



IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no: D377/11

In the matter between:

SOMAHKHANTI PILLAY & 37 OTHERS

Applicants

and

MOBILE TELEPHONE NETWORKS

(PROPRIETARY) LIMITED

Respondent

Heard: 26 October 2016

Delivered: 05 May 2017

Summary: Application for an order directing the respondents to give effect to the consequences of the Appeal Court judgment that the applicants were employees of the respondent as a consequence of a section 197 transfer of a business as a going concern Viz that the applicants be paid their remuneration from the date of the transfer of the going concern to the date of the Labour Appeal Court judgment. Application granted.

JUDGMENT

GUSH J

[1] This application arises as a result of the decision in the Labour Appeal Court under case number DA10/13 in which matter the Labour Appeal Court set aside the decision of this Court in case number D377/11 and made the following order:

‘Accordingly the following order is made:

1. The appeal is upheld with costs.

2. The order of the court *a quo* is set aside and replaced with the following order:

2.1 It is declared that there was a transfer of a business as a going concern by the second respondent to the first respondent and that such transfer forms within the ambit of section 197 of the Labour Relations Act 66 of 1995.

2.2 Second and further appellants are declared in law to be employees of the first respondent effective from 1 December 2010 with no loss of service.

2.3 The first respondent is ordered to pay the appellants’ costs.

[2] Given the order of the Labour Appeal Court, the second respondent in the original application is not a party to these proceedings.

[3] In this application, the applicants apply for an order declaring that the respondent is obliged to do all things necessary in order to give effect to the order of the Labour Appeal Court that the applicants were declared to be employees of the respondent with effect from 1 December 2010 with no loss of service.

[4] In particular, apart from an order for costs, the applicants specifically apply for two distinct orders:

a. Firstly, an order directing the respondent to provide each of the applicants with contracts of employment as contemplated by section 29 of the Basic

Conditions of Employment Act 75 1997 containing terms and conditions no less favourable than other employees of the respondent performing similar work and backdated to 1 December 2010;

- b. And secondly an order directing the respondent to pay to the applicants the remuneration due to them “from 1st December 2010 to date, (inclusive of mora interest with effect from 1st December 2010).”

[5] At the outset, the parties confirmed and agreed that only those applicants set out in the list attached hereto marked “A” are parties to this application. The applicants are the remaining applicants who have not withdrawn their claim against, or who have not accepted voluntary severances packages from the respondent.

[6] The detailed background to the matter is set out in the judgment of the Labour Appeal Court and I do not intend to repeat it save to record the following salient facts that are relevant to this application.

- a. With effect from 1st December 2010, the respondent in this matter took transfer of the business operated by Interaction Call Centre (Pty) Limited.
- b. The applicants were all employees of Interaction Call Centre (Pty) Limited, the second respondent in the initial application.
- c. The respondent denied that the takeover of Interaction Call Centre (Pty) Limited constituted a transfer of a business as a going concern and accordingly section 197 of the Labour Relations Act 66 of 1995 (LRA) was inapplicable and therefor refused to recognise the applicants as employees.

[7] As a result, the applicants applied to this Court for an order declaring the transaction to be a transfer in terms of section 197 of the LRA and, accordingly, they be declared employees of the respondent from 1 December 2010 with no

loss of service. The applicants included in their prayer for relief an order directing the respondent to take the applicants into its employ in accordance with the LRA.

[8] This application was dismissed by this Court and the applicants successfully appealed to the Labour Appeal Court against this decision. The decision of the Labour Appeal Court was handed down on 21 April 2015.

[9] It is apparent from the pleadings that after the judgment of the Labour Appeal Court, despite an attempt to settle the consequences of the judgment, the matter was not settled.

[10] After receiving the judgment, the applicants claimed payment from the respondent of their remuneration from 1st December 2010 to date. When their claim was rejected by the respondent the applicants filed this application.

[11] Before the matter was heard during the course of the exchange of pleadings, the respondent made a tender for the payment of the applicants' remuneration for the period 22nd April 2015 to 27th June 2016 (the date on which this application was filed). During argument the applicants indicated that they accepted this tender.

[12] What remains to be determined by this Court is whether the applicants are entitled to an order:

- a. Directing the respondent to comply with section 29 of the Basic Conditions of Employment Act 75 of 1997 and
- b. That the applicants are entitled to their remuneration for the period 1 December 2010 to the 21st April 2015 and directing the respondent to pay the applicants.

[13] In response to and in defence of the applicants' claim, the respondent raised only three defences to the applicants' claim. Although these points are designated as "points *in limine*" in the respondent's answering affidavit they constitute and were

argued as the respondent's defence and the sole basis of the respondent's opposition to the applicants' application.

[14] The three defences to the applicants' claim raised by the respondent are:

A. CLAIM FOR SPECIFIC PERFORMANCE: PROVING TENDER OF SERVICES

The relief sought by the applicants in prayer 1(b) of their notice of motion, properly construed, is a claim for specific performance. The applicants are therefore required to lead oral evidence to prove, *inter alia*, when they tendered the services to the respondent. Accordingly, motion proceedings inappropriate and the applicant should instead institute action to claim such specific performance.¹

B. TRANSFER OF CONTRACTS AND TENDER OF SERVICES:

The respondent averred that the effect of the Labour Appeal Court judgment was that the contracts of employment of the applicants were **transferred** from Interaction Call (Pty) Ltd to the respondent with effect from 1 December 2010. The respondent pleaded that the applicants had failed to tender their services to the respondent on 1 December 2010 and according they were not entitled to their remuneration. "The applicants are not entitled to be remunerated until such time as they tender the services to the [respondents]".²

C. PRESCRIPTION:

The relief sought by the applicants in prayer 1(b) of their Notice of Motion, properly construed as a claim for specific performance, being the monthly remuneration which falls due at the end of each calendar month with effect from 31 December 2010 against their tender of service to the respondent. The applicants served and filed this application and 6 July 2016. Accordingly, the applicants' claim to remuneration which allegedly became due and payable

¹ Pleadings page 33 Paragraph 4 and 5 of the answering affidavit.

² Pleadings page 34 Paragraph 7 8 and 9 of the answering affidavit.

during the period 31 December 2010 to 30 June 2013 has prescribed in terms of the Prescription Act 68 of 1969.³

[15] In summary, the only defences the respondent raises against the applicants' claim are:

- a. that the applicants' claim is for specific performance and that the applicants accordingly are required to lead oral evidence to prove that they tendered their services to the respondent prior to 21 April 2015;
- b. That the applicants' contracts of employment were **transferred** from Interaction Call Centre (Pty) Ltd on 1 December 2010, and accordingly the applicants were required to tender their services to the respondent at the time of the transfer. As the applicants only tended the services to the respondent on 21 April 2015 their claim for payment of remuneration before 21 April 2015 is fatally defective.
- c. That the applicants' claim for remuneration for the period 31 December 2010 to 30 June (sic) 2013 has prescribed.

A Claim for specific performance:

[16] The respondent aver that as the applicants' claim is for specific performance, the claim should have been brought by way of action and that the applicants were required to lead oral evidence to prove that "*inter alia* they tendered their services to the respondent".⁴

[17] I shall firstly deal with the respondent's averment that the applicants did not tender their services to the respondent, an averment that is central to two of the respondent's defences to the applicants' claim.

[18] It is abundantly clear from the pleadings and the judgments of both this Court and the Labour Appeal Court that immediately following the takeover of

³ Pleadings pages 34/5 paragraphs 11,12 and 13.

⁴ Pleadings page 33.

Interaction Call Centre (Pty) Ltd by the respondent, a dispute arose regarding whether the transaction constituted a transfer of a business as a going concern as envisaged by section 197 of the LRA.

- [19] As a result of this dispute, the applicants timeously referred the matter to the Labour Court for determination. The basis of the referral was simply that the applicants regarded the transaction as a transfer of a business as a going concern as envisaged by section 197 of the LRA and, that accordingly, their employment contracts of employment with Interaction Call Centre (Pty) Ltd continued uninterrupted with the respondent.
- [20] Included in their notice of motion the applicants asked for an order that they be declared employees of the respondent.
- [21] Section 197 provides that the contracts of employment of employees continue uninterrupted as do the rights and obligations between the “new employer and the employees”.⁵ Taking into account the nature and effect of this section, it would appear that it is not required of the employees to tender their services where the business employing them is transferred in accordance with section 197. The employment continues uninterrupted.
- [22] If, however, employees are required to tender their services, the applicants argued that they had, in fact, tended their services to the respondent.
- [23] Nothing could be a clearer tender of their services by the applicants than their referral of the dispute to the Labour Court concerning the applicability of section 197 and the relief they sought.
- [24] I am accordingly satisfied, in so far as it may be required, that the referral of this dispute by the applicants stands as incontrovertible proof of the tender of their services to the respondent.

⁵ Section 197(2).

- [25] It is clear from the relief sought by the applicants in their notice of motion that their claim is specifically a contractual claim for payment of their remuneration consequential upon the Labour Appeal Court's judgment that the acquisition of Interaction Call Centre (Pty) Ltd by the respondent constituted a transfer of a business as a going concern.
- [26] The effect of the Labour Appeal Court's judgment is that the respondent was "automatically substituted in the place of [Interaction Call Centre (Pty) Ltd] in respect of all contracts of employment [and] all the rights and obligations between [Interaction Call Centre (Pty) Ltd] and the [applicants] ... continued in force as if they had been rights and obligations between [the respondent] and [the applicants].⁶
- [27] The only defence the respondent offers in response to the applicant's claim is the averment that the applicants were obliged to lead oral evidence of their tender of services.
- [28] The respondent pleads in their response to the applicants' claim that oral evidence is only required to prove a tender of their services. There is nothing in the pleadings to suggest that besides that evidence the applicants are obliged to lead oral evidence. The respondent does not raise any other defence that may have required the applicants to lead oral evidence.
- [29] In the circumstances, therefore, in respect of this defence, as I am satisfied that there was, in fact, a tender of services (if required), the fact that the applicants brought their claim by way of application as opposed to an action is of no consequence.

B Transfer of contracts and tender of services

- [30] The foundation of the respondent's second defence to the applicant's claim also lies on its averment that the contracts of employment were transferred and that

⁶ Section 197(2)(a) and (b) of the LRA.

there was therefore, as a result of the transfer, a requirement that the applicants tender their services to the respondent as from 1 December 2010 in order to be entitled to their remuneration.

[31] As I have set out above, I am satisfied that even if there was a need for the applicants to tender their services, the application brought by the applicants constituted such a tender. It is clear that the respondent has based this defence on its apparent misunderstanding of the provisions of section 197 and the effects thereof. In the pleadings and in argument, the respondent repeatedly averred that the contracts of employment of the applicants were **transferred** from Interaction Call Centre (Pty) Ltd to the respondent.

[32] What the respondent fails to appreciate is that, despite the heading to section 197 viz, "Transfer of contract of employment" the wording of the section does not deal with or contemplate the transfer of the contracts of employment but deals with the "transfer of a business or part thereof as a going concern"⁷ and the consequences thereof.

[33] The provisions of the section set out very clearly what the consequences are of a transfer of a business or part thereof as a going concern on the contracts of employment of the employees.

(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;

⁷ Section197(1)(b).

- (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 unfair discrimination, is considered to have been done by in relation to the new employer; and
- (d) the transfer does not interrupt an employee's continuity of employment, and employee's contract of employment continues with the new employer as if with the old employer.⁸

[34] The use of the word "transfer" or "transferred" in relation to the employees in sub sections (3) (5) and (7) is merely descriptive of the employees and does not alter the legal effect of Section 197(2)(a). This must particularly be so given the definition of the word "transfer" in section 197(1).

[35] As regards the second "point *in limine*" or defence raised by the respondent, I am not persuaded that the applicants' claim is fatally defective for want of a tender of their services.

C Prescription

[36] The third defence raised by the respondent to the applicants' claim is one of prescription. The respondent avers that the applicants' claim is for specific performance viz. the payment of their remuneration for the period 31 December 2010 to 21 April 2015, and that the claim for payment (this application) was only served on 6 July 2016. The respondent avers that accordingly, the remuneration for the period 1 December 2010 to 30 June 2013 has prescribed in terms of the Prescription Act 68 of 1969.

[37] Section 12 of the Prescription Act specifically provides that prescription will only run from the date on which the debt falls due.

12. When prescription begins to run.

⁸ Section 197(2).

(1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.

- [38] At the time of the transfer of the business of Interaction Call Centre (Pty) Ltd to the respondent, there was a dispute as to whether the transfer fell within the ambit of section 197. Accordingly, it cannot be said that the debt (viz. the employees' remuneration) was due. The debt only became due after the judgment of the Labour Appeal Court to the effect that the transfer was one envisaged by section 197. Having so decided the consequence of the Labour Appeal Court's judgment was that the respondent was automatically substituted as the applicants' employer and became liable to the applicants for the payment of their remuneration. As the debt in respect of the remuneration only fell due on 21 April when the Labour Appeal Court handed down judgment the running of prescription commenced on that day.
- [39] I am therefor satisfied that the remuneration due to the applicants has not prescribed.
- [40] A further issue requiring determination is the applicants' claim for *mora* interest on the remuneration payable to applicants. The applicants claim that as they are entitled to their remuneration from 1 December 2010 they are entitled to *mora* interest.
- [41] As the debt only fell due on 21 April 2015 when the Labour Appeal Court handed down judgment *mora* interest can only run from that date. I am satisfied that the *mora* interest is only due from 21 April to date of payment.
- [42] The claim for payment of the applicants' remuneration for the period from the date of the Labour Appeal Court judgment was the subject of the tender by the respondent which tender the applicants accepted. It is not necessary therefor to deal with this matter any further. This tender and the acceptance thereof is helpful in determining the basis of the calculation of the remuneration due to the applicants from 1 December 2010 to 21 April 2015.

[43] The applicants in their prayer for relief also sought an order directing the respondent to provide the applicants with contracts of employment in accordance with the Basic Conditions of Employment Act. In the light of the accepted tender there is nothing in the papers to suggest that the applicants are unaware of the terms and conditions of their employment at the time of the transfer of Interaction Call Centre (Pty) Ltd. The same terms and conditions apply to their current employment with the respondent. The quantum of their remuneration forms part of the settlement of the applicants' claim post the Labour Appeal Court's judgment and it is unnecessary to make such an order.

[44] This matter has unfortunately dragged on much longer than is desirable. The delay however is not directly due to the conduct of either party. It was simply a consequence of the time litigation takes.

[45] There is no reason why the costs should not follow the result as the applicants have been substantially successful.

[46] In the circumstances and for the reasons set out above, I make the following order:

- a. The respondent is ordered to pay the applicants the remuneration due to them in accordance with their contracts of employment for the period 1 December 2010 up to and including 21 April 2015.
- b. The calculation of the quantum of the remuneration is to be based on the principles applied by respondent to the calculation of the amount of the tender, accepted by the applicants, in respect of the remuneration payable to the applicants for the period from 22 April 2015 to 5 July 2016.
- c. The respondent is ordered to pay the applicants interest on the amount referred to above at the prescribed rate from 22 April 2015 to date of payment.
- d. The respondent is ordered to pay the applicants' costs.

D H Gush

Judge of the Labour Court of

South Africa

APPEARANCES:

FOR THE APPLICANT:

Adv. M Pillemer

Instructed by: B Purdon Attorneys

FOR THE RESPONDENT:

Adv. M van As

Instructed by Mashiane Moodley Monama Attorneys