPOLITAN MUNICIPALITY **Second Respondent**

MEC FOR TRANSPORT, COMMUNITY SAFETY

AND LIASION, KWA-ZULU NATAL **Third Respondent**

Heard: **23 November 2013**

Delivered: **20 June 2013**

Summary: **An application for a declarator that there was a transfer of a business as a going concern in terms of section 197 of the LRA in a public transport service arrangement involving a municipality – effect of closing down of service before alleged transfer.**

JUDGMENT

CELE, J

Introduction

[1] The issue that arises crispy for determination in this matter is whether the decision by the third respondent to appoint the 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, amounts to a transfer of a business as a going concern, as envisaged by Section 197 of the Labour Relations Act[1], ("the Act"). The applicant seeks an affirmative answer to the question as a consequence of which it seeks an order in the following terms:

1. Declaring that the bus service was and is the whole or part of a business, undertaking or service as contemplated by section 197 (1) (a) of the Act, accordingly a business for purposes of section 197;

2. Declaring that each of the successive outsourcing arrangements constitute a transfer of the second respondent's bus service as a going concern, as contemplated by section 197 of the Act;

3. Declaring that the applicant's members who were formally employed by the second respondent are deemed to have been transferred from one 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 applicant's members whose names are appearing in annexure "ZM%" to resume their employment in the bus service;

5. Further and/or alternative relief.

[1] Act Number 66 of 1995.

[2] The first and second respondents opposed the application by contending that the decision by the third respondent to appoint the first respondent as a substitute bus operator does not amount to a transfer of a business as a going concern, as envisaged by Section 197 and therefore that orders prayed for should be dismissed. The third respondent chose to abide the decision of the Court.

[3] The applicant sought condonation for the late filing of its replying affidavit, filed some 275 days out of time, due to a dispute which arose between it and its erstwhile attorneys relating to instructions in other matters given to those attorneys but, according to the applicant, not carried out. It also related to payments that the applicant did not make to those attorneys for assistance in those other matters. The two respondents opposed this application. The period of delay when seen against the period required for compliance is certainly inordinately long. In its own explanation, the applicant contributed to the challenges it faced with its erstwhile attorneys. At best for the applicant, it was gross negligent in its dealings with those attorneys and in waiting for almost a year to sort things out for the filing of the replying affidavit. While erstwhile attorneys held on to the file of this matter, the current attorneys were able to source information for the late filing of the replying affidavit. The explanation for the delay amounts to no explanation at all. Also, the applicant's prospects of success leave much to be desired.

Factual Background

[4] The second respondent had been providing public passenger transport services in the greater Durban area prior to 2003. In order to give effect to the provisions of the National Land Transport Transition Act,[2] (the Transport Transition Act) the second respondent had to outsource the provision of municipal public transport services. Extensive negotiations were held by the second respondent with the employees' collective bargaining representatives, being the South African Municipal Workers Union (SAMWU) and the Independent Municipal and Allied Trade Union (IMATU).

[2] Act No 22 of 2000.

[5] On 13 March 2003, an agreement was concluded between the second respondent, SAMWU and IMATU which they called the Rob Roy agreement. In terms of the agreement, those employees listed in annexure "Z5" to the founding affidavit were retrenched by the second respondent. In May 2003, the second and the third respondents appointed a company known as Remant Alton Land Transport (Pty) Limited ("Remant") to provide public passenger transport services in the greater Durban area and the appointment was subsequently extended to 30 September 2010. Remant engaged the services of a number of the employees that were in the employ of the second respondent.

[6] On 1June 2009, Remant gave notice to the second respondent of its intention to terminate the transport service contract and agrees to find an alternative operator but later failed to find one. On 30 June 2009, Remant terminated the contract. Remant retrenched its employees and the provision of public transport was halted for some time. The first respondent was subsequently appointed by the third respondent as a substitute bus operator in the greater Durban area on a month-to-month basis, pending the appointment of new operator through a public tender.

Submissions by parties

1. Applicant's submissions

[7] The applicant averred that after the termination of the contract between the second respondent and Remant, the provision of public transport and the accompanying assets thereof were transferred back to the second respondent or the third respondent. It said that, similarly, the first respondent was making use of the same employees that were in the employ of Remant prior to the termination of the contract between Remant and the second respondent. The first respondent was said to be also presumably using almost the same bus infrastructure that was initially outsourced to Remant by the second respondent.

[8] The applicant said that the appointment of Remant by the second respondent was to be construed as "the first generation outsourcing" and the appointment

of the first respondent by the third respondent as the "second generation outsourcing". The submission was that on the objective facts the provision of the public passenger transport services was provided by the first respondent, and that therefore it was to be accepted that the business had been transferred back to the third or second respondent by Remant, in respect of the first generation outsourcing. Consequently, according to the submission, the third respondent in cahoots with the second respondent had subsequently transferred the business to the first respondent amounting to a second generation outsourcing. Accordingly, it was said, any future, or fixed or permanent transfer of the business to a third party would occur within the meaning of Section 197 of the Act.

[9] According to the submission, the conclusion was therefore inescapable that the question posed in the introduction was to be answered in the affirmative. A negative answer to the question posed in the introduction would make a mockery of the objects and purpose of Section 197 of the LRA, as well as the interpretation propounded by courts. Furthermore, an interpretation to the contrary would sacrifice substance for legal form where the substance of transactions should not the form of transactions. Court was asked to render aside the veil in which the transaction was wrapped and to examine its true nature and substance. The outcome of such examination, it was contended, would reveal that the transaction in question amounted to a transfer of business as going concern within the meaning of section 197 of the Act.

2. Submissions by the respondents

[10] It was submitted on behalf of all three respondents that:

1. the applicant was not entitled to the interdictory relief sought in paragraph 4 of the notice of motion because the applicant did not make out a case for such relief;

2. On the applicant's own papers, no case has been made out for any relief. In terms of the Rob Roy agreement employees agreed to being either redeployed within the municipality or to be retrenched;

3. the provision of a bus service was not "a business" but rather the provision of a statutorily imposed obligation, undertaken by the first respondent on behalf of the second respondent;

4. the bus service operated by Remant was not capable of a transfer as "as going concern" as it was neither in operation nor making a profit at the time of the first respondent's appointment and

5. Remant would not have been able to transfer the "business" to the second respondent as the second respondent was statutorily barred from operating it.

Evaluation

[11] For purposes of this application, the relevant and essential part of Section 197 of the Act reads as follows:

> '197 (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 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 practise 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.'

[12] Section 197 of the Act was the subject of interpretation by the Constitutional Court in the case of *Aviation Union of South Africa and South African Transport and Allied Workers Union v South African Airways (Pty) Ltd and Others*[3] (the *SAA* case), when the Court held that:

> 'At common law the acquisition and transfer of a business that was in operation led to termination of contracts of employment. If the new owner wished to continue operating the business with the same workers, it would have to conclude new employment agreements with them. Section 197 changed this by providing that certain legal consequences would automatically flow from a transfer of a business as a going concern. One of these consequences is the transfer of the workforce engaged in the transferred business.'

[13] In *National Education Health and Workers Union v University of Cape Town and Others*[4] (the *NEHAWU* decision), the Constitutional Court explained the objectives of section 197 as follows:

> 'Its purpose is to protect the employment of the workers and to facilitate the sale of businesses as going concerns by enabling the new employer to take over the workers as well as other assets in certain circumstances... In this sense, s 197 has a dual purpose, it facilitates the commercial transactions while at the same time protecting the workers against unfair job losses.'

[3] [2012] 3 BLLR 211 (CC) at para 3.
[4] [2003] 2 BCLR 154 (CC), (2003) 24 ILJ 95 (CC) at para 53.

[14] The test whether there was a transfer of a business as a going concern was stated by the Constitutional Court in the *NEHAWU* decision *supra* as:[5]

> '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. They must all be considered in the overall assessment and should therefore not be considered in isolation.'

[15] In the the SAA case the Court further said that:

> '[47] But whether a transfer as contemplated in section 197 has occurred or will occur is a factual question. It must be determined with reference to the objective facts of each case. Speaking generally, a termination of a service contract and a 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* (own emphasis).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 on to the third party. These may be in the form of assets or the taking over of workers who are assigned to provide the service….'[6]

[16] Section 197 has altered the common law position which provided that the acquisition and transfer of a business that was in operation led to termination of contracts of employment. If the new owner wished to continue operating the business with the same workers, it would have to conclude new employment agreements with them. With the advent of section 197, certain legal consequences would automatically flow from a transfer of a business as a going concern one of which is the transfer of the workforce engaged in the

[5] See *NEHAWU* at para 56.
[6] SAA case *supra* at 47-48.

transferred business. Whether a transfer as contemplated in section 197 has occurred remains a factual probe to be determined with reference to the objective facts of each case.[7]

[17] It has thefore to be ascertained whether the applicant succeded in showing by evidence that there has been a transfer of a business as a going concern from the second respondent to Remant and from Remant to the first respondent.

[18] Annexure "ZM5" to the founding affidavit reflects the identities of 1,183 employees who were retrenched by Durban Transport in 2003 and who were employed by Remant. Despite the first respondent's challenge on this issue, the applicant has annexed proof of the membership of only fourteen of its members. As correctly submitted by the respondents, the applicant has failed to demonstrate which of the 1,183 people reflected on annexure "ZM5" were still employed by Remant on 30 June 2009 and, the applicant has demonstrated merely that the fourteen people reflected in annexure "ZM8" were members of the Applicant in 2005. This deficiency is a challange to the order as prayed for in paragraph 4 of the notice of motion for the affected members of the applicant.

[19] The Applicant has said in paragraph 23 of the founding affidavit that Remant terminated its contract with the Municipality on 30 June 2009 and "ceased operations". The Applicant has then alleged that the third respondent appointed the first respondent as a substitute bus operator. Again, and as correctly contended by the respondents, the applicant has failed to demonstrate through its evidence that there was any transfer of "the business" from Remant to the second respondent and that there was any transfer of "the business" to the third respondent at all. In the evidence of the applicant, there was no longer any business running when Remant ceased its operations. Therefore, neither eThekwini Municipality nor the second or third respondents were substituted as employer, as contemplated in Section 197 (2) (a). In the event that Remant's employees' employment was terminated, there would be no contracts of employment in existence immediately before the date of transfer of the business.

[7] See *SAA* decision at para 47.

[20] In any event, it was common cause that in terms of section 156 of the Constitution of the Republic of South Africa Act 108 of 1996, the eThekwini Municipality was constitutionally obliged to provide municipal public transport within the area of its jurisdiction. In terms of the Transport Transition Act, transport authorities were established within municipalities and were obliged to call for tenders for public transport services to be operated, as those services could not, at the time, be operated by the transport authority itself. A municipality which was a party to a transport authority could not conclude a contract with that authority to render public transport services. The National Land Transport Act[8] reaffirmed the Municipality's responsibility to provide municipal public transport and set the manner in which this responsibility was to be delegated to, and then executed by, public transport operators, such as the first respondent. In this matter, I find that the first respondent is providing municipal public transport services on behalf of the second respondent, which is unable to provide these services itself.

[21] Accordingly, the first respondent was acting as the agent of the second respondent. The provision of a municipal bus service was therefore not "a business" as contemplated in Section 197 of the Act but rather the exercise of a statutory obligation imposed on the second respondent and which had to be undertaken regardless of the question of profit.

[22] In the absence of any business operation for a public bus transport operated by Remant, it would have been impossible for the second or third respondents to then transfer business to the first respondent, which Remant had ceased to operate. Further, "the business" could not have been transferred by Remant "as a going concern" when Remant had ceased operations prior to such transfer.

[23] In the circumstances, I find that the question posed at the beginning should be ansered in the negative, in which instance the orders sought by the applicant are not competent. Having reflected on the application and the fairness to the aspect of costs, I shall therefore issue an order in the following terms:

[8] Act No 5 of 2009.

1. Condonation for the late filing of the replying affidavit is not granted.

2. The application for orders sought is dismissed.

3. No costs order is made.

Cele, J

Judge of the Labour Court.

APPEARANCES:

For the applicant:	Mr R M Mathaba
Instructed by:	Medupi Lehong Incorp.
For the First Respondent:	Mr Brassey with Mr W N Shapiro
Instructed by:	Redfern and Findlay Attorneys.
For the Second Respondent:	Mr van Niekerk
Instructed by:	Shepstone and Wylie Attorneys.