IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT PORT ELIZABETH)

CASE NO. P180/05

In the matter between:

CHEMICAL, ENERGY, PAPER, PRINTING, WOOD

AND ALLIED WORKERS UNION AND OTHERS **First Applicant**

NGQAMSHOLO, S & OTHERS **Second to Fifth Applicants**

and

PRINT TECH (PTY) LTD **First Respondent**

PE TECH (PTY) LTD **Second Respondent**

COLVEN ASSOCIATES BORDER CC **Third Respondent**

JUDGMENT

AC BASSON, J

The parties

[1] The first applicant is the Chemical, Energy, Paper, Printing, Wood and Allied Workers Union (hereinafter referred to as "CEPPWAWU" or "the union"), a trade union registered in terms of the Labour Relations Act, 66 of 1995, (hereinafter referred to as "the LRA"). The union brings this application on its own behalf and on behalf of its members, the second to fifth applicants. The second to fifth applicants are members of the union who were employed by the first and second respondents until their

dismissal.

[2] The first respondent is Print Tech (Pty) Ltd. The second respondent is PE Tech (Pty) Ltd. The first and second respondents are thus two distinct and separate corporate entities and employers. The third respondent is Colven Associates Border CC (hereinafter referred to as "the labour broker").

The facts

[3] On 25 October 2004, both the respondents handed all their production employees a letter advising them of the intention to restructure as contemplated in section 189(3) of the LRA. The letter dated 25 October 2004 is headed “CONTEMPLATED DISMISSALS DUE TO OPERATIONS REASONS”. This letter states that the *“company is presently contemplating the dismissal of a number of employees due to operational reasons….”*. As per the operational reasons as set out in the notice of 25 October 2004, the respondents envisaged outsourcing their hourly paid/production personnel to a temporary employment service (the labour broker). During the first formal consultation meeting with the affected employees, the issue of alternative positions with the labour broker was also consulted upon. This meeting took place on 17 October 2004. The meeting was adjourned to 29 October 2004 so that the employees could consider the aforementioned alternative.

[4] During the consultations on 29 October 2004 the employees indicated that they would like to meet with the labour broker. The meeting took place on 1 and 2 November and each employee was given an opportunity to meet with the labour broker.

[5] Mr. Kloppers held meetings with the affected employees advising them of the respondents' intentions described above and urging them to accept employment on the terms offered by the labour broker. The second to fifth applicants rejected the offer of alternative employment with the third respondent. They were thereafter retrenched. The dispute was referred to the bargaining council but conciliation was unsuccessful.

[6] In essence the intention of the respondents was to retrench their entire operational labour force and outsource their services to a labour broker. This is evident from the letter dated 10 November 2004 to the employees. In this letter it is stated that "*[t]he company has now decided to proceed with the process of outsourcing its labour force to the Labour Brokers, Colven Associates Border CC, as from 14 November 004 (effective date)".* It was common cause that the business of the first and second respondents stayed the same and that it was only the employees who had been transferred. Although the employees had been transferred to the labour broker they would have continued to do the same work for their erstwhile employer because the business remained the same and the business remained in the hands of the same employer. Only the employees were therefore to be transferred to the labour broker.

[7] Mr. Cakata was the local organizer of the union at the relevant time. He confirmed that he had seen the notice of the employers' intention to retrench. He confirmed that he did meet with the respondent on 9 November 2004 and that he met with Mr. Du Toit and Mr. Andre Klopper. He testified that his members were not happy to be transferred to the

labour broker and that they were unhappy that their new contracts would be for a fixed term whereas they previously were permanently employed. He conceded in cross-examination that the employees would have accepted the contacts if the contracts were permanent.

[8] A perusal of the contract issued to the employees confirms that the employees would be employed only as long as the client needed their employment. In terms of the contract the employee acknowledges that there can be no expectation of the renewal of the assignment. The contract further provides that the "*assignment will automatically terminate when the Company is instructed by the Client to remove the Assignee and/or when the assignment as set out in of (sic) Annexure A ends. There will thus be no entitlement by the Assignee to notice or severance pay at any point whatsoever.*" The contract further states that "*[t]he Assignee will not be entitled to participate in the funds, benefits and other conditions applicable to permanent employees of the Company and/or the Client*".

[9] In the statement of claim the applicants argued that they were unfairly dismissed, *inter alia,* because: "*20.2 The respondents transferred a part of their business as a going concern to the labour broker, without the consent of the dismissed employees and without transferring all their existing rights and obligations of employment with the respondents to the labour broker, contrary to the requirements envisaged on section 197(2) of the LRA*".

Was there a transfer in terms of section 197 of the LRA?

[10] Mr. Snyman relied on *SAMWU & Others v Rand Airport Management Company (Pty) Ltd & Other* [2005] 3 BLLR 241 (LAC) in support of its

contention that the outsourcing of the labour constituted a transfer of a going concern and urged this Court to regard the outsourcing of the labour force as a service. I do not agree that the *Rand Airport* judgment is authority for this proposition. The LAC clearly stated that it is an essential requirement of a transfer of a business as a going concern that the business transferred must continue to operate and remain the same, though in *different* hands. The LAC also pointed out that regard must be had to substance and not the form of the transaction. The LAC further held that section 197 is only activated if there has been an agreement between two employers to transfer a business from one to the other.

[11] In the present case there has not been a transfer of a business. What the employer tried to transfer was the employees who rendered a service to the employer. The business remained in the hands of the same employer. There has clearly not been a transfer of a business which continues to operate and remain the same though in different hands. What the respondents tried to do was to transfer the contracts of employment from one employer to another – namely to a labour broker. In the *Rand Airport* - case there was a transfer of gardening and security services which were performed by the employer in the conduct of it business to another party (the service provider). It is thus clear that the services once performed by the employer were transferred to another employer. I therefore do not accept that a transfer of the applicants' contracts of employment to the labour broker can constitute an outsourcing of a "*service"* within the definition of section 197 of the LRA nor am I of the view (as already pointed

out) that this was the interpretation by the LAC in Rand Airport- case. The decision of Landman J in *NUMSA v Staman Automatic CC & Another* (2003) 24 ILJ 2162 (LC) is furthermore clear authority for the interpretation of what constitutes a transfer of a business in terms of section 197 of the LRA. The Court held as follows:

> *"The NUMSA employees are regular employees of Staman. They place their labour potential at the disposal of their employer and become entitled to remuneration. They work with either the machines that produce plastic products, machine operators or they are general workers. They are not employed to render a service on behalf of Staman. They are employed to render a service to Staman. Their work is connected to the machines. The machines are part of Staman's infrastructure. Staman has no intention of parting with its machines by selling or disposing of them. There is clearly no transfer of the machines or the business. This is evident from the "transfer of business agreement"*

Also to the point is the following statement:

> *"The services of the employees, in this case, are not an economic entity that will retain its identity after the purported transfer. That the employees may not see a difference as regard their job functions, because they will be contracted back to perform the same functions at Staman does not mean that they retrain their previous identity. What Staman and Jobmates seek to do is to define the employees by reference to their employment status and not as a stable*

economic entity."

[12] I am in agreement with the decision in *Staman* and I am further of the view that the decision of the LAC did not disturb the findings of *Staman*. As already pointed out, the decision in *Rand Airport* supports the submission that what is transferred must be a business or service that will continue as a going concern in the hands of a different employer. In the present case there has not been such a transfer of a service. The economic entity of the (original) employers remained exactly the same. What the 1st and 2nd respondents purported to transfer was thus not an entity that would retain an economic identify after the purported transfer (see *Staman*). I am therefore satisfied that there is and was no service which could have been transferred.

Fairness of the retrenchment

[13] The 1st and 2nd Respondents have not offered any evidence in justification of the applicants' dismissal. Consequently their dismissals are deemed to be substantively and procedurally unfair.

[14] In light of the fact that the dismissals took place in 2004, I am of the view that compensation is the preferred remedy in the circumstances. I therefore award 12 months compensation to each of the individual applicants.

Costs

[15] In respect of costs I can see no reason why the 1st and 2nd respondents should not be ordered to pay the applicants' costs. On behalf of the 3rd Respondent it was argued that there was no need to have brought them to court and that the applicants should pay their costs. It was the 3rd

Respondent's case that there was no transfer in terms of section 197 and that the applicants should pay their costs in light of the fact that the applicants have failed to show any case which the 3rd Respondent had to answer. I agree with this submission and therefore order that the applicants' pay the costs of the 3rd Respondent.

Order

[16] In the event the following order is made:

1. The dismissals of the second to fifth applicants were substantively and procedurally unfair.
2. The 1st respondent is ordered to pay Mr. Sandile Ngqomsholo compensation equal to 12 months salary.
3. The 2nd respondent is ordered to pay the remaining applicants each compensation equal to 12 months salary.
4. The 1st and 2nd respondents are ordered to pay the costs of the applicants jointly and severally, the one paying the other to be absolved.
5. The first applicant is ordered to pay the costs of the 3rd respondent.

AC BASSON, J

29 January 2010

For the Applicants:

Adv Euijen instructed by Gray Moodliar Attorneys

For the 1st and 2nd Respondents:

Mr. S Snyman of Snyman Attorneys.

For the 3rd Respondent

C Krichman