Reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case No: J 1864/17

In the matter between:

SISONKE PARTNERSHIP T/A DSV HEALTHCARE	**Applicant**
and	
MEDTRONIC SOUTH AFRICA (PTY) LTD	**First Respondent**
STANLEY MATSEKE & 4 OTHERS	**Second and further Respondents**

Heard: 24 and 25 August 2017

Delivered: 14 September 2017

Summary: (Urgent application – declarator – alleged transfer of an undertaking under s 197 – termination of warehousing and logistics contract – original warehousing contract entailed s 197 transfer from client – on termination of contract warehousing and logistics function reverted to client – no transfer of undertaking as going concern)

JUDGMENT

LAGRANGE J

Introduction

[1] The applicant ('Sisonke') seeks a declaratory order on an urgent basis that the termination of an agreement with the first respondent ('Medtronic') constitutes a transfer of undertaking in terms of section 197 of the Labour Relations Act, 66 of 1995 ('the LRA'). It also seeks consequential relief that the employment contracts of the second to six respondents ('the individual respondents') were transferred to Medtronic with effect from the date of alleged transfer on 21 August 2017. The individual respondents did not oppose the application. It is common cause that five permanent employees and seven temporary employees were engaged by the applicant specifically for the services rendered to Medtronic by Sisonke.

Urgency

[2] The application was launched on 14 August and was initially enrolled for hearing on 24 August but was postponed by agreement until 25 August to allow Sisonke to respond to a supplementary affidavit filed by Medtronic. Between April and July 2017, there was correspondence and discussions which took place between Sisonke and Medtronic about whether the termination of the contract and the planned in-house operation of the warehousing function performed previously by Sisonke on Medtronic's behalf entailed a transfer of an undertaking under section 197 of the LRA. In the first week of August the parties could not agree and it became apparent that their disagreement could only be settled in court. The urgency of the application was not seriously contested and I am satisfied that, it was not unreasonable of the applicant to launch the application when it did. In effect the applicant is seeking final relief and given the absence of prejudice to the respondents it would serve little purpose re-enrolling the matter again. Though not decisive, another consideration is that it is important that the employment status of the individual applicants be clarified so as to determine whether their employment contracts with Sisonke remain intact or whether they have been transferred to Medtronic by operation of law.

Background

The LSA outsourcing arrangement between Medtronic and Sisonke

[3] In 2012 Sisonke and Medtronic entered into a logistics services agreement ('the LSA'). In terms of the LSA Sisonke was to "provide warehouse and warehouse management services (including goods in, stock management, order management, goods out and value-added services in respect of products/materials imported by Medtronic)". The applicant was obliged to provide the services in question in respect of all Medtronic's products as specified in an annexure to the agreement. Sisonke is a logistics company providing "logistics solutions to the public and private sector".

[4] In terms of the LSA, certain IT systems including specific hardware and software, racking equipment and five permanent staff were transferred to Sisonke by Medtronic. Although certain employees were excluded from the transfer due to specific operational requirements of Sisonke, the entire business unit and infrastructure transferred to it. Medtronic agrees that Sisonke provides warehouse and warehouse management services to it but denies that Sisonke runs its entire logistics and warehouse function.

[5] It might be arguable that when the LSA was concluded and when staff and equipment were transferred from Medtronic to Sisonke pursuant to that agreement a transfer of a discrete part of Medtronic's warehousing and logistics function amounting to a transfer of an undertaking under section 197 occurred. The parties themselves do not agree whether the original transaction fell under section 197 or not. However, it is not necessary to determine if that was a consequence of the conclusion of the LSA for the purposes of identifying the legal nature of the operational changes arising at the termination of the LSA, which is the subject matter of this application.

Termination of the LSA between Medtronic and Sisonke

[6] On 2 February 2017 Medtronic notified Sisonke that it was terminating the agreement with effect from 21 August 2017. Sisonke claims that in April an agreement was concluded in terms of which Medtronic would reabsorb the

previously outsourced business. Sisonke argues that, this agreement entails the transfer of the logistic and warehousing portion of Medtronic, from it back to Medtronic with effect from 21 August. It claims that this is the same business Medtronic transferred to it in 2012. However, Medtronic denies concluding any such agreement and there is no evidence of written confirmation of the same. As at the date of the termination of the contract, Sisonke employed the individual respondents and seven temporary employees to fulfil its obligations under the contract with Medtronic.

[7] Medtronic does concede that certain upright storage baskets are being returned to it at the end of the contract and the shelves used by Sisonke to store long products horizontally, though there is a dispute whether the latter shelving was returned at the insistence of Medtronic or Sisonke. In any event, Medtronic claims that it has no need for the flat storage shelving for long products as it has custom-built shelves for long products in its own warehouse. Of the approximately 9528 storage bin locations required for Medtronic's products, only 130 of those locations are required for long products.

[8] Medtronic claims that its products only occupied approximately 8% of the storage capacity of Sisonke's warehouse. Paradoxically, Sisonke does not admit or deny this contention nor does it put up an alternative version despite, one must assume, being in a better position than Medtronic to attest to this.

[9] Sisonke alleges that Medtronic will have to provide 9398 bin locations at its own warehouse, which Sisonke formerly had to provide at its warehouse facility to service the applicant's requirements. However, Medtronic states that these storage facilities will in future be supplied by itself at its own warehouse. The storage bins used by Sisonke do not form any part of any equipment which the applicant is returning to it for future storage purposes. At the end of the contract, Medtronic's products were loaded onto pallets in the existing storage bins in which they were stored by Sisonke and the bins were relabelled at Medtronic's request. Medtronic maintains that the relabeling of the boxes was simply an inventory control measure, and the use of the bins was simply to make the transfer of the

products to Medtronic easier. Moreover, empty storage boxes which contained no stock at the time products were transferred to Medtronic, are simply being retained by Sisonke.

[10] The storage and receipt of supplies by Sisonke on behalf of Medtronic ("goods in") was previously captured using Sisonke's own Delta software system. In turn that system provides limited information to Medtronic's own SAP system confirming that the goods have been received and stored. The SAP system in turn provides information to the Delta system concerning Medtronic's products dispatched to Sisonke's warehouse. How the stock was managed and moved around in Sisonke's warehouse was determined by Sisonke and captured on its Delta system.

[11] The equipment such as mechanical handlers and picker trolleys used to move stock around and retrieve stored products is being retained by Sisonke applicant. Similarly, the barcoding system used by Sisonke to identify stock location will not be transferred to Medtronic.

[12] In relation to the management and dispatch of orders ("goods out") from Medtronic's customers, the orders would be placed with Medtronic and captured on the Medtronic's SAP system. The SAP system would convey the order information to Sisonke's Delta system. The Delta system was then used to identify the stock locations of products in its warehouse and compile a schedule for pickers to retrieve the stock and package the orders for delivery. Once the items have been taken out of stock and ready for dispatch, Sisonke staff would enter a delivery number on the SAP system which would generate a delivery note. Sisonke would be responsible for arranging the delivery of the order using a courier service.

[13] The only item of computer hardware that will be returned to Medtronic is the SAP operated system used by Sisonke to generate delivery notes for Medtronic's customers. This consisted of four desktop computers, printers and a server unit. Medtronic states that its SAP system requires significant reconfiguration to enable it to run warehouse stock management at its own in-house distribution centre. The system of order management and the 'goods out' process applicable to Medtronic's products stored at Sisonke's warehouse was an integral part of Sisonke's own larger warehouse

operation and will not be transferred to Medtronic. The IT assets originally provided to Sisonke by Medtronic were solely for the purpose of generating and printing delivery notes and invoices before products were dispatched, but were not utilised to manage the storage of products in Sisonke's warehouse.

[14] Essentially, Medtronic contends that none of the assets previously used to receive, store or retrieve its products in Sisonke's warehouse are being taken over by it for use in its warehousing operation at its own distribution centre, though it appears that it will be able to use the IT equipment for despatching products to some extent. The IT equipment and software used to manage the warehousing of its products by Sisonke as well as the warehouse facility and equipment will remain with the Sisonke except for some upright storage equipment which is being returned to it, and the SAP hardware. Medtronic also submits that the limited assets that are being returned to it by Sisonke are not sufficient to continue the services provided by the applicant, which it will now conduct in-house. It maintains that after the termination of the services agreement, the applicant will still be able to use its existing technology and warehouse infrastructure to render warehousing services to Sisonke's other customers

[15] There is a dispute about whether only the second and third respondents were originally transferred to the applicant pursuant to the LSA or whether the fourth, fifth and sixth respondents were also transferred. However, the issue the court is required to decide is what the status of the current transaction is.

Evaluation

[16] What is not in dispute is that the receipt of goods, warehousing and dispatch of Medtronic's products previously performed by Sisonke under the LSA, will now be done in-house by Medtronic at its own distribution centre. Thus, Medtronic has internalised a service which it previously outsourced to Sisonke. Sisonke had previously incorporated Medtronic's warehousing and distribution function within its own operation.

[17] *Mr Nel* for the applicant argued that, essentially, exactly the same business is being conducted at Medtronic's premises that was being conducted by Sisonke on its behalf and that the only reason for the consolidation of warehousing operations is that, Medtronic took over a competitors operations and required more warehousing facilities. All that has transpired is that, the location of the operation has moved from Sisonke's warehouse to Medtronic's distribution centre. Even if the infrastructure changed, the essential character of the business undertaking remained the same. *Mr Frahm-Arp* conceded that Medtronic's distribution centre would be performing the same warehousing function that Sisonke provided under the LSA, but argued that the applicant could not demonstrate that the warehousing operation of Sisonke was transferred as a 'going concern' to Medtronic. The limited computer hardware and upright storage baskets returned to Medtronic are inadequate to permit Medtronic to replicate the warehouse operation formerly conducted by Sisonke on Medtronic's behalf. Insofar as some of the brown storage bins containing Medtronic's stock held by Sisonke are being used to transport the stock to Medtronic, that is for the practical convenience of moving the stock, not to utilise the bins for permanent storage of stock in Medtronic's distribution centre. Further, Sisonke's warehouse operation under which Medtronic's warehousing requirements were met, will continue to operate.

[18] Both parties referred to the cases of *SVA Security (Pty) Limited v Makro (Pty) Limited (a division of Massmart) and Others*[1] and *TMS Group Industrial Services (Pty) Ltd t/a Vericon v Unitrans Supply Chain Solutions (Pty) Ltd & Others*.[2] Medtronic contended that the facts of this matter were closer to the *SVA* case, whereas Sisonke contended they lay somewhat between the two.

[19] Section 197(1) of the LRA states:

> "In this section and in section 197A—

[1] (J720/17) [2017] ZALCJHB 137 (3 May 2017)

[2] ((2015) 36 *ILJ* 197 (LAC)

> (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."

(emphasis added)

[20] The Constitutional Court in *Aviation Union of SA v SA Airways (Pty) LTD & Others .(Aviation Union)* [3] said:

> "It must be emphasized that what is capable of being transferred is a business that supplies the service and not the service itself. Were it to be otherwise, the termination of a service contract by one party and its subsequent appointment of another service provider would constitute a transfer within the contemplation of the section. That is not what the section was designed to achieve as is apparent from its scheme, historical context and its purpose."[4]

[21] The *SVA* matter concerned the termination of a security service contract by a national retailer and the appointment of a new security service provider. The new provider invited former employees of the previous contractor to apply for appointments but the former provider contended the security operation it was running previously had been transferred to the new contractor under s 197. The new contractor employed about two-thirds of the former security workforce in any event. Although it was common cause that the new contractor would be rendering fundamentally the same service as its predecessor, it would be using its own equipment and there would be no transfer of assets between the two providers. The court decided that the matter ought to have been struck off for lack of urgency but, as the applicant sought a final order, the court saw no purpose in the matter being re-enrolled to decide the application and proceeded to decide the merits of the application. Thlothlalemaje J highlighted an essential feature of s 197 transfers, thus:

> "[25] Whether a business, including the whole or part of any business, trade undertaking or service, has been transferred 'by one employer to another

[3] 2012 (1) SA 321 (CC); (2011) 32 *ILJ* 2861

[4] *Aviation Union* at para 52

employer as a going concern' was answered by the Constitutional Court in *NEHAWU v University of Cape Town*[5] in the following terms:

> "The phrase "going concern" is not defined in the LRA. It must therefore be given its ordinary meaning unless the context indicates otherwise. What is transferred must be a business in operation "so that the business remains the same but in different hands". Whether that has occurred is a matter of fact which must be determined objectively in the light of the circumstances of each transaction. In deciding whether the business has been transferred as a going concern, regard must be had to the substance and not the form of the transaction. 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 assessment and therefore should not be considered in isolation." (Footnotes omitted.)

[22] The court found that the case was distinguishable from that of *TMS* on a number of grounds. Firstly, in *SVA* the applicant lost its security service contract to the competitor. Secondly, there was no transfer of any equipment, intellectual property or tangible/intangible assets between the two security service providers. Thirdly, what was taken over by the new contractor was merely the provision of service to the retail client, not the business of the former contractor. Fourthly, the former security provider was at liberty to continue its business with other clients. Lastly, the mere fact that a number of employees of the first contractor were employed by the second partly as a result of the client's intervention did not in and of itself mean that a section 197 transfer had occurred.[6]

[23] Superficially, there is a factual similarity between this matter and the situation in *TMS*, in that a third party ('Unitrans') had been contracted to operate the warehousing and distribution functions of the client ('Nampak'). When that contract expired a new contractor ('TMS') was engaged to provide the same functions to Nampak. In this case, the client

[5] 2003 (2) BCLR 154; 2003 (3) SA 1 (CC); (2003) 24 *ILJ* 95 at para 56.

[6] *SVA,* paras [26] – [29]

(Medtronic) will conduct the operation itself in-house. In *TMS* the LAC confirmed that both contractors were engaged in providing a warehouse service to Nampak and that the warehousing service constituted a discrete business.[7] However, the LAC went on to describe another important feature of the warehousing operation in that instance, viz:

> "[31] ... At the date of the inception of its agreement with third respondent [Nampak], appellant [TMS] assumed the right to use third respondent's assets and infrastructure in order to continue to provide the same service to third respondent as it had previously been provided by first respondent. As Mr van Esch said in his answering affidavit, the warehouse services, which were presently performed by the appellant can only be performed at the production facility of third respondent. Thus, the services are 'performed at the very same site and fixed premises as the services that were performed by Unitrans in terms of the warehousing agreement'. Appellant was required to make use of the same equipment and IT systems that were previously employed by first respondent including forklifts, computers, printers, a computer system as well as other assets such as furniture.
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> [31] This uncontested evidence provided the basis by which to determine whether there has been a transfer of business as a going concern by an old employer to a new employer. The concept of a going concern is not a novel concept within South African law. For example, s 11(1)*(e)* of the Value Added Tax Act of 1981 refers to an enterprise 'which is disposed as a going concern'. The term 'going concern' is well known in comparative value added tax jurisprudence. The New Zealand High Court, in interpreting the equivalent concept in New Zealand legislation, which legislation formed the basis of the South African Value Added Tax Act, said the following about the meaning of going concern: 'The activity must be one which is handed over to the transferee in such a state that it may be carried on by the transferee if he so wishes.' *CIR v Smith's City Group Ltd* 1992 (14) NZTC 9,140 at 9,143.
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> [32] This dictum is particularly illuminating in the present case. The activity which was carried on by first respondent flowed from the relationship entered into between appellant and third respondent. The necessary facilities were handed over to the appellant in a state in which appellant

[7] *TMS* 208,para [30]

> was able to carry on the very same activity which had previously been conducted by first respondent. It performed these services on the premises of third respondent. It employed third respondent's computer systems and other equipment and carried on the same activity of warehousing described in the evidence provided by virtue of third respondent's Mr van Esch. This evidence justifies the conclusion that there was a transfer of a business as a going concern from the old employer to a new employer.
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> [33] This approach to s 197 is not novel. It flows from the decisions of the Constitutional Court in *NEHAWU* and *Aviation Union of SA* as well as two recent decisions of this court, *City Power* and *Hydro Colour Inks (Pty) Ltd v Chemical Energy Paper Printing Wood & Allied Workers Union* (2011) 32 *ILJ* 1625 (LAC) at paras 12-13 and para 16."[8]

(Emphasis added)

The LAC concluded that the business of warehousing Nampak's products was transferred as a going concern to TMS by Unitrans[9]

[24] In this instance, as in both the *SVA* and *TMS* cases, a discrete service performed by a third party ceases to be provided by that party in its entirety and the service is then performed by another entity, except that here the entity taking over the rendering of the service is the client, Medtronic. Unlike what happened in *SVA*, where no assets of the original contractor were going to be used by the new service provider operator, in this instance there are some assets which are being returned to Medtronic. These will be of some limited use in the warehousing operation at its own premises. Those items are the desktop computers used in dispatching products and the related software, albeit significantly modified according to Medtronic to be compatible with its own larger warehouse operation, and a portion of the storage bins (for upright storage of long items) that might be utilised in the relocated warehousing operation.

[25] I am not persuaded on the evidence that the bins used to transfer products to Medtronic will form an integral part of Medtronic's warehousing operation going forward. Apart from anything else, it is noteworthy that storage bins which happened to be empty, but which had been used to

[8] *TMS* at 208-209.

[9] *TMS* at 209, para [36].

store a particular product item, at the time the contract came to an end were not destined to be delivered to Medtronic.

[26] Importantly, the handover of those items to Medtronic by themselves will not enable Medtronic to simply continue running the warehousing operation Sisonke operated, even if one leaves aside the issue that the operation will now be conducted at different premises. Medtronic still had to install the necessary shelving, make provision for equipment for moving stock around the warehouse and devise its own system for managing the movement of products in the warehouse to replace the Delta system used by Sisonke. It is obvious from a consideration of these factors alone that what Sisonke handed over to Medtronic was nothing like an up and running warehouse operation, which merely was relocated to Medtronic's premises. Accordingly, I am satisfied that the termination of the LSA and the items and products dispatched by Sisonke to Medtronic consequential to the termination of the LSA did not entail the transfer of the whole or part of any business, trade, undertaking or service and accordingly did not amount to a transfer under s 197 of the LRA.

Costs

[27] There is no reason why the costs of this application should not follow the result, given that the parties to the litigation are essentially litigating over the consequences of their contractual arrangements, and the individual respondents did not oppose the application.

Order

[1] The matter is dealt with as one of urgency and the non-compliance with the rules for the conduct of proceedings in the Labour Court in respect of forms and time periods is condoned.

[2] The application for a declarator is dismissed.

[3] The applicant must pay the first respondent's costs.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	A J Nel instructed by Lee and McAdam Attorneys
FIRST RESPONDENT:	L Frahm-Arp of Fasken Martineau
SECOND AND FURTHER RESPONDENTS	No appearance