IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH

CASE NO.: P683/2010

In the matter between:

INDEPENDENT MUNICIPAL &

ALLIED TRADE UNION ("IMATU") **FIRST APPLICANT**

SA MUNICIPAL WORKERS

UNION ("SAMWU") **SECOND APPLICANT**

and

DEPARTMENT OF HEALTH:

EASTERN CAPE PROVINCE **FIRST RESPONDENT**

THE MEC FOR HEALTH:

EASTERN CAPE PROVINCE N.O. **SECOND**

RESPONDENT

THE MEC FOR LOCAL GOVERNMENT:

EASTERN CAPE PROVINCE N.O. **THIRD RESPONDENT**

SA LOCAL GOVERNMENT

ASSOCIATION **FOURTH RESPONDENT**

CACADU DISTRICT MUNICIPALITY **FIFTH RESPONDENT**

AMATHOLE DISTRICT MUNICIPALITY **SIXTH RESPONDENT**

Judgment

Molahlehi J

Introduction

[1] This matter was conducted by way of a telephone conference between Johannesburg and Port Elizabeth on the 15th December 2010. After considering the written submissions made by the parties and listening to the submissions made by their respective counsels, this court made an order dismissing the urgent application. In terms of the application the applicants sought an order in the following terms:

> *"2.1 declaring the proposed transfer of employees currently employed in the primary health care services rendered by municipalities in the Eastern Cape Province to the provincial government to be in breach of the provisions of section 197 of the Labour Relations Act 66 of 1995 ("LRA");*

2.2 *interdicting and restraining the Respondents from engaging directly with the Applicants' members regarding the proposed transfers;*

2.3 *directing the Respondents not to proceed with the proposed transfers unless and until the Applicants have concluded an agreement as contemplated by section 197(6) of the LRA;. . .”*

The application was opposed and the respondents raised number preliminary points. The reasons for the order are set out below.

The parties

[2] The applicants are both trade unions registered as such in terms of the Labour Relations Act 66 of 1995 (the LRA).

[3] The first respondent is the Department of Health of the Provincial Government of the Eastern Cape. The second and third respondents are Members of the Executive Council in the Eastern Cape Provincial Government, responsible for the portfolios of health and local government respectively.

[4] The second and third respondents are Members of the Executive Council of Provincial Government, responsible for the portfolios of health and local government respectively.

[5] The fourth respondent is the South African Local Government Association (SALGA), an association registered as an employers' organization in terms of s96 of the LRA and represent all the municipalities in the province in deliberations at South African Local Government Bargaining Council (SALGA). The fifth and sixth respondents are local government structures incorporated in terms of the Municipal Structures Act no 7 of 1998.

The case of the applicants

[6] In essence the order which the applicants seek is not different to the one they sought when this matter came before this court on the 23rd November 2010 (that application will in this judgment be referred to as "the first application"). On that day the court after considering the papers before it and submissions made by both Mr Grogan and Mr Kroon, for the respective parties struck the matter from the roll due lack of urgency and also because in its view the applicants had other satisfactory remedies. The reasons for that order was latter made in the unreported case of *Independent Municipal Trade Union and another v Department of Health: Province of the Eastern Cape and others under case number P634/10.*

[7] It would seem that the reason why the applicants have launched this application after the earlier order was made by this court is that they have since placed the respondents on terms by requiring them (the respondents) to state whether or not they were contemplating transferring the affected employees to the province and whether they intends doing so on terms and conditions as applicable to the affected employees whilst they are in the employ of the municipalities. According to the applicants at the time of launching this application the first respondent had failed to respondent the said query. The letter placing the fifth respondent on terms was addressed to the state attorney and not to the first respondent.

[8] The reasons for urgency are stated in the applicants' founding affidavit as follows:

> "*12. . . the proposed transfer in terms of Section 197 of the LRA of the employees currently employed in the primary health care services rendered by the municipalities in the Eastern Cape, to the provincial government of the Eastern Cape . . .is intended to take place on 1 January 2011.*
>
> *13. As the date of implementation is imminent, this*

matter is self-evidently urgent. A determination regarding the various issues set out herein below must be made before 1 January 2011 if the Applicants and their members are not to be irretrievably prejudiced.

14. *As far as the Applicants are concerned, the right at issue is their constitutional right to bargain collectively. As far as their members are concerned, their rights at issue are their right to be represented by the unions of their choice, their constitutional right to fair labour practices, and their common law right to work for their present employers until their employment is (awfully terminated or their contracts are lawfully transferred in terms of section 197 of the Labour Relations Act 66 of 1995.*

15. *As will appear below, it is now dear that the Respondents are intent on proceeding with the transfers notwithstanding their obligation to reach*

agreement with the Applicants if the terms and conditions of affected employees are altered by the transfer. This application is intended to anticipate and prevent what would be a patently unlawful transfer of the contracts of employment of the affected employees.

16. *If the Applicants are not granted the interim relief sought, the Applicants will be confronted with a fait accompli. This will result in unnecessary and wasteful litigation which must result in the transfers being reversed in due course. The present application is aimed at preventing that undesirable result.*

17. *When this matter was launched on an urgent basis on 23 November 2010 the Applicants were unable to state with certainty whether the Applicants were indeed intent upon changing the affected employees' terms and conditions of employment upon their transfer to the Provincial Government. As appears below, the Applicants are now in possession of documents which place that issue beyond*

doubt.

18. *Since the Applicants finally became aware of the Respondents' intention to proceed with the transfers only on or about 22nd November 2010 they were unable to have the matter set down on the ordinary role before 31 December 2010, the date of the proposed transfers. The current application was launched on or about 1 December 2010, the earliest date on which the Applicants could acquire the necessary approval to proceed, to instruct our attorney, and to brief counsel.*

19.1 *I am advised by the Applicants attorney of record, that the Initial short period of service was the result of advice from the Registrar of the matter should be set down on 23 November 2010.*

20. *In addition, since the matter was removed from the roll by the Honourable Mr Justice Molahlehi on 24 November 2010, the Respondents have been put on terms and salient information has been requested. All the Respondents need do is state whether they indeed contemplate transferring affected*

employees on different terms and conditions, or whether they intend concluding the agreement contemplated by the LRA before they take over the PHC services as a going concern. I confirm that to date they have not done so.

21. Given the specific issues raised by this Application, it is respectfully submitted that the Respondents have been give more than sufficient time to place their case, if any, before the above Honourable Court.

22. It is respectfully submitted that the facts set out below establish at the very least a prima facie right to the relief sought, that the balance of convenience favours the applicants, and that they have no adequate alternative relief."

[9] The applicants further argue in their heads of argument that the matter is urgent because the date of the transfer is to take place in a matter of days, that they have consistently sought to negotiate the issue of the transfer with the first respondent, and that it was only sometime in October that they learned of the first respondent's fixed intention to proceed with the

transfers and that the employees' terms and conditions of employment will indeed change once the transfer takes place.

[10] In his argument in support of the applicants' case Mr Grogan, relied strongly on the decision in the case *SAMWU & another v SALGA & others [2010] 8 BLLR 882 (LC).* He emphasised in particular paragraph [14] of that judgment where Van Nieker J in determining whether the applicant in that matter was entitled to the relief sought had the following to say:

> "*Secondly, the relief sought by the applicants raises the nature of the relationship between section 197(2) and (6). In my view, section 197(2) clearly establishes a "default" position. In other words, provided that the nature of a transaction is such that it falls within the ambit of section 197, the consequence of an automatic and obligatory substitution of the transferor employer for the transferee can be avoided or varied only by an agreement that complies with section 197(6). The dual purpose of section 197 was explained in the NEHAWU judgment, supra – it serves to protect workers against loss of employment, but also to facilitate the transfer of businesses. Section 197(6) provides additional flexibility to both parties. For example, workers who*

do not wish to be employed by the transferee employer may elect not to be transferred and to accept a severance package from the transferor. The limits on the variation of the consequence of an automatic transfer of employment contracts are determined only by the relevant parties' capacity to agree. However, while section 197(6) establishes scope for flexibility, it also provides safeguards. It does in the cross-reference to section 189(1), and effectively establishes a strict hierarchy of bargaining partners with whom "contracting-out" agreements may be concluded. This provision is clearly intended to protect the interests of affected workers and in particular, to ensure that any rights under section 197(2) that are compromised are compromised only after a process of negotiation with a properly authorised and legitimate representative body. Although the process in this instance is one of negotiation rather than consultation, I see no reason to depart from the principles established by this Court under section 189 that recognise a hierarchy of persons and bodies, the first relevant to the particular factual circumstances excluding all others that rank below it (see Sikhosana (supra) and Maluleke & others v Johnson Tiles (Pty) Ltd (2008) 29 ILJ

2606 (LC) [also reported at [2008] 11 BLLR 1065 (LC). In the present instance, it is common cause that the unions were parties to collective agreements with the municipalities that entitled them to be consulted in the event of a proposed retrenchment. That being so, the respondents were obliged to seek the agreement of the unions to vary the consequences of the application of section 197 to the transaction. They sought that agreement, but failed to secure it. In these circumstances, the default prevailed and the Department was substituted, by the operation of law, as the employer of those employees who provided primary health care services for the municipalities. In my view, this occurred in June 2006, on the date that the services were transferred (see Van der Velde v Business & Design Software (Pty) Ltd & another (1) [2006] 10 BLLR 995 (LC).”

[11] In *SAMWU*’s case the court was faced with the situation where the union challenged the validity of the agreements concerning the transfer of the employees from the municipalities to the province which were concluded with the individual employees. Although the transfer of the employees would be in terms of s197 of the LRA, both the municipalities and the province were of the view that negotiating the transfer in terms of

s197(6) of the LRA was impracticable. SAMWU was opposed to the transfer been effected on terms and conditions, different to those the employees enjoyed whilst employed by the municipalities. A year later, SALGA announced that the transfer of the employees would be dealt with on *"an individual basis."* Thereafter, SALGA and the province concluded agreements with the individual employees regarding their transfers to the province. It is those agreements which the municipalities concluded with the individual employees that the union sought to have nullified. The union brought the application apparently some 5 (five) years after the conclusion of the contracts.

[12] The Learned Judge in *SAMMU* went further under paragraph [18] of his judgment to says:

> *"It is also no defence for the respondents to claim that the consequences of section 197 were impracticable, or somehow not practically capable of implementation. The fact that this may have been logistically difficult to manage the employment-related components of the transfer did not justify the recourse to negotiating section 197(6) agreements at individual level. In short, in the absence of an agreement concluded with the unions prior to the transfer to vary section 197(2), whether this was the consequence of a refusal to*

bargain or otherwise, the respondents had two choices – to abandon the transfer or revert to the default represented by section 197(2) and seek post-transfer, through a process of collective bargaining, to align the conditions of employment of the transferred employees with those of existing incumbents."

[13] Mr Grogan further argued that what the applicants were seeking to do with this application was to influence the changes that will occur when the transfer takes place. Any alternative remedy that may exist after the transfer will be *expose factor* and will not assist the applicants as it will not address the issue of failure to negotiate by then respondents.

The case of the respondents

[14] The case of the first respondent is that during 2002, the first and the fifth respondents (the municipalities) concluded an agreement known as a Partnership Performance and Service Agreement (PPSA) in terms of which each municipality was appointed to provide, within the geographical area of its municipal jurisdiction, the primary health care services previously provided by the first respondent. The PPSA further required the municipalities to appoint staff to provide that service.

[15] The PPSA came into operation as from April 2002, and remained in force for a year. Since then the PPA have been renewed continuously on

a yearly basis. The current one is to expire at the end of December 2010. The first respondent is responsible for all the costs associated with the service including payment of the salary of staff delivering the service.

[16] The first respondent concedes that it has informed the municipalities that it intends not to renew the PPA when they expire at the end 2010. The first respondent has since then engaged the municipalities in discussions about the transfer of the function including the staff and the understanding reached between the parties is that the transfer of the affected employees would take place in terms of s197 of the LRA. The intension is to have the transfer effected as from the 1st January 2011, which will also bring to the end the existence of the PPA. In this respect the first respondent states the following in its answering affidavit:

"1. Significantly and as appears from the attached document, the Section 197(7) Agreement provides inter alia as follows:

*1.1 Affected employees will be transferred from Fifth Respondent to First Respondent "**in accordance with terms and conditions of their current employment"** ;*

1.2 The transfer of affected employees on this basis will include their entitlement to the following:

1.2.1 The salary, salary scale, rank, notch, allowances, bonuses, hourly tariffs and rates applicable to the affected employees will remain unchanged;

1.2.2 The continuity of employment of the affected employees shall not be affected by the transfer;

1.3 The responsibility for the payment of accrued leave shall be assumed by First Respondent up to a maximum of 48 days, and any remaining balance will be encashed;

1.4 Any entitlement to long service awards accruing prior to date of transfer will be paid by Fifth Respondent before transfer;

1.5 Fifth Respondent will pay each affected employee a pro rata bonus on his/her last day of service with Fifth Respondent;

1.6 The responsibility for payment of all benefits which fall due following upon transfer will become the responsibility of the First Respondent;

1.7 Whilst it is intended that affected employees will be placed in posts with appropriate public service rank, designation and salary scale following upon transfer, affected

employees will retain their existing salary notch and salary scale as "contractual to encumbent" in the event that their salary is higher than the maximum notch provided for in First Respondent's grading system.

1.8 Affected employees will have the option of retaining their accrued benefits in their existing Retirement/Pension Funds or alternatively transferring these to the Pension Fund available to First Respondent's employees, subject to the provisions of Section 197(4) of the Act.

1.9 In the event that existing employees of First Respondent have additional benefits and/or allowances which do not form part of the conditions of service of affected employees, it is intended that the affected employees be accorded these additional benefits."

[17] The first respondent further says in its answering affidavit that:

"2 On the contrary, and during the course of "road shows" held by First Respondent during the course of the past months in order to inform affected employees of the effects of the transfer, First Respondent has been at pains to stress:

2.1 That affected employees will retain the same posts, designation and grade and will be transferred with their existing employment contracts in place;

2.2 That this would remain so for the "transitional period" of twelve months;

2.3 *That changes to the conditions of service contemplated by First Respondent "would not be made unilaterally and that adequate consultation on these matters would be undertaken".*

[18] In addition to the above the first respondent states in its answering affidavit that there is no intention whatsoever to require of the affected employees that upon transfer, they are to accept changes to their existing conditions of service. The first respondent goes further to say:

"3. In addition and in any event, if consensus is not reached between First and Fifth Respondents on the matter contained in the Section 197(7) Agreement, this will not alter the fact that transfer of the contracts of affected employees will nevertheless proceed by operation of law in accordance with the provisions of Section 197(2) of the Act, and they will in addition be afforded the protection extended by Section 197(8) of the Act."

[19] The first respondent in the confirmatory affidavit by the Human Resource Manager which was filed in the morning of this hearing states:

> *"I wish to stress that it is envisaged that all employees who fall to be transferred on the same terms provisions of section 197 of the LRA will be transferred on the same terms and conditions of their present employment."*

The legal principles

[20] The legal requirements to be satisfied in order to succeed in an urgent application are as follows: *(a)* the applicant has to either show a clear right or a prima facie right in the case of interim relief; (b) a well-grounded apprehension of irreparable harm if the relief is not granted on an urgent basis, (c) that the balance of convenience favours the granting of the relief on an urgent basis; and (d) that the applicant has no other satisfactory relief. See *Jonker v Wireless Payment Systems CC (2010) 31 ILJ 381*. And in terms of rule 8 of the rules of the court a party seeking an urgent relief has to set out the reasons for urgency, and why urgent relief is necessary.

[21] The case of the applicants is based on the reading of s197(2) with that of s197(6) of the LRA. Section 197(2) provides that:

"(2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6) -

(a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;

(b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;

(c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and

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

And s197(6) provides that:

> *"(6)(a) An agreement contemplated in subsection (2) must be in writing and concluded between -*
>
> *(i) either the old employer, the new employer, or the old and new employers acting jointly, on the one hand; and*
>
> *(ii) the appropriate person or body referred to in section 189(1), on the other.*
>
> *(b) In any negotiations to conclude an agreement contemplated by paragraph (a), the employer or employers contemplated in subparagraph (i), all relevant information that will allow it to engage effectively in the negotiations.*
>
> *(c) Section 16(4) to (14) applies, read with the changes required by the context, to the disclosure of information in terms of paragraph (b).*

[22] It is clear from the language of s197(2) that by operation of the law a transfer of a business as a going concern means that the old employer is substituted by the new employer and that the new employer assumes all the rights and obligations that existed between the old employer and its employees prior to the transfer. In other words the terms and conditions of employment that existed between the old employer and its employees prior to the transfer remain in place even after the transfer. The automatic retention of the *status quo* in as far as the terms of conditions applicable prior to the transfer can only be altered in compliance with the provisions of s197 (6) which provides that the altering of the terms and conditions of the employees by the new employer can only be done by agreement between the parties including the representatives of the employees.

Evaluation

[23] This application like the first one turns around the issue of urgency. The key issue is whether the applicants have discharged their duty of showing that the matter is urgent and whether or not it deserves an urgent relief. In the same way as the first application this matter turns on two aspects of the requirements of urgency which are interrelated. The first issue is whether, the facts as presented mainly by the applicants support the contention that the matter is urgent and therefore justify jumping the queue. The second

aspect which is also an aspect of the urgency concerns the issue of whether there are no other satisfactory remedies available to the applicants in the event that the respondents effect the transfers in contravention of the provisions of s197 of the LRA.

[24] In my view, this matter is not urgent firstly because the applicants have been aware for the past three years what the intentions and plans of the respondents were regarding the transfer of the health services to the first respondent. And secondly because on their own version they were already aware of the plans of the fifth and sixth respondents since the meeting of the South African Local Government Bargaining Council (the SALGBC) which was held on the 24th January 2010. At that meeting the applicants raised their concerns about the stand taken by the two respondents but did nothing since then until the launch of their first application.

[25] The other important date in as far as the urgency of this matter is concerned is the 14th July 2010. On that date the applicants addressed a letter to the first respondent wherein, on a proper reading of that letter it is clear that the applicants were quite aware of the stand and the approach adopted by the first respondent in as far as the issue of the transfer of the health services were concerned. In essence the applicants in that letter placed the respondents on terms as concerning the issue of the transfer of

their members. In this respect the applicants states very clearly that they would approach the High Court or the Labour Court for an injunctive relief if the respondents did not *"immediately cease this unlawful practice*"- referring to the transfer of the health services. The applicants had at that stage clearly and unambiguously declared the conduct of the respondents in relation to the transfer of the health services to be unlawful. The difficulty facing the case of the applicants is that there is no explanation as to why in the light of this, nothing was done until the first application which was heard on the 23 November 2010 was launched.

[26] On the 20th September 2010, the first respondent sent a circular to all the municipal managers in the province informing them that the transfer of the health services would take place as from the 1st January 2010. Although the applicants do not take the court into their confidence and state the date when they received the circular, the probabilities suggest that they received it sometime prior to the launching of the first application and that must have been in October 2010. The circular is attached to their papers.

[27] The first application which was substantially based on the same evidence as that of the present one was struck off the roll for lack of urgency. The applicants say the matter has subsequently become urgent because they receive information on the 22nd November 2010, a day before the hearing

of the first application indicating that the first respondent had held a meeting where the affected employees were informed of their eminent transfers. That meeting which was part of a road show was held on the 3rd November 2010. This is another instance where the applicants as parties seeking the indulgence of the court to condone the non compliance with the general time frame for bringing the matter before this court do not explain why if their members were told about the transfers on the 3rd November 2010, they only came to know about what was said at that meeting on the 22nd November 2010. Another weakness in the applicants' case is that despite this information having come to their attention a day before the hearing of the first matter they do not explain why same was not disclosed to the court on that day. It is thus my view that all this is a fabrication or an attempt at misleading this court. Thus the letter of the 22nd November 2010, wherein the applicants sought to put the respondents on terms in as far as the transfers were concerned was nothing but an attempt at creating unfounded urgency where none existed.

[28] In the light of the above discussion the view expressed in the earlier judgment of this court still stands. Thus the case of the applicants stands to fail again on the ground of lack of urgency alone.

[29] In addition to the above and as part of the aspect of the requirements of urgency, I still stand by the view expressed in the first application that the applicants have other satisfactory remedies in the event the respondents fail to comply with the requirements of the provisions of s197 of the LRA.

[30] I do not agree with the proposition that the case of SAMWU is illustrative of the lack of satisfactory remedies *ex post facto* the transfer of the employees. The facts of that case are different to the present one in that in that case the union sought an order declaring the agreement signed with the individual employees invalid. The application in that matter failed because of the time that the applicants took in seeking their relief, which was five years after the event. A different conclusion would probably have been reached had the union brought its claim timeouosly.

[31] On the basis of the above I do not deem it necessary to deal with the other points raised by the respondents.

[32] As concerning the costs I am of the view that whilst there is no specific relationship between the first respondent and the applicants, a costs order will have an adverse effect on the relationship with the municipalities and at another level the relationship between the parties including the first respondent exists as part of the public sector. I arrived at this conclusion

after pondering for a while on the issue of costs because of the unsatisfactory manner in which the applicants approached this matter. I was even more concerned with the non disclosure of some information regarding certain aspects of the case of the applicants.

[33] It was accordingly on the basis of the above that the applicants' application was dismissed with no order as to costs.

Molahlehi J

JUDGE OF THE LABOUR COURT

Date of Hearing :15 December 2010

Date of Judgment : 23 December 2010

Appearances

For the Applicants : JG Grogan, instructed by Wheeldon Rushmere & Cole.

For the First Second Respondents: CK Mey instructed by State Attorney.

For the Fifth Responndent: SC Rorke SC, instructed by Chris Baker and Associates.

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