IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

CASE NO C411/2007

In the matter between

SAMWU	**First Applicant**
IMATU	**Second applicant**
and	
SA LOCAL GOVERNMENT ASSOCIATION	**First respondent**
MEC FOR HEALTH, WESTERN CAPE	**Second respondent**
THOSE MUNICIPALITIES LISTED IN SCHEDULE 'A'	**Third to twenty-fifth respondents**
THOSE PERSONS LISTED IN SCHEDULE 'B'	**Twenty-sixth and further respondents**

JUDGMENT

VAN NIEKERK J

Introduction

[1] The applicants ('the unions') seek an order declaring that any written agreements concluded between any of their members or former members and the second respondent ('the Department'), in terms of which the employment of those members is transferred to the Department, are null and void. The unions also seek an order directing that all future transfers of employment from the

relevant municipality to the Department must take place in terms of section 197(2) of the Labour Relations Act ('LRA'), unless the applicants and the Department or the relevant municipality have concluded a written agreement in terms of section 197(6).

The facts

[2] The factual background to the claim is briefly the following. In 2002, it was decided that the Department should assume responsibility for delivering primary health care services, until then a service provided by municipalities. This decision (or what has been termed the 'provincialisation process') raised the potential application of s 197 of the LRA. The Department and the municipalities affected by the decision accept that the nature of the transfer in this instance was such that it fell to be regulated by s 197, i.e. that the contracts of employment of municipal employees engaged in the provision of primary health care service transferred automatically to the Department. That notwithstanding, the Department and municipalities adopted the view that it was not practicable to implement an automatic transfer, and that agreements in terms of s 197(6) were necessary to vary that consequence. In March 2005, a public statement was issued stating that the Department would assume responsibility for the primary health care services then provided by municipalities with effect from 1 April 2005. The unions responded by asserting that if a transfer was to take place (something to which they in any event objected) it could occur only in terms of s 197(2). In the course of the negotiations that were initiated to conclude a s 197 (6) agreement, the unions refused to agree to a transfer on varied terms. The Department and the municipalities claim that they refused to negotiate at all. Almost two years passed without any further progress and in December 2006, the first respondent, SALGA, accepted that deadlock had been reached. During the course of these negotiations, the Department had been assuming operational

control of the assets of the primary health care services. In June 2006, the Department and SALGA concluded an agreement regulating the transfer of the operational control of the primary health service, the transfer of assets and liabilities from the municipalities to the department and what was termed 'staff transfer and integration'. In terms of the agreement, the latter was to be dealt with in terms of s 197(6) 'or such other process as are allowed in terms of applicable legislation.'

[3] In February 2007, SALGA issued a further circular indicating that the transfer of staff engaged in primary health care should be dealt with on an 'individual basis' i.e. that negotiations should be conducted directly with individual employees to conclude agreements in terms of s 197(6). A number of 'transfer agreements' were concluded between the Department, the relevant municipality and the affected employees. The transfer agreements provided for the transfer of the contracts of employment of the employee parties to the Department with effect from 1 July 2007. These are the agreements that the union seek to have set aside. There is some uncertainty on the papers as to how many employees remain affected by these proceedings. The Department contends that at the time the answering affidavit was filed, a total of 515 employees had been transferred, all of whom have long been absorbed into the Department on terms that did not financially prejudice them. The Department also claims that at best for the unions, some 127 employees have indicated their support for these proceedings. Given the basis on which I have come to a decision in this matter, these are not material issues.

The relevant legislative provisions

[4] Section 197(1)(a) defines a 'business' to include '*the whole or a part of any business, trade, undertaking or service…'*. Paragraph (b) defines a transfer

as '*the transfer of a business by one employer … to another employer… as a going concern*.'

[5] Section 197(2) provides that unless otherwise agreed in terms of s 196(6), if a transfer of a business takes place, the transferee is automatically substituted for the transferor as the employer in respect of all contracts of employment in existence immediately prior to the transfer.

[6] Section 197(6) contemplates the variation of the consequence of the substitution of the transferee employer for the transferor contemplated by s 197 (2), and establishes the means by which any variation might be achieved. The subsection requires any variation to be in writing, and concluded between the transferor, the transferee, or the two of them acting jointly on the one hand, and 'the appropriate person or body referred to in section 189(1), on the other'. Section 189(1) establishes a hierarchy of parties that must be consulted prior to any dismissal effected for a reason related to an employer's operational requirements. The parties who are entitled to be consulted rank as follows – a person required to be consulted in terms of a collective agreement, a workplace forum, and a registered trade union whose members are likely to be affected by the proposed dismissals, and the employees likely to be so affected.

[7] In the context of retrenchment procedures, this Court has held that s 189(1) defines a hierarchy of entities and that there is generally no obligation on an employer to consult with a person or body placed any lower in the hierarchy (see *Sikhosana & others v Sasol Synthetic Fuels* (2000) 21 ILJ 649 (LC)). In other words, the person or body that ranks first in the defined hierarchy has the exclusive right to be consulted on the terms of any proposed retrenchment. In the present instance, of course, the right is not one of consultation – s 197(6) defines a hierarchy of bargaining partners.

The parties' contentions

[8] The applicants contend that they qualify, to the exclusion of any other body or person, as the negotiating party for the purposes of any agreement to be concluded in terms of s 197(6). This being so, the applicants submit, the agreements concluded between the Department and the affected employees regulating the terms of a transfer from the municipalities to the Department are of no force and effect.

[9] The respondents accept that s 197 applied to the transfer of primary health care services to the province. Indeed, in June 2004, the relevant Public Service regulations were amended to incorporate a clause to the effect that "*if personnel are transferred from an entity outside the public service to a department [whether national or provincial] the executing authority shall comply with section 197 of the LRA*." The Department concluded, however, that s 197(2) was not capable of implementation, and that it had no option but to attempt to conclude agreements with the unions under s 197(6). In particular, the Department expressed the view that it was not possible to take over the existing collective agreements, since the terms and conditions of employment were not consistent with the 'equitable and uniform standards' which applied to the public service. In the face of the unions refusal to negotiate the terms of a s 197(6) variation agreement and after early 2006, the respondents began to negotiate with union members directly, with the express purpose of securing their transfer to provincial government on consensual basis. The majority of the affected employees have been transferred (with their consent) and their support (or lack thereof) for this application remains unclear.

[10] The respondents defend the approach to union members directly on the basis that the unions had obstinately and persistently refused to enter into any negotiations to conclude a s 197(6) agreement. They submit that the unions' refusal to bargain since dialogue was first initiated in April 2005 amounted to bargaining in bad faith, and that deadlock having been reached in these circumstances, the respondents were entitled to negotiate directly with the employees concerned and to conclude binding agreements with them.

Analysis

[11] I deal first with the second prayer in the notice of motion, i.e. that the Court direct that all future transfers of employment of the applicants' members from the relevant municipality take place in terms of s 197(2), in the absence of any written agreement concluded under s 197(6). In my view, the relief sought in respect of any future transfers is misguided, for at least two reasons. First, in *NEHAWU v University of Cape Town* 2003 (3) SA 1 (CC), the Constitutional Court observed that the fact that the seller and a purchaser of a business have not agreed on the transfer of the workforce as part of a transaction does not disqualify the transaction from being a transfer of a business for the purposes of s 197. Ngcobo J (as he then was) said: "*Each transaction must be considered on its own merit, regard being had the circumstances of the transaction in question. Only then can a determination be made as to whether the transaction constitutes a transfer of a business as a going concern*" (at 29B-C). In my view, this necessarily requires that every transaction claimed to fall within the ambit of s 197 must be scrutinised, on a case by case basis, in order to ascertain whether the elements established by the section have been met, i.e. whether there was a transfer by one employer to another, whether there is an economic entity capable

of being transferred, and whether the economic entity that is transferred retains its identity after the transfer. It is far from clear on the papers before me that every future transaction in terms of which services provided by municipalities are assumed by provincial governments will assume the form of the transfer of a business as a going concern. Secondly, it is a well-established rule that the courts will not deal with hypothetical or academic questions in proceedings for a declaratory order (see Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa*, 4 ed., Van Winsen, Cilliers and Loots, edited by Dendy, at p 1054). In so far as any future transfers of health or other services from municipalities to provincial government are concerned, the relief sought by the union is hypothetical. For these reasons, the relief sought in prayer 2 of the Notice of Motion must be refused.

[12] The unions' claim to the relief sought in prayer one of the notice of motion, i.e. the applicant's contention that the agreements concluded directly with its members should be set aside because they were concluded in breach of s 197(6), raises a number of complex issues.

[13] I deal first with the question whether s 197 applied to the transaction in terms of which primary health care services were transferred from the municipalities to the Department. As I have already indicated, the respondents accept that the provision of primary health care services constitutes a 'service' (and therefore a 'business') for the purposes of s 197(1), and that the business was transferred as a going concern. The unions' position is less unequivocal, but I did not understand Mr Whyte, who appeared for the applicants, to contend that s 197 was not applicable in the present circumstances. On the contrary, the unions' case relies on an interpretation of s 197(6) to the effect that in the absence of their agreement, the contracts concluded by the Department with individual employees were invalid. In effect, the unions seek to assert the status

and to enforce the rights afforded them under s 197(6). This relief is available to the unions if and only if the transaction under consideration is one triggered by s 197. It is common cause that the 'Transfer and operational framework' agreement concluded between the Department and SALGA in June 2006 regulated the transfer of primary health care services from the municipalities to the Department. All of the objective facts establish that the services provided by the municipalities were indeed transferred to the Department in circumstances where the municipalities' patients, assets, liabilities and the like were transferred to the Department, and where the Department continued to provide the same services after the transfer. In short, the nature of the transaction between the municipalities and the Department was such that it attracted the application of s 197.

[14] Secondly, the relief sought by the applicants raises the nature of the relationship between s 197(2) and (6). In my view, section 197(2) clearly establishes a 'default' position. In other words, provided that the nature of a transaction is such that it falls within the ambit of s 197, the consequence of an automatic and obligatory substitution of the transferor employer for the transferee can be avoided or varied only by an agreement that complies with s 197(6). The dual purpose of s 197 was explained in the *NEHAWU* judgment (supra) – it serves to protect workers against loss of employment, but also to facilitate the transfer of businesses. Section 197(6) provides additional flexibility to both parties. For example, workers who do not wish to be employed by the transferee employer may elect not to be transferred and to accept a severance package from the transferor. The limits on the variation of the consequence of an automatic transfer of employment contracts are determined only by the relevant parties' capacity to agree. However, while s 197(6) establishes scope for flexibility, it also provides safeguards. It does in the cross-reference to s 189(1), and effectively establishes a strict hierarchy of bargaining partners with whom

'contracting-out' agreements may be concluded. This provision is clearly intended to protect the interests of affected workers and in particular, to ensure that any rights under section 197(2) that are compromised are compromised only after a process of negotiation with a properly authorised and legitimate representative body. Although the process in this instance is one of negotiation rather than consultation, I see no reason to depart from the principles established by this Court under s 189 that recognise a hierarchy of persons and bodies, the first relevant to the particular factual circumstances excluding all others that rank below it. (See *Sikhosana* (supra) and *Maluleke & others v Johnson Tiles (Pty) Ltd* (2008) 29 *ILJ* 2606 (LC)). In the present instance, it is common cause that the unions were parties to collective agreements with the municipalities that entitled them to be consulted in the event of a proposed retrenchment. That being so, the respondents were obliged to seek the agreement of the unions to vary the consequences of the application of s 197 to the transaction. They sought that agreement, but failed to secure it. In these circumstances, the default prevailed and the Department was substituted, by the operation of law, as the employer of those employees who provided primary health care services for the municipalities. In my view, this occurred in June 2006, on the date that the services were transferred (see *Van der Velde v Business and Design Software (Pty) Ltd & another* [2006] 10 BLLR 995 (LC)).

[15] It follows that the Department's attempts after June 2006 to secure agreements in terms of s 197(6) from individual employees were futile. When the services were transferred, so were the contracts of employment and in the absence at that point of an agreement with the unions, the Department became bound by the employees' terms and conditions of employment as they applied immediately before the transfer, and also by any collective agreements and arbitration awards that bound the municipalities (see s 197 (5)(a)).

[16] In view of this conclusion, it is not strictly necessary for me to deal with the respondents' submission that the unions' intransigence was a legitimate reason to initiate negotiations on a s 197(6) agreement with the affected employees directly. Nevertheless, I would make the following observations. The authority relied on by the respondents (*NUM v East Rand Gold and Uranium* 1992 (1) SA 700 (AD)) is predicated on a statutory duty to bargain in good faith, and the powers afforded the courts to enforce that duty. The LRA introduced a voluntarist system of collective bargaining, a system in which this court (nor any other court or tribunal) is empowered to scrutinise bargain conduct or make pronouncements on the good faith or otherwise exhibited by any of the parties to collective bargaining (see *SANDU v Minister of Defence & others; Minister of Defence & others v SA National Defence Union & others* [2006] 11 BLLR 1043 (SCA)).

[17] It is also no defence for the respondents to claim that the consequences of s 197 were impracticable, or somehow not practically capable of implementation. The fact that this may have been logistically difficult to manage the employment-related components of the transfer did not justify the recourse to negotiating s 197(6) agreements at individual level. In short, in the absence of an agreement concluded with the unions prior to the transfer to vary s 197(2), whether this was the consequence of a refusal to bargain or otherwise, the respondents had two choices – to abandon the transfer or revert to the default represented by s 197(2) and seek post-transfer, through a process of collective bargaining, to align the conditions of employment of the transferred employees with those of existing incumbents.

[18] In summary:

1. The transfer of primary health services from the affected municipalities to the provincial government triggered the application of s 197.

2. The consequences of s 197 (and in particular, the consequence of an automatic and obligatory substitution of the Department for the relevant municipality) could have been varied or avoided by agreements that complied with s 197(6).
3. In the absence of the unions' agreement, the agreements concluded by the Department with affected employees or their purported representatives did not comply with s 197(6).
4. In the absence of a valid agreement varying the consequence of an automatic and obligatory transfer of all contracts of employment, the Department was substituted as the employer of the affected employees on the date that the business was transferred, i.e. in June 2006, and the Department simultaneously became bound by all collective agreements and arbitration awards that bound the municipalities immediately prior to the transfer.

Relief

[19] The relief sought in terms of prayer 1 falls within the ambit of the court's powers under s158(1)(a)(iv) of the LRA, i.e. a declaratory order. In exercising this power, this court ought appropriately to approach the matter in accordance with the principles established by the High Court in considering matters for declaratory relief under s 19 (1)(a)(iii) of the Supreme Court Act, 1959.

[20] In *Eagles Landing Body Corporate v Molewa* 2003 (1) SA 412 (T), Kroon J, dismissing the application, said the following

> *"Should the orders sought be granted, that might be a moral victory for the applicant, but nothing more. The practical* status quo *would remain. The required tangible or justifiable advantage in relation to the applicant's position with reference to an existing, future or contingent right would not flow from the grant of the declaratory orders sought."*

[21] In the present matter, I am not persuaded that any justifiable or tangible advantage can accrue to the unions. The process of negotiation on the employment-related consequences of the transfer commenced in 2005. The Court sits in the unenviable position, some 5 years later, of having to deliver judgment in opposed motion proceedings, in circumstances where the Department has long-since finalised the transfer of some 515 employees, all of whom are *de facto* now employed by the Department, on terms that do not appear to be materially less favourable than those that applied when the employees were engaged by the municipalities. The LRA was intended to introduce a system of dispute resolution capable of adjudicating disputes, such as the present, which involve significant numbers of employees and matters of public policy, on an efficient and expeditious basis. Given the delay in bringing this matter to the point of adjudication, it would appear that a significant number of these employees have no interest in returning to work for the municipalities – at best, it would seem that some 127 employees (about 25% of those affected) support this application. I am also mindful of the fact that collective agreements concluded in the bargaining council to which SALGA and the unions are members (certainly insofar as terms and conditions of employment are concerned) are entered into for defined and limited periods, and that in the public sector, collective agreements concluded in the bargaining council established for that sector are routinely extended by the Minister to bind non-parties to the agreement. I make no finding in this regard; I simply make the observation that at this point, some four years after the transfer, the terms and conditions of

employment on which the affected employees were transferred (i.e. those that applied between them and the municipalities) have become subsumed by binding collective agreements concluded in the public sector. Finally, a declaration such as that sought by the unions would have far-reaching financial and organisational consequences, and may compromise the delivery of services to citizens in need of them. For these reasons, I am inclined, in the exercise of the discretion conferred upon me, to refuse the declaratory relief sought.

[22] Finally, in relation to costs, s 162 of the LRA confers a discretion on this Court to make costs orders on the basis of the requirements of law and fairness. In *NUM v East Rand Gold and Uranium Ltd* (supra), the then Appellate Division of the Supreme Court held that the existence of a collective bargaining relationship and the prejudice that any costs order might pose to it, was a relevant factor. In the present instance, there is no collective bargaining relationship between the unions and the respondents, but the present dispute arose within a context of such a relationship, and in circumstances where the unions sought to exercise their rights as collective bargaining representatives. I also take into account the fact that the unions have largely succeeded in respect of the merits of their claim, albeit that the relief they sought has been refused. For these reasons, it is appropriate that no order for costs should be made.

I accordingly make the following order:

1. The application is dismissed.
2 There is no order as to costs

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Date of hearing: 24 February 2010

Date of judgment: 3 March 2010

For the applicants: Mr. J Whyte

Cheadle Thompson and Haysom Inc.

For the first and second respondents: Adv P Gamble SC with Adv N Bawa

Instructed by the state attorney