IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

LABOUR COURT

Reportable

Case no: J 720/17

In the matter between

SVA SECURITY (PTY) LIMITED	**Applicant**
and	
MAKRO (PTY) LIMITED A DIVISION OF MASSMART	**First Respondent**
FIDELITY SECURITY SERVICES (PTY) LTD	**Second Respondent**
CARLA BARNES & 329 OTHERS	**Third – Further Respondents**

Heard: **11 April 2017**

Delivered: **3 May 2017**

JUDGMENT

TLHOTLHALEMAJE J

Introduction

[1] The applicant, SVA Security (Pty) Ltd, approached this Court on an urgent basis to seek a declaratory order that it be determined that the termination of the Guarding Agreement between it and the first respondent (Makro (Pty) Ltd) (Makro) and the awarding of the contract to the second respondent (Fidelity Security Services (Pty) Ltd) (Fidelity), constitutes a transfer of an undertaking as a going concern as contemplated in the provisions of section 197 of the Labour Relations Act (LRA).[1]

[2] The applicant further seeks that the employment contracts of the third to further respondents be transferred automatically from it to Fidelity on the date of the transfer being 1 April 2017. Only Fidelity opposed the application.

Background

[3] The applicant is a privately owned entity, which provides security and related services, including but not limited to site guarding, offsite monitoring and other related security services to public and private entities. The applicant has a workforce of about 1347 employees within the Republic. The third to further respondents are its employees.

[4] Fidelity is also a privately owned security company, which provides *inter alia* cash solutions, guarding services, electronic solutions, parking management and specialised services.

[5] Makro, a division of Massmart Group is a privately owned enterprise and it trades as a retailer throughout the Republic. For the purposes of these proceedings, Makro was the principal provider of a security contract to the applicant since 2008 until 1 April 2017. The applicant provided security services to various retail locations of Makro and had provided a total of 330 security personnel in that regard.

[6] During December 2016, Makro invited existing security contractors including SVA to bid or re-tender for the guarding contracts at a national level. During

[1] Act 66 of 1995, as amended.

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January 2017, the applicant was notified by Makro that the contract it currently held and had tendered for had been awarded to Fidelity. The effect thereof was that with effect from 1 April 2017, Fidelity would assume all security obligations throughout all the Makro retail premises nationally.

[7] During 23 January 2017, Fidelity despatched written confirmation to the applicant regarding the awarding of the contract. In the latter titled **"ROLL OUT / TAKEOVER IN TERMS OF THE AWARD REGARDING PHYSICAL SECURITY SERVICES"** the following was recorded:

> ". . .
>
> Please be advised that we were advised by MAKRO that we were appointed by them to take over all current physical security services on their sites nationally.
>
> In this regard, we have been made aware that you are currently providing this service to MAKRO and thus you and your staff would be affected by this appointment. We therefore would like to invite all your current staff who are providing security services on this Contract and who may be affected by the appointment of ourselves, to apply for positions with our Company.
>
> In this regard, all applicants would be considered for employment should they meet the necessary requirements of ourselves.
>
> We have ensured that the process which we would embark on herein would be in compliance with the Labour Relations Act, Basic Conditions of Employment Act and the Sectoral Determination 6, and any other relevant legislation that may be applicable.
>
> . . ."

[8] The clear intention of this confirmation was to invite employees of the applicant, who were stationed at various Makro retail premises and who may have been affected by the termination of contract to apply for employment with Fidelity. The applicant however held the view that new contract between Makro and Fidelity constituted a transfer as contemplated in the provisions of

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section 197 of the LRA. It was contended that this view was fortified by its letter dated 25 January 2017 addressed to Fidelity, in which *inter alia* it was recorded that:

> "…
>
> …the termination of our contract for the provision of security services to Makro and the award of the contract to yourselves triggers the force, effect and application of section 197 of the Labour Relations Act, No. 66 of 1995, as amended (the "LRA"). For your ease of reference, we attach hereto a copy of section 197 of the LRA.
>
> It is trite law that in the aforesaid circumstances section 197 wholly applies, and the application thereof impacts Makro, SVA and yourselves.
>
> Accordingly, the contents of paragraph 3 of your aforementioned letter in that our staff members are to apply for positions within Makro violate, and are not in compliance with the provisions of section 197. In brief, the 'new employer' in terms of section 197 is Fidelity Security, who is obliged to accept the transfer of employment of all of our staff members as specifically provided for in the said section 197. This is most certainly our wish and intent as discussed with your Mr Denis Dreyer at a meeting held at Makro distribution Centre on Friday, 20 January 2017.
>
> …"

[9] In a letter dated 27 January 2017, Fidelity held the view that the provisions of section 197 did not find application in the current process and therefore the applicant's employees stationed at Makro ought to make themselves available for recruitment and selection. In a further letter dated 6 February 2017, from Fidelity addressed to the applicant, it outlined the selection and recruitment exercise to be undertaken and the minimum requirements that a candidate for employment ought to possess in order to be considered for employment. More importantly, Fidelity emphasised its view that the provision of section 197 did not find application.

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[10] Upon seeking legal advice, the applicant through its legal representatives sent a letter to Fidelity on 24 March 2017, again reiterating its position that a transfer as contemplated in terms of section 197 of the LRA had taken place, and implored Fidelity to reconsider its position. A draft section 197 agreement was also attached to this correspondence. In a written response on 27 March 2017, Fidelity's attorneys of record again disputed that the termination of the agreement amounted to a transfer as contemplated in section 197, and accordingly rejected any consideration of the draft section 197 agreement.

[11] It was common cause that as at the date of the hearing of this application, a total of 240 of the third to further respondents were employed by Fidelity following Makro's intervention and the recruitment process. In essence therefore, only 89 of the applicant's former employees remain affected by this dispute.

[12] The applicant nevertheless contends that its business at the sites operated by Makro will be transferred to Fidelity as a going concern and that should it capitulate, the third to further respondents would have to be retrenched as each of its operation operates as a unique entity on the premises of a client. It was submitted that it was the third to further respondent that stood to be prejudiced should they be not transferred on the principles set out in section 197.

[13] Fidelity in its answering affidavit denied that the cancellation of the guarding agreement between the applicant and Makro, and the conclusion of a similar written agreement with it constituted a transfer of a business as a going concern from the applicant to it. It was conceded that Fidelity would be rendering essentially the same security service as previously rendered by the applicant to Makro, but that it would be using its own equipment to do so. It was contended that that there would be no transfer of any security equipment or any other movable assets from the applicant to Fidelity.

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[14] Fidelity further conceded that some 240 of the individual respondents have been employed by it at the request of Makro, and that the remaining employees have either not applied for positions or are disqualified from doing so. Accordingly, it was submitted that the applicant with this application merely sought to foist its statutory and contractual obligations to pay severance packages to the individual respondents on Fidelity.

Evaluation

(i) Urgency

[15] Fidelity disputes that the matter is urgent. In the event that the Court accords the matter urgency, it was further disputed that there was a section 197 transfer. The principles applicable in urgent applications are trite. Rule 8 of the Rules for the Conduct of proceedings in the Labour Court provide that:

> "(1) A party that applies for urgent relief must file an application that complies with the requirements of rules 7(1), 7(2), 7(3) and, if applicable, 7(7).
>
> (2) The affidavit in support of the application must also contain—
>
> (a) the reasons for urgency and why urgent relief is necessary;
>
> (b) the reasons why the requirements of the rules were not complied with, if that is the case; and
>
> (c) if a party brings an application in a shorter period than that provided for in terms of section 68(2) of the Act, the party must provide reasons why a shorter period of notice should be permitted."

[16] It was common cause that the invitation to tender for the business was made in December 2016. On 23 January 2017, Makro awarded the tender to Fidelity. The applicant approached the Court with this application on 5 April 2017, and set the matter down for a hearing on 11 April 2017. This was now some 52 court days since the applicant was advised that it had lost the contract.

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[17] The applicant's contention was that the urgency arose on the basis that Fidelity refused to take over the employees' as a going concern on or before 1 April 2017. Unfortunately, however, the proverbial horse had already bolted at the time that this matter came before the Court, as the contract between Makro and Fidelity came into effect on 1 April 2017. It was only on 28 March 2017 that the applicant threatened to approach the Court with this application, and even then, it had been confirmed through various forms of correspondence that Fidelity did not consider the taking over of the contract as a transfer.

[18] It is accepted that parties need not needlessly approach the Court on an urgent basis if a dispute can be amicably resolved. However, in this case, any averments in regard to when attempts were made to amicably resolve the matter are vague. As correctly pointed out on behalf of Fidelity, a contention by the applicant that it had *"attempted to resolve the matter without further litigation"* is equally vague. As at the time that the contract was awarded to Fidelity, and upon the latter's response as early as 27 January 2017, it was apparent what its stance was on any allegations of a transfer. Thus any further engagements between the parties thereafter was futile.

[19] There is further no merit in the contention that the mere fact that the remaining employees would lose their jobs, or the fact that Fidelity had cherry-picked employees from the applicant on its own created urgency. The applicant knew of the consequences of the loss of the contract as early as 23 January 2017. As at that date, the applicant was equally made aware that Fidelity sought to invite the applicant's employees for positions. As shall further be illustrated below, the loss of employment as a result of the termination of the guarding contract, or the fact that Fidelity employed some of the applicant's employees does not imply that other employees not appointed remain remediless.

[20] In the light of the above, I am satisfied that the urgency claimed in this case is clearly self-created. It is trite that the longer it takes from the date of the event-

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giving rise to the proceedings, the more urgency is diminished.[2] Furthermore, the Court cannot accord a matter urgency in circumstances where the urgency claimed is self-created.

[21] Flowing from the above conclusions on urgency, the matter ought to be struck off the roll. It is however my view that since the applicant seeks a final order, no purpose would be served in placing the matter back on the roll. To that end, I intend to deal with the question whether there was a transfer as contemplated within the meaning of section 197.

(ii) Was there a section 197 transfer?

[22] Section 197(1) of the LRA provides that:

> "(1) In this section and in section 197A—
>
> (a) 'business' includes the whole or part of any business, trade, undertaking or service; and
>
> (b) 'transfer' means the transfer of a business by one employer ("the old employer") to another employer ("the new employer") as a going concern.
>
> (2) If a transfer of a business takes place, unless otherwise agreed in terms of sub-section (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 transfer continue in force as if there 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 the new employer; and

[2] *AMCU and Others v Northam Platinum Ltd and Another* (2016) 37 ILJ 2840 (LC) at para 26.

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(d) the transfer does not interrupt and employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer."

[23] Emanating from the above provisions, it is trite that for these provisions to find application, the three prerequisites, viz, (i) a transfer; (ii) of a business (the transfer must be of the whole or part of a business); (iii) as a going concern must be met simultaneously.[3]

[24] Whether a business, including the whole or part of any business, trade undertaking or service, has been transferred 'by one employer to another employer as a going concern' was answered by the Constitutional Court in *NEHAWU v University of Cape Town*[4] 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.)

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[3] *Aviation Union of South Africa & Another v South African Airways (Pty) Ltd and Others* 2012 (2) BCLR 117 (CC); [2012] 3 BLLR 211 (CC); (2011) 32 ILJ 2861 (CC); 2012 (1) SA 321 (CC) at para 44. (*Aviation Union)*

[4] 2003 (2) BCLR 154; 2003 (3) SA 1 (CC); (2003) 24 ILJ 95 at para 56.

[25] The applicant's basis for alleging that a transfer took place was that Fidelity would be providing an identical service in favour of Makro in accordance with the same services that it previously provided at the same premises, such as the operation of running the staff and providing the required security. It was contended that the order sought is materially in the same terms as granted in *Unitrans Supply Chain Solutions (Pty) Ltd & Another v Nampak Glass (Pty) Ltd & Others*,[5] where the termination of the warehousing agreement in that case between the first applicant and second respondent and the conclusion of an agreement for the provision of similar services by the second respondent was found to have constituted a transfer in terms of section 197 of the LRA. The Court in that case further found that the contracts of the third to further respondents had transferred automatically from the second applicant to the second respondent on the date of the transfer.

[26] The objective facts of this case are in my view distinguishable in that the applicant lost its contract of service to Fidelity. From a further examination of the substance of the transaction between Makro and Fidelity, I did not understand the applicant's case to be that there was a transfer of any equipment, intellectual property or any tangible/intangible assets from it to Fidelity to enable the latter to service the contract. There was therefore a mere cancellation of the contract of service with Makro, and what was taken over by Fidelity was the service, and not a 'business'. This was so in that upon taking over the contract, Fidelity would utilise its own equipment, assets and resources to service that contract. Thus, Fidelity would continue to seamlessly service the contract with Makro without any assets or equipment being taken over from the applicant.

[27] As it was correctly pointed by Counsel for Fidelity, it is trite that the termination of a service contract and the subsequent appointment of a new

[5] (2014) 35 ILJ 2888 (LC) at para 33, as confirmed 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).

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service provider does not *per se* constitute a section 197 transfer. This principle was confirmed by Jafta J in *Aviation Union*[6] in the following terms:

> "*Transfer*
> For the section to apply the business must have changed hands, whether through a sale or other transaction that places the business in question in different hands. Thus the business must have moved from one person to the other. The breadth of the transfer contemplated in the section is consistent with the wide scope it is intended to cover. Therefore, confining transfers to those effected by the old employer is at odds with the clear scheme of the section.
>
> But whether a transfer as contemplated in section 197 has occurred or will occur is a factual question. It must be determined with reference to the objective facts of each case. Speaking generally, a termination of a service contract and a subsequent award of it to a third party does not, in itself, constitute a transfer as envisaged in the section. In those circumstances, the service provider whose contract has been terminated loses the contract but retains its business. The service provider would be free to offer the same service to other clients with its workforce still intact.
>
> For a transfer to be established there must be components of the original business which are passed on to the third party. These may be in the form of assets or the taking over of workers who were assigned to provide the service. The taking over of workers may be occasioned by the fact that the transferred workers possess particular skills and expertise necessary for providing the service or the new owner may require the workers simply because it did not have the workforce to do the work. Without the protection afforded by section 197, the new owner with no workers may be exposed to catastrophic consequences, in the event of the workers declining its offer of employment."

[28] In this case, and as already indicated, no components of the applicant's business with Makro were passed on to Fidelity. Jafta J in a minority judgment in *Aviation Union* emphasised that although the definition of business in section 197(1) includes a service, "*it must be emphasised that*

[6] *Aviation Union* above n 3 at paras 46 – 8.

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what is capable of being transferred is the business that supplies the service and not the service itself".[7]

[29] To reiterate, only the service of a contract was taken over in this case, and not the applicant's business. The applicant is at liberty to continue with its business by providing similar services to other potential clients. The fact that some of the applicant's employees were taken over as a consequence of the intervention of Makro in this case cannot be indicative of a transfer. To hold otherwise would lead to untenable results in that if every time a mere contract of service is taken over by a new service provider, and the latter would be required to take over all the employees from the old service provider on the basis that a section 197 transfer has taken place, this would then imply that the old service provider can simply wash its hands off its employees after losing a contract. Clearly this scenario could not have been anticipated by the drafters of section 197 of the LRA, in view of its purpose, which is to safeguard security of employment.

[30] It is accepted that the provisions of section 197 are meant to protect the interests of employees where there is a genuine transfer. However, where there is no transfer within the meaning of section 197 as in this case, the affected employees, to the extent that the previous contract holder cannot find alternative positions for them as a result of the termination of the contract of service, are not in any event remediless. The provisions of section 189 of the LRA are available to them, and to the extent that the new service provider had cherry-picked amongst the old service provider's employees, those not appointed have remedies in terms of the provisions of Chapter II of the Employment Equity Act.[8]

[31] In conclusion, having had regard to the circumstances of this case, the nature of the contract that was terminated between the applicant and Makro, and the

[7] Id at para 52.

[8] Act 55 of 1998.

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new contract as entered into between Makro and Fidelity, I am not persuaded that the facts of that particular transaction constituted a transfer within the ambit of section 197 of the LRA.

[32] Fidelity sought a cost order in the event that it was successful. Having had regard to the requirements of law and fairness, I do not see any reason why the applicant should not be burdened with the costs of this application.

Order

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

1. The applicant's application is dismissed with costs.

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E Tlhotlhalemaje

Judge of the Labour Court of South Africa

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Appearances

For the Applicant:	Adv. AJ Nel
Instructed by:	Lee and McAdam Attorneys
For the Second Respondent:	Adv. MJ. Van As
Instructed by:	Blake Bester De Wet & Jordaan Attorneys

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