

SOUTH AFRICA / JUDGMENT

NUMSA obo Members and Others v AIH Logistics (Pty) Ltd and Another (D 1112/19) [2023] ZALCD 3 (27 February 2023)

[2023] ZALCD 3**COURT**
Labour Court Durban**BEFORE**
B Witcher**CASE / FILE NUMBER**
D 1112/19

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IN
THE LABOUR COURT OF SOUTH AFRICA, DURBAN
Case
No: D 1112/19
Reportable
In

the matter between:

NUMSA obo
Members First
Applicant
N
MNGAMBI Second
Applicant
X
MAHOVA Third
Applicant
L
MTHEMBU Fourth
Applicant
S
PHAROE Fifth
Applicant
B
MTHEMBU Sixth
Applicant
B
GUMEDE Seventh
Applicant
and

AIH LOGISTICS (PTY)
LTD First
Respondent
BLACKSUITS (PTY)
LTD Second
Respondent

Heard: 2, 3, 4 and 8 March,
2 April and July 2022

Delivered: 27 January 2023

JUDGMENT

WHITCHER J

Introduction^[1]

^[1] By way of their closing argument, the applicants^[2] have abandoned some of their claims.^[3] They pursue only that the purported transfer of a business from the first to the second respondent be declared unlawful and invalid, and, following this, the court pass order for restoration of the status quo that prevailed immediately before the transfer vis-a-vis the employment relationship between them and the first respondent. In the event that the court finds that the transfer falls within the prescripts of section 197 of the LRA, the court is asked to act as an arbitrator in terms of section 158(2) of the LRA and determine the fairness or not of the dismissals by the second respondent of the second, third and fourth applicants for refusing to wear the second respondent's branded work clothes.

The transfer

^[2] It should at the outset be noted that section 197 of the LRA's primary function is the protection of employees' rights, specifically their right to continuity of employment. Where an employer sells a business or outsources an autonomous business unit, an affected employee's contract

transfers to the new employer. The triggering conditions for a transfer of business under section 197 are thus not set onerously

high. The main condition is that the business (or part thereof) is transferred as a 'going concern'. This, to some extent, works against employees who wish to resist transfer to a new employer under section 197.

^[3] The first issue the court must decide is whether an alleged transfer between the first and second respondents is not a transfer as envisaged in section 197 of the LRA and/or is not a bona fide transfer. This question is properly stated in the negative. The applicants bear the onus to show that the transaction was, as they

allege, a guise by the first respondent to rid itself of a certain portion of its labour force to a labour broker, the portion being trade union members, of NUMSA. Once the applicants have done sufficient evidentiary work in this regard, the respondent must

adduce evidence in rebuttal.

- [4] In deciding whether a transfer is one envisaged by section 197 of the LRA, it is not always necessary to describe the intricate details of the business transferred between an old and new employer. In some sense a court can only ever take a macro view of matters. Fortunately, in this case there is no dispute that a transfer purportedly occurred. There is no dispute that the applicants have continued to perform exactly the same work for the second respondent that they performed for the first respondent, namely motor-vehicle assembly.
- [5] The applicants allege that the transaction was a sham to get rid of them to the second respondent. Tied up in this allegation is the notion that there has been no real transfer of a business as a 'going concern' but only a transfer of the services of the employees to a new employer. The first respondent is still substantively in charge and it remains the true employer. The applicants seek a remedy which sets asides the alleged sham and restores the status quo ante.
- [6] The applicants point to certain structural indicators that a bona fide transfer of a business as a going concern has not occurred. These include that:
- (a) The agreement between the first and second respondent did not reference any excised portion of the first respondent's business that was subject to the transfer;
 - (b) Certain employees in the business were not also transferred;
 - (c) There was no price paid for the transfer of business;
 - (d) The second respondent makes rent free use of the first respondent's premises;
 - (e) There was no sale or lease of tools or equipment or transfer of assets;
 - (f) The first respondent retained the primary contractual relationship with the client (Mahindra) who provides the components which the second respondent assembles;
 - (g) The first respondent still provides skills training to the transferred staff and retained the sole certification to provide it; and
 - (h) The second respondent's management has no meaningful control over the second respondent's supposed new employees. Control remains with the first respondent.
- [7] The applicants allege in a nutshell that the first respondent simply transferred the service that the shop floor employees (the applicants) provided and brought these services back through a different vehicle (the second respondent). No ownership of a business as a going concern changed hands.

- [8] In contextual support of their case theory, the applicants state that NUMSA had, shortly before the 'transfer', started organising within the first respondent. Employees had pushed wage demands and there had also been on an unprotected strike.
- [9] In reply, the respondents contend that there was a transfer of a portion of the business as a going concern. In argument, the respondents defines a portion of the business as a going concern as "(i.e. some form of income generating activity)".
- [10] The respondents point out that the applicant's main witness, Mahova, who testified on the state of operations after the transfer had only worked for the second respondent for one month. His experience of the new operations and specifically on the limited role of the second respondent's site manager, Naidoo, were thus unreliable. I have taken this into consideration but also note that Mahova's testimony that Naidoo was not fully in charge of the transferred staff is strongly corroborated by the contract between the first and second respondent and concessions made by Naidoo himself. I find that the first respondent retained direct supervision of the second respondent's staff.
- [11] The respondent spent considerable time in argument setting out the AIH group corporate structure which includes an impressive array of logistics services the group of companies provides. This is in support of the argument that motor-vehicle assembly is not its core function and was thus apt to be outsourced, especially where productivity issues arose.
- [12] However, the AIH group of companies is not before this court as an entity specialising in the logistics value chain but with a spare motor-vehicle assembly unit it wished to detach from its core work. The old employer before this court (in terms of section 197 of the LRA), the first respondent chose to pursue its venture into motor vehicle assembly as AIH Logistics (Pty) Ltd. Despite its name, the evidence shows that this company is narrowly concerned with the assembly of motor-vehicles. There is no reason not to hold those trading within this corporate form to the identity they have assumed. While

the strategy of the overall AIH group is not entirely irrelevant in understanding the conduct of the first respondent, it is ultimately

the first respondent's ambit of work that must inform an assessment of whether a transfer of business occurred as a going

concern. It thus follows that the contention that the first respondent outsourced non-core work functions to the second respondent is wrong.

- [13] Instead, the first respondent purported to transfer some employees on its shop floor performing part of the core function of motor-vehicle assembly to the second respondent where they would continue to perform this core function under the supervision of the first respondent.

- [14] In light of these proven facts, the first respondent needed to discharge the evidentiary burden to show that the transfer was nevertheless bona fide. This means that the transfer was, notwithstanding these features, the transfer of a going concern.
- [15] The constitutional court has admonished to focus on the substance and not the form of the underlying transaction[4]. In casu, we know that some, but not all, of the workers involved in the assembly of motor-vehicles were transferred between respondents. No assets seem to have been transferred, nor were any customers or suppliers. The second respondent neither has its own equipment nor leases the equipment it uses from the first respondent. One certainly cannot say that the same business is being carried on by the new employer. The functions provided by the second respondent do not have the end result of producing a quality-controlled Mahindra motor-vehicle.
- [16] This should not be meant to imply that all assets and personnel must be transferred from the old to the new employer. However, in a true arm's length transfer of business, what should be transferred are those assets and personnel that are essential to the business as it was operated by the transferor, as without the transfer of the means to do the work, there could be no transfer of the business as a going concern.
- [17] What does the first respondent itself say that the second respondent was supposed to do? In argument, the first respondent contends that it 'looked for service providers to assist with their people and labour management issues', to better enforce PPE utilization, and to remedy absenteeism and increase productivity by having reserve staff on hand. The first respondent states that it kept the team leaders on its staff as they were hired to oversee process and quality management of the assembly and thus had to stay at first respondent, inter alia, to ensure compliance with safety certification.
- [18] The court in *Aviation Union*[5] struck a distinction between a genuine transfer of a business as a going concern and the mere transfer of the right to provide an outsourced service. Looking at the overall picture of the transfer, the indications are that the first respondent did not transfer a portion of the business as a going concern to the second respondent. The core shopfloor assembly work the applicants did is simply not functionally severable from the overall task of producing Mahindra pick-ups. Even in this work, the first respondent did not relinquish control of the applicants. The first respondent identified an 'income generating activity' and a 'service' the second respondent could supply to it. But this falls short of the section 197 test. Looked at holistically, on the evidence before the court, the second respondent is not an autonomous economic entity[6] capable of operating as a going concern.
- [19] The first respondent argues that the second respondent took over a portion of business which related to the labour involved in the assembly of the motor vehicles and that this was a severable portion of the business of the first respondent. Severable, yes, as body is from a head, but not as a going concern.

- [20] The first respondent argues that the second respondent did achieve positive results after the purported transfer of business in increasing productivity. This too may be perfectly true but the second respondent structurally viewed could not achieve those results as a separate, excisable business. Without its own machines, tools, premises, safety certification, team leaders, customers, and ability to issue operational instructions, the second respondent's laudable role in achieving better results for the first respondent is akin to the work of an HR/IR consultancy.
- [21] Considered properly, the purpose of the transaction was to shift employees to another entity, not to shift work processes there, with the employees following behind. The new employer is not in possession of a going concern after the transfer but rather in possession of the right to perform certain HR time management and disciplinary functions, which is brought into focus when one considers the personnel the second respondent brings to the table; labour lawyers, labour brokers and no-one with assembly-line experience.
- [22] Since no portion of the business was transferred as a going concern then section 197 of the LRA was not engaged, and the contracts of the applicants did not automatically transfer from the old to the new employer.
- [23] Irrespective of (a) what may or may not have occurred in the purported employment relationship between any of the further applicants (some of which had been dismissed by the second respondent) and the second respondent or, (b) the fact that the 3-year period reflected in the further applicants' employment contracts with the first respondent had expired, the position between the first respondent and the further applicants as at 14 March 2019 must be restored.

Order

1. The transfer of a business from the first to the second respondent on 15 March 2019 is not one that falls within the prescripts of section 197 of the Labour Relations Act, 1995.
2. The position between the first respondent and the further applicants as at 14 March 2019 must be restored.
3. The respondents are ordered to pay the applicants' cost of suit.

B Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

For Applicants: Adv

T Seery,

Instructed by: Purdon

and Munsamy Attorneys

For Respondents: MacGregor

Erasmus Attorneys Inc

- [1] The judgment up to paragraph [22] was completed in July 2022, but the parties, starting with the respondents were required to revert to the Court with further submissions regarding appropriate relief. They had not done so by 22 January 2023.
- [2] The eighth applicant withdrew from the proceeding by way of an affidavit filed with the court.
- [3] The claim that the first respondent subjected them to an automatically unfair dismissal on 14 March 2019.
- [4] *Nehawu v University of Cape Town and Others*
[2002] ZACC 27; 2003 (3) SA 1 (CC) at para 56.
- [5] *Aviation Union of SA and Another v SAA (Pty) Ltd and Others* (2011) 32 ILJ 2861 (CC) at para 108
- [6] See *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and Others* [2014] 10 BLLR 945 (LAC)
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