IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case no: D1233/19

In the matter between:

MEDICARE HEALTHCARE GROUP (PTY) LTD	**First Applicant**
THE EMPLOYEES LISTED IN ANNEXURE A	**Second and further Applicants**

And

Dr. F BUDDING & ASSOCIATES No. 158 Inc	**First Respondent**
EXP CONSULTING GROUP HOLDINGS (PTY) LTD	**Second Respondent**
THE EMPLOYEES LISTED IN ANNEXURE B	**Third to Eight Respondents**
EXP HEALTHCARE SOLUTIONS (PTY) LTD	**Ninth Respondent**
ICEBREAKERS EQUIPMENT (PTY) LTD	**Tenth Respondent**

Heard: **17 October 2019**

Delivered: 7 November 2019

Summary: Urgent Application: Transfer as a going concern- Section 197 of the Labour Relations Act 66 of 1995 considered.

JUDGMENT

GUSH, J

[1] This is an urgent application brought by the first applicant seeking an order declaring that the effect of the termination of the Administration Agreement entered into between the first applicant and the first respondent was that the "whole or part of the services under the Administration Agreement" was transferred to the first respondent as a going concern.

[2] In addition to this order, the applicant sought a further order that the employment contracts of the employees (the second and further applicants) be automatically transferred to the first respondent in terms of section 197 of the Labour Relations Act[1] (LRA) on terms and conditions no less favourable than those they enjoyed during their employment by the applicant.

[1] Act 66 of 1995 as amended.

[3] Despite the multiplicity of parties to this application, the issue is straightforward: Did the cancellation of the Administration Agreement entered into between the first applicant and the first respondent by the first respondent result in a transfer as a "going concern" of the services rendered to the first respondent by the first applicant in accordance with that agreement.

[4] The first applicant, the first respondent and the second respondent challenged in their opposing papers, the issue of urgency and non-joinder. The first respondent in addition seeks an order striking out certain sections of the applicant's affidavits.

[5] At the outset, the parties agreed (and in so far as it was necessary I ordered) that:

5.1 All the parties had had adequate time to file their pleadings;

5.2 The applications for joinder be granted (not opposed);

5.3 The strike out application would not be pursued and accordingly be dismissed;

5.4 The matter be heard as a matter of urgency; and

5.5 The matter would proceed based only on whether there had been a section 197 transfer.

[6] In its founding affidavit the applicant describes its function as *"providing infrastructure and an established multidisciplinary medical centre network to medical and dental practices … [and] administers … medical or dental*

practices, allowing the medical or dental practitioners to focus on treating patients."[2]

[7] It is clear from the papers that the first respondent is but one of the practices for whom the first applicant renders services.

[8] The nature and the extent of the services provided by the first applicant to the first respondent is set out in an Administration Agreement (entered into between the first applicant and the first respondent).. Specifically, the parties recorded the "Functions, Services and Duties" which the first applicant would provide to the first respondent in an annexure to the Agreement.[3]

[9] In terms of the administration agreement, the first applicant provided the first respondent with certain infrastructure and equipment. The infrastructure included the premises, (which the first respondent will continue to occupy). The equipment falls into two categories:

9.1 Firstly, the equipment leased by the first applicant for the use of the first respondent; and

9.2 Secondly, the equipment that belonged to the first applicant and would remain the property of the first applicant on termination of the agreement.

[10] The equipment referred to *supra* was leased from the tenth respondent in terms of a lease agreement. The parties were *ad idem* that the lease agreement for the equipment would terminate simultaneously with the Administration Agreement. The essential effect of this is that the first applicant's obligations both with regard to the leasing of the equipment and

[2] Founding affidavit para 13 at page 11.
[3] Annexure B to the Administration Agreement pleadings at page 44.

any obligation to supply the equipment to the first respondent, fell away on cancellation of the Administration Agreement.

[11] Somewhat surprisingly, it was the first applicants case, at least initially, that this amounted to the transfer of equipment from the first applicant to the first respondent. There is nothing in the papers to justify this conclusion. It is abundantly clear that the cancellation of the Administration Agreement did not result in the transfer of any equipment whatsoever.

[12] In fact, the only equipment that may have been transferred following the cancellation, should there have been a transfer of the business as a going concern, is that which was listed in annexure CH3[4]. The Administration Agreement however expressly provided that the equipment specifically would be returned to the first applicant on cancellation of the Administrative Agreement.

[13] The first applicant in its founding affidavit makes the startling submission, in support of its averment that the cancellation of the Administration Agreement amounts to a section 197 of the LRA transfer, is that "*96% of the assets will transfer to the [first respondent] on termination of the Administration Agreement"*[5]. This is simply not correct. It is clear from the first applicant's replying affidavit that it regards the transfer of equipment as the determining factor in ascertaining whether there has been a section 197 of the LRA transfer[6].

[14] Turning to the employees, it is clear from the Administration Agreement that all the employees, listed as applicants or respondents in this matter, were prior to the cancellation of the Administration Agreement, all employed by the

[4] Pleadings at page 57.
[5] Founding affidavit at para 24.2 pleadings page 17.
[6] First applicants replying affidavit pleadings at pages 305 – 313.

first applicant. Their contracts of employment all appear to provide that their employment is based on the first applicant's business that comprises *inter alia,* rendering of services by the first applicant to its medical and dental practice clients in general and not specifically as employees dedicated to one or any specific practice.[7]

[15] The fact that the first respondent has offered some of the first applicants employees employment does not indicate that a transfer of employment has or should follow the cancellation of the Administration Agreement, let alone a transfer of a business or part thereof. It is apparent that all the employees employed by the first applicant were employed for the purpose of rendering the service that the first applicant offers to various medical and dental practices as part of its business.

[16] The test applied in determining whether there has been a section 197 of the LRA transfer was set out by the Constitutional Court in the matter of *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town and Others*[8] and in *Aviation Union of SA and Another v SAA (Pty) Ltd and Others*[9]. This test has consistently been applied in section 197 of the LRA determinations. There are as many decisions that conclude that there has not been a transfer as there are decisions that conclude that there has been. The essence of the test is that the facts of each matter will determine the answer.

[17] Apposite to this matter in *Aviation Union*[10] the Constitutional Court said:

> "[47] …a termination of a service contract and a subsequent award of it to a third party does not, in itself, constitute a transfer as envisaged in the section. In those circumstances, the service provider whose contract has been terminated loses the contract but retains its business. The service provider

[7] Founding affidavit at paras 13 – 18 pages 11 – 13.

[8] (CCT2/02) [2002] ZACC 27; 2003 (2) BCLR 154; 2003 (3) SA 1 (CC).

[9] 2012 (1) SA 321 (CC)

[10] Id n 9.

would be free to offer the same service to other clients with its workforce still intact.

[48] For a transfer to be established there must be components of the original business which are passed on to the third party. These may be in the form of assets or the taking-over of workers who were assigned to provide the service. The taking-over of workers may be occasioned by the fact that the transferred workers possess particular skills and expertise necessary for providing the service or the new owner may require the workers simply because it did not have the workforce to do the work. Without the protection afforded by s 197, the new owner with no workers may be exposed to catastrophic consequences, in the event of the workers declining its offer of employment.

[52] Although the definition of business in section 197(1) includes a service, it must be emphasised that what is capable of being transferred is the business that supplies the service, and not the service itself. Were it to be otherwise, a termination of a service contract by one party and its subsequent appointment of another service provider would constitute a transfer within the contemplation of this section. That this is not what the section was designed to achieve is apparent from its scheme, historical context and purpose'.

[18] As already stated above. the facts in this matter are straightforward: The first applicant provided a service to the first respondent. The first applicant's business, *inter alia*, involves, in its own words "*providing infrastructure and an established multi-disciplinary medical centre network to medical and dental practices.*"[11] This service is not provided exclusively to the first respondent but to a number of medical and dental practices at a number of its "Medicross" facilities within South Africa.

[19] The service it provides does not, (in the words of the Constitutional Court in *Aviation*), constitute "the business that supplies the service". Applying the

[11] Founding affidavit para13 at page 11.

rationale set out in the Aviation case it is clear that there has been no transfer of a business or part thereof as a going concern.

[20] I am not persuaded that the first applicant has established on the facts before this Court that the cancellation of the Administration Agreement by the first respondent has the effect of or has resulted in the transfer of a business "or part" thereof as a "going concern".[12]

Costs

[21] This Court has a wide discretion in awarding costs. I have taken into account the decision in *Member of the Executive Council for Finance, KwaZulu-Natal v Wentworth Dorkin N.O*[13]. I have had regard to the prevailing relationship between the first applicant and the first respondent, and I can find no reason in law or in fairness why costs should not follow the result. The same applies to the second and ninth respondents. As for the second and further applicants, they merely signed confirmatory affidavits and there is no reason in fairness why they should be mulcted in costs. The first applicant sought no relief against the third to eighth and tenth respondents and accordingly there is no reason why the first applicant should pay their costs.

[22] For the reasons set out above I make the following order:

Order

1. The first applicant's application is dismissed;

[12] Section 197 (1) of the LRA.
[13] (2008) 29 ILJ 1707 (LAC). See also: *Zungu v Premier of the Province of KwaZulu-Natal and Others* [2018] ZACC 1; (2018) 39 ILJ 523 (CC); [2018] 4 BLLR 323 (CC); 2018 (6) BCLR 686 (CC).

2. The first applicant is ordered to pay the first, second and ninth respondents' costs.

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D H Gush

Judge of the Labour Court of South Africa

Appearances:

For the First Applicant:	Advocate F Boda SC
Instructed by:	Norton Rose Attorneys
For the First Respondent:	Advocate L Frank SC
Instructed by	Mashabane Liebenberg Sebola Attorneys
For the Second and Ninth Respondents	Advocate W Nicholson
Instructed by:	Laurie Wright and Partners
For The Employees	Advocate Z Ploos van Amstel