

SOUTH AFRICA / JUDGMENT

Communication Workers Union ("CWU") and Others v Mobile Telephone Networks (Pty) Ltd ("MTN") and Another (DA10/13) [2015] ZALAC 8; (2015) 36 ILJ 1819 (LAC) (21 April 2015)

[2015] ZALAC 8

COURT

Labour Appeal Court

BEFORE

Waglay, Davis, Ndlovu

CASE / FILE NUMBER

DA10/13

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REPUBLIC OF SOUTH

AFRICA

THE LABOUR APPEAL

COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no: DA10/13

In the matter

between:

COMMUNICATION

WORKERS UNION

("CWU").....First

Appellant

K PILLAY AND

OTHERS.....Second

Respondent

and

MOBILE TELEPHONE

NETWORKS (PTY) LTD ("MTN").....First

Respondent

INTERACTION CALL

CENTRE (PTY)

LIMITED.....Second

Respondent

Heard: 17 March

2015

Delivered:

21 April 2015

Coram:Waglay JP, Davis and Ndlovu JJA

JUDGMENT

DAVIS JA

- [1] This case concerns the scope of s197 of the Labour Relations Act 66 of 1995 (“LRA”). This dispute regarding the application of s197 of the LRA turns on whether the termination of the service agreement concluded between first and second respondents stands to be considered as a simultaneous resumption by first respondent of the service and thus constitutes a transfer of the business as a going concern for the purposes of s197.

Factual matrix

- [2] Most of the facts in this case appear to be common cause. In 2000, first respondent established an MTN call centre in KwaZulu-Natal. It was one of the largest call centres nationally and was designed to serve the needs and answer the queries of first respondent’s prepaid customers. Initially, first respondent managed and administered the operation of the call centre. In 2006, however, first respondent concluded a “Call Centre Service Agreement” (“the agreement”) with second respondent. In this agreement, second respondent contracted to provide first respondent with “services” as defined. These were defined in the agreement as “the services to be rendered by Interaction at the KZN Interaction Call Centre or any other call centre managed by Interaction for MTN as more clearly defined in the service level agreement”.

- [3] In terms of clause 6.5 of the agreement, it was second respondent who contracted to ensure that the provision of the services was in line with the following criteria.

‘1. The training, management, discipline, control, administration and supervision of all Agents under its control, and other matters

related thereto, including, but not limited to, the retention of all information pertaining to agents, the imposition of restraint and confidentiality provisions in accordance with MTN policies. Payment and administration of wages and salaries, work attendance and timekeeping will be in compliance with all applicable laws.

2. To provide and to ensure the availability at all reasonable times and when necessary of a knowledgeable, competent and experienced staff member of Interaction to assume responsibility to give effect to the provisions of what is set out in this agreement hereof at the site where Agents provided by Interaction are present.
3. To ensure at all times that it is familiar with MTN’s vision, mission statement, policies, and strategies to the extent that they impact on the nature, type and calibre of Agents suitable for MTN’s needs and goals as a telecommunications company.

4. To ensure that the national and/or regional Account Executive is available to attend such meetings and provides such information as shall be reasonably requested by MTN in connection with the rendering of the Services by Interaction.’

[4] Of equal importance to the relationship between first and second respondent was clause 13 which provided thus:

‘Management Control

The parties agree that it shall be the sole responsibility of Interaction to manage, administer and control the KZN Interaction Call Centre or any other call centre managed by Interaction for MTN and its employees and MTN shall not be held liable for the negligence occasioned by Interaction in the running and management of the KZN Interaction Call Centre or any other call centre managed by Interaction for MTN.’

[5] According to Ms Gugu Mcoyi, a supervisor who was also the 27th applicant, second respondent used the following staff and methodology to provide services as defined in the agreement:

1. Agents who were employed by labour brokers dealt with calls from MTN’s clients regarding technical and other cell phone queries.
2. Supervisors who were employed by second respondent managed teams of agents, assisted agents with queries that they were unable to handle, coached and trained agents, managed and assisted the performance of agents and conducted quality evaluations of the queries which had been conducted by these agents.
3. Second respondent also employed call centre managers to manage teams of supervisors and conduct performance and quality control as supervisors.
4. It appears that there was also a workforce department which was mandated to draw up work and shift schedules to ensure that there were sufficient agents and supervisors to perform the business of the call centre.
5. A quality assurance specialist ensured quality control of the service. There was also an operations manager, a financial manager, operations administrators, a human relations officer and trainers.

[6] In June 2010, first respondent informed second respondent and the appellants that it had decided to terminate the agreement with second respondent effective from December 2010. In terms of a letter generated by Mr Eddie Moyce, Executive: Customer Operations of MTN on 1 June 2010, second respondent was informed that:

‘We regret to inform you that MTN’s management has taken a strategic decision to internalise the sourcing of the Pre-Paid Call

Centre Services which services would be provided by Interaction under the agreement.’

It appears from the record, particularly from the evidence of Ms Mcoyi, that all the call centre managers with an average of four years of experience, the entire workforce department, eight supervisors with the average of four years' experience and three quality controllers with the average of four years' experience were employed by first respondent following the cancellation of the agreement and first respondent's resumption of running the call centre from 1 December 2010.

- [7] In February 2011, a further four former supervisors previously employed by second respondent were employed by first respondent. It appears as well that the first respondent also retained the services of at least 47 of the agents employed by the labour brokers, but utilised initially by second respondent. In terms of clause 19 of the contract between first and second respondent, the first respondent had taken over responsibility for these agents.
- [8] As a result of these developments, appellants' attorneys wrote to first and second respondent on 30 November 2010, noting that s197 of the LRA provides for the automatic transfer of employment contracts of employees from one employer to another where a business is transferred as a going concern. Appellants' attorneys contended that where employees were dismissed because of a transfer, the dismissal was regarded as automatically unfair and, where employees have been re-employed with the loss of service and on less favourable terms, this act also constituted an automatically unfair dismissal.
- [9] Once first and second respondents adopted the approach that s197 was inapplicable to the facts as I have outlined them, appellants approached the Labour Court for an order couched in the following terms:
- '(i) declaring that there was a transfer of a business as a going concern by Interaction Call Centre (Pty) Ltd [the second respondent in the court a quo] to MTN. the respondent and that such transfer falls within the ambit of s 197 of the Labour Relations Act, 1995;
- (ii) declaring that the second and further appellants are in law employees of the respondent with effect from 1 December 2010 with no loss of service;
- (iii) directing the respondent to take into its employ the second and further appellants on terms prescribed by s 197 of the LRA.'

The court a quo

- [10] Cele J dismissed the appellants' case. The central reasoning employed by the learned judge is captured in the following passage of his judgment:

'I am persuaded by the first respondent's submission that at no stage did the second respondent have its own infrastructure as it had to utilise that of the first respondent infrastructure. The employees it employed to provide the services to the first respondent played a very limited, constricted role in the first respondent's call centre in KZN. The actual work in the call centre was performed by the agents employed by a labour broker and everything done by the managerial or supervisory staff employed by the second respondent had to conform to the first respondent's

standards and directions. Moreover, the majority of employees used by the second respondent were not required by the first respondent when it commenced on 1 December 2010 to provide the service of managing the agents in the call centre. Managers and supervisory staff were transferred from Johannesburg and only some of the second respondent's employees who had the required skills were appointed.'

The appeal

[11] Appellants' contended that second respondent had run a defined and discrete business. The running of this business was sufficiently autonomous from that of first respondent. In appellants view, the business comprised of the following elements:

1. a business objective, being the generation of revenue for first respondent by maintaining an unproblematic network for first respondent's prepaid clients;
2. the fulfilment of contractual obligations as set out in the agreement;
3. a specific operational method of rendering a service;
4. a contractual right to use the infrastructural assets and resources owned by the first respondent to render the specified services;
5. an organised grouping of employees as well as agents who were recruited from labour brokers;
6. specific activities performed by these affected employees; and
7. goodwill in the form of a quality service which generated business accolades which were awarded to the centre during the duration of the agreement.

When the agreement was terminated, this business was transferred as a going concern to the first respondent in that, the latter performed the services previously provided by the second respondent in the form of a call centre. Services were rendered to the same category of clients. The main business objective remained the same as it had been during the duration of the agreement. The same operational methods of rendering services were pursued by first respondent. Furthermore, first respondent took over a significant part of second respondents' former employees together with a significant number of agents, all of whom were assigned to provide a necessary service.

[12] Section 197 of the LRA has been subjected to significant jurisprudential scrutiny. It might have been thought after the careful judgment of the Constitutional Court in *Aviation Union of South Africa and Another v South African Airways (Pty) Ltd and Others*[1], which judgment had built upon the law as set out in an earlier decision in *National Education Health and Allied Workers Union v UCT and Others (NEHAWU)*, [2] that judicial clarity and certainty had been given to the scope of this section.

[13] However, this Court has been confronted with a number of further challenges. See *TNS Group Industrial Services (Pty) Ltd v Unitrans Supply Chain Solutions (Pty) Ltd*[3] and *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and Others (City Power (Pty) Ltd)*. [4] As this Court remarked in *City Power (Pty) Ltd*, a court is required to examine the substance of the agreement to determine whether an entity retains its identity after a transfer so that it can be concluded whether the transferor carries on the same or similar activities with the same personnel and/or business assets without substantial interruption. [5] As the court stated:

‘[t]he question is whether the activities conducted by a party such as first respondent constitute a defined set of activities which represents an identifiable business undertaking so that when a termination of an agreement between first respondent and appellant takes place, it can be said that this set of activities, which constitutes a discrete business undertaking has now been taken over by another party.’[6]

[14] Mr van der Riet SC, who appeared together with Mr Baloyi on behalf of first respondent, submitted that at no stage did second respondent own its own infrastructure. It provided a service to first respondent, using the latter’s infrastructure. In his view, the employees, who were employed to provide a service to first respondent, played a very limited and restricted role in the call centre. The core of the work had been performed by agents who were employed by a labour broker. Further, all activities performed by the managerial/supervisory staff employed by second respondent had to conform to standards imposed by first respondent. Further, the

majority of employees employed by the second respondent had not been required by first respondent when it commenced on 1 December 2010 to provide the service of managing the call centre itself.

[15] Mr van der Riet correctly conceded that it was fair to classify the operation of a call centre as a separate business, albeit that this was only a component of the broader business enterprise of first respondent. The thrust of his argument was that second respondent did not operate the call centre, partly because it had no infrastructure but employed that of the first respondent and partly because key elements of the activities of a call centre were performed by agents who were employed by labour brokers as opposed to employees of the second respondent. Viewed accordingly, employees of second respondent played a limited role in the operation of the call centre.

[16] These submissions are contradicted by the express agreement which was entered into between the parties. In terms of clause 3.2, second respondent was held to have “expertise and adequate resources means to render and complete the Services”.

[17] Insofar as the personnel who answered the calls were agents and employed by a labour broker and not by second respondent, clause 4.4 states: “All benefits to which an Agent is entitled to is the subject matter of an agreement between Interaction and such agents”. The agreement thus envisaged a relationship between second respondent and the agents. First

respondent had no role insofar as these agents are concerned. This provision should be read together with clause 2.2 of the Service Level Agreement which provides “below is a ramp up plan showing the minimum number of trainable agents that Interaction will recruit at the time level shown below.” Thereafter, follows a table which indicates dates and trainable agents that must be recruited by

second respondent. Again, the agreement makes it clear that first respondent played no role in the manner in which these agents were to be integrated into the business operation nor in the recruitment thereof. Further support for this conclusion is to be found in clause 6.7:

‘In the event of an Agent’s violation and/or failure to adhere to uphold MTN’s policies, brand values, procedures, and code of business conduct or due to incompetence, MTN reserves the right to escalate such violation and/or non-adherence to Interactions’

management.’

[18] I have already referred to clause 13 which makes it clear that the management, registration and control of the call centre were to be the sole responsibility of second respondent. Indeed first respondent ensured, by way of the contract, that it could not be held liable for negligence which might be occasioned by second respondent’s running of the call centre. For example, if

an agent performed negligently, any loss occasioned thereby would have to be made good by second respondent. First respondent thus

ensured that it remained “out of the legal picture”.

[19] Clause 19 headed the “Termination Clause” provided some further measure of guidance: “in the event of Interaction ceasing its trade and/or going into liquidation, MTN reserves the right to take over onto its payroll all or any Agents and/or management governed by this agreement at no cost”.

[20] Returning to the law, the application of s197 depends upon a finely grained analysis of the facts of a particular case. Such an analysis will produce an answer to the key question, whether in substance a discrete business operation had been transferred from entity A to B. See also NEHAWU, *supra* at para 56.

[21] In my view, the evidence which was provided to the court *a quo* justifies an answer that the second respondent was operating a call centre as a discrete business. The fact that it was its only business is hardly material to the case. In terms of clauses 7 and 8 of the agreement, second respondent could not, without permission of first respondent, operate a call centre for another cell phone company. It was therefore not surprising that, in relation to the running of a call centre business for a cell phone company, second respondent had but one client. Outside of a cell phone company, it was possible for second respondent to create another business. The fact that it had but one client and operated a discrete business for this client should not detract from a conclusion that it was operating a call centre business which

constituted a discrete business, sufficient to fall within the scope of s197 of the LRA.

[22] There was some debate about certain of the appellants who refused re-employment and thus being the beneficiaries of retrenchment packages which appeared to have been paid by second respondent. This set of facts does not prevent the relief that must be granted in terms of s197 of the LRA. If s197 of the LRA applies, it must then follow that, in terms of s197(2) of the LRA, 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. All the rights and obligations between the old employer and an employee, at the time of the transfer, continue to be in force as rights and obligations between the new employer and these employees.

[23] For these reasons, therefore a declaration of s197 of the LRA is required and applies in this case. It means that the individual appellants (as set out in Annexure A to the statement of claim) will continue to be employed but now by first respondent as opposed to second respondent.

Order

[24] Accordingly, the following order is made:

1. The appeal is upheld with costs.
2. The order of the court a quo is set aside and replaced with the following order:

2.1 It is declared that there was a transfer of a business as a going concern by the second respondent to first respondent and that such transfer falls within the ambit of s197 of the Labour Relations Act 66 of 1995.

2.2 Second and further appellants are declared in law to be employees of first respondent effective from 1 December 2010 with no loss of service.

2.3 The first respondent is ordered to pay appellants costs.

Davis JA

I agree

Waglay JP

Ndlovu JA

APPEARANCES:

FOR THE APPELLANTS: Adv P Schumann

Instructed by Brett Purdon Attorneys

FOR THE FIRST RESPONDENT: Van der Riet SC and Adv F Baloyi

Mashiane, Moodley & Monama Inc

[1] 2012

(1) SA 321 (CC).

[2] 2003

(3) SA 1 (CC),

[3] [2014] 10 BLLR 974 (LAC)

[4] [2014] 10 BLLR 945 (LAC).

[5] City Power (Pty) Ltd at para 23,

[6] City Power (Pty) Ltd at para 24.

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Prepared on 13 October 2026 · Esheria