IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN DURBAN)

Case no: D 396-20

Reportable

In the matter between:

NUMSA obo MEMBERS	**Applicant**
and	
SACKS PACKAGING (PTY) LTD	**First Respondent**
SAFETY WORKPLACE BUSINESS SOLUTIONS (PTY) LIMITED	**Second Respondent**
ADCORP WORKFORCE SOLUTIONS	**Third Respondent**

Heard (Zoom): **1 September 2020**

Judgment delivered: **8 September 2020**

Summary: Section 197 of the LRA - Transfer of business - Definition of 'going concern' -Declarator sought - Employer outsourcing non-core functions and purporting to effect a transfer of business - However employer ran integrated production process and some of the transferred employees also performed certain core functions - Held that: a factor in assessing whether a business is transferred as a 'going concern' is whether the outsourced functions are performed by a discrete and stable set of employees prior to transfer. *In casu*, court declared that transfer was not of a 'going concern'.

JUDGMENT

WHITCHER J

[1] The Applicant seeks on an urgent basis relief in the following terms:

1.1 That it is declared that the transfer or purported transfer of the contracts of employment of the Applicant's members from the First Respondent to the Second Respondent is invalid and unlawful.

1.2 That the First Respondent is interdicted and restrained from transferring or purporting to transfer the contracts of employment of any of the Applicant's members to the Second Respondent in terms of Section 197 of the Labour Relations Act, 1995 or for any other cause.

1.3 Costs of suit.

[2] The application was launched on 27 August 2020 for a hearing at 14h00 on 1 September 2020.

[3] The First Respondent filed opposing papers which challenges the urgency and the merits of the application. The Second Respondent did not oppose the application. It filed a notice that it will abide by the court's decision.

Urgency

[4] I am not persuaded that there was a belated approach by the Applicant for relief. The appropriate trigger occurred on 17 August 2020 when the First Respondent gave a definitive indication of an intended transfer on 1 September 2020. The Applicant then reasonably sought legal advice and copies of the transfer agreements. It did this on 19 August 2020. The agreements were only provided on 24 August 2020 and this application was filed on 27 August 2020.

Interdictory relief

[5] I also reject the claim that the application is defective because the transfer agreement came into effect on 1 September 2020. The Applicant also seeks that the transfer be declared invalid and unlawful.

The facts

[6] The First Respondent manufactures bags for packaging. Its production process involves receiving delivery of paper in reels as its raw material. These reels are then delivered by drivers into the warehouse. The paper is then taken to the

printer, Sacks Line and SO department by inbound grab drivers. The manufactured bags are packed onto a pallet by packers or machines. Outbound drivers then take pallets to a wrapping and strapping machine and thereafter the pallets are stored in the finished goods warehouse by outbound hysters and reach drivers. The outbound drivers then load trucks based on customer orders and outsourced transporters will then deliver the final product to customers.

[7] The First Respondent decided to outsource all those functions which were not related to the actual manufacture of bags. It characterises the packing and movement of the goods after being packed by various employees as non-core work. The First Respondent claims the packing and movement of bags constitutes a discrete business capable of being transferred to another entity on the basis that these processes require their own specific raw materials and certain machinery to conduct this function.

[8] On 20 August 2020, eleven days before the transfer was to take place, the First Respondent concluded a transfer of business agreement with the Second Respondent and a day later, on 21 August 2020, a Service Level Agreement was concluded. As indicated above, the conclusion of these agreements, which were brought to the attention of the Applicant on 17 August 2020, triggered the launching of this application which was heard on 1 September 2020, the date on which the transfer of business was to happen. The transfer was to affect 96 employees.

Evidence and argument

[9] The Applicant contends that a transfer of business as a “going concern” as envisaged by Section 197 of the LRA will or did not occur. This claim rests partly on the fact that the transferred employees will continue to perform exactly the same functions on the First Respondent’s production line as they have previously performed. The First Respondent also runs an integrated production line. The employees carry different job titles, but the Applicant contends that their positions are interchangeable and general workers can and do perform checking and packing functions at various stages of the production line. The Applicant also contends that some forklift drivers perform functions within both the ‘core’ and non-core’ areas of the plant.

[10] The First Respondent counters that the packing and movement of goods is a distinct process which is performed at the First Respondent's premises and therefore is a function which can be removed from the ordinary day to day work of the First Respondent's employees and a service that can then be provided by an outsourced service provider. This service provider, the Second Respondent, is not a temporary employment service provider.

[11] I note that in terms of the service level agreement, the Second Respondent will lease all the equipment and machinery needed to perform the packaging service. The First Respondent will source the raw materials needed for the performance of the service and invoice the Second Respondent.

[12] While it concedes that it runs an integrated production line, the First Respondent contends that the packing and goods movement functions can be "split" from the core work of bag manufacture. It states that it has outsourced many other non-core functions over the years such as security, cleaning and information technology. The fact that the Second Respondent will still operate from the same premises does not mean it cannot be a separate business.

[13] On the allegation that some positions are interchangeable and that general workers can and do perform checking and packing functions at various stages of the production line, the First Respondent states that:

> *"There are employees that are employed within the business that predominately perform the packing function and these are the employees that will be transferred to the new service provider."*

[14] On the allegation that some forklift drivers perform tasks within the production process that the First Respondent has characterised as both core and non-core, the First Respondent states:

> *"It is denied that the forklift drivers are required to perform all the functions. The First Respondent will retain the drivers that feed the reels into the machinery however, the outbound process drivers will be transferred. The First Respondent is easily able to split these drivers with regards to the tasks that they predominately perform."*

[15] A backdrop to the Applicant's argument is that the purported transfer of business is a sham and that the Second Respondent will in fact act as little more than a labour broker while the employees in truth and in fact still answer to the First Applicant's managers. In support of this contention, the Applicant points to the service level agreement that it states does not contain the elements one would expect if there was a genuine transfer to an arms' length third party. At the time of signature, the machinery the Second Respondent would lease from the First Respondent to enable it to function as a business was not finalised, the exact nature of the services to be performed had not been described and a fixed price for the service had not been set.

[16] The First Respondent replies that the lease of machinery has since been agreed and that it is unnecessary to set out in explicit detail what services it requires from the Second Respondent as these are known to the parties. The agreement may not be the most comprehensively drafted one but no ulterior purpose can be inferred from its terms. It is an agreement that can be entered into and complied with by both of the parties.

Analysis of evidence and argument

[17] A determination of whether a business was transferred from one employer to another as a going concern is a fact-driven exercise.

[18] At the very least, the facts must meet the following legal requirements for the application of s197 of the LRA to occur:

(i) there must be a transfer by the old to the new employer,

(ii) what must be transferred is the whole or part of the business; and

(iii) the whole of part of the business must be transferred as a going concern.[1]

[1] *Imvula Quality Protection (Pty) Ltd and Others v University of South Africa [2018] 12 BLLR 1151 (LAC); (2019) 40 ILJ 104 (LAC)*

[19] In this matter, the key issue for determination is whether the identified "non-core" functions the First Respondent wishes to outsource to the Second Respondent is "a going concern".

[20] In *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town and Others* (*NEHAWU)*, the Constitutional Court found that:

> 'In deciding whether a 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 the workers are taken over by the new employer, whether customers are 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.'[2]

[21] In *Imvula Quality Protection*[3], the Labour Appeal Court stated further:

> 'To constitute a transfer of a business as a going concern, not all the assets of the business need to be transferred, nor do all the relevant employees. But what must be transferred are those assets and personnel that are essential to the business as it was operated by the transferor. The transfer allows the actual business or a clearly demarcated portion thereof to operate seamlessly after the transfer.'

[22] The First Respondent's approach is that non-core functions can be identified and shifted to the Second Respondent. It has explained where it regards the border to lie between core and non-core functions. This is the border between manufacture of bags on the one side and packing and transport of bags on the other.

[23] The issue in dispute comes down to this: is the conceptual and operational separation of core and non-core functions also a separation between businesses that are both a "going concern"?

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[2] [2002] ZACC 27; 2003 (3) SA 1 (CC) at para 56.
[3] Ibid

[24] The problem, as I see it, is that while the non-core functions are capable of being separated in terms of the production process, these functions were, at least in respect of some employees, not sufficiently separable in terms of the staff who performed these roles. When the First Respondent states that there are various employees that *predominately* perform functions within the manufacturing process that fall within either its core or non-core parts, this is in fact a concession that they also perform functions in the other zone.

[25] It is not the role of this court to pronounce on the commercial sense of a transfer of business. Part of a business may be validly transferred as a going concern even if a court thinks it will make no difference, be difficult to manage or even be impractical. However, this court is called upon to rule on whether a particular movement of business functions to the Second Respondent, with automatic legal implications on the contracts of affected employees, constitutes the movement of a going concern.

[26] In *Nehawu*, the court found that the list of factors to be taken into account when deciding whether a business is being transferred as a going concern is not an exhaustive list. On the facts of this case, in my view, one of the matters that strongly arises and should be considered is whether, prior to the transfer, the discrete functions to be transferred were in fact performed by a discrete group of employees.

[27] In response to the allegation by the Applicant that the production process was integrated in relation to the interchangeability of some of the staff who performed both core and non-core functions, the First Respondent stated that it sought to transfer to the Second Respondent, among this list, only those employees who predominantly performed non-core functions.

[28] First, it strikes me that, in defining "going concern", it is apt to also consider whether a fixed set of employees were in fact concerned with the work now to be transferred to another employer. If an employee spent 3/8ths of their capacity in manufacturing bags (core) and the other 5/8ths in packing (non-core), does the First Respondent's deployment of human capital before the transfer suggest that non-core work is really a going concern if it is outsourced?

I think the deployment of human capital over these two categories of work prior and up to the transfer tends to suggest not.

[29] Second, if some employees could be - and were - assigned tasks in either component of the company, the identity of those employees who now find themselves transferred out of the First Respondent, is something determined not solely by operational questions but also by the exercise of a managerial prerogative in assigning tasks. One of the historical concerns labour has with transfers of business is that the contracts of employees often move from a solid employer to one that is more precarious. For policy reasons and to curb mischief, I hesitate to endorse a definition of "going concern" that does not envisage as part of the "concern" a relatively stable set of employees who more or less perform only the functions of the business being transferred. Of course, each matter should be decided on its own facts but, *in casu,* it was clear that a significant number of the employees to be transferred could and did perform core functions when required to do so by the First Respondent. The First Respondent did not respond to the Applicant's allegation of substantial integration beyond stating that the employees to be transferred "predominantly" performed non-core functions. If this court had been told, for example, that 99% of their functions were non-core or that any core functions were negligible or immaterial, the answer may have been different. 'Predominance' as an answer leaves a fair amount of interchangeability in function on the table.

[30] Third, there seems to be a logical problem. The First Respondent assures the court that the non-core functions of the employees it will transfer are discrete and severable from the core work of the employees it will retain. It also states that, after their transfer to the Second Respondent, the transferred employees will longer spend any of their capacity at work attending to core functions. However, given that some of the transferred employees do perform core work (and vice versa), this suggests a change in the scope of work of some employees in both the core and non-core sections of the production process. All employees will now do only core or non-core work and not predominantly one or the other. Although not decisive on its own, this is another sign that perhaps the transfer was one of concept and function alone and not the transfer of an *in-practise* going concern. It is worth noting that had the First Respondent

crisply separated both function and human capital into separate components before purporting to effect a transfer of a business, its case in support of the transfer being of a going concern may have been more persuasive.

[31] In sum, I am not persuaded that the transfer between First and Second respondent was of a business as "a going concern". I had no problem accepting the First Respondent's claim that it is free to determine what its core business is and to streamline through outsourcing. I further had no difficulty accepting that conceptually and operationally it was able to make this distinction as falling between manufacture of bags on the one hand and packing and transport on the other. However, in relation to those employees who could and did work in both sections, the First Respondent could tell me no more than it sought to transfer those employees who predominantly performed non-core work. I was, thus, in the end unconvinced that what was being transferred was, in a fully practical sense, a going concern.

[32] There is no basis on the pleadings to authorise the transfer of those employees who did indeed perform only non-core functions and those who only predominantly did. With the transfer of the latter not passing muster, there is factually no going concern to transfer in respect of the former.

[33] Consequently, I find that no transfer of business in fact occurred on 1 September 2020.

[34] In closing, I do not place reliance on the Applicant's criticism of the terms of the Service Level Agreement in the finding I have made above. I accept the First Respondent's point that its lease of equipment to the Second Respondent, which would permit the latter to function as more than just a labour broker, was in fact in place at the date of hearing of this application.

[35] I do however, without making a finding that the Service Level Agreement was a sham, find it curious that no price for the service rendered by the Second Respondent was set. The applicable clause states:

"Services"

Sacks will make payment to SWBS monthly and on 33 days from receipt of an invoice being rendered, containing the normal company terms of trade services, in respect of the services rendered by SWBS in favour of Sacks as identified in Schedule A3." [clause 8]

[36] The First Respondent does not claim that the price of the service it would receive from the Second Respondent was subject to any separate, subsequent oral agreement. In its replying affidavit, the First Respondent counters the allegation that this is a suspicious oddity by saying: "clause 8.1 specifically sets out the fact that an invoice will be rendered regarding the services to be provided and that the First Respondent will attend to payment of same within a certain period of time." This answer still does not address the significant hole in its contract with the Second Respondent. I can appreciate how the lack of clarity on such a key term in any commercial agreement raised suspicions that the agreement was not truly an arm's length accord between truly independent parties. However, as stated above, I make no finding on this.

Order

1. The transfer or purported transfer of the contracts of employment of the Applicant's members by the First Respondent to the Second Respondent is invalid and unlawful.
2. The First Respondent is directed to pay the Applicant's costs of suit.

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Benita Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

APPLICANT:	Adv P Schumann, instructed by Brett Purdon Attorneys
FIRST RESPONDENT:	MacGregor Erasmus Attorneys