REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J2661/09

In the matter between:

CHEMICAL ENERGY, PAPER, PRINTING AND ALLIED WORKERS UNION **First Applicant**

MOTLOUNG D AND 14 OTHERS **Second Applicant**

and

SAMBANE POWDER COATERS CC **First Respondent**

LAVENDER MOON TRADING 301 CC **Second Respondent**

Heard: 9 and 10 May 2013

Delivered: 24 July 2013

Summary: Unfair dismissal claim. Outsourcing of labour. Dismissal unfair- no consent of the employees. Restating test to apply in conflicting versions.

JUDGMENT

MOLAHLEHI J

Introduction

[1] The applicants claim that the second to further applicants (the employees) were unfairly dismissed by the first respondent. The first respondent contends that it did not dismiss the employees but that they were transferred to the second respondent a labour broker who in turn assigned them to it (the first respondent). As concerning the dismissals of the employees, M Govender, the main member of the first respondent testified that the dismissals of the employees were because the employees participated in an unprotected strike action.

[2] The employees seek an order declaring their dismissals to be both procedurally and substantively unfair and that they be reinstated into their employ with the first respondent.

The background facts

[3] The conflict between the parties in this matter arose from the outsourcing of the employees by the first respondent to the second respondent. The sole member of the second respondent Mr Mkhwanazi was, until the last moment

prior to the outsourcing of the employees, also an employee of the first respondent. The second respondent is a labour broker.

[4] Mr Govender testified that the reason for outsourcing the employees to the second respondent was because he wanted to focus on the business and not be concerned with labour issues. He testified in evidence in chief that in outsourcing the employees the first respondent followed the procedure set out in the main agreement of the Metal Engineering Industries Bargaining Council (the bargaining council). He also stated that the bargaining council and the first applicant, the union, were informed of the outsourcing.

[5] Before the outsourcing of the employees, the first respondent had operated on short-time which according to Mr Govender was due to poor economic conditions faced by the first respondent. The bargaining council was according to him informed in a letter dated 27 March 2009 that the first respondent would be doing short time as from 6 April 2009 to 30 April 2009.

[6] The outsourcing agreement between the respondents was concluded on 5 May 2009. On 29 May 2009, the first applicant addressed a letter to the first respondent wherein it indicated that the employees were complaining that the first respondent was contemplating a transfer of ownership in terms of section 197 of the Labour Relations Act of 1995 (the LRA). In response the first respondent did not deny the transfer but indicated that it was not done in terms of section 197 of the LRA. It was further stated in the same letter that the employees had already been transferred to the second respondent. According to the first respondent, it posted notices on the notice boards, on

the same day, advising the employees that they were taken over by the second respondent.

[7] The transfer of the employees in terms of the agreement between the respondents took effect on 1 June 2009 and on that day the employees, according to the first respondent, refused to work. Mr Govender disputed that he had, on that day, locked out the employees after they refused to sign for their transfer to the second respondent. He stated that the employees could not have been locked out because they continued to use the facilities of the first respondent. He also disputed that he locked the employees out when they refused to sign for their transfer to the second respondent.

[8] As concerning the events of 6 July 2009, Mr Govender testified that although they were working short time they had to work over the weekend because a customer had placed an urgent order. He further testified that because of the refusal to work by the employees over that weekend, casual employees were called in to assist.

[9] The following day of work, when they arrived at work, the employees according to Mr Govender enquired from Mr Mkwanazi as to who did the work over the weekend. When they were told that it was the casual employees they demanded to see Mr Govender.

[10] Thereafter, Mr Mkwanazi approached by Mr Govender and informed him that the employees wanted to see him. He testified that the employees informed him that they would not work and that the people who worked over the weekend should continue working.

[11] The employee were issued with a written notices, informing them that they had embarked on an unprotected strike and that they should resume their duties by 10h30, failing which disciplinary action would be taken against them. The first applicant was also sent a letter notifying it about the notice that had been given to the employees. Another notice was given to the employees latter that day instructing them to return to their duties by 14h00 failing which disciplinary action would be taken against them. A further notice was given to the employees to return to work by 15h00.

[12] On the same day, a letter was addressed by the second respondent to the first applicant requiring them to show cause why the employees should not be dismissed for failing to obey lawful instruction and bringing the name of the company into disrepute. And thereafter, the employees were issued with notices to attend disciplinary hearings on 8 July 2009.

[13] The employees received notices of their dismissals on 09 July 2009; the disciplinary hearing having been conducted in their absence.

[14] The applicants disputed:

a. that they participated in a work stoppage on 1 June 2009;

b. that they received written warnings for allegedly participating in the strike on 1 June 2009 from any of the respondents; and

c. that they participated in the alleged strike action on 6 July 2009.

Evaluation

[15] The first issue to determine in assessing the fairness of the dismissal of the employees is whether their outsourcing to the second respondent was done in a lawful manner.

[16] It is common cause that the first and second respondent concluded an agreement in terms of which the employees were transferred to the second respondent. It is also common cause that the transfer was not done terms of section 197 of the LRA. Mr Govender testified that the outsourcing of the employees was lawful because it was done in terms of the bargaining council rules. The first respondent, in this regard, contended that the outsourcing of the employees to the second respondent was done in terms of the bargaining council's main agreement.

[17] In terms of the main agreement, outsourcing and insourcing is dealt with in clause 33 (4) which read as follows:

> 'Where an employer intends outsourcing a part of the enterprises's activities he shall notify the Regional Council and the party trades unions representing the affected employees not less than 42 days prior to the implementation date. The notice shall be given in writing and shall contain the following information;
>
> (i) The proposed date of outsourcing and/or insourcing;
>
> (ii) the reason (s) for outsourcing or insourcing; and

(iii) any other relevant information relating to the site outsourcing or insourcing.'

[18] The notion of outsourcing in our labour law is governed by the provisions of section 197 of the LRA.[1] The purpose of section 197 is in addition to facilitating business transactions provides for transfer of employment contract from one employer to another. It also provides for protection against unfair loss of employment arising from a sale of a business as a going concern or the outsourcing of part of a business.[2]

[19] Turning to the provisions of clause 33(4) of the main agreement of the bargaining council, it is clear that the primary purpose of that clause is to provide for the implementation of section 197 of the LRA and not as the first respondent contended, to outsourcing employees from one employer to another.

[20] It follows that in terms of the law, transfer of employees from one employer to another can only be as a consequence of an employer outsourcing "part of

[1] The key provisions of section 197 A reads as follows:

'1(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.'

[2] *NEHAWU v University of Cape Town and Others* (2003) 24 ILJ 95(CC) at para 67.

the enterprise's activities." There is no provision in legislation or common law that provides for outsourcing of employees from one employer to another unless it is done as a result of the outsourcing part of the business. In other words, the transfer of employees from one employer to another can only be lawfully done where the old employer transfers its employees to the new employer consequent to the transfer of the business as a going concern the outsourcing of part of a business. The only way that an employer can transfer employees to another employer is if it done with the consent of the employees.

[21] It follows that, in the present instance, the transfer of the employees to the second respondent was unlawful and invalid as it was done without the consent of the employees. The transfer the of the employees would still have been unlawful even if the transfer was to be regarded as falling within the provisions of clause 33 (4) of the main agreement because there is no persuasive evidence that there was compliance with the 42 days' notice as required by the provisions of the main agreement.

[22] It is not the first respondent's case that the second respondent was to take over any part of its business. The transfer of the employee in this matter was essentially the handing over of the utilisation of the labour to the second respondent.

[23] Turning to the issue of the reasons for the dismissal, once the transfer had taken place, there are two conflicting versions in relation to both the events of 1 June 2009 and 6 July 2009. The version of the first respondent is that the

employees participated in an unprotected strike action on 1 June 2009 after they were informed that they had been taken over by second respondent. The employees' dismissals were as a consequence of the alleged unprotected strike action issued with the written warnings.

[24] The employees deny having received any written warning from the first respondent concerning the alleged work stoppage on 1 June 2009.

[25] The technique to apply in resolving factual disputes in cases is summarised in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others,*[3] by the Supreme Court of Appeal as follows:

> 'To come to a conclusion on the disputed issues a court must may findings on (a) credibility of the various factual witnesses; (b) their reliability and (c) the probabilities.'

[26] In *Director General Department of Public Works and Another v Public Service Sectoral Bargaining Council and Another*,[4] the court in dealing with the test to apply when seeking to resolve conflicting versions had the following to say:

> '... It is trite that when faced with two conflicting versions the enquiry... conduct is that which was set out in *Stellenbosch Farmers' Winery Group v Martell et Kie and Others*. The enquiry set out in that case essentially entails assessing and making a finding on the credibility of witnesses including the probabilities to determine where the truth lies in the matter. It would seem to me that the key aspect of this enquiry is whether the probabilities favour the party that bears the onus of proof. It is also important to note that whilst the

[3] 2003 (1) SA 1 (SCA) at para 5.
[4] (2012) 33 ILJ 1649 (LC) at para 26.

credibility of a witness is in an extricable manner bound to the consideration of the probabilities the case... resort to credibility (should be) where the probabilities fail to point which version embraces the truth.'

[27] Mr Govender disputes the version of the employees that they were locked out because they refused sign for their transfer to the second respondent.

[28] As concerning 6 July 2009, the version of Mr Govender is that the employees refused to work when they discovered that work was done over the weekend by casual employees. In this respect, it is apparent that he was informed by Mr Mkwanazi about the alleged refusal to work by employees. He further testified that Mr Mkwanazi informed him that he had placed notices in the factory instructing the employees to return to work. The employees denied having seen any notices instructing them to return to work.

[29] The employees deny having embarked on a strike action 06 July 2009. Their version is that they demanded an explanation fron Mr Govender as to why their job was done by casuals. According to them Mr Govender was very angry about their approach and further ordered Mr Mkhwanazi to switch off the machines.

[30] It is apparent from the above that the person who could have assisted in clarifying what actually happened on the days in question is Mr Mkwanazi. He was for no apparent reason not called to testify by the first respondent.

[31] In *UPUSA OBO Khumalo v Maxiprest Tyres (Pty) Ltd*,[5] the Court confirmed the established principle of our law that failure to produce a witness who is available to testify and give relevant evidence may lead to an adverse inference being drawn.

[32] In *Tshishonga v Minister of Justice and Constitutional Development*,[6] the Court dealing with the same issue of failure to call a relevant witness had the following to say:

> 'But an adverse inference must be drawn if a party fails to testify or place evidence of a witness who is available and able to elucidate the facts as this failure leads to naturally to the inference that he fears that such evidence will expose facts unfavourable to him or even damage his case.'

[33] In the present instance, it is apparent that the testimony of Mr Mkwanazi was critical in explaining a number of material facts as to the following:

a. Did the employees refuse to work on 1 June 2009;

b. Were the employees issued with and in fact receive the written warnings;

c. Did the employees refuse to work on 6 July 2009 when they discovered that work was done over the weekend, by casual employees; and

d. Were employees issued with notices to return to work and did they fail to obey such instruction.

[5] (2009) 30 ILJ 1379 (LC) at paras 29-31.
[6] (2007) 28 ILJ 195 (LC) at para 112.

[34] The above is important because the version of Mr Govender regarding the same is based on what he was told by Mr Mkwanazi. His testimony is also important because the employees disputed Mr Govender's version. It is for this reason and the unexplained inconsistencies in his evidence that the version of Mr Govender has to be rejected as unreliable. He was also not an impressive witness in a number of material aspects such as the contradiction that the notice of short-time was sent by fax contrary to what is indicated on the letter, that it was sent by hand to the bargaining council. The explanation why a different fax number was used for the letter which was allegedly sent to the union was also unsatisfactory. He claimed that the union did not represent the majority of the employee but when presented with the number of employees employed and those who are members of the union he could not explain his statement.

[35] In my view, the most plausible version in all respect is that of the employees which was presented during the proceedings through the testimony of Mr Raselomane, one of the applicants. His testimony unlike that of Mr Govender was consistent, persuasive and the most plausible of the two versions presented to the Court.

[36] In relation to the alleged work stoppage of 1 June 2009, he denied that they refused to work. He testified that Mr Govender informed them on the morning of the 29 May 2009 that the employees would be meeting with their new employer. On 31 May 2009, on arrival at work, both the night and day shift employees were told by Mr Govender not to change into their work clothes and to wait for their new employer.

[37] According to Mr Raselomane, during the course of the morning Mr Govender arrived with Mr Mkwanazi and informed them that the second respondent is their new employer. He then required the employees to sign the contracts transferring them to the second respondent. Upon refusal to sign the contracts, Mr Govender told the employees to leave the premises. The employees left the factory and stood outside the factory and waited for the union official to arrive.

[38] On arrival of the union official, a meeting was held between the parties. Although there was no agreement about the transfer of the employees to the second respondent, it was agreed that the employees would return to work. The union proposed a further meeting to discuss the issue of transfer. There seems to be no dispute that the employees did return to work and also worked on 2 June 2009.

[39] A further meeting was held on 3 June 2009 concerning the transfer. The meeting could not reach an agreement regarding the transfer of employees to the second respondent.

[40] As concerning the 6 July 2009, Mr Raselomane testified that on arrival at work they found that work had been done over the weekend. When they enquired from Mr Mkwanazi as to the reason for the work done by other people over the weekend, they were told to speak to Mr Govender.

[41] It is common cause that Mr Govender spoke to the employees. According to Mr Raselomane, Mr Govender was angry when he spoke to them. He also

told Mr Mkwanazi to shut off the machines and that the employees should leave the factory.

[42] The employees left the factory and waited outside until the arrival of the union official at about 16h00. The union negotiated access into the factory for the employees to collect their clothing. On 7 July 2009, on arrival at work, the employees found the factory closed. Mr Govender arrived at about 7h00. The employees were then issued with notices of suspension.

[43] The employees contend that they never refused to work over the weekend of the 4 July 2009 when the services of the casual employees were utilised. They say that they were never approached by the first respondent and required to work during that weekend.

[44] In the premises, the probabilities favours the version of the employees that they never refused to work on 1 June 2009. Even if they did, the respondents have not disputed that the issue was amicably resolved and that the employees did return to work and worked until the 4 June 2009.

[45] The dismissal of the employee would still be unfair even if it was to be found that that they participated in a work stoppage on that day because they were not issued with the written warnings that the first respondent sought to rely on as a factor which was taken into account in dismissing them. The warnings, according to Mr Govender, were issued by Mr Mkwanazi, who as stated earlier was never called to testify.

[46] I also find that the probabilities support the version of the employees that they did not embark on a strike action on 6 July 2009 but that the first respondent

locked them out when they complained as to why in the face of working short-time other people were brought in to do their work over the weekend. The dismissal of the employees would remain unfair even if it was to be found that the employees embarked on the work stoppage on 6 July 2009 because there is no evidence that the employees were issued with the notices that the first respondent relies on in this regard. The notices were according to Mr Govender issued by Mr Mkwanazi, who again as stated earlier was never called to testify.

Conclusion

[47] In light of the above, I find that the transfer of the employees to the second respondent was a nullity and, accordingly, their employment contract with the first respondent and remains in place. The dismissal of the employees by the first respondent was unfair.

Order

[48] In the premises, the following order is made:

1. The dismissals of the Second and further Applicants were unfair.

2. The first respondent is ordered to reinstate the Second and further Applicants into the position they occupied prior to their dismissals without loss of earnings or benefits.

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Molahlehi, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicants:	Advocate H Van der Riet
Instructed by:	Cheadle Thompson and Haysom Attorneys
For the First Respondent:	Ms Y Bosch of Yvette Bosch Attorneys