DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

11/06/2020
DATE SIGNATURE

THE JUDICIARY · REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Of interest to other judges

Case no: J3042/18

In the matter between:

PETER ALEXANDER CHRIS FULTON **First Applicant**

JOHANNA JACOBA GERRINDINA FULTON **Second Applicant**

MARCEL WILLEM VERBEEK **Third Applicant**

and

VITA NOVA SELECTION PLANT (PTY) LTD
[Registration number: 2012/058465/07] **First Respondent**

GERHARD STEFANUS CRONJE
[Identity number: 7310115011088]
[In his capacity as trustee of the MOOIPAN TRUST]
IT 249/2014 **Second Respondent**

JOHANNES ISAK CRONJE
[In his capacity as trustee of the MOOIPAN TRUST]
IT249/2014 **Third Respondent**

FRANS JOHANNES STEYN
[In his capacity as trustee of the MOOIPAN TRUST]
IT 249/2014 **Fourth Respondent**

Decided: **In Chambers**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 11 June 2020.**

Summary: **Transfer of business as a going concern – Section 197(5) of the LRA is not applicable in awards issued consequent to unfair dismissal, unfair labour practice and discrimination disputes – purpose of section 197(5) is to facilitate the transfer of organisational rights that are provided for in terms of collective agreements or arbitration awards that bound the old employer before the transfer of business as a going concern.**

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] The applicants were all employed by the first respondent, Vita Nova Selection Plant (Pty) Ltd (Vita Nova). They were dismissed on 24 October 2016 on allegations of misconduct, a dismissal they successfully challenged at the Commission for Conciliation Mediation and Arbitration (CCMA). Mr Collins Lenkwasi Makama, the commissioner who arbitrated the dispute, issued an award under case number NWKD4043-16, dated 7 August 2017 wherein he found that the dismissal of the applicants was procedurally and substantively unfair and awarded compensation to the applicants in the amounts of R377 520.00, R154 880.00 and R242 000.00, respectively.

[2] Vita Nova did not challenge the award. Despite, it failed to comply with the award and a writ of execution was issued. The Sheriff duly attended to the writ and attached the movable assets of Vita Nova. Mooipan Trust – IT249/2014 (Mooipan), represented by the respondents, its Trustees, in these proceedings, challenged the attachment of the movable assets by way of an

interpleader. The second respondent, Mr Gerhardus Stefanus Cronje (Mr Cronje) the deponent to the founding affidavit in the interpleader application, contended that Mooipan is the owner of the movable assets attached by the Sherriff. Attached to Mr Conje's affidavit was the agreement of sale concluded between Vita Nova and Mooipan pertaining to 35 Dorp Street, Bloemhof (portion 1 of erf 2249, Bloemhof) (factory) where Vita Nova operated its business. In terms of the Deed of Sale, the factory was sold as a going concern together with immovable assets specified therein. It is telling that both Vita Nova and Mooipan were represented by Mr Cronje who was also the Director and Shareholder of Vita Nova at that time.

[3] The applicants were not aware that Vita Nova had sold its business to Mooipan as a going concern prior to the interpleader application. The effective date of the transfer of business of Vita Nova to Mooipan is a controversial issue. The applicants argue that the transfer became effective from 21 August 2017, after the arbitration award was issued. The respondents, on the other hand, maintain that the transfer took place at the signing of sale agreement on 31 May 2017.

[4] In these proceedings, the applicants seek an order in the following terms:

4.1 Declaring the transfer of the business of Vita Nova to Mooipan Trust to constitute a going concern in terms of section 197 of the Labour Relations Act[1] (LRA); and

4.2 Declaring that Mooipan is jointly and severally liable, together with Vita Nova, to comply with the arbitration award issued under case number NWKD4043-16, dated 7 August 2017, including the payment of the compensation in the amount of R774 400.00, together with the interest on the said amount from 28 August 2017 until date of payment.

[5] The respondents concede to the order declaring that the business of Vita Nova was transferred as a going concern in accordance with section 197 of the LRA.

[1] Act 66 of 1995, as amended.

However, they disavow liability, jointly and severally together with Vita Nova, in terms of the award. The nub of their impugn is that Mooipan is not bound by the award as it was not a party to the arbitration proceedings and that the award was only issued subsequent the effective date of the transfer of the business of Vita Nova as a going concern.

The legal principles and application

[6] The applicants' claim is hinged on section 197 of the LRA which provides as follows:

'197. Transfer of contract of employment

(1) In this section and in section 197A –

(a) 'business' includes the whole or a 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 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.

(3) ...

(4) ....

(5)

(a) For the purposes of this subsection, the collective agreements and arbitration awards referred to in paragraph (b) are agreements and awards that bound the old employer in respect of the employees to be transferred, immediately before the date of transfer.

(b) Unless otherwise agreed in terms of subsection (6), the new employer is bound by –

(i) any arbitration award made in terms of this Act, the common law or any other law;

(ii) any collective agreement binding in terms of section 23; and

(iii) any collective agreement binding in terms of section 32 unless a commissioner acting in terms of section 62 decides otherwise.' (Emphasis added)

[7] In *National Education Health and Allied Works Union v University of Cape Town and Others (NEHAWU)*,[2] interpreting section 197 of the LRA, the Constitutional Court stated the following:

'The proper approach to the construction of section 197 is to construe the section as a whole and in the light of its purpose and the context in which it appears in the LRA. In addition, regard must be had to the declared purpose of the LRA to promote economic development, social justice and labour peace. The purpose of protecting workers against loss of employment must be met in substance as well as in form. And, as pointed out earlier, it also serves to facilitate the transfer of businesses. The section is found in a chapter that deals with unfair dismissal. Construed against this background, the section makes provision for an exception to the principle that a contract of employment may not be transferred without the consent of the workers. Subsection (1) says so and it makes it possible to transfer the business on the basis that the workers will be part of that transfer. This will occur if the business is transferred "as a going concern".' (Emphasis added)

[2] [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at paras 46 - 53.

[8] It is clear from the above dictum that the correct construction of section 197 is to construe the whole section within context and the purpose of the LRA as opposed to cherry picking individual subsections.

[9] In the present instance, the respondents submit that Mooipan is not bound by the arbitration award in that section 197(5)(a) of the LRA exclude from its ambit the arbitration proceedings and subsequent arbitration awards that preceded the date of transfer of a business as a going concern. This argument is mounted despite clear provisions of section 197(2) of the LRA which state, *inter alia*, that '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' and that 'anything done before the transfer by or in relation to the old employer, including the dismissal of an employee...is considered to have been done by or in relation to the new employer.'[3]

[10] In *Edgars Consolidated Stores Ltd v South African Commercial and Catering and Allied Workers Union and Others,*[4] the old employer, CNA, dismissed the employee, dismissal that was successfully challenged at the CCMA. The commissioner found that the dismissal was substantively unfair and ordered CNA to reinstate and compensate the employees in terms of the award dated 20 December 2001. In February 2002, CNA launched a review application to set aside the award. On 27 July 2002, CNA was placed in provisional liquidation. On 21 October 2002, in the course of CNA's liquidation, Edgars Consolidated Stores Ltd (Edcon) acquired the business of CNA as a going concern following the conclusion of a sale of business agreement between itself and the joint liquidators of CNA. Edcon sought leave to intervene in the review application which CNA had launched, but withdrew this application before the matter was heard on 30 November 2005. The review application was dismissed.

[11] Edcon tried to escape liability by arguing that the award was unenforceable in that 'an arbitration award of more than seven months' vintage issued against

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[3] See section 197(2(a) and(c) of the LRA.
[4] [2010] 12 BLLR 1282 (LC) at paras 22 -23.

CNA (the old employer) occurred too long ago to be brought within the ambit of section 197(4) and hence section 197(5) of the LRA cannot operate to preserve the enforceability of the award against it, as the new employer'.[5] The Court defined the term "immediately before" in sections 197(5)(*a*) of the LRA to refer not to the date when the award was issued but to the question 'whether or not an arbitration award is still binding on the old employer on the eve of the transfer'.[6]

[12] This construction was further expounded by the Labour Appeal Court (LAC) in *High Rustenberg Estate (Pty) Ltd v NEHAWU obo Cornelius and Others,*[7] where it was stated that:

> '[19] ... The wording of the section is clear, an arbitration award that can bind the old employer immediately before the date of transfer in respect of the employees to be transferred binds the new employer.
>
> [20] The arbitration award must bind the old employer in the circumstances of this dispute because all that has occurred is that the Labour Court substituted a correct award, in its view, for the incorrect award which had previously been made. That the Labour Court has substituted the award does not detract from the conclusion that this was an award which bound the old employer immediately before the date of transfer because the substituted award must be deemed to take effect from that date.
>
> [21] Mr Joubert made much of the argument that the new employer, being the appellant, had to be joined to proceedings certainly before the attachment of its property to be effected. This was the basis of the previous decision of this Court to which I have made reference. The purpose of the initial order of this Court, was that because the new employer had not been heard, a stated case should be decided by the court *a quo* in circumstances where the appellant, being the new employer, would have an opportunity to present its case. If an attachment

[5] Ibid at para 15.
[6] Ibid at paras 22 -23.
[7] (2017) 38 ILJ 1758 (LAC) paras 10 – 21.

> of property takes place, it does appear that the new employer has to be joined to such proceedings. However, the question of joinder cannot on its own trump the wording of s 197 (5) of the LRA, read in terms of its purpose, namely that if an award is binding on the old employer it is deemed to be binding on the new employer. The fact that the Labour Court substitutes the formulation of the award for the one which is set aside cannot detract from this conclusion, for, if it did, it would ultimately damage the very purpose of s 197, namely to protect employee rights in the context of a sale of a business as a going concern. These rights flowed from an arbitration award, albeit one that required substitution by the Labour Court." (Emphasis added).

[13] The facts in the present case are far removed from the above authorities. The award was issued subsequent to the transfer of business of Vita Nova. Even though the date of the transfer is in dispute, nothing much turns on it. In my view, the real inquiry is whether section 197(5) of the LRA finds application in the context of the present case.

[14] The preceding phrase 'for the purposes of this subsection' in section 197(5) of the LRA lends an important guide to commence the inquiry. What is then the purpose of this subsection? The answer is found in the explanatory notes in the memoranda to the Bills that led to the Labour Relations Amendment Act[8] (Amendment Act).

[15] Clause 47 of the Labour Relations Amendment Bill, 2000[9] proposed section 197(6) to provide as follows:

> 'Unless otherwise agreed in terms of subsection (7), the new employer is bound by –
>
> (a) any organisational right granted in terms of Chapter III binding on the old employer immediately before the transfer in respect of any workplace that is transferred; and

[8] Act 12 of 2002.
[9] Government Gazette No 21407.

(b) any collective agreement binding on the old employer in terms of section 23 immediately before the transfer in terms of which a registered trade union is recognised by the old employer as representing employees in a workplace that is transferred.'[10]

[16] The explanatory note to the proposed amendments to section 197 of the LRA, *inter alia*, states that:[11]

'47. Transfer of contracts of employment - Amendment to section 197

Features of the revised section 197

47.6 The revised section 197 seeks to address the problems raised by the social partners and to clarify the meaning of the section. The section has been significantly redrafted in a manner that should clarify its operation. The most significant features of the revised draft are set out in the following paragraphs –

...

(f) Provides that the old employer's obligations in respect of trade union organisational rights or recognition agreements are transferred to the new employer. This will facilitate the continuity of collective bargaining. (subsection 6)'

[17] Clause 53 of the Labour Relations Act Amendment Bill [B77 – 2001][12] was reworded to state the following:[13]

'(5) (a) For the purposes of this subsection, the collective agreements and arbitration awards referred to in paragraph (b) are agreements and awards that bound the old employer in respect of the employees to be transferred, immediately before the date of transfer.

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[10] *Ibid* at page 34.
[11] *Ibid* pages 73-75.
[12] Government Gazette No 22642 of 31 August 2001 at page 23.
[13] *Ibid* at pages 22- 23.

(b) Unless otherwise agreed in terms of subsection (6), the new employer is bound by –

(i) any arbitration award made in terms of this Act, the common law or any other law;

(ii) any collective agreement binding in terms of section 23; and

(iii) any collective agreement binding in terms of section 32 unless a commissioner acting in terms of section 62 decides otherwise.'

[18] The explanatory note to Clause 53 simply states that 'the new employer is bound by the collective agreements and arbitration awards that bound the old employer'.[14] Notably, the current version of section 197(5) of the LRA which came as result of the substitution of the old section 197 by section 49 of the Amendment Act is the mirror image of the Clause 53.

[19] It is absolutely clear from the above memoranda that the purpose of section 197(5) of the LRA is to facilitate the continuity of collective bargaining by providing that the old employer's obligations in respect of trade union organisational rights in terms of the arbitration awards or collective agreements, that bound the old employer immediately before the transfer of business as a going concern, shall automatically transfer to the new employer.

[20] In my view, section 197(5) of the LRA does not apply to arbitration awards that are issued consequent to employees successfully challenging the conduct of the old employer in relation to dismissal, unfair labour practice or discrimination. The outcome of those processes would be binding on the new employer in terms of section 197(2)(c) of the LRA irrespective of the date on which they were issued.

[21] The respondents' construction of section 197(5) of the LRA is not only inconsistent with the purpose of the subsection, but is inherently irrational as it does not account for automatically unfair dismissal, retrenchments and

[14] *Ibid* at page 36.

discrimination disputes which are ordinarily adjudicated by the Labour Court and judgments accordingly delivered. According to the respondents' construction, judgments in those matters would escape the grasp of section 197(5) of the LRA and, unlike in the case of arbitration awards, the new employer would still be bound by the judgment even if it was delivered after the transfer of the business as a going concern.

[22] Additionally, the respondents assert that, since Mooipan was not a party to the arbitration proceedings, it was not afforded an opportunity to be heard. Mr Cronje, who is also the deponent to the respondents' answering affidavit, concedes that he was part of the arbitration proceedings, representing Vita Nova as a Director when he was also a Trustee of Mooipan. It is not disputed that he never disclosed to the applicants that Vita Nova had been sold to Mooipan and transferred as a going concern so that it could be joined as a party or advise its Trustees to intervene in those proceedings. Nonetheless, this application has presented the respondents with an opportunity to be heard and have accordingly availed themselves to it by the opposing the relief sought in prayer two of the Notice of Motion.[15]

Conclusion

[23] In the circumstances, the respondents' effort to resist the applicants' claim that Mooipan, as new employer, is also liable in terms of the arbitration award that the applicants seek to enforce is evidently ill-conceived and must fail. As such, the applicants have made out a case for the grant of the relief sought in the Notice of Motion.

Costs

[24] The Constitutional Court made it clear in *Zungu v Premier of the Province of KwaZulu-Natal and Others*[16] that the rule of practice that costs follow the result does not apply in matters before this Court as orders of costs in this Court are

[15] See: *High Rustenberg Estate* above n 7 at para 21.
[16] [2018] ZACC 1 at para 24 to 26.

to be made in accordance with the requirements of the law and fairness. In this instance, it would not be fair and just to award costs.

[25] In the circumstances, I make the following order

Order

1. The transfer of the business of Vita Nova Selection Plant (Pty) Ltd to Mooipan Trust – IT249/2014, is declared a going concern in terms of section 197 of the Labour Relations Act 66 of 1995, as amended.

2. Mooipan Trust – IT249/2014 is jointly and severally liable, together with Vita Nova Selection Plant (Pty) Ltd, to comply with the arbitration award issued under case number NWKD4043-16, dated 7 August 2017, including the payment of the compensation in the amount of R774 400.00, together with the interest on the said amount from 7 August 2017 until date of payment.

3. There is no order as to costs.

PP Nkutha-Nkontwana

P. Nkutha-Nkontwana

Judge of the Labour Court of South Africa