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IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: JS227/03

2003-07-14

In the matter between
NOKENG TSA TAEMANE LOCAL MUNICIPALITY First Applicant

INDEPENDENT MUNICIPAL AND ALLIED TRADE UNION Second Applicant
and
METSWEDING DISTRICT MUNICIPALITY First Respondent

SOUTH AFRICAN MUNICIPAL WORKERS UNION Second Respondent

MEC FOR DEVELOPMENT, PLANNING AND LOCAL GOVERNMENT, GAUTENG Third Respondent

MEC FOR HEALTH, GAUTENG Fourth Respondent

J U D G M E N T

LANDMAN J:

This is an application which was brought by way of urgency for a declaratory order. The application was brought by Nokeng Tsa Taemane Local Municipality (Nokeng), first applicant, and the Independent Municipal and Allied Trade Union, second applicant. The first respondent is the Metsweding District Municipality. The

second respondent is the South African Municipal Workers Union.

Two further respondents were joined by order of this court dated 5 May 2003. They are the Member of the Executive Council for Development, Planning and Local Government, Gauteng, the third respondent and the Member of the Executive Council for Health, Gauteng, the fourth respondent.

The order which the applicants seek reads as follows:

"Declaring that by operation of section 197 of the Labour Relations Act 66 of 1995, as amended, the first respondent became the employer of all persons previously employed by the first applicant in its Emergency Medical Services Department with effect from 1 April 2003."

The Ekungwini Municipality and the Nokeng Municipality, are local municipalities. Local municipalities fall within the area of jurisdiction of a district municipality. In this case Nokeng and Ekungwini fall within the area of jurisdiction of the Metsweding District Municipality. These local municipalities and the district municipality are located within the area of jurisdiction of the Gauteng Provincial Government.

In terms of Schedule 5 to the Constitution of the Republic of South Africa, Act 108 of 1996, Ambulance Services are a functional area of exclusive provincial legislative competence. The Gauteng Province in this matter, which is the relevant province, is tasked by section 125 of the Constitution to perform the executive functions in respect of its province. (See also section 16(1)(b) of the Health Act 63 of 1997).

It is permissable for the province, as the competent authority, to allow local government, i.e. a municipality or district municipality, to perform ambulance services on an agency basis. I shall refer to the Ambulance Services or Emergency Services as the EMS.

The Gauteng Province’s Department of Health concluded a

written agency agreement with the Metsweding District Council to render an EMS within its area of jurisdiction and to perform certain incidental functions. This agreement, to which I shall refer as the MOA, was concluded on 17 October 2002. The agreement was said to endure from 1 April 2002 to 31 March 2003. The MOA appears to have ratified an informal arrangement. What Metsweding did before and more and specifically, after November 2002, is of more importance than the terms of the agreement itself.

Nokeng rendered an EMS within its area of jurisdiction. Nokeng found the financial burden which rested on it too enormous. Nokeng decided to terminate its EMS with effect from 1 January 2003. Nokeng advised Metsweding and the Province of its intention to do so. However, by agreement, Nokeng continued rendering the service until 6 January 2003.

On a later date a meeting was held between the representatives of the various parties. Mr A J Boshoff, the municipal manager of Nokeng, was present at the meeting. He says:

"20. At that meeting where there was no union representation, the first respondent requested the first applicant to continue rendering ambulance services as before until 31 March 2003. The impression was conveyed by the first respondent's "representatives at this meeting that the first respondent will take over the first applicant's EMS department from 1 April 2003 and required the three months period to make the necessary arrangements to effect the transfer.

21. The first respondent undertook to pay for the period 1 January 2003 to 31 March 2003 all the first applicant's expenses in respect of emergency medical services including salaries. Moreover to settle the dispute between the first applicant and the second applicant concerning the payment of shift allowances to members of the second applicant the first

respondent mandated the first applicant to offer a shift allowance of R250.00 per month to its EMS employees.

23. In a letter dated 7 January 2003, Letwaba, of the first respondent, confirmed the decisions taken at the meeting of 6 January 2003. Annexure AJB8 is a copy of said letter."

As a result of this meeting a task team was formed. Correspondence was exchanged between the Province, Nokeng and Metsweding and each other. Several meetings took place. When 31 March arrived, Nokeng stopped rendering the EMS. The assets connected to this function were transferred to the Province. Nokeng took up the position that 43 of its staff members, whose names appear on an annexure to Mr Boshoff's letter of 20 March 2003, were transferred to Metsweding. Metsweding denies that it is their employer.

The result was this urgent application for a declaratory order was launched.

The principal question is whether there has been a transfer of the service as a going concern as contemplated in s 197 of the LRA.

The Constitutional Court in *National Education Health and Workers Union v University of Cape Town and Others* (2003) 24 ILJ 95 (CC), considered the meaning of the transfer of a business as a going concern in terms of s 197 of the Labour Relations Act 66 of 1995 as well as in terms of s 197 as introduced by Act 12 of 2002. The Constitutional Court had the following to say at paragraph 67:

> "The categories of transfer that were dealt with in s 197(1)(a) and (2)(a) are now dealt with in the new s 197. The categories of the transfers that were dealt with in 197(1)(b) and (2)(b) are now dealt with in s 197A. Although the new s 197 uses different language, its effect is the same as the old s 197. It provides that 'the new employer is automatically substituted

in the place of the old employer in respect of all contracts of employment'; that the rights and obligations between the old employer and the worker are transferred to the new owner; that the transfer does not interrupt the continuity of the employment; and that the employment contract 'continues with the new employer as if with the old employer'. In all the circumstances the recent amendment fortifies the conclusion that upon the transfer of the business contemplated in s 197, workers are transferred to the new owner of the business."

The Constitutional Court considered the meaning of a transfer and held that:

"The fact that the seller and purchaser of the business have not agreed on the transfer of the workforce as part of the transaction does not disqualify the transaction from being a transfer of business as a going concern with the meaning of s 197. Each transaction must be considered on its own merit regard being had to the circumstances of the transaction in question. Only then can a determination be made as to whether the transaction constitutes the transfer of a business as a going concern. In this regard I agree with Zondo JP". (See paragraph 58).

Zondo JP said in the passage referred to above:

"In my view the position is that there will be cases where the transferor and the transferee agree that the workforce will be taken over by the transferee but the transaction cannot be described as a transfer of the business as a going concern if any of the other factors that are relevant to a transfer being one as a going concern are absent and there will be transactions where the transferor and transferee will agree that the workforce will not be taken over but the transaction will still amount to a transfer of a business as a going concern because of the presence of many or all of the factors that go to making a transfer of a business to be one as a going concern. Accordingly each transaction must, in my view, be considered on its own merits in the light of all the surrounding circumstances of the transaction before a determination can be made whether it constitutes a transfer of a business as a going concern."

See *National Education Health Allied Workers Union v University of Cape Town and Others* (2002) 23 ILJ 306 (LAC) at paragraph 65.

I should add that one of the amendments affected by the Labour Relations Amendment Act of 2002 is to insert the word “service” to make it clear that the transfer of a service as a going concern is also contemplated by s 197.

It must be born in mind that the *NEHAWU* matter dealt with an agreement on the sale of a business. To that extent there was a contractual nexus, the circumstances there differ from the facts of this case.

Mr Naidoo, who appeared on behalf of Metsweding and SAMWU, submitted that the applicant's reliance on s 197 of the LRA as amended is without merit in the circumstances of this case. He submitted that the object of s 197 appears to be the protection of the employees' concerned. He submitted that in these circumstances the formality of writing as prescribed in s 197(6) would be required in respect of an agreement for the transfer of a business or service by one employer to another as envisaged in s 197(2).

He pointed out that s 197(7) requires very detailed agreements and a careful proportioning of liability between the old and the new employer. He contended that s 197(7)(e) also stipulates that a written agreement is required. He contended that the allegations pleaded by the applicants did not satisfy the requirements of s 197 of the LRA.

I am of the view that a transfer as contemplated in s 197 of the LRA is not restricted to a transfer resulting by agreement between a transferor and transferee. A transfer is a transaction which is determined by making a value judgment on all the relevant facts. This much is clear from the wording of section 197(2) which reads:

"If a transfer of a business takes place unless otherwise agreed in terms of sub-section (6) ..."

Section 197(7), to which Mr Naidoo referred, reads as follows:

"(7) The old employer must-

(a) agree with the new employer to a valuation as at the date of transfer of-

(i) the leave pay accrued to the transferred employees of the old employer;

(ii) the severance pay that would have been payable to the transferred employees of the old employer in the event of a dismissal by reason of the employer's operational requirements; and

(iii) any other payments that have accrued to the transferred employees but have not been paid to the employees of the old employer.

(b) conclude a written agreement that specifies-

(i) which employer is liable for paying any amount referred to in paragraph (a), and in the case of the apportionment of liability between them, the terms of that apportionment; and

(ii) what provision has been made for any payment contemplated in paragraph (a) if any employee becomes entitled to receive a payment.

(c) disclose the terms of the agreement contemplated in paragraph (b) to each employee who after the transfer becomes employed by the new employer; and

(d) take any other measure that may be reasonable in the circumstances to ensure that adequate provision is made for any obligation on the new employer that may arise in terms of paragraph (a)."

Sub-section (7) does not stipulate that an agreement should be concluded *before* a transfer of a business or service as a going

concern arises; whether that transfer is pursuant to an agreement or otherwise.

The European Free Trade Area Court of Justice in *Viggosdottir v Islandspostur H F* [2002] IRLR 425 summarise the import of case law on article 1 of the EC Business Transfers Directive 77/187 at pargraph 20 as follows:

> "In these judgments, the Court has set out criteria for determining whether there is a transfer within the meaning of Article 1(1) of the Directive. According to that case law, it is necessary to consider all the facts characterising the transaction in question, including the type of undertaking or business concerned, whether or not tangible assets, such as buildings and moveable property, or intangible assets such as patents or know-how are transferred, the value of the assets at the time of the transfer, whether or not most of the personnel is kept on by the new employer, whether or not customers are transferred, the degree of similarity between the activities carried out before and after the transfer and the period of any suspension of those activities. All those circumstances are, however, only individual factors in the overall assessment to be made and cannot therefore be considered in isolation (see for example, *Eidesund,* cited above, at paragraph 32, and see also case C-24/85 *Spijkers v Benedik* [1986] ECR 1119, at paragraph 13)."

A further observation need to be made on the concept of a transfer in circumstances such as in the present case. It is a feature of this case that the Gauteng Province contracts its ambulance service obligation out to municipalities. It is theoretically possible that:

(a) the Province could, by retrieving its assets and equipment from Nokeng, be involved in the transfer of the service from Nokeng to itself.

I need not consider this aspect as it is not in Nokeng's case that there has been such a transfer.

(b) There could be a transfer from one agent to another agent without the necessity for there to be a contractual relationship between the agents.

This situation has received the attention of courts interpreting Directive 77/187. For instance in *Oy LjikenneAB v Liskojarvi and Juntunen* [2001] IRLR 171 paragraph 25, the European Court of Justice held:

> "The first answer to be given to the national court must therefore be that the taking over by an undertaking of non-maritime public transport activities- such as the operation of scheduled local bus routes- previously operated by another undertaking, following a procedure for the award of a public service contract under Directive 92/50, may fall in the material

scope of Directive 77/187, as set out in Article 1(1) of that Directive."

Here too, it is unnecessary to decide the issue for I am prepared to assume that the concept of a transfer of a service in terms of section 197 embraces a transfer between an existing agent and a new agent of the same principle without the need for an agreement to be concluded between the old and new agent.

The Constitutional Court in the *NEHAWU* case said at paragraph 56:

"The phrase ‘going concern’ is not defined in the LRA. It must therefore be given its ordinary meaning unless the context indicates otherwise. What is transferred must be a business in operation 'so that the business remains the same but in different hands.' Whether that has occurred is a matter of fact which must be determined objectively in the light of the circumstances of each transaction. 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

transferrred 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.They must all be considered in the overall assessment and therefore should not be considered in isolation."

A good starting point is to ask precisely what was the EMS which was operated by Nokeng? The service can be said to consist of the following:

(a) Nokeng rendered an emergency medical service, (ambulance service) within its municipal jurisdiction;

(b) the EMS was principally an ambulance service but may have had a fire fighting function;

(c) 43 employers were employed and rendering the service. I do not know what functions these persons performed, how they are managed, their shifts, or whether they performed additional tasks related to the functions of the municipality;

(d) the founding affidavit refers to Nokeng's EMS department but details have not been supplied regarding the structure and operation of this department and its position within the municipal organisation. It may be that it is a department of such a nature that it could be execised from the municipal organisation so as to retain its identity and structure. But I do not know whether this is so;

(e) it appears that Nokeng's EMS department functions under a head of a department;
(f) Nokeng's expenses (and possibly other amounts) concerning its EMS were reimbursed by the Province which challenged this reimbursement through the offices of Metsweding.
I now turn to consider whether Metsweding has itself an EMS.

(a) The MOA empowered Metsweding to render an ambulance service. This activity is defined in the agreement. The definition has a bearing on the service which Metsweding agreed to render. The definition reads as follows:

"Ambulance services refers to

(i) the transportation and emergency medical treatment services up to and including Advanced Life Support rendered to a patient from the point of injury or illness to stabilisation and admission to an appropriate medical facility; and

(ii) the administration of the ambulance service."

(b) In implementing an EMS, Metsweding would have to establish-

(i) an administration;

(ii) acquire ambulances and equipment;
(iii) recruit staff;
(iv) co-operate with and report to the Province on a number of matters;
(v) keep financial records relating to the EMS;
(vi) ensure that those members of staff who are required to be registered are registered and those who are required to have permits, have them;
(vii) maintain the assets entrusted to it by the Province under its control;
(viii) indemnify the Province for damages which may be sustained to these assets; and

(ix) take out comprehensive insurance.

(c) Metsweding says that the MOA was not implemented. Nokeng denies this. I will assume that the MOA was implemented after a fashion. I have already mentioned that it was set to endure until 1 March 2002.

(d) Since 31 March 2002 no further agreement has been entered into between Metsweding and the Province, save for an agreement which appears to be an interim agreement pending the outcome of the dispute between Nokeng and Metsweding.

(e) The Province, the trade unions, in particular SAMWU and IMATU, Nokeng and Metsweding, contemplated that Metsweding would take over Nokeng's EMS. For instance, the Director (EMS) of the province considered:

"That an agreement needs to be reached on the transfer of staff and functions to Metsweding within realistic time frames."

The Province and Metsweding did not contemplate the taking over all of Nokeng's EMS staff and did not agree to do so. But required Nokeng to remedy replacement of its staff, their remuneration and conditions of service and thereafter Metsweding would consider in re-employing some of them.

(g) Nokeng has adopted the position that its EMS staff have been transferred to Metsweding from 1 April 2003. This of course is in dispute.

(h) On 1 April 2003 Nokeng was required by Metsweding, acting at the instance of the Province, to deliver the assets and stock for the provision of ambulance services to the Province at Cullinan. This appears to have been done. Presumably the Province also removed the radio equipment from Nokeng's control centre. I assume that the assets are now held by the Kungwini Municipality on behalf of the Province.

I now turn to consider a few other relevant facts which may throw light on the question whether there has been a transfer of the EMS as a going concern.

The present process was precipitated by Nokeng's announcement that financial constraints required it to terminate its EMS department. It would therefore seem that at it was not then contemplated that there would be a transfer. However, one must have regard to factors which took place thereafter.
Ekungwini also operates an EMS service and did so on 31 March 2003. It is clear that Metsweding did not intend to take over the EMS department of this municipality and that of Nokeng. Metsweding reasoned that if it did so this would result in duplication of its EMS requirements.

A final and weighty consideration is whether, on a proper construction of the documents, upon which Nokeng relies, as well as the facts set out in the papers, prove an agreement was concluded between Nokeng and Metsweding for the transfer of the EMS service.

Mr Boshoff only had the “impression” that there would be a take over of the EMS department by Metsweding. Mr Boshoff admits this in his letter of 7 January. He points out that the letter, which set out the decisions of the meeting of 6 January, did not expressly state that there will be a transfer or a take-over of the EMS department.

The facts do not warrant an inference of a tacit agreement requiring Metsweding to take over the EMS rendered by Nokeng. The matter is to my mind sufficiently clear on the papers that there is no call to send the matter for oral evidence.

The facts set out above do not show that there has been a transfer of the EMS to Metsweding as a going concern. The assets have not been transferred to Metsweding. Metsweding is not

conducting a fully operational EMS although it might contemplate doing so. Metsweding does not wish to employ Nokeng's EMS staff. There has been no integration of Nokeng's EMS with that of Metsweding (of whatever scale). On 1 April 2003 the EMS which was operated by Nokeng came to an end without there being a transfer of this service.The result is that Metsweding remains the employer of its EMS staff.

This brings me to the question of costs. The Province does not seek its costs. Both Nokeng and IMATU on the one side and Metsweding and SAMWU on the other side are content that cost should follow the result. The reserved costs on 23 April were caused by inadequate notice to Metsweding and SAMWU. The reserved costs of 24 June were caused by Nokeng and IMATU's failure to join the Province in this application.

Mr Naidoo submitted that the costs should be awarded on an attorney and own client scale. I do not think that this would be appropriate in the light of the ongoing relationship between Nokeng and Metsweding and the unions which have taken sides. There is already bad blood between the municipalities. This would be worsened by a cost order on the scale suggested.

In premises therefore

1. The application is dismissed with costs including the reserved costs.

2. No order of costs is made as regards the third and fourth respondents.

SIGNED AND DATED AT BRAMFONTEIN ON THIS 8TH DAY OF SEPTEMBER 2003

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A A Landman
Judge of the Labour Court of South Africa

For applicant:	Adv H M Viljoen instructed by Jac Van Niekerk,
	Hartzenberg & Ferreira Inc

For 4th respondent:	Adv Michael Naidoo instructed by Zwane Sambo Attorneys
Dates of hearing:	23 April 2003 03 May 2003 24 June 2003
Date of judgment:	14 July 2003