

IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO J3150/2000

In the matter between:

IMATU	First Applicant
ADRIAAN PIETER STRYDOM	Second Applicant
NORMAN THEO BROWN	Third Applicant
WADE MICHAEL BERNING	Fourth Applicant
SAMWU	Fifth Applicant

and

GREATER JOHANNESBURG METROPOLITAN COUNCIL	First Respondent
THE JOHANNESBURG FRESH PRODUCE MARKET CO (PTY) LTD	Second Respondent
THE JOHANNESBURG METROPOLITAN BUS COMPANY (PTY) LTD	Third Respondent
THE JOHANNESBURG ZOO COMPANY (INCORPORATED ASSOCIATION NOT FOR GAIN)	Fourth Respondent

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JUDGMENT

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JAMMY AJ

1. Pursuant to an unopposed application in terms of Rule 22(2)(a) of the Labour Court Rules, SAMWU (the South African Municipal Workers' Union) was joined as an Applicant in these proceedings and is accordingly cited as the Fifth Applicant.

2. It is common cause that, as at 30 June 2000, the Second, Third and Fourth Applicants were employed by the First Respondent respectively at its Fresh Produce Market, in its Bus Division and at the Johannesburg Zoo. It is also not disputed that, as part of a restructuring and development plan known as "iGoli 2002", the First Respondent procured the formation, registration and incorporation of the Second, Third and Fourth Respondents by virtue of the provisions of s17D of the Promotion of Local Government Affairs Act, 91 of 1983 ("the PLGAA") and that on 30 June 2000, it concluded separate sale agreements with each of those corporate entities in terms of which, with effect from 1 July 2000, the business operations conducted by it in the three divisions referred to were respectively sold to them as going concerns.
3. Section 17D of the PLGGA provides that -
"Local Authority may form company and acquire shares therein. - (1)
Notwithstanding anything to the contrary in any law contained, a local authority, or two or more local authorities acting jointly, may -
- (a) **form, register and promote a company as contemplated in the Companies Act, 1973 (Act No 6 of 1973); and**
- (b) **acquire and hold shares in a company as contemplated in the Companies Act, 1973;**
- Provided that the main object or one of the objects of such company shall be the performance of a function or the rendering of a service which is substantially the same as a function or service which a local authority may legally perform or render....."**
4. During the course of June 2000, the First Respondent, by way of a comprehensive memorandum, informed its employees in the divisions to be corporatised, *inter alia* that, in terms of s197(1) of the Labour Relations Act 1995 ("the LRA"), their contracts of employment would be transferred automatically to the relevant new corporate entities. This, it was explained, would take place with effect from 1 July 2000 and their consent was not required provided that the terms and conditions of their existing contracts of employment were preserved, which would, it was stated, be the case in all respects.
5. Section 197(1) of the LRA provides as follows:
"A contract of employment may not be transferred from one employer (referred to as 'the old employer') to another employer (referred to as 'the new employer') without the employees' consent, unless -
- (a) **the whole or the part of a business, trade or undertaking is transferred as a going concern;**
or

(b)"

6. This information was formally confirmed in a letter addressed by the First Respondent to all its affected employees, including the individual Applicants in this matter, on 27 June 2000 in identical terms, differing only in the reference to the specific corporate entity concerned. The letter read as follows:

"TRANSFER OF EMPLOYMENT CONTRACT TO(incorporated under Section 21)

As communicated to you in more detail earlier this month, we now confirm that your employment contract will be transferred to in terms of Section 197(1) of the Labour Relations Act 66 of 1995.

For ease of reference, a copy of the document which reflects the discussion of the previous briefing sessions on migration/transfers, is attached.

It is to be noted that all your Conditions of Service and your existing fixed terms or monthly contract benefits which you currently enjoy, as applicable to your current substantive post, will be transferred with you to the new employer.

It is hereby confirmed that your last working day with the Greater Johannesburg Metropolitan Council will be Friday, 30 June 2000. You will accordingly commence employment with in your current capacity with effect from 1 July 2000, at the time and place you are usually required to report for duty, unless you have been advised otherwise. In the case of persons currently acting, such employees will continue acting in terms of the Conditions of Service until such time as the need ceases to exist and or rotation takes place in terms of the Conditions of Service.

We wish you every success in your future employment with"

7. In an application brought as one of urgency on 28 July 2000 the Applicants, having initially perceived a need for interim relief, now seek final orders in terms set out in their Notice of Motion as follows:

- "1. Declaring that the purported transfers on 1 July 2000 of the contracts of employment of the first respondent's members employed by the first respondent at the Johannesburg Fresh Produce Market, Bus Division and Zoo at 30 June 2000 to the second, third and fourth respondents respectively is void and of no force or effect.**
- 2. Declaring that such transfers can only be lawfully effected with the consent of the persons concerned in terms of s17E of the Promotion of Local Government Affairs Act. Act 91 of 1983.**
- 3. Ordering the respondents to pay the costs of this application jointly and severally, one paying the others to be absolved.**
- 4. Granting further and/or alternative relief."**

8. Section 17E of the PLGAA reads thus:
"Local Authority may transfer or second officer or employee to or place his services at the disposal of company. - A local authority may, with effect from a date determined by such local authority, with the consent of the officer or employee concerned, transfer or second any of its officers or employees to or place his services at the disposal of any company referred to in Section 17D: provided that in the event of a transfer such officer or employee shall be employed by the company concerned on such terms and enjoy such rights and privileges as are not less favourable than those applicable to him at the time of such

transfer."

9. No such consent, the Applicants contend, was either sought or obtained from the employee members of the First and Fifth Applicants before the purported transfer of their employment contracts with effect from 1 July 2000 and those transfers, it is alleged, are therefore illegal and void.
10. The First Respondent does not dispute that formal consent to the transfer of the contracts was at no time requested or obtained prior to the effective date thereof. That, it submits, is because this was not required having regard to the provisions of s197(1) of the LRA. The businesses or undertakings involved were transferred to the new corporate entities as going concerns and the employment contracts of employees thereby affected were automatically transferred pursuant thereto, with no change in the terms and conditions of their employment.
11. To the extent to which, on the issue of the requirement of consent, the provisions of s197(1) of the LRA conflict with those of s17E of the PLGAA, regard must be had, the First Respondent contends, to s210 of the LRA, which provides that:
"210. Application of Act when in conflict with other laws. If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail."
12. That, the First Respondent contends, is precisely the position obtaining in this instance. To the extent that the provisions of s197(1) of the LRA, which exclude the need for consent in circumstances such as those here prevailing, conflict with the express necessity to obtain it which is prescribed by s17E of the PLGAA, the former must prevail.
13. Considerable attention was directed by Mr M Wallis, Senior Counsel for the Applicants, to the concept of repeal by implication of an earlier statute by conflicting provisions of a later one which are so manifestly inconsistent with

them as to constitute a "repugnance and contradiction" as dealt with by **Kotzé AAJA** in -

New Modderfontein Co v Transvaal Provincial Administration. 1919 AD 367 AT 400.

14. That, he argued, is the effect of the Respondents' contention that s197 of the LRA prevails over s17E of the PLGAA in relation to the issue of consent. If they are correct, what will have resulted is the partial repeal of one provision forming part of an overall statutory scheme. This could not have been intended by the Legislature and in any event, the two enactments are not necessarily inconsistent. The later is of general application, whilst the former is specially directed to a particular subject and ***generalis specialibus non derogant***.
15. Section 210 of the LRA moreover, it was contended, is by inference anticipatory. Its saving provisions relate expressly to the Constitution or "any Act expressly amending this Act." By necessary interpretation therefore, it is argued, it is any *future* (my emphasis) legislative provisions, other than those specifically referred to, which will have no application if they conflict with specific provisions of the LRA.
16. In my opinion, neither of these submissions is sustainable. In the first instance, the Applicants' contention that the two statutory provisions in question are not necessarily inconsistent, and certainly not so to a degree of contradiction which would support a finding of the repeal by implication of the earlier of them by the later, is not challenged, correctly in my view, by the Respondents. Their contentions support no such inference. If expunging the relevant provisions of the PLGAA had been the intention of the Legislature, it would, as it has done in relation to other legislation by s12 read with Schedule 6 to the LRA, have said so. The fact that this has not been done cannot be construed as a legislative oversight. The consent required by s17E of the PLGAA will still be necessary where the transfers involved are not effected in the circumstances envisaged in s197(1)(a) and (b) of the LRA.

17. Conflicting statutory provisions are not unique and a legislated pronouncement, where this occurs in a specific context, that one will prevail over the other, cannot be intended to indicate an intention that the provisions of the latter will necessarily cease to apply in any circumstances. The perceived necessity to issue such a directive is in essence an implied provision to the contrary. Repeal by implication, as was stated in **New Modderfontein Gold Mining Co v Transvaal Provincial Administration (supra)**, will not easily be presumed and will occur only where the provisions of one statute cannot continue at all to co-exist with those of the other and the former is not formally and expressly repealed. There is nothing in the language of s197 of the LRA which suggests or implies that the subservient legislation there generally referred to will cease to have relevance or application where it is proper that it should do so. This, however, is not such a case.
18. The second of the Applicants' contentions to which I have referred, namely the suggested anticipatory intention of s210, cannot, I repeat, be sustained. The language of the section is clear and unambiguous and no basis for attributing to it anything other than the ordinary meaning of the words used can in my view be justified. Mr Wallis' emphasis on the specific reference, apart from the Constitution, to any amending, and therefore necessarily future, legislation, takes no account of the reference in the section to "the provisions of **any other law**" (my emphasis). There is no ambiguity in that phrase. The position of any such law in the chronology of legislative enactments, in the absence of any express provision to the contrary, is irrelevant. The PLGAA is patently one such "other law". The consent requirements in s17E of that Act are manifestly in conflict with those of s197 of the LRA. It is therefore the latter which, in terms of s210, must prevail.
19. Finally, the submission that the relevant provisions of the LRA will not be applicable to municipal employees because of specialised legislation governing them cannot, in my view, be upheld in this instance. Sectors of employment specifically excluded from the application of the Act are expressly defined in

- s2. Neither Local Government nor any specific categories of employment within it, are specified.
20. For the reasons which I have stated therefore, I find that neither the consent of the Second, Third or Fourth Applicants, nor of any other member of the First and Fifth Applicants, was required for the transfer of their contracts of employment by the First Respondent to the Second, Third or Fourth Respondents as each case may be and that the transfers in question were valid and of full effect.
21. That being the case it is unnecessary for me to pronounce on the justification or otherwise for the allegedly urgent basis of the application. The legal aspects of the dispute were, as was stated, fully argued and, as far as this Court is concerned, have been determined.
22. The application is accordingly dismissed. The Applicants are ordered jointly and severally to pay the Respondents' costs.

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B M JAMMY

Acting Judge of the Labour Court

10 August 2000

aring: 28 July 2000

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For the First to Fourth Applicants: Adv M J D Wallis SC, with him: Adv M A Kriegler, instructed by Kochs & Dreyer, Attorneys

For the Fifth Applicant: Mr A Roskam of Cheadle Thompson & Haysom Inc

For the Respondents: Adv P Kennedy, instructed by Bowman Gilfillan Inc