

SOUTH AFRICA / JUDGMENT

Vermaak and Another v Sea Spirit Trading 162 CC t/a Paledi Super Spar and Others (JS964/2015) [2017] ZALCJHB 34; (2017) 38 ILJ 1411 (LC) (31 January 2017) [2017] ZALCJHB 34

COURT

Labour Court Johannesburg

BEFORE

Prinsloo

CASE / FILE NUMBER

JS964/2015

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THE

LABOUR COURT OF SOUTH AFRICA

JOHANNESBURG

Reportable

Case no: JS 964/2015

In the matter between:

CORNELIUS MARTHINUS

VERMAAK

First Applicant

MARLENE DAPHNE

VERMAAK

Second Applicant

and

SEA

SPIRIT TRADING 162 CC t/a PALEDI SUPER SPAR

First Respondent

GREENVILLE

TRADING 543 CC t/a PALEDI TOPS

Second Respondent

THE

SPAR GROUP LIMITED t/a PALEDI SUPER SPAR

Third Respondent

Heard:

3,

4 and 7 November 2016

Delivered:

31 January 2017

Summary: Transfer of business as a going concern. The question is: does the perfection of a notarial bond and consequent taking of possession of movable property to realise an indebtedness constitute a transfer of a business as a going concern as contemplated in section 197 of the LRA.

JUDGMENT

PRINSLOO J.

Introduction

- [1] The Applicants approached this Court for relief in terms of section 187(1)(g), read with section 197, of the Labour Relations Act[1] (the Act), claiming that they were automatically unfairly dismissed.
- [2] Before I deal with the pleadings, evidence or merits of the case, I deem it necessary to set out who the *dramatis personae* are.
- [3] The First Applicant (Vermaak) and a partner, Mr Kasper Steenkamp (Steenkamp) purchased the First and Second Respondents from the previous owner, Mr Riaan Claasen, and they each held 50% members' interest in the two entities.
- [4] The First Respondent is a close corporation that traded under the name Paledi Super Spar (Paledi Super Spar) as a Spar supermarket at the Twin City Shopping Centre on the R71 between Polokwane and Tzaneen in the Limpopo province.
- [5] The Second Respondent is also a close corporation and traded under the name Paledi Tops (Paledi Tops) as a retail liquor store in the same shopping centre.
- [6] Vermaak and Steenkamp started to trade as the owners of the two businesses on 1 November 2013. On the same date Vermaak was employed as member / owner and he signed a contract of employment with Paledi Super Spar wherein his basic salary was set out as R 55 000 per month. On 26 February 2014 his salary package was revised and it was increased to R 70 000 per month with effect from 1 March 2014.
- [7] The Second Applicant (Marlene) is Vermaak's wife and she was employed as finance manager of Paledi Super Spar with effect from 1 November 2013 at a basic salary of R 30 000 per month. On 26 February 2014 her salary package was revised and it was increased to R 40 000 per month with effect from 1 March 2014. At this point Marlene was the finance manager at Paledi Super Spar and Paledi Tops.
- [8] The Third Respondent is Spar Group Limited (Spar) and it supplied trading stock to Paledi Super Spar and Paledi Tops. Spar registered general notarial covering bonds over the movable property of Paledi Super Spar and Paledi Tops as security for their indebtedness for the stock that was supplied to them.

- [9] Subsequently Paledi Super Spar and Paledi Tops were unable to meet their financial obligations and notified Mr Freeman, Spar's new business development manager, on 24 June 2015 that they would be closing down at the end of June 2015.
- [10] Spar almost immediately approached the High Court on 25 June 2015 on an urgent basis for an order inter alia to take possession of all the movable property of Paledi Super Spar and Paledi Tops for the purpose of perfecting its security in terms of the general notarial covering bonds that were registered in November 2013. The order was granted on 30 June 2015 and Spar took over control of Paledi Super Spar and Paledi Tops on 1 July 2015.
- [11] The Applicants' case is that the business of Paledi Super Spar and Paledi Tops was transferred to Spar as a going concern on 1 July 2015 and they were dismissed by Spar on 22 July 2015.

The pleadings and pre-trial minute

- [12] In their statement of case the Applicants claimed that Paledi Super Spar and Paledi Tops were transferred to Spar as a going concern on 1 July 2015 in terms of the order granted by the High Court on 30 June 2015. All the employees of Paledi Super Spar and Paledi Tops, including the Applicants, were transferred and became the employees of Spar by virtue of the provisions of section 197 of the Act.
- [13] Spar traded and conducted business under the name and style of Paledi Super Spar and Paledi Tops.
- [14] The Applicants claim that they were dismissed by Spar on 22 July 2015 when they were instructed to leave the premises because they did not accept Spar's contracts of employment. The new contracts of employment contained conditions materially less favourable than those on which they were employed by Paledi Super Spar and Paledi Tops. Their claim is that they were automatically unfairly dismissed as provided for in section 187(1)(g), read with section 197, of the Act.
- [15] In response to the Applicants' statement of case, Spar's pleaded case is that it does not and did not trade or conduct business under the name and style of Paledi Super Spar and Paledi Tops.
- [16] Spar denied that the business of Paledi Super Spar or Paledi Tops was transferred as a going concern and that the employees became employees of Spar by virtue of section 197 of the Act. Spar's case is that it obtained a court order on 30 June 2015 that inter alia authorised it to enter the premises of Paledi Super Spar and Paledi Tops for the purpose of perfecting the general notarial covering bond and directing them to give Spar possession of such movable property and to carry on the business of Paledi Super Spar and Paledi Tops relating to the movable property in the name of and at the expense of Paledi Super Spar and Paledi Tops.

- [17] The parties agreed on the issues this Court has to decide and those are firstly whether the Applicants were employees of Paledi Super Spar and Paledi Tops on 30 June 2015 and when the alleged transfer of the businesses as a going concern to Spar took place, secondly whether there was a transfer as a going concern, thirdly and if so, whether Spar dismissed the Applicants on 22 July 2015 and lastly, if they were dismissed, whether such dismissal constituted an automatically unfair dismissal as contemplated in section 187(1)(g) of the Act.

The evidence adduced

- [18] Vermaak testified on behalf of the Applicants. I do not intend to repeat what is already captured supra insofar as Vermaak testified about how it came about that he started with the business in November 2013.
- [19] He testified that he was employed to manage the shops, to order stock and to deal with all issues related to staff, security, meetings etcetera. His business partner, Steenkamp, did not have an employment contract as he was a silent partner and not involved in the day to day running of the business, as was Vermaak and for which he was paid a salary.
- [20] Initially Vermaak was paid R 55 000 per month. He testified that when the business did well he had a discussion with Steenkamp, as they had initially agreed that Vermaak would start on a lower salary, but when the business did well they agreed on an increase. On 26 February 2014 his salary package was revised and increased to R 70 000 per month with effect from 1 March
2014. His wife's salary was increased at the same time.
- [21] The shopping mall where Paledi Super Spar and Paledi Tops traded from was enlarged and Shoprite opened in the same mall. Vermaak testified that Paledi Super Spar and Paledi Tops were hurt by the opening of Shoprite and the business did not do well after Shoprite opened in the same mall.
- [22] Paledi Super Spar and Paledi Tops ran into financial trouble and were in arrears with payments for stock. Vermaak requested a voluntary bond perfection and Spar obtained a court order that authorised the perfecting of Spar's security in terms of the general notarial covering bond. Vermaak referred to the specific clauses in the court order that authorised and empowered Spar to carry on the business of Paledi Super Spar and Paledi Tops in the name of and at the expense of Paledi Super Spar and Paledi Tops and for that purpose, purchase goods and do whatever else Spar deemed necessary.
- [23] Vermaak testified that on 1 July 2015 Spar came in and started to run the business of Paledi Super Spar and Paledi Tops. The Applicants remained in the shop and fulfilled their normal functions, but Vermaak had to report to the Spar representatives on a number of issues, including on the daily takings and labour issues. The Applicants requested to remain present at the stores in a managerial capacity, pending the conclusion of a management agreement.

- [24] The Applicants were subsequently handed 'management agreements' that purported to be an agreement between the Spar Group Limited and the Applicants. The management agreement drafted for Vermaak, wherein the parties were Spar Group Limited and Vermaak, appointed Vermaak as store manager of Paledi Super Spar for a period of three months, commencing on 1 July 2015 and terminating on 30 September 2015 at a basic salary of R 30 000 per month. The agreement further stipulated that Spar North Rand would open a bank account in the name of Paledi Super Spar and all monies received by the business, had to be deposited into the said bank account and Vermaak had to report to Spar's senior retail operations manager on a daily basis on all deposits made into the bank account and all purchase orders issued and weekly on issues relating to purchases, sales and stock.
- [25] A similar management agreement was drafted for Marlene wherein she was appointed as manager of Paledi Tops at remuneration of R 12 500 per month for a period of 3 months commencing on 1 July 2015 and terminating on 30 September 2015.
- [26] On 22 July 2015 Spar's Mr Craig Records (Records) visited Paledi Super Spar and Paledi Tops and the Applicants indicated that the terms of the management agreement were not acceptable to them as they earned R 70 000 and R 40 000 per month respectively and the management contracts they received indicated that they would be appointed at R 30 000 and R 12 500 per month, which was far below what they earned. Furthermore, the contracts were fixed for a period of three months only. They did not sign the contracts and when they rejected the terms, Records told them that they were dismissed and they no longer worked for Spar. The Applicants were told to evacuate the premises immediately as they were relieved of their duties and their services were no longer required.
- [27] Vermaak testified that he had eight other managers in the store who reported to him and the shop manager, but they stayed on as employees and carried on with the business as usual and they are still working at Paledi Super Spar. The other managers' salaries were paid by Spar. Only the Applicants were told to leave and to vacate the premises. No other manager was told to leave.
- [28] Spar's attorney confirmed on 22 July 2015 that as the management contracts were no suitable and accepted by the Applicants, no management contract came into existence between Spar and the Applicant. Further that Spar decided, in terms of the powers conferred upon it under the court order obtained on 30 June 2015, to carry on the business itself and that the Applicants had to vacate the premises and cease their involvement in the management of the businesses.

- [29] On 23 July 2015 Spar's attorneys wrote another letter to Vermaak wherein his attention was drawn to the terms of the court order obtained on 30 June 2015 and specifically to the fact that Spar was authorised to take possession of all the movable property of Paledi Super Spar and Paledi Tops and that included in the movable property Spar took possession of, were the businesses of Paledi Super Spar and Paledi Tops as going concerns.
- [30] Vermaak testified that Paledi Super Spar and Paledi Tops were never closed and never stopped trading. His testimony was that on 30 June 2015 Spar did a stock take and the stock was credited back to their account and was deducted from the amount they owed Spar. As from 1 July 2015 Spar took over the operation of Paledi Super Spar and Paledi Tops. Spar opened a new bank account and all the money generated by Paledi Super Spar and Paledi Tops was paid into the bank account opened by Spar.
- [31] Vermaak testified that the Applicants were paid their salaries until 30 June 2015 and they were not paid for the 22 days in July 2015 that they rendered their services at Paledi Super Spar and Paledi Tops. The Applicants claim their salaries for the period in July 2015 they rendered services but were not paid for, notice pay and leave.
- [32] In cross-examination Mr van As for the Third Respondent canvassed the issue of the perfection of the bond and the transfer of the business. Vermaak agreed that the notarial covering bond he signed meant that Spar would provide goods to Paledi Super Spar and Paledi Tops and if they could not pay for the goods provided, Spar would perfect the bond and take over the business to realise the debt. Spar could sell off the stock and equipment or the store as a whole to cover the debt but if the businesses became profitable and the debt was paid, Spar could have handed it back to them to carry on with the business. In casu Spar sold Paledi Super Spar and Paledi Tops to settle the debt.
- [33] Mr van As put to Vermaak that after 1 July 2015 Spar opened a bank account and all deposits from Paledi Super Spar and Paledi Tops were paid into the bank account and that money was used to settle the indebtedness that arose before 1 July 2015 and before the perfection of the notarial bond. Vermaak agreed but stated that he still had to pay the overdraft as Spar refused to pay that.
- [34] Mr van As put to Vermaak that there was no transfer as a going concern as Spar simply took possession of Paledi Super Spar and Paledi Tops for the purpose of paying off the debt and not to run the business for themselves. If that was the case, Spar would have kept all the money deposited into the bank account and not used it to pay debt that arose before 1 July 2015. Vermaak disagreed and stated that in all the documents the words 'going concern' was used and he understood it to be taken over as a going concern. The shops continued to trade and all the employees remained there, except the Applicants.

[35] Mr van As also put to Vermaak that Paledi Super Spar and Paledi Tops were in financial distress and that was the reason why the notarial bond was perfected and the reality was that there was no money in the businesses and it was not possible to pay Vermaak R 70 000 and Marlene R 40 000 per month, as they earned at 30 June 2015.

[36] Mr Craig Freeman (Freeman) testified in his capacity as Spar's new business development manager. He testified that the core business of the Third Respondent is to sell and supply stock to Spar retailers. A notarial bond is registered over the movable assets of the business as security if the retailer cannot pay for the stock and the notarial bond would be perfected when excessive amounts are due and not paid. He explained that where a notarial bond registered in favour of Spar is perfected, Spar takes over the control of the store, stabilize the business and determine the indebtedness. Where the store is stabilized and the debts paid,

it is given back to the owner of the store and if this cannot be done, the business is sold.

[37] In casu Spar took over the control of Paledi Super Spar and Paledi Tops on 1 July

2015. Freeman testified that Spar was in control of the said businesses for the period 1 July 2015 until 2 April 2016, but was unable to get the stores to be profitable and Spar looked for a buyer. Vermaak and Steenkamp were also afforded an opportunity to find a buyer, but they could not. When Paledi Super Spar and Paledi Tops were sold in April 2016, there was still a shortfall of R 890 000.

[38] Freeman testified that Vermaak asked to remain in the business after Spar took control in July 2015 as he would have no other means of income. The salary the Applicants drew was not sustainable and Spar looked at market related salaries and offered them such salaries, which offer the Applicants rejected. After the Applicants rejected the fixed-term contracts that were offered to them, Spar had to put a new store manager in place and that was done with effect from 22 July 2015, when Spar appointed a new store manager, Matthew Human, and the Applicants were requested to leave the premises. Freeman testified that if Vermaak accepted the contract Spar offered to him, he would have remained as the store manager. No other managers or employees of Paledi Super Spar and Paledi Tops were replaced.

[39] In cross-examination Freeman testified that after Spar took control of Paledi Super Spar and Paledi Tops, the two close corporations (First and Second Respondents) played no further role in the stores.

The issues this Court has to decide:

Were the Applicants employees?

[40] The first issue to be decided is whether the Applicants were employees of Paledi Super Spar and Paledi Tops on 30 June 2015 and when the alleged transfer of the businesses as a going concern to Spar took place on 1 July 2015.

- [41] Vermaak signed a contract of employment with Paledi Super Spar on 4 December 2013, with effective date being the commencement of employment which is recorded as 1 November 2013. Marlene signed a contract of employment on 1 November 2013 in terms of which she was employed as finance manager of Paledi Super Spar with effect from 1 November 2013. The Applicants' terms and conditions of employment were set out in the said contracts.
- [42] Vermaak testified that he rendered services as general or store manager and Marlene as the financial manager and that they were paid as per the contracts of employment and tax and UIF had been deducted monthly.
- [43] Mr van As argued that there is no evidence to show that the Applicants concluded written contracts of employment with the First and Second Respondents as the contracts of employment that were entered into, are between the Applicants and Paledi Super Spar, a non-existent legal entity. In my view there is no merit in this argument as Paledi Super Spar is the First Respondent's

trading name and it was not disputed that the Applicants rendered services to Paledi Super Spar. To accept Mr van As' argument

would be to place form over substance and would be ignoring the evidence before me and I am not inclined to do that.

- [44] I am satisfied that the Applicants indeed entered into an employment agreement with the First Respondent and that they rendered services and performed duties as general and finance manager in respect of Paledi Super Spar and Paledi Tops. They assisted in the carrying on and conducting of the business of the First and the Second Respondents and for that they received remuneration.
- [45] The Applicants were indeed employees of Paledi Super Spar and Paledi Tops as at 30 June 2015.
- [46] Mr van As further argued that this Court should draw an adverse inference from Marlene's failure to testify and to give evidence at the trial, when she knew that the existence of an employment relationship was challenged and she was present but did not adduce evidence to prove the employment relationship.
- [47] In my view there is no merit in this argument. Vermaak testified about the fact that Marlene was employed as finance manager and his evidence was supported by a written contract of employment, which I accepted was sufficient to establish the existence of an employment relationship. Vermaak further testified about the salient facts Marlene would have testified about, for instance the salary that she earned, which was not disputed and I cannot draw an adverse inference from Marlene's failure to testify.

Was there a transfer as a going concern?

- [48] The Applicants' case is that the businesses of the First and the Second Respondents were transferred to Spar as going concerns on 1 July 2015 in terms of an order of the High Court. All employees of Paledi Super Spar and Paledi Tops, including the Applicants, became employees of Spar on the date of the transfer by virtue of the provisions of section 197 of the Act.
- [49] The Third Respondent's case is that the High Court order empowered and authorised Spar to perfect a notarial bond over the movable assets of Paledi Super Spar and Paledi Tops and that there was no transfer as a going concern as Spar simply took possession of Paledi Super Spar and Paledi Tops for the purpose to pay off the debt and not to run the business for themselves.
- [50] The question is: does the perfection of a notarial bond and consequent taking of possession of movable property to realise an indebtedness constitute a transfer of a business as a going concern as contemplated in section 197 of the Act.
- [51] In casu Spar perfected a notarial bond and took possession of movable property to realise an indebtedness, but it did not end there and that is why the issue of transfer as contemplated in section 197 of the Act arose.
- [52] Before dealing with the merits of this case, the general principles applicable to a section 197 transfer have to be set out.
- [53] Section 197 (1) and
- (2) of the Act read as follows:
- "(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.”
- [54] The Constitutional Court in *Aviation Union of SA and another v SA Airways (Pty) Ltd and others*[2] (Aviation) held that section 197 must be interpreted against the background that its purpose is to preserve all contracts of employment between the workers and the owner of the business which is transferred as a going concern. In this way, on the one hand, the workers' employment is safeguarded and, on the other, a new owner is guaranteed a workforce to continue with the operation of the business.
- [55] The question whether or not there has been a transfer of a business as a going concern entails an enquiry into (1) the existence of a business (is there an economic entity capable of being transferred) (2) whether there was a transfer of a business and (3) whether the business is transferred as a going concern (does the economic entity that is transferred retain its identity after the transfer?)[3].
- [56] In summary, section 197 will apply if all conditions are met and will be triggered with reference to three requisites namely a business, transfer and going concern.

The existence of a business

- [57] The first enquiry is whether there is a ‘business’ as defined in section 197(1)(a).
- [58] The Courts have considered the question of what would constitute a business with reference to the concept of an autonomous economic entity capable of being transferred. The Courts found that a transfer of the same services in itself is not adequate to bring the transaction within the ambit of section 197. What is transferable in terms of the section is not a service itself but a business or entity that provided the service concerned. For a transfer to trigger the application of the section, it must constitute a transfer as a going concern.[4]
- [59] In *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and others*[5] (Grinpal) the Court held that:

“..The 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.”

- [60] The business conducted by Paledi Super Spar is that of a Spar supermarket and Paledi Tops is that of a retail liquor store, which are identifiable business undertakings and which constitute autonomous economic entities and a ‘business’ for purposes of section 197(1)(a).

Transfer as going concern

[61] Having found that Paledi Super Spar and Paledi Tops are businesses for purposes of section 197(1)(a), the next consideration is whether the business was transferred and if so, whether the transfer was as a going concern.

[62] The issue of ‘transfer as going concern’ had been considered by the Courts and the test for determining whether a business was transferred as a going concern or not was laid down by the Constitutional Court in *National Education Health and Allied Workers Union v University of Cape Town*[6] (NEHAWU) as follows:

“.. 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 or not workers are taken over by the new employer, whether customers are transferred 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.”

[63] In *Gripal* the Labour Appeal Court held that:

“..In essence, the approach adopted in NEHAWU follows that of the European Court of Justice in the application of the Business Transfers Directive (2001/23/EC) which is applicable in the European Union, and dictates that a transfer must relate to an autonomous economic entity (defined to mean an organized group of persons and assets facilitating the pursuit of an economic activity that promotes a specific objective). In turn this involves a determination whether that entity retains its identity after the transfer; that is, the transferor must carry on the same or similar activities with the personnel and/or the business assets without substantial interruption.”

[64] In *Unitrans Supply Chain Solutions (Pty) Ltd v Nampak Glass (Pty) Ltd*[7] (*Unitrans*) the Court held that:

“To the extent that the contractual right to provide warehousing services now vests in TMS, the same assets are used to provide those services and the activities conducted at Nampak’s behest are substantially the same as those performed by the first applicant

prior to 1 February, the business performed by the first applicant has transferred as a going concern to TMS.”

[65] In summary, to determine whether a business was transferred as a going concern a number of factors must be considered and regard must be had to the substance and not the form of the transaction. The factors to be considered are whether there was a transfer of assets, whether employees and customers were taken over, whether the same business is being carried on, whether the entity retained its identity after the transfer and carries on with the same or similar activities without substantial interruption.

- [66] To answer the question whether the perfection of a notarial bond and consequent taking of possession of movable property to realise an indebtedness constitute a transfer of a business as a going concern as contemplated in section 197 of the Act, I have to consider the substance and not the form of the transaction.
- [67] The perfection of a notarial bond and the consequent taking of possession of movable property to realise an indebtedness does not per se constitute a transfer as contemplated in section 197 of the Act. Where movable property is taken to realise an indebtedness and the property is sold for that purpose, there is no transfer of a business as a going concern.
- [68] However, a consideration of the substance of such transaction, would require a closer look at other factors. Ultimately it calls for an assessment of the objective facts.
- [69] Mr van As submitted that there was no transfer of a business as Spar did not take possession of the business of Paledi Super Spar and Paledi Tops in order to manage it for its own account, but instead took control of the businesses on a temporary basis in order to realise their indebtedness to Spar and Spar did no more than to act as a creditor to secure indebtedness. Spar did not take control of the business for its own account but instead continued to operate the business for the account of Paledi Super Spar and Paledi Tops. The money generated was used to settle the indebtedness that arose prior to 1 July 2015.
- [70] In my view Spar did more than to act as a creditor seeking to secure and realise indebtedness to it. If Spar simply sought to secure and realise a debt, it could have taken control over the movable property of Paledi Super Spar and Paledi Tops and could have sold or disposed of the moveable property to realise the debt. Instead, Spar took not only control over the movable property, but also of the stores and operated the stores from 1 July 2015 until April 2016, when Spar sold the businesses as going concerns.
- [71] Mr van As submitted that the question in *casu* relating to the perfection of a notarial bond has not been previously considered and he referred to *PE Rack 4100 CC v Sanders and others*[8] (PE Rack) where a similar question was considered. In PE Rack the Labour Appeal Court considered whether a transfer as a going concern took place where the franchisor terminated a franchise agreement and entered into a similar agreement with the new franchisee. The majority found that it did not constitute a transfer of a business in terms of section 197 of the Act.
- [72] In my view PE Rack does not assist Spar for two reasons. The first and obvious is that the issue in *casu* does not relate to a franchise agreement. Even if the question that was considered was similar to the question this Court has to consider, it still does not assist Spar as the facts are different. In PE Rack the second respondent (the franchisor, Cell C) remained the lessee of the business premises in which the franchisee conducted business and the furniture and fittings on the business premises remained the property of Cell C. The stock remained the property of the franchisee and when the agreement was cancelled, the stock was removed from the business premises by the franchisee. The Labour Appeal Court held that the business was not acquired as a going concern and that:

“What effectively had taken place was that the license to operate a business on behalf of the second respondent had been terminated by the latter, insofar as the third and fourth respondents were concerned. This was not the equivalent situation to that of an

outsourcing agreement. The franchisor continued to hold the core assets. They remained those of the franchisor, being the second

respondent, both before and after the agreement had been concluded. There was thus no transfer of infrastructural assets which would sustain an argument that there was a transfer of a going concern. Once the core assets remained intact, that is in the ownership of the second respondent as the franchisor, it becomes difficult to see how a transfer of a business pursuant to s 197(1) has taken place.”[9]

[73] Mr van As submitted that a transfer assumes the permanent handing over of control and that the intention of the parties is relevant. He submitted that the Court should consider whether the parties intended the transfer of a business. In casu Spar took possession of the businesses without a section 197 transfer taking place. Spar took possession in order to realise the debts and to carry on with the business until it was profitable and could be handed back to the owners, Vermaak and Steenkamp and there was never an intention to transfer the business. This was not a transfer but a creditor taking control.

[74] Section 197 will be triggered if a business was transferred as a going concern. That means that a business in operation is transferred to remain the same but in different hands. The sale of a business is not required by section 197, nor is it required that the transfer be a long term or permanent one. In my view the intention of the parties or the reason why a business is transferred, is immaterial and irrelevant and play no role in the objective enquiry whether a transfer as contemplated in section 197 of the Act has taken place.

[75] If the transfer meets the criteria I already set out, the provisions of section 197 of the Act would apply and if that is the case, the transferee is substituted automatically and by operation of law for the transferor as the employer of those of the transferor's

employees engaged in the business on the date of the transfer. The transfer occurs by operation of law and irrespective of the wishes or intentions of the parties.

[76] The real question is thus: did the transfer meet the criteria to trigger the operation of section 197 of the Act.

[77] In casu the following is undisputed:

77.1. Vermaak and his partner, Kasper Steenkamp purchased Paledi Super Spar and Paledi Tops from the previous owner, Mr Riaan Claasen;

77.2. Spar took control over Paledi Super Spar and Paledi Tops on 1 July 2015, after it obtained a court order on 30 June 2015;

77.3. The court order of 30 June 2015 authorised and empowered Spar to enter upon the premises of Paledi Super Spar and Paledi Tops and to take possession of all movable property for the purpose of perfecting Spar's security in terms of a notarial covering bond and to retain possession of the movable property as security for the debts of Paledi Super Spar and Paledi Tops for so long as Spar deemed fit. Spar was also authorised to carry on the business of Paledi Super Spar and Paledi Tops in the

name of and at the expense of Paledi Super Spar and Paledi Tops and for that purpose to purchase goods and do whatever else Spar deems necessary;

77.4. After 30 June 2015 when Spar took control over Paledi Super Spar and Paledi Tops, the stores did not close but continued to trade under the same name and from the same premises;

77.5. Except for the Applicants, all the employees of Paledi Super Spar and Paledi Tops remained employed after Spar took control of the said stores on 1 July 2015;

77.6. Spar appointed a store manager after 22 July 2015 and he reported to Spar and carried out instructions from Spar;

77.7. In April 2016 Spar sold Paledi Super Spar and Paledi Tops and disposed of the said businesses as going concerns.

[78] Vermaak and Steenkamp purchased Paledi Super Spar and Paledi Tops from the previous owner, Mr Riaan Claasen. Unlike PE Rack Spar was never the owner or lessee of the business premises in which Paledi Super Spar and Paledi Tops conducted business. The furniture

and fittings on the business premises never belonged to Spar. Spar had a notarial bond registered as security for the goods or stock it supplied to Paledi Super Spar and Paledi Tops. Yet, when the notarial bond was perfected, Spar took over control of the stores, continued to trade under the same name and from the same premises with the same employees, except the Applicants, and even appointed its own store manager to run the show. I have difficulty to accept that in doing all this, Spar did not more than to act as a creditor to secure indebtedness, as submitted by Mr van As.

[79] I alluded to the factors to be considered and based on the evidence that was adduced, I am convinced that in casu there was a transfer of assets as Spar has taken over two stores with whatever furniture, fittings or infrastructure they had. All the employees of Paledi Super Spar and Paledi Tops, except the Applicants were taken over and the same business with the same or similar activities carried on without any interruption and retained its identity after 1 July 2015.

[80] In my view there was indeed a transfer of the business of Paledi Super Spar and Paledi Tops from the First and Second Respondents to the Third Respondent and such transfer took place on 1 July 2015.

Did Spar dismiss the Applicants

- [81] Having found that the Applicants were employees and that the business of Paledi Super Spar and Paledi Tops transferred to Spar on 1 July 2015 as a going concern, it follows that the Applicants became employees of Spar with effect from the date of the transfer by virtue of the provisions of section 197 of the Act.
- [82] The question is whether they were dismissed by Spar on 22 July 2015 when they were told to vacate the premises and that their presence was no longer required.
- [83] The evidence was that on 22 July 2015 Records visited Paledi Super Spar and Paledi Tops and the Applicants indicated that the terms of the management agreement were not acceptable to them as they would be appointed at a monthly remuneration far below what they earned and only for a fixed period of three months. Records told them that they were dismissed and they no longer work for Spar. The Applicants were told to evacuate the premises immediately as they were relieved of their duties and their services were no longer required.
- [84] Spar's attorney confirmed on 22 July 2015 that as the management contracts were not suitable and accepted by the Applicants, no management contract came into existence between Spar and the Applicants. Further that Spar elected, in terms of the powers conferred upon it under the Court order obtained on 30 June 2015, to carry on the business itself and that the Applicants had to vacate the premises and cease their involvement in the management of the businesses.
- [85] On 23 July 2015 Spar's attorneys wrote another letter to Vermaak wherein his attention was drawn to the terms of the Court order obtained on 30 June 2015 and specifically to the fact that Spar was authorised to take possession of all the movable property of Paledi Super Spar and Paledi Tops and that included in the movable property Spar took possession of, were the businesses of Paledi Super Spar and Paledi Tops as going concerns. The letter also confirmed that Spar was authorised to do whatever it deemed necessary and that it was vested with the right to manage the business and as such has appointed managers to run the businesses. It was re-iterated that the Applicants' presence at the businesses was not required and that they remained employed by Paledi Super Spar and Paledi Tops and any claims they may have for salary or otherwise, are claims against the First and the Second Respondents.
- [86] Freeman testified that Vermaak asked to remain in the business after Spar took control in July 2015 as he would have no other means of income. After the Applicants rejected the fixed-term contracts that were offered to them, Spar had to put a new store manager in place and that was done with effect from 22 July 2015, when the Applicants were requested to leave the premises.

[87] I have no doubt that telling an employee that his or her presence at the work place is no longer required, requesting an employee to leave the premises and subsequent non-payment of the employee's salary, can be nothing else but a termination of the employment relationship, thus dismissal.

Did the Applicants' dismissal constituted an automatically unfair dismissal as contemplated in section 187(1)(g) of the Act

[88] In casu the transfer of the business of Paledi Super Spar and Paledi Tops from the First and Second Respondents to the Third Respondent meets the criteria and the provisions of section 197 of the Act apply. The First and Second Respondents are substituted automatically and by operation of law for Spar as the employer of those employees engaged in the business of Paledi Super Spar and Paledi Tops on 1 July 2015.

[89] For Spar to comply with the provisions of section 197(2), it had to employ the transferred employees on terms and conditions that were not less favourable to the employees than those on which they were previously employed.

[90] It is common cause that Spar handed 'management agreements' to the Applicants wherein Vermaak was appointed as store manager of Paledi Super Spar for a period of three months, commencing on 1 July 2015 and terminating on 30 September 2015 at a basic salary of R 30 000 per month. Marlene was appointed as manager of Paledi Tops at remuneration of R 12 500 per month for a period of 3 months also commencing on 1 July 2015 and terminating on 30 September 2015.

[91] On 22 July 2015 when the Applicants indicated that the terms of the management agreement were not acceptable to them as they earned R 70 000 and R 40 000 per month respectively and the management contracts they received indicated that they would be appointed at R 30 000 and R 12 500 per month, which was far below what they earned. The contracts were also fixed for a period of three months only.

[92] The Applicants did not sign the contracts and when they rejected the terms, they were told that they were dismissed and they no longer work for Spar.

[93] It is evident that Spar failed to comply with the provisions of section 197(2) and

(3) when it offered the Applicants contracts on terms and conditions that were less favourable to them. The fact that Spar effected the Applicants contracts of employment is further indicative that as section 197 transfer indeed took place.

[94] When the Applicants rejected the less favourable terms and conditions, they were told to evacuate the premises immediately as they were relieved of their duties and their services were no longer required.

[95] Section 187(1)(g) of the Act provides that a dismissal is automatically unfair if the reason for dismissal is a transfer or reason related to a transfer contemplated in section 197.

[96] In *Van der Velde v Business and Design Software (Pty) Ltd*[10] (*Van der Velde*) the Court formulated a test in instances where automatic unfair dismissal is alleged and held that :

“ In summary, and in an attempt to crystallize these views and to formulate a test that properly balances employer H and worker

interests, the legal position when an applicant claims that a dismissal is automatically unfair because the reason for dismissal

was a transfer in terms of s 197 or a reason related to it, is this:

- The applicant must prove the existence of a dismissal and establish that the underlying transaction is one that falls within the ambit of s 197.
- The applicant must adduce some credible evidence that shows that the dismissal is causally connected to the transfer. This is an objective enquiry, to be conducted by reference to all of the relevant facts and circumstances. The proximity of the dismissal to the date of the transfer is a relevant but not determinative factor in this preliminary enquiry.
- If the applicant succeeds in discharging these evidentiary burdens, the employer must establish the true reason for dismissal, being a reason that is not automatically unfair.
- When the employer relies on a fair reason related to its operational requirements (or indeed any other potentially fair reason) as the true reason for dismissal, the court must apply the two-stage test of factual and legal causation to determine whether the true reason for dismissal was the transfer itself, or a reason related to the employer's operational requirements.
- The test for factual causation is a 'but for' test - would the dismissal have taken place but for the transfer?
- If the test for factual causation is satisfied, the test for legal causation must be applied. Here, the court must determine whether the transfer is the main, dominant, proximate or most likely cause of the C dismissal. This is an objective enquiry. The employer's motive for the dismissal, and how long before or after the transfer the employee was dismissed, are relevant but not determinative factors.”

[97] Mr van As argued that should this Court find that Spar indeed dismissed the Applicants, the Court should find that their dismissal was not because of the section 197 transfer, but rather because they were not prepared to work for Spar on a fixed -term contract and at a lower salary. This argument is not sustainable in view of the provisions of section 197(2) and (3), which Spar failed to comply with when it offered the Applicants contracts on less favourable terms, which the Applicants rejected.

[98] I am satisfied that the Applicants discharged the evidentiary burden, as set out in *Van der Velde*. It remains for Spar to establish the true reason for dismissal.

- [99] Mr van As further argued that Paledi Super Spar and Paledi Tops could not afford to pay the Applicants their previous salaries and that the Applicants' dismissals were as a result of operational reasons and not as a result of the transfer of the business. This is so, Mr van As submitted, because Spar was prepared to offer fixed-term employment at a lower salary. He further argued that the finances were managed from Spar's head office and there was no longer a need for a finance manager.
- [100] When the employer relies on a fair reason related to its operational requirements as the true reason for dismissal, I must apply the two-stage test of factual and legal causation to determine whether the true reason for dismissal was the transfer itself, or a reason related to the employer's operational requirements.
- [101] The test for factual causation is a 'but for' test - would the dismissal have taken place but for the transfer?
- [102] If the test for factual causation is satisfied, the test for legal causation must be applied. Here, the court must determine whether the transfer is the main, dominant, proximate or most likely cause of the dismissal. This is an objective enquiry. The employer's motive for the dismissal is relevant.
- [103] Mr Stemmet submitted that the Applicants were dismissed after a transfer had taken place and even if they were not dismissed as a result of the transfer, they were dismissed for a reason related to the transfer namely affordability.
- [104] Mr Stemmet argued that the Applicants were dismissed in an attempt by Spar to avoid its obligation of employing the Applicants on their existing terms and conditions.
- [105] I am satisfied that the Applicants were dismissed after a section 197 transfer took place and that the transfer is the most likely cause of the dismissal. If I am wrong on this and the transfer is not the main cause of the dismissal, I am satisfied that the Applicants were dismissed for a reason related to the transfer. The Applicants' dismissal was automatically unfair in terms of the provisions of section 187(1)(g), read with section 197 of the Act.
- [106] Mr van As submitted that if the Applicants were indeed employees and dismissed by Spar for operational reasons, they are not entitled to relief as their claim does not relate to dismissal for operational reasons.
- [107] In my view there is no merit in this argument. If Spar was unable to pay the Applicants the salaries they earned at the date of transfer or if it was of the view that their salaries were not sustainable in view of the financial position of the business, or if they no longer needed the positions occupied by the Applicants, Spar could have terminated their services for operational reasons and should have embarked on a section 189 retrenchment process.

[108] Spar did not embark on a section 189 process and cannot now claim that the Applicants have no case before this Court because they did not pursue a claim for unfair retrenchment. To accept such an argument would be to deprive the Applicants of the remedy they have and pursued in this matter in accordance with the applicable provisions of the Act.

Relief:

[109] Having found that the Applicants' dismissal was automatically unfair in terms of the provisions of section 187(1)(g), read with section 197 of the Act, the remaining issue to be considered is the relief to be granted.

[110] The Applicants seeks compensation. Mr Stemmet argued that the Applicants should be compensated in an amount equivalent to twelve months' remuneration. Mr van As on the other hand argued that they should not be awarded more than three months' remuneration as compensation.

[111] Section 194(3) of the Act provides for the awarding of compensation to an employee whose dismissal is automatically unfair and for such compensation to be just and equitable in all the circumstances. The Applicants are entitled to compensation for the automatic unfairness of their dismissal.

[112] In my view and with due consideration of all the circumstances, the Applicants are entitled to twelve months' remuneration calculated at the rate of their remuneration on the date of dismissal as just and equitable compensation.

[113] Mr van As conceded that the Applicants are in principle entitled to the statutory monies that they claim. The precise relief claimed as statutory monies had been agreed upon by the parties in the pre-trial minute and I accept the calculations as per the pre-trial minute as agreed to and correct

[114] The parties left the issue of costs in the hands of this Court.

Costs

[115] Costs should be considered against the provisions of section 162 of the Act and according to the requirements of the law and fairness.

[116] The requirement of law has been interpreted to mean that the costs would follow the result.

[117] In considering fairness, this Court has held that the conduct of the parties should be taken into account and that mala fide, unreasonableness and frivolousness are factors justifying the imposition of a costs order. Another factor to be considered is

whether there is an ongoing relationship that would survive after the dispute had been resolved by the Court. If so, a costs order may damage the ongoing relationship.

[118] I have considered the fact that there is no ongoing relationship that may be damaged by a cost order and in my view there is no reason to deviate from the general rule that costs should follow the result.

[119] In the premises, I make the following order:

Order

1. The Applicants' dismissal is automatically unfair;
2. The First Applicant is awarded compensation equivalent to 12 (twelve) months' salary, calculated at the rate of remuneration on date of dismissal (R 70 000 x 12) in a sum of R 840 000;
3. The First Applicant is to be paid outstanding remuneration for July 2015 (R 70 000 per month x 22 days) in a sum of R 49 677,42;
4. The First Applicant is to be paid notice pay in a sum of R 64 665,12;
5. The First Applicant is to be paid leave pay (R 2 666,66 x 23 days) in a sum of R 61 333,33;
6. The Second Applicant is awarded compensation equivalent to 12 (twelve) months' salary, calculated at the rate of remuneration on date of dismissal (R 40 000 x 12) in a sum of R 480 000;
7. The Second Applicant is to be paid outstanding remuneration for July 2015 (R 40 000 per month x 22 days) in a sum of R 28 387,10;
8. The Second Applicant is to be paid notice pay in a sum of R 36 951,50;
9. The Second Applicant is to be paid leave pay (R 1 435,89 x 16 days) in a sum of R 22 974,36;
10. The Third Respondent is to pay the costs.
11. The Respondents are jointly and severally liable to pay the Applicants as per paragraphs 2 – 9 of this order, the one paying the other to be absolved.

Connie Prinsloo

Judge of the Labour Court

Appearances:

For the Applicants: Mr J Stemmet of Stemmet and Osman Attorneys

For the Third Respondent: Advocate M van As

Instructed by: Moss Marsh and Georgiev Attorneys

[1] Act 66 of 1995.

[2]

(2011) 32 ILJ 2861 (CC).

[3] See *Franmann Services (Pty) Ltd v Simba (Pty) Ltd and another*

(2013) 34 ILJ 897 (LC). ('Simba')

[4] *Aviation Union of SA and another v SA Airways (Pty) Ltd and others (Aviation)*

(2011) 32 ILJ 2861 (CC) at para 71.

[5]

(2014) 35 ILJ 2757 (LAC). (*Grinpal*) at para 24

[6]

(2003) 24 ILJ 95 (CC) at para 56

[7]

(2014) 35 ILJ 2888 (LC) at para 30.

[8]

(2013) 34 ILJ 1477 (LAC).

[9] At para 18

[10] (2006) 27 ILJ 1738 (LC) at 1148-1149

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