IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Of interest to other Judges

Case No: J 2718/2016

In the matter between:

FRASER ALEXANDER (PTY) LIMITED	**Applicant**
and	
INSTASOL TAILINGS (PTY) LIMITED	**First Respondent**
HARMONY GOLD MINING COMPANY LIMITED	**Second Respondent**
TSWELOPELE BENEFICIATION OPERATION (PTY) LIMITED	**Third Respondent**
ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION	**Fourth Respondent**
NATIONAL UNION OF MINEWORKERS	**Fifth Respondent**
THE PERSONS WHOSE NAME ARE LISTED IN ANNEXURE "A" TO THE NOTICE OF APPLICATION	**Sixth to Further Respondents**

LABOUR COURT

REASONS FOR JUDGMENT

[1] On 28 November 2016, I made the following order:

1. A rule *nisi* is issued, calling on the respondents to show cause at **Wednesday, 30 November 2016 at 10:00**, why a final order should not be made in the following terms:
    1.1 declaring that the cancellation of the agreements concluded on 10 November 2010 and 21 April 2015 between the applicant and the second respondent and the applicant and the third respondent respectively, and the engagement of the first respondent in the stead of the second and third respondents, constitutes a transfer of a business as a going concern for the purposes of s 197 of the Labour Relations Act, 66 of 1995;
    1.2 that the first respondent pay the costs of the application.

2. This order is to be served personally or by email on those of the applicant's employees identified as a 'non-contributor' in Annexure A to the notice of motion.

[2] The order was issued consequent on an urgent application in which the applicant sought a final order broadly in the above terms. One of the points in *limine* taken by the first respondent was that the applicant had not been served on certain of the respondents, those recorded as 'non-contributors' in the annexure to the notice of motion. These are employees of the applicant, who are not members of either the fourth or fifth respondents (AMCU and NUM respectively). In these circumstances, I decided to issue a rule *nisi*, and order that service be effected on the employees concerned.

[3] On the return date, 30 November 2016, one of the respondents listed as a non-contributor appeared. It transpired that she had resigned during October 2016, and was no longer in the applicant's employ. I confirmed the rule *nisi*, and ordered that the first respondent to pay the costs of the proceedings, but for the costs of the return date, which were to be paid by the applicant. These are my reasons for that order.

LABOUR COURT

Points in *limine*

[4] In the answering affidavit, the first respondent raised a number of points in *limine*. These include the assertion that the application is not urgent, and that it should have been enrolled for hearing on a Tuesday or Thursday and not a Friday. Further, the first respondent recorded that portions of the founding affidavit should be struck out as hearsay. Mr Beaton SC, who appeared for Intasol, did not pursue the application to strike out, nor did he pursue the objection to the matter being enrolled for hearing on Friday. (It transpired that the matter had been enrolled for hearing on a Friday in accordance with a directive by the registrar.) As I have indicted above, insofar as the respondents described as 'non-contributors' are concerned, the failure to serve the application on them was resolved by the granting of an interim order, together with the direction that the papers be served on them.

[5] That leaves the question of urgency. I am satisfied that the applicant did not delay unduly in filing this application and that the application ought appropriately to be heard on an urgent basis. On its version, the applicant became aware of Intasol's identity only on 5 October 2016. The present application was filed on 16 November 2016. The delay is not inordinate, particularly given the exchanges that took place between the parties and their representatives during this period. Of some significance too is the fact that the application was heard less than a week before the date on which the contracts between Harmony and the applicant were to terminate, and Intasol's appointment to take effect. The application or otherwise of s 197 to the cancellation of one set of contracts and the taking effect of another is an enquiry which has profound consequences for all concerned. In my view, there is little merit in requiring the application to be heard in the normal course, a consequence which may well have a material impact on all of the parties, not least the employees affected by the transactions.

[6] Mr Beaton also raised the question of jurisdiction. As I understand the submission, Intasol contends that this court has no jurisdiction to entertain the application since neither the LRA nor any other statute confers jurisdiction on

LABOUR COURT

the court to decide whether the provisions of s 197 apply to the facts disclosed in the papers in the present instance. To the extent that the applicant relies on s 158 (1)(a)(iv) of the LRA to establish jurisdiction (a subparagraph that empowers the court to make declaratory orders), Intasol submits that this provision does no more than confer powers on the court relating to matters falling within its jurisdiction is determined by s157 of the Act. The only provision conferring jurisdiction on the court in relation to s 197 is when the court adjudicates an automatically unfair dismissal in terms of s 187 (1)(g), i.e. a dismissal which has as its reason a transfer or a reason related to a transfer in terms of s 197.

[7] In my view, there is no merit in this submission. While it is correct that s 197 does not contain a discrete procedure for disputes concerning the interpretation or application of this section (unlike, for example, s9 of the LRA in relation to disputes concerning the right to freedom of association) it seems to me that what s 197 seeks to achieve is twofold – first, to define the transfer of a business secondly, establish the rights and obligations of the transferee and transferor employers, and the affected employees, when a transfer of a business occurs. When a party seeks a declaratory order as to its rights and/or obligations in terms of the section (as the applicant does in the present instance), that is an order that the court is empowered to grant, by virtue of s 158(1) (a) (iv). I fail to appreciate how the absence of a provision that specifically requires disputes concerning the application and interpretation of s 197 serves to deprive the court of jurisdiction.

[8] In any event, the construction contended for by Intasol subverts one of the primary purposes of the LRA - to establish an efficient a coherent framework for the resolution of labour disputes. In *Chirwa v Transnet Ltd and others* [2008] 2 BVLLR 97 (CC), Ngcobo J said the following (footnotes omitted):

> [112] When a proposed interpretation of the jurisdiction of the Labour Court and the High Court threatens to interfere with the clearly indicated policy of the LRA to set up specialised tribunals and forums to deal with labour and employment relations disputes, such a construction ought not to be preferred. Rather, the one that gives full effect to the policy and the objectives of the LRA must be preferred. The principle involved is that where

LABOUR COURT

> Parliament in the exercise of its legislative powers and in fulfilment of its constitutional obligation to give effect to a constitutional right, enacts the law, courts must give full effect to that law and its purpose. The provisions of the law should not be construed in a manner that undermines its primary objectives. The provisions of subsections (1) and (2) of section 157 must therefore be construed purposively in a manner that gives full effect to each without undermining the purpose of each.
>
> [113] The purpose of section 157(1) was to give effect to the declared object of the LRA to establish specialist tribunals "with exclusive jurisdiction to decide matters arising from [it]". To this extent, it has given exclusive jurisdiction to the Labour Court and Labour Appeal Court to deal with matters arising from the LRA.

[9] Although the judgment is a minority judgment, the views expressed on the nature of this court and its jurisdiction are clearly shared by the majority. To require disputes regarding the application of s 197 to be determined by the High Court (which is what the consequence of any adoption of the interpretation of s 157(1) advanced by Mr Beaton would necessarily be), would not promote the clearly indicated policy underlying the LRA. Indeed, it would be inimical to that policy. In my judgment, this court has jurisdiction to entertain the applicant's claim.

Factual background

[10] The material facts are not in dispute. The applicant has four business divisions. The division with which this application is concerned is the Fraser Alexander Tailings Division (the company), which is involved in the construction and monitoring of tailings dams and the hydraulic re-mining of slime dams in the mining industry. All of the individual respondents are engaged in one or the other of these operations.

[11] On 10 November 2010, the applicant concluded an agreement with the second respondent (Harmony) for the maintenance and management of tailings dams in the Free State. This agreement was extended from time to time, the last extension being signed on 23 June 2016. On 6 May 2015, the

LABOUR COURT

applicant concluded an agreement with the third respondent, for the hydraulic re-mining of slimes dams in the Free State province.

[12] On 16 September 2016, Harmony wrote a letter to the applicant terminating the tailings dam agreement with effect from 30 November 2016. On the same date, harmony addressed a similar letter to the applicant advising that the hydraulic re- mining agreement would be terminated with effect from the same date

[13] On 28 September 2016, the applicant addressed a letter to Harmony to propose a meeting with Harmony and the new service provider to discuss the possible transfer of the individual respondents to the new service provider in terms of s 197 of the LRA. On 5 October 2016, the fourth and fifth respondents, trade unions of which the majority of the applicant's employees are members, were advised about the termination of the agreements and the prospect of a transfer in terms of s 197. A meeting was scheduled for 10 October 2016 but cancelled by Harmony. At the same time, Harmony confirmed that Intasol would be taking over both the maintenance of tailings dams and the hydraulic re-mining operations in the Free State.

[14] Letters were subsequently exchanged between the parties' respective legal representatives in regard to the application of s 197 to the cancellation of the contracts between Harmony and the applicant, and the conclusion of new contracts by Harmony with Intasol. Of some significance is the letter addressed by Intasol's attorney of record to the applicant's attorney of record on 2 November 2016. In this letter, Intasol's attorney disputed that s 197 applied to either contract but indicated a willingness to meet with the applicant and representatives of the fifth respondent (NUM) to discuss Intasol's proposed employment of some 84 of the company's employees who had been engaged by the applicant. The proposal made was that Intasol would conduct interviews and evaluate the applicant's employees, that the employees once interviewed and selected would receive preference and would be offered employment before any other applicants, subject to security and medical screening. Of some significance are the following paragraphs:

LABOUR COURT

… c) persons appointed would be paid at our client's current rates, which, we are aware, are below your client's rates and will be appointed within our clients predesignated structure;

d) your client will be liable for leave pay and pro rata bonuses to date;

e) new employees would not carry over service to our client.

[15] In the fortnight prior to the present application, a number of the individual respondents resigned from the applicant's employ in order to take up employment with Intasol. These employees are engaged in mostly managerial or supervisory positions. This much is evident from an exchange of emails in which a human resources officer, acting on behalf of Harmony, went so far as to purportedly resign on behalf of employees, so that they could commence employment with Intasol. The applicant (quite correctly) took exception to this and advised that any of its employees who wish to resign should do so by giving the applicant notice. This advice was met by the response that the applicant was *'playing delaying tactics which could impact on the chances of their employees getting a chance of further employment at Intasol.'*

[16] On 8 November 2016, the applicant's operations manager addressed an email to the applicant's attorneys listing specific items that will remain on site. These include those related to any direct impact on the technical stability of the operations such as platforms and catwalks, walkways and stations, freeboard poles, drainpipes, Piezo support poles, and safety signage. Further, items supplied by Harmony will remain on site. These include life buoys, safety harnesses and cables. Those items that the applicant intends to remove from the site include all yellow machines, any machinery hired from suppliers (subject to the right of Intasol to take over the relevant contracts), all of the applicant's equipment, office buildings and infrastructure, storage containers, HME equipment and guns. Further, generic tools used for daily operational tasks would be removed.

[17] Intasol points to the terms of the tender that it was awarded, which requires Intasol in respect of each site to supply an LDV, small tools, a density scale, a dumpy level, a dip meter, a lightning detector, as well as slimes shovels, a tractor and ditchers. Further, Intasol will not be utilising the container and

LABOUR COURT

temporary office facilities utilise by the applicant – it intends to establish its own housing and office facilities, and to acquire its own computer equipment.

[18] In so far as the methodology of the re-mining operation is concerned, Intasol avers that in respect of the re-mining operation, it is intending to provide its own equipment (at considerable cost)

The applicable legal principles

[19] For s 197 to be applied to a transaction, three elements must be satisfied. There must be the transfer, the whole or part of a business, as a going concern. The first element (the existence of a transfer) in circumstances such as the present is not controversial - the termination by a client of an agreement with one service provider and the conclusion of an agreement with another for the provision of similar services, is capable of constituting a transfer. In particular, the courts have held that the absence of a contractual nexus between the outgoing and incoming contractors does not preclude the application of s 197. In relation to the existence of a the whole or part of a business, the latter phrase is denied in s 197(1) but the courts have adopted the concept, developed by the ECJ, of an economic entity , or an organised grouping of employees and assets facilitated the exercise of an economic activity. Although the ECJ has made clear that an entity cannot be reduced to the activity entrusted to it, the relevant UK regulations include a service provision change within the scope of what is contemplated as a business. In any event, as this court observed in *Harsco*, the definition of 'business' in s 197(1) is broad, and it is difficult to conceive of an economic entity that would not comprise a business for the purposes of s197. Whether a business is transferred as a going concern is the subject of a multi-factoral enquiry established by *Nehawu v University of Cape Town*, and referred to below.

[20] In *COSAWU v Zikhethele Trade (Pty) Ltd* (2005) 26 *ILJ* 1056 (LC), Murphy J said the following:

> In order to determine whether there has been a retention of identity it is necessary to examine all the facts relating both to the identity of the undertaking and the relevant transaction and assess the cumulative effect,

LABOUR COURT

looking at the substance, not the form, of the arrangements. The mode or method of transfer is immaterial. The emphasis is on a comparison between the actual activities of and actual employment situation in an undertaking before and after the alleged transfer (*Kelman v Care Contract Services Ltd* [1995] ICR 260 (EAT)). What seems to be critical is the transfer of responsibility for the operation of the undertaking. Mummery J's conclusion in *Kelman* offers a salutary guideline. He said:

> The theme running through all the recent cases is the necessity of viewing the situation from an employment perspective, not from a perspective conditioned by the principles of property, company or insolvency law. The crucial question is whether, taking a realistic view of the activities in which the employees are employed, there exists an economic entity which, despite changes, remains identifiable, though not necessarily identical, after the alleged transfer.

[21] This approach resonates with the decision by the ECJ in *Spijkers v Gebroeders Benedick Abattoir v Alfred Benedik en Zonen BV* [1986] 2 CMLR 286 (ECJ) where the ECJ held that the decisive criterion is whether the business concerned retains its identity after the transfer. That would be indicated, amongst other things, by the fact that the operation is actually continued or resumed by the new employer, with the same or similar activities.

[22] In relation to a change in service provision in particular, the relevant principles were summarised recently by the Labour Appeal Court in *TMS Group industrial services (Pty) Ltd t/a Vericon v Unitrans Supply Chain Solutions (Pty) Ltd & others* (2015) 36 ILJ 197 (LAC). In that judgment (per Davis JA), the court noted the influence of the European Transfers Directive on the interpretation of s 197, particularly in regard to what is referred to in European law as a change in service provision. The court made specific reference to Wynn-Evans *The Law of TUPE Transfers* (2013) where the following is said:

> A SPC [service provision change] occurs on a change (other than on a one-off or short term basis or in relation to the supply of goods) to the identity of the person who has the conduct of activities to which a particular organised

LABOUR COURT

> grouping of employees has principally been dedicated for a particular client. According to the 2009 Guidance SPC's "concern relationships between contractors and the clients who hire the services". The Consultation Response indicated that the term describes situations where a contract to provide a business service to a client is let, re-let or ended by bringing it in-house.

[23] The LAC continued (at paragraph 22):

> For there to be an SPC certain other requirements must be satisfied - first, there must be an organised group of employees principally dedicated to that contract activity prior to the transfer for there to be an SPC and, second, the contract award must be on an ongoing rather than on a one-off and short-term basis and not relate to the supply of goods. This additional and alternative concept of the relevant transfer was introduced with the objective of ensuring clarity in the application of the transfer legislation to situations such as outsourcing, in- housing, and the rendering of contracts from one contractor to another.

[24] The test is more easily stated than applied. What is an issue in matters such as the present is the scope of these principles. In this regard, in the *TMS Group* judgment, the LAC referred with approval to the decision by the European Court of Justice in *Abler & others v Sodhexco MM Catering Staff GmbH* [2004] IRLR 168 (ECJ), where the ECJ in broad terms referred to factors such as the activity carried on, the production or operating methods employed in the relevant undertaking, and the like. The LAC noted that the approach adopted by the ECJ was consistent with that adopted by the Constitutional Court in matters such as *Aviation Union of SA & another v SAA Airways (Pty) Ltd & others* (2009) 30 *ILJ* 2849 (LAC) and *National Education Health & Allied workers Union v University of Cape Town & others* (2003) 24 *ILJ* 95 (CC), where a multi-factoral approach to determining whether a transfer as a going concern has occurred. In the latter case, in an often quoted passage, the court said the following:

> In deciding whether a business has been transferred as a going concern, regard must be had to the substance are not the form of the transaction. A number of factors will be relevant to the question whether a transfer of a

LABOUR COURT

> 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 employee, 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 was to factors is not exhaustive and that none of them is decisive individually.

[25] The LAC went on to make clear that the demarcation between those cases which are deserving of protection under s 197 and those which fall outside its scope are dependent on a comprehensive engagement with the facts of each case. The fact that this may be difficult does not call the policy that underpins the section into doubt. As the court noted:

> But the section is clear: where there is a direct transfer of the whole or part of the business as a going concern in which the employment of workers are employed, these workers are afforded particular statutory protection in terms of s 197. That is the clear policy of the legislation and must be sensibly applied, no matter whether arguments about potential overlap of relief may potentially be raised. The challenge is to engage fully with the particular facts.

The issue

[26] The issue can be simply stated: whether the consequence of the termination of the agreements between Harmony and the applicant and the appointment by Harmony of Intasol to provide the same services constitutes a transfer of a business for the purposes of s 197, or whether the transactions concerned amount to no more than the termination of the appointment of one service provider and its replacement with another.

Analysis

[27] In the present instance, the nature of the service provided is not in dispute. It is the construction and monitoring of tailings dams and the hydraulic re-mining of slime and dams at Harmony's Free State mining operations. Also not in dispute is the fact that the contracts in terms of which the services were provided by the applicant have been validly terminated, and valid contracts concluded in terms of which Harmony has appointed Intasol to provide the same services. In the answering affidavit, Intasol admits in as many words

LABOUR COURT

that it is replacing the applicant as the service provider to Harmony in respect of the two contracts concerned. It is also not disputed that the services will be carried out at Harmony's premises in Virginia, Free State, on the same sites where the applicant previously rendered services.

[28] On these admitted facts, there are already strong indications that s 197 is applicable – the same services are to be conducted on the same premises for the same client. In the words of the authorities referred to above, the operation that comprises the management of tailings dams and the hydraulic re-mining of slimes dams previously conducted by the applicant continues in the hands of the transferee employer, Intasol. In other words, there is an organised group of employees dedicated to a contract and activity prior to the transfer in circumstances where the contract award is not a one-off or short term, nor does it relate to the supply of goods. What remains to be determined is whether after any transfer, there exists an economic entity which despite changes, remains identifiable though not necessarily identical (see *COSAWU* above).

[29] Intasol contends that s 197 does not apply because firstly, it will provide all the equipment to render the services and secondly, because it will render the hydraulic re-mining service in a different way.

[30] Insofar as the provision of equipment is concerned, while it may be correct that Intasol will provide much of its own equipment, is not disputed that it will utilise the equipment referred to in the founding affidavit as FA 20. Indeed, the deponent to the answering affidavit says the following:

> All the items mentioned in Annexure "FA20" "The lists that will remain…" (Save for hand tools used for wall packing which First Respondent will not use) are actually materials that are built into the slimes dams as the areas of operation change. The court will appreciate that slime stems are of considerable size and the precise areas from which tailings are taken to be re-mined changes. Drainpipes are laid to direct rainwater and slimes across the considerable distances that the slimes are transported during the hydraulic mining activity. In order to access areas of the slime stems platforms and catwalks are re-erected. These are built into the slimes dams in

LABOUR COURT

order to facilitate the maintenance thereof. Safety features and materials have to be installed and supplied by law and the costs of these materials, which become an integral part of the damp or slimed down, recovered from the Second Respondent. First respondent will also erect such features and leave them for its (possible) successor. The actual equipment used to transport the slimes and install the catwalks and platforms, however, is being removed by applicant and fresh equipment supplied by first respondent.

[31] As the deponent acknowledges, there are tangible assets that will be taken over by Intasol. What is not specifically referred to but which Intasol will clearly take over are the premises themselves, and, it would appear, water and energy. In other words, there is infrastructure without which the services cannot be rendered that will remain on site after the transfer, to which Intasol will have access. More than that, it will use the equipment to provide the services that are the subject of the contract. The business that is the subject of the transfer is continuous in nature – Intasol will continue to develop and build structures previously development by the applicant, using infrastructure and equipment belonging to it and to Harmony. This brings the matter squarely within the ambit of *Sodhexco*, where the ECJ held that a transfer occurred when a new contractor took over the client's premises, infrastructure (including water and energy) and certain of the equipment.

[32] In regard to the nature of the operation to be conducted by Intasol, Intasol contends that it will process the slimes dams using different equipment. The deponent to the answering affidavit avers that Intasol has purchased eight guns for the hydraulic re-mining contract as well as an item described as a 'low-level stacker'. Those tailings not deep enough to be moved by conventional hydraulic mining means will be scraped out and fed into the stacker which deposits them in a 'stack', which is then conveyed to the terminal in the normal way by guns, furrows and screens (or sieves) which Intasol will apply. It does not seem to me that the use of a particular item of equipment not utilised by the applicant to achieve the same results has the consequence that there is no transfer of the business as a going concern. It may well be that the equipment brought to site by Intasol will improve the efficiency of the operation, but Intasol has not made a case to the effect that

LABOUR COURT

the nature of the operation is rendered any different by the introduction of a stacker or any other item of equipment, or that it is so different that one cannot say that Intasol conducts the same activities.

[33] There are other factors, the issue of equipment and operational methods aside, which must necessarily be brought into the mix. It is not disputed that Intasol approached Mr Elijah Mzamani, who is employed by the applicant, to become employed by Intasol. In relation to other employees, there is no dispute that Intasol has engaged with certain of the applicant's employees and that Intasol is prepared to offer them employment on the sites on which the applicant rendered services in terms of its contracts with Harmony. The letter annexed to the founding affidavit as 'FA 13' dated 2 November 2016 is the clearest possible indication that Intasol was prepared to meet with the first respondent and representatives of the NUM with a view to negotiating an agreement providing for the employment by Intasol of some 84 ex-employees of the applicant, all associated with the cancelled contracts and who worked on the management and hydro-mining of Harmony's slimes dams. While the letter proposes no more than that interviews would be conducted and that employees would be required to pass a security and medical screening, the applicant's employees were guaranteed preference for the 84 positions that Intasol sought to fill. It is of some interest that the agreement that Intasol proposed negotiating was one 'possibly in terms of Section 197(6)'. This is at least an implicit acknowledgement by Intasol's own legal advisers that s 197, potentially at least, applied to the termination of the applicant's contract and the appointment of its client to render the same services.

[34] Finally, there is the matter of the purpose that underpins s 197. This was referred to by the Constitutional Court in *Aviation Union* (*supra*) where both the majority and minority judgments made specific reference to this issue. While the court disagreed on the factual enquiry to be conducted in that case, there was consensus that the purpose of s 197 is to alter the employment-related consequences of the transfer of a business as a going concern at common law. The substitution automatically and by operation of law of the transferee employer for the transferor as the employer of all of those of its employees engaged on the date of the transfer on the same terms and

LABOUR COURT

conditions, achieves the end of consistency with the constitutional right to fair labour practices, and in particular, the protection of security of employment. It also facilitates the smooth transfer of the business by guaranteeing the transferee employer's skilled workforce.

[35] In the answering affidavit, the deponent (a director of Intasol) says the following, at paragraph 5.16:

> … I wish to add that first respondent is not 'cherry picking' employees as alleged by applicant but was prepared to give applicant's employees preference – that offer was rejected. The lower salaries paid by First Respondent are part of the reason it was able to tender on better terms (presumably) and Applicant and again shows that this is not a seamless take-over or transfer as a going concern. '

[36] In other words, it would appear that on its own version, Intasol secured the contracts concerned by reason of the competitive advantage afforded it by an offer of wages lower than those paid by the applicant, for the same work. This is a consequence that would fly directly in the face of at least one of the stated purposes of s 197 - to ensure the security and continuity of employment when a business is transferred as a going concern.

[37] In summary: Intasol will perform services at the same site and in doing so, it will carry on the same activity for the same client, Harmony. Intasol will utilise infrastructure provided by Harmony and previously utilised by the applicant. Intasol has engaged with certain of the applicant's employees with a view to employing them on the same site, and it is open to employing at least 84 of the applicant's employees on the same site to perform the same work but on different (less favourable) conditions of employment. For the above reasons, in my view, the termination by Harmony of its contracts with the applicant and the appointment of Intasol to provide the same services constitutes a change to the identity of the party who has had the conduct of activities to which an organised group of employees has been principally dedicated for a particular client. There is thus a transfer of a business as a going concern for the purposes of s 197 of the LRA. The applicant is accordingly entitled to the relief that it seeks.

LABOUR COURT

Costs

[38] The applicant is substantially succeeded in its claim and there is no reason to deny the applicant its costs. However, in so far as the proceedings on the return data concerned, the interim order and the return date were occasioned solely by the applicant's failure to file the notice of motion and founding affidavit and all of the respondents that it cited. For that reason, the applicant ought to be held liable for the costs of the return date, a proposition not contested by Mr van As, who appeared for the applicant.

[39] For the above reasons, I granted the declaratory order sought by the applicant and the order for costs associated with it.

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT
5 December 2016

REPRESENTATION

For the applicant: Adv. M van As, instructed by Webber Wentzel

For the first respondent: Adv. R Beaton SC, instructed by Erasmus Scheepers.

LABOUR COURT