

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 15246/2019

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED YES

6 May 2020

Date

Signature

In the matter between:

PEKA MESHACK MAOKE

First Applicant

ESSAU CYRIL BALOYI

Second Applicant

and

TELKOM (SOC) LIMITED

First Respondent

COMBINED PRIVATE INVESTIGATION CC

Second Respondent

Heard: 19 November 2019

Judgment: 6 May 2020

JUDGMENT

MOVSHOVICH AJ:

Background and the applicants' case

- [1] The first applicant ("**Mr Maoke**") was an employee of the first respondent ("**Telkom**") from 1998 to 31 May 2017. The second applicant ("**Mr Baloyi**") was employed by Telkom from 1992 to 31 May 2017.
- [2] With effect from 1 June 2017, their contracts of employment were transferred to the second respondent ("**CPIC**") in terms of section 197 of the Labour Relations Act, 1995 ("**LRA**") as a result of a transfer of Telkom's business as a going concern to CPIC pursuant to a tender process won by CPIC. In accordance with statute, CPIC took over Telkom's employees (including the applicants) on terms and conditions no less favourable than those in those employees' contracts of employment with Telkom.
- [3] The applicants do not challenge the legality or propriety of the section 197 process. Mr Maoke states in the replying affidavit that *"this matter is not about whether the section 197 transfer was done legally or lawfully by [Telkom]. I am not seeking...relief to declare the section 197 transfer illegal or unlawful."*
- [4] The applicants' complaint may be summarised as follows. Telkom agreed with CPIC since November 2016 that there will be a section 197 transfer. In February 2017, it offered the applicants Voluntary Severance Packages ("**VSP**") and/or Voluntary Early Retirement Packages ("**VERP**"). At that stage, however, Telkom did not inform them that a section 197 transfer was imminent and had been agreed. Telkom also did not suggest that there would be any retrenchments at Telkom, but simply that the VSPs and VERPs were part of a potential restructuring exercise in the business of Telkom. The applicants only came to know of the section 197 transfer in late March 2017, by which time the VSPs and VERPs were no longer available.
- [5] The applicants allege that had they known of the section 197 transfer in February 2017, they would have exercised their option to take up a VSP or VERP, which would have been far more lucrative than any compulsory retrenchment package which they would be offered by CPIC. They allege that their constitutional rights have been infringed as a result and they suffered harm.

- [6] In the founding papers, their challenge is based on a breach of the following constitutional rights / principles:
- [6.1] the right to just administrative action (section 33 of the Constitution);
 - [6.2] the right to fair labour practices (section 23 of the Constitution);
 - [6.3] the right of access to information (section 32 of the Constitution); and
 - [6.4] the principle of legality under the Constitution.
- [7] As a result of the alleged breaches, the applicants seek:
- [7.1] declaratory relief to the effect that Telkom's withholding of the information was "unjust, arbitrary, unreasonable and unfair" and violated the aforesaid rights; and
 - [7.2] payment of the value of the VSPs / VERPs which would have been payable to the applicants in February 2017.

The respondents' position

- [8] The respondents challenge the accuracy of the factual averments on which the applicants rely. Telkom also disputes that it had any legal duty to provide the relevant information to the applicants or that this Court has jurisdiction to hear the matter. CPIC objects to having been dragged into this litigation in the first place, given that only Telkom's conduct is impugned by the applicants. It thus seeks dismissal of the application with costs on a punitive scale.

The applicants' case as it developed at the hearing

- [9] At the hearing of the application, the applicants focused their challenge on sections 23 and 32 of the Constitution. The applicants' counsel expressly disavowed, correctly in my view, any reliance on section 33 of the Constitution. I thus do not propose to deal with it further. He also did not press the challenge based on the principle of legality. I shall, however, briefly address it below.

Jurisdiction

- [10] Jurisdiction is determined by reference to an applicant's pleadings, and not the substantive merits of the case.¹ If, on a proper interpretation, there are adequate facts pleaded to engage the jurisdiction of the Court, that is sufficient to allow the Court to adjudicate the matter further. In the labour context, however, as the Constitutional Court has cautioned, if the pleadings, properly interpreted, actually make out a challenge under the LRA over which the Labour Court has exclusive jurisdiction, then the High Court should decline to hear the matter.²
- [11] The demarcation of the proper scope of the Labour Court's exclusive jurisdiction is not easy. There is a long line of not entirely reconcilable judgments which attest to the difficulties.
- [12] In the present case, the applicants expressly eschewed reliance on the LRA and have not, other than in one instance which I address below, alleged that any provision in that statute has been breached. All parties in this matter accept that the LRA does not provide for the information rights which the applicants assert, and the applicants rely squarely on their constitutional rights. Even in the context of reliance on section 23, the applicants assert that Telkom's conduct amounts to an unfair labour practice only in terms of the Constitution, and that such conduct does not constitute an unfair labour practice as defined in the LRA.
- [13] On the basis of the above, and without traversing the merits of the applicants' case, subject to what is set forth below in relation to subsidiarity, I am satisfied that the applicants' pleadings make sufficient averments to engage this Court's jurisdiction.

Subsidiarity

- [14] At the conclusion of the hearing, I directed the parties to make further written submissions to the Court in relation to any possible effect of the principle of subsidiarity on this application.
- [15] The principle of subsidiarity "*means that where legislation gives effect to constitutional rights, it is impossible to go behind that legislation by relying on the*

¹ *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC), para [75].

² *Loc cit.*

*Constitution directly. A litigant's remedy is to attack the legislation for its deficiency."*³

- [16] The principle has been applied strictly in the context of administrative justice and access to information rights under the Constitution. The Courts reasoned that, as legislation is constitutionally required to be passed to give effect to those rights and as such legislation has now been enacted, being the Promotion of Administrative Justice Act, 2000 ("**PAJA**") and the Promotion of Access to Information Act, 2000 ("**PAIA**"), if litigants assert a breach of either of those two constitutional rights, they must do so through the provisions of PAJA and PAIA, respectively, or launch a challenge to those statutes' constitutional validity, as a result of under-inclusivity, over-inclusivity or otherwise.⁴
- [17] The applicants have not invoked any provision in PAIA as the basis for their claim as to a breach of their right of access to information and relied only on section 32 of the Constitution. In accordance with the majority judgment of the Constitutional Court in *My Vote Counts I*, this they may not do by virtue of the principle of subsidiarity. They either have to locate their case in PAIA or to challenge PAIA's constitutionality.
- [18] The position in relation to the principle of legality and section 23 of the Constitution is more nuanced.
- [19] In *South African National Defence Union v Minister of Defence* ("**SANDU**"),⁵ the Constitutional Court rejected that section 23(5) of the Constitution, dealing with collective bargaining, could be relied on directly, instead of the relevant provisions of the LRA. It cited with approval the approach taken by the Cape Provincial Division in *NAPTOSA v Minister of Education, Western Cape*.⁶ In that case, a full bench held that section 23(1) - the very section invoked in this case - could not be relied on directly. What had to be pursued is a claim under the LRA or the LRA had to be challenged for unconstitutionality. Otherwise, the Court held there was a

³ *Annex Distributors (Pty) Ltd v Bank of Baroda* 2018 (1) SA 562 (GP), para [26].

⁴ *My Vote Counts NPC v President of the Republic of South Africa* 2016 (1) SA 132 (CC) ("**My Vote Counts I**"); and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC), para [25].

⁵ 2007 (5) SA 400 (CC).

⁶ 2001 (2) SA 112 (C).

real danger that two parallel systems would be established, which was undesirable.

- [20] The Court in *NAPTOSA* stated as follows: *"Mr Du Plessis candidly admitted that the unfair labour practice regime which the Courts would, on his argument, have to apply under s 23 of the Constitution would resemble that developed by the industrial court. To grant relief which would encourage the development of two parallel systems would in my view be singularly inappropriate. Taking into account the right to fair labour practices and the duties imposed thereby on employers and employees alike, it is not a right which can, without an intervening regulatory framework, be applied directly in the work place. The social and policy issues are too complex for that. The consequences of adopting Mr Du Plessis's argument would be dramatic. For example, an unfair dismissal, which is undoubtedly an unfair labour practice, would become justiciable in the High Court without having been aired before the CCMA."*⁷
- [21] Of that approach, O'Regan J in *SANDU* stated as follows: *"In my view, this approach is correct: where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard."*⁸
- [22] The *NAPTOSA* judgment has also been cited with unqualified approval in Ngcobo J's judgment in *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others*,⁹ and the majority judgment by Langa CJ in *MEC for Education, KwaZulu-Natal v Pillay*.¹⁰
- [23] In *National Education Health & Allied Workers Union v University of Cape Town & others ("NEHAWU")*,¹¹ the Constitutional Court also held that *"[t]he concept of fair labour practice must be given content by the legislature and thereafter left to gather meaning, in the first instance, from the decisions of the specialist tribunals including the LAC and the Labour Court. These courts and tribunals are responsible for overseeing the interpretation and application of the LRA, a statute which was enacted to give effect to s 23(1)."*

⁷ At 123.

⁸ Para [51].

⁹ 2006 (2) SA 311 (CC), paras [436]-[437].

¹⁰ 2008 (1) SA 474 (CC).

¹¹ 2003 (3) SA 1 (CC), para [34].

- [24] The Court went on to hold as follows: "*That is not to say that this court has no role in the determination of fair labour practices. Indeed, it has a crucial role in ensuring that the rights guaranteed in s 23(1) are honoured. In the First Certification Judgment this court remarked in relation to s 23 in general:*

'The primary development of this law will, in all probability, take place in labour courts in the light of labour legislation. That legislation will always be subject to constitutional scrutiny to ensure that the rights of workers and employers as entrenched in NT 23 are honoured.'

*Although these remarks were made in the context of collective bargaining, they apply no less to s 23(1). This court also has an important supervisory role to ensure that legislation giving effect to constitutional rights is properly interpreted and applied."*¹²

- [25] *NAPTOSA*, its principled statements on subsidiarity and the application of subsidiarity to section 23(1) of the Constitution appeared to be settled law.

- [26] Then came the Constitutional Court's unanimous judgment in *Pretorius v Transport Pension Fund*. The Court stated in its judgment that "[t]he application of the principle of subsidiarity in relation to the LRA and other labour legislation is complex."¹³ The Court held that a distinction should be drawn between those provisions of the Constitution (such as section 32) where Parliament was obliged to enact legislation to give effect to a constitutional right and provisions such as section 23(1) where it did not have that obligation.¹⁴ The Court reasoned that the LRA does not purport to be a complete memorial of unfair labour practices and other labour rights.¹⁵ The Constitutional Court thus concluded that "[a] fair labour practice claimant may be entitled to rely on the Constitution directly without having to show that the LRA (or patchwork of other statutes) is deficient."¹⁶

- [27] In *Murray v Minister of Defence*,¹⁷ the Supreme Court of Appeal accepted that a member of the South African National Defence Force, who was definitionally

¹² *Ibid*, para [35] (emphasis added).

¹³ 2019 (2) SA 37 (CC), para [50].

¹⁴ *Ibid*, para [51].

¹⁵ *Ibid*, para [50].

¹⁶ *Ibid*, para [51] (emphasis added).

¹⁷ 2009 (3) SA 130 (SCA).

excluded from the remit of the LRA, was entitled to rely directly on section 23(1) of the Constitution for pursuing a claim or indirectly in developing the common law.¹⁸ This is not comparable to the present case, but does illustrate that the courts have accepted that it remains open to litigants to invoke section 23(1) without recourse to the LRA.

- [28] There is a tension between the judgment in *Pretorius* on the one hand and the judgments in *SANDU*, *NEHAWU* and *NAPTOSA* on the other. After all, *SANDU* concerned section 23(5), which does not oblige the legislature to pass any legislation. *SANDU* also endorsed the more general principle arising from *NAPTOSA*. And *NEHAWU* concluded that the LRA gives effect to section 23(1) and that the contours of unfair labour practices should primarily be left to the legislature and the specialist tribunals in terms of the LRA.¹⁹ *SANDU*, *NEHAWU* and *NAPTOSA* are not cited or discussed in *Pretorius*. *Pretorius* is, however, the latest pronouncement on the topic from our highest court.
- [29] *Pretorius* was decided on exception, and the Court in that matter was anxious not to close the door on potential, novel claims in circumstances where all the facts had not yet been placed before the Court and the outer contours of the principle of subsidiarity had not been fully defined. In that case, the plaintiffs alleged that a promise was made to them in 1989 that they would receive the same pension benefits from the new pension fund under a commercial entity, Transnet (SOC) Limited, as they would have received from the old pension funds operated under the auspices of the State. The plaintiffs alleged that the failure to fulfil the promise was an unfair labour practice actionable under the Constitution.
- [30] The Constitutional Court did not offer detailed guidance as to the test to be applied to assess whether subsidiarity can find any application in the context where a party claims conduct which falls outside the definition of an unfair labour practice in the LRA (as was the case in *Pretorius*) is actionable under the Constitution. Given, however, that the Court was prepared to send the matter to trial, it is plain that there is no peremptory bar against relying directly on section 23(1) of the Constitution rather than challenging the constitutionality of the LRA. This appears to be reinforced by academic commentary. John Grogan writing in the *Bill of*

¹⁸ At para [5].

¹⁹ Subject, of course, to judicial review powers.

Rights Handbook states that a person may rely directly on section 23(1) "if the LRA does not provide for unfair labour practice complained of. For example, the unfair labour practice definition makes no mention of unfair transfers."²⁰

- [31] While the preamble to the LRA (as amended with effect from 1 January 2015) does state that it was enacted to give effect to section 23 of the Constitution, there is no indication that it thereby sought to "cover the field" of labour relations. Indeed, the preamble to the Basic Conditions of Employment Act, 1997 ("BCEA") likewise states that the BCEA is intended "to give effect to the right to fair labour practices referred to in section 23(1) of the Constitution". As the Constitutional Court remarked in *Pretorius*, there is "patchwork" of labour relations statutes. In circumstances where several statutes seek to give effect to the same right, it is clear that none of them purports to give complete effect to that right. In such an instance, it is difficult to conclude that numerous disparate statutes, taken together, in fact cover the field. Also, if, in terms of the principle of subsidiarity, a litigant is required to challenge a statute's constitutionality for over or under-inclusivity, it is unclear which of the "patchwork" of statutes such a litigant is required to challenge.
- [32] The LRA also does not profess to encapsulate every instance of unfair labour practice as envisaged in section 23(1) of the Constitution. I am also mindful of the fact that the LRA recognises that the High Court will continue to have jurisdiction to adjudicate certain claims arising in the labour relations contexts, but which are rooted in alleged breaches of fundamental rights under chapter 2 of the Constitution, and not the LRA.²¹ The High Court should not close the door on litigants in a manner which undermines this legislative objective.
- [33] It is plain that LRA excludes numerous classes of persons in or connected to work situations where unfair practices may arise. It also omits from the definition of an unfair labour practice a wide variety of situations which the erstwhile Industrial Court and international instruments have recognised as unfair labour practices. I do not think one should lightly impute to the legislature the intention to have effectively excluded their right to the protections afforded by (a now constitutionally enshrined) prohibition against unfair labour practices.

²⁰ Iain Currie and Johan de Waal *The Bill of Rights Handbook* (6ed) (2013), 475.

²¹ Section 157(2) of the LRA.

- [34] I think that, if the principle of subsidiarity is to develop in future, there may indeed be a distinction which will need to be drawn between an alleged unfair labour practice arising from conduct connected with the implementation of LRA processes and procedures, and an alleged unfair labour practice in the context of conduct not thus connected. It seems to me that the case for the application of the principle of subsidiarity in the former is more compelling than the latter. On the face of it, certain elements of the applicants' case may tend towards the former scenario rather than the latter.
- [35] Nevertheless, given the Constitutional Court's most recent judgment on the topic, in *Pretorius*, the supple nature of the subsidiarity principle and the fact that the applicants in their pleadings situated their complaint in the context of the VERP/VSP process, I am prepared to accept that the applicants' claim under section 23(1) is not proscribed by subsidiarity.
- [36] I now briefly turn to the principle of legality.
- [37] As has recently been held by the Supreme Court of Appeal, "[o]ne cannot assert the 'right' to the principle of legality in a vacuum."²² It usually has to be linked to some legislative framework which is alleged to have been breached, and in respect of which a decision was reached unlawfully or irrationally. The founding affidavit is not clear in this regard but suggests that a "decision" was taken by Telkom to withhold information from the applicants pertaining to the impending section 197 transfer, and that such decision was not lawful and was arbitrary. Exactly why this is so is not articulated in the pleadings, but it is stated that "*the principle of legality in the premises would require[] that a procedure be followed when a decision which adversely affects an employee had to be taken.*" It is unclear what "decision" is referred to here, as it cannot be the decision to withhold information. The founding affidavit goes on to state that "*most cardinaly, [the principle of legality] would require that [Telkom] informs [Mr Maoke] that [he] will be transferred to [CPIC] in terms of section 197 while VSP / VERP were still available instead of being ambushed.*" What legal provisions are relied on for this conclusion is not clear.

²² *Motor Industry Staff Association v Macun* NO 2016 (5) SA 76 (SCA), para [21].

- [38] The applicants' heads of argument state that Telkom was by law required to notify the applicants in terms of section 197(6)(b) of the LRA. That is the only legal provision cited in the heads in the context of the principle of legality. If this is the provision which is relied upon, then, at the core, the applicants' case in this regard is founded on the LRA. This Court's adjudication of such a challenge is precluded by the principle of subsidiarity and the exclusive jurisdiction of the Labour Court in LRA matters.²³
- [39] In all other respects, insofar as any reliance is placed by the applicants on the principle of legality, it appears to constitute (at best for the applicants) no more than a rehashing of their claims on the basis of the prohibition on unfair labour practices and the other constitutional rights. It is in those constitutional provisions or the enabling legislation that the causes of action will be founded, not in the principle of legality itself.
- [40] As such, the principle of legality challenge either does not take the matter further or is precluded by the principle of subsidiarity or jurisdiction.
- [41] I now turn to consider the merits of the unfair labour practice challenge.

Was there an unfair labour practice?

- [42] There is no exhaustive list or definition of unfair labour practices. Conduct which is lawful may nevertheless constitute an unfair labour practice.²⁴ A great deal of conduct which has been considered unfair by the Industrial Court prior the enactment of the LRA found its way into the definition of an unfair labour practice in that statute.
- [43] Some types of practices which have previously been held to be unfair were not, however, included in the definition. Examples of these are the unilateral variation of conditions of employment, unlawful transfers, refusal to bargain and pension rights. Conduct such as that alleged by the applicants does not appear to have been recognised as an unfair labour practice in the case law (pre or post the enactment of the LRA) and the applicants have cited no direct case authority in

²³ *Ibid*, paras [20] and [21].

²⁴ *Council of Mining Unions v Chamber of Mines of SA* (1985) 6 ILJ 293 (IC) and *Media Workers Association of SA & others v The Press Corporation of SA Ltd* (1992) 13 ILJ 1391 (A).

support of their claim. This does not, of course, in itself, exclude the possibility of recognition of the conduct as an unfair labour practice in this case.

- [44] An unfair labour practice may arise out of a single event or act.²⁵ In pre-constitutional jurisprudence, it has been held that whether a labour practice was unfair was neither a question of law nor fact and was ultimately a question of discretion and judgment by the Industrial Court.²⁶
- [45] Under the Constitution, it is a right enshrined in section 23(1). It is thus, subject to what I indicated above in respect of jurisdiction and the principle of subsidiarity, fully justiciable. Ultimately, the meaning of an unfair labour practice is to be sourced in the Constitution and must be suffused with constitutional values.
- [46] The Constitutional Court held in *NEHAWU* that the "*concept of fair labour practice is incapable of precise definition. This problem is compounded by the tension between the interests of the workers and the interests of the employers that is inherent in labour relations. Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgment. It is therefore neither necessary nor desirable to define this concept.*"²⁷ The Court went on to hold that "*[i]n giving content to this concept the courts and tribunals will have to seek guidance from domestic and international experience*", including Industrial Court and Labour Court jurisprudence, before the enactment of the Constitution and thereafter. "*International experience is reflected in the Conventions and Recommendations of the International Labour Organization. Of course other comparable foreign instruments such as the European Social Charter 1961 as revised may provide guidance.*"²⁸
- [47] Unfortunately, there is little concrete guidance in our law in relation to procedures pertaining to information provision in voluntary retrenchment or voluntary early retirement processes. The parties have also not adverted to a single local, international or foreign legal authority dealing squarely with the issue. The matter of what is fair and appropriate in the circumstances will depend to a large extent on a constitutionally compliant value judgment based on all the relevant pleaded facts.

²⁵ *Natal Die Casting Co (Pty) Ltd v President, Industrial Court & others* (1987) 8 ILJ 245 (D).

²⁶ *Media Workers Association* supra.

²⁷ At para [33].

²⁸ At para [34].

The facts should also, however, be seen in the context of the LRA's provisions dealing with transfers of employees upon a transfer of a business as a going concern.

[48] It is apt to start with the facts. The papers of all the parties are regrettably parsimonious in this regard. The applicants appear to rely specifically on the following:

[48.1] they were long-standing employees of Telkom;

[48.2] Telkom had an agreement with CPIC to transfer the employees (including the applicants) in terms of section 197 of the LRA ("**the section 197 agreement**") which was allegedly concluded in 2016 and the obligation to take transfer of employees was expressly accepted by CPIC in correspondence dated 8 November 2016;

[48.3] Telkom underwent a restructuring exercise in or about February 2017, in terms of which the applicants were offered, but declined VSPs / VERPs;

[48.4] the applicants, however, did not make and could not have made an informed decision in relation to whether to opt for the VSPs / VERPs given that Telkom withheld critical information from them., being information about the section 197 transfer;

[48.5] had the applicants known about the transfer, they would have elected to take the VSPs / VERPs, which would have been more financially advantageous than retrenchment packages with CPIC;

[48.6] the applicants only found out about the section 197 transfer in late March 2017, by which stage the VSPs / VERPs were no longer available and Telkom refused to re-open the offer;

[48.7] the withholding of information was a sinister plan to protect the deal already agreed with CPIC, and was specifically designed to stop an exodus of employees prior to the section 197 transfer;

- [48.8] the section 197 agreement expressly provided for consultation with the applicants, which was not done.
- [49] The respondents do not squarely respond to all of the above issues and, for the most part, deal with the applicants' papers in a general, high level fashion.
- [50] CPIC does, however, place the allegations set forth in [48.2] above in issue. It is also patent from the 8 November 2016 letter from CPIC that no section 197 agreement had at that stage been concluded. That letter states that CPIC accepts the "potential" section 197 "implications should the contract be awarded to [CPIC]" (emphases added). The contract in question was only concluded, according to CPIC, on 3 April 2017 ("**the Telkom / CPIC contract**"), a fact which I must accept as correct under the *Plascon Evans*²⁹ rule in motion proceedings. And under that contract, the section 197 transfer only became effective on 1 June 2017. There is nothing in the record to suggest (other than the applicants' bald averments) that the Telkom / CPIC contract was awarded to CPIC, or that CPIC assumed an obligation to receive Telkom's employees, prior to 3 April 2017 (or 28 March 2017 - being the date of Telkom's presentation and email indicating to the applicants that there will be a section 197 transfer).
- [51] Telkom denies that either of the applicants qualified for a VSP / VERP, on the basis that they were not at risk of being retrenched and the VSPs / VERPs were only being made available to those who may be retrenched. This averment seems at odds with the record, which includes a communication from Telkom's Group Executive: Human Capital Management, Melody Lekota, to Telkom's staff stating that "*[t]here will not be any retrenchments. There will, however, be potential changes in reporting lines for employees in the Corporate Centre, as well as relocation to different business units.*" Mr Maoke was, moreover, in fact, sent a VERP letter by Telkom on 23 February 2017. That letter, however, did not commit to a VERP being available to Mr Maoke and simply stated that a VERP "*may be available*" to him.
- [52] The respondents deny that they were part of any sinister stratagem to withhold information. Telkom asserts that it was at all times simply following the prescripts of section 197, which do not require consultation with the employees except where

²⁹ *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

the employees will not transfer on the same terms and conditions as they had with Telkom and, even in those circumstances, the consultation will occur with the participating trade union, not the applicants. Telkom states that it had no obligation to offer or accept to pay any VSP or VERP and had no specific obligations in connection with these packages to the applicants. It avers that it has fulfilled all its duties in connection with section 197 of the LRA and the applicants transferred to CPIC on the same terms and conditions as those on which they were employed by Telkom. It asserts that there is nothing further required of it in law.

- [53] Telkom's pleadings would have benefitted from a closer and more substantive engagement with the factual averments of the applicants. Nevertheless, there is force in the respondents' pleaded case.
- [54] There is no serious dispute that the respondents have followed the procedures set forth in the LRA, in relation to a section 197 transfer. To the extent that the applicants suggest that section 197(6) consultation has not been complied with, as I indicated above, this is not something that appears to fall within this Court's jurisdiction to consider. But, in any event, there is no merit in the applicants' allegation. A section 197(6) agreement (and concomitant consultation) is only applicable and necessary to the extent that any of the usual consequences set forth in subsection 197(2)(a) to (d) of the LRA are sought to be altered. That was not the case in respect of the transfer to CPIC and it is common cause that the applicants transferred on the same terms and conditions of employment. The applicants have thus suffered no legally cognisable prejudice as a result of the transfer.
- [55] The applicants have also not suggested that Telkom owed them any legally enforceable duties to make available VSPs / VERPs, although it seems that a potential VERP was contemplated in respect of Mr Maoke. The applicants allege that prior to the date for acceptance of the potential VERP, Telkom as an employer had to tell them that there was an agreed section 197 transfer. There is, however, no factual evidence of such agreement existing or a section 197 transfer becoming reality prior to late March 2017. The "section 197 agreement" on which the applicants rely was part of the Telkom / CPIC contract, concluded on 3 April 2017.

And the letter of 8 November 2016 relied on by the applicants is plainly aspirational and is conditional on CPIC being awarded that contract.

- [56] As such, on the evidence before me, there was no section 197 transfer or agreement which would give rise to such a transfer by the date that the VSPs / VERPs had to be accepted, being 1 March 2017. I have to accept on the pleadings that an agreement had not been reached between Telkom and CPIC as at that date, and a section 197 transfer may or may not have happened. Dissemination of information which was still uncertain would have been not only premature but potentially misleading. As such, the applicants' averments fail at the factual level.
- [57] I do not think that it is incumbent, as a matter of fair labour practice, on the old employer to keep their employees apprised of every potential transfer of business as a going concern. Indeed, in this respect, the provisions of the LRA are instructive, as they regulate the consequences of and consultations pertaining to transfers of business in the labour relations context. The LRA does not require any consultation or information sharing of the kind contemplated by the applicants. No challenge has been mounted against the legality of the LRA in this regard.
- [58] Even if a section 197 transfer was potentially in the offing, I am not convinced that the law requires employers to go beyond the process set forth in section 197 to protect the rights and interests of their employees. I am also not convinced that, objectively speaking, the information about a potential section 197 transfer is critical or material to a decision by an employee as to whether to accept a voluntary retrenchment or retirement package. I do not agree with the applicants' submission that an informed decision on a VSP/VERP cannot be made in the absence of such information, such that it is incumbent on an employer as a matter of fair labour practice to inform all employees considering whether to apply for discretionary voluntary retirement or retrenchment packages. The employee's rights are not adversely affected by a section 197 transfer. The employee may simply have a change of his/her immediate working environment. On the facts of the present case, the restructuring within Telkom undertaken in February 2017 in any event contemplated a change of environment, as set forth in Ms Lekota's email quoted above.

- [59] Moreover, even if the applicants continued to be employed by Telkom in future, there was no legally enforceable right that a VERP or VSP (or any other discretionary benefit) in a comparable amount would be offered to them ever again by Telkom. All they could legitimately expect to obtain from their employer (whoever that may be) after the time for acceptance of a VSP or VERP had expired was what was due to them in law. That position did not change pursuant to the section 197 transfer; their legal rights have not been adversely affected by virtue of the change of the identity of their employer.
- [60] I am thus not persuaded that the applicants have made out a case for an unfair labour practice in terms of section 23(1) of the Constitution, or the relief they seek. This is simply reinforced by the fact that even if Mr Maoke would have applied for a VERP, there is no proof that he was likely to receive it, and so there is also a problem in establishing causality. There is no evidence that Mr Baloyi received any VERP/VSP letter at all.
- [61] In all the circumstances, I am thus of the view that the application must fail.

Costs

- [62] What remains to consider is the issue of costs.
- [63] Telkom submits that costs must follow the result, taxed on the ordinary scale. CPIC, on the other hand, submits that a punitive costs order is warranted (at least insofar as its participation is concerned) as:
- [63.1] it should never have been joined to these proceedings; and
- [63.2] the applicants acted in a high-handed, disingenuous, reckless and malicious manner.
- [64] In general, in labour matters under the LRA, the usual rule that costs follow the result does not apply. The standard order is that each party bears its own costs,³⁰ unless there are compelling reasons to deviate from this principle.
- [65] Obviously, this rule is not of direct application in the High Court, but does provide an indication of a policy position taken in respect of challenges involving industrial

³⁰ *Zungu v Premier of the Province of Kwazulu-Natal* (2018) 30 ILJ 523 (CC), paras [23] - [25].

relations. Given that the Labour Court and the High Court have concurrent jurisdiction to consider constitutional challenges arising in the context of industrial relations, Labour Court jurisprudence on costs is not irrelevant.

- [66] More importantly, this was a case where the applicants sought to vindicate their constitutional rights. They did so vigorously and I have no reason on the papers to doubt their *bona fides* in doing so. Ultimately, it is true that their attempts were misguided (perhaps even seriously misguided) and unsuccessful, but this in itself is not a basis for an adverse costs order.
- [67] The well-known *Biowatch* principle provides that "*in constitutional litigation...an unsuccessful applicant in proceedings against the state ought not to be ordered to pay costs.*"³¹
- [68] The Constitutional Court recently reaffirmed that the *Biowatch* principle is not "*confined to litigation involving the state in the narrow sense of the word.*"³² It applies more broadly to public institutions and organs of state. The principal challenge in this case, and the relief sought, was directed against Telkom. In its pleadings, Telkom admitted that it is state-owned, as alleged by the applicants. It is true that CPIC was cited as a second respondent. It is noteworthy, however, that no specific relief was sought against it (except an adverse costs order *if it opposed the application*). It was probably cited for any interest it may have had, including pursuant to having taken transfer of employees of Telkom and assumed certain legal duties as a result. It was not obliged to oppose the application, but it chose to do so, despite it indicating that it was a stranger to the applicants' complaints.
- [69] Of course, a Court is not rigidly bound to apply the no-adverse-costs rule, where it is inappropriate to do so. This would usually be the case where proceedings are vexatious or frivolous. I cannot on these papers find that the application was so manifestly inappropriate as to be vexatious or frivolous. This application had a serious purpose and was instituted because the applicants believed that their constitutional rights were infringed. While the application may have annoyed the

³¹ *Hotz v University of Cape Town* 2018 (1) SA 369 (CC), para [22].

³² *Ferguson v Rhodes University* 2018 (1) BCLR 1 (CC), para [20].

respondents, I cannot on these papers conclude that the application was launched for "*the purpose of annoying or embarrassing an opponent*."³³

[70] I am mindful that costs orders should not have a chilling effect on parties genuinely seeking to assert their constitutional rights in these types of contexts.

[71] In all the circumstances, I am satisfied that the *Biowatch* principle applies. In any event, I would have been inclined to order each party to pay its own costs on the basis that this litigation arises in the labour relations context and it is fair and reasonable to order each party to pay its own costs.

Order

[72] In the premises, I make the following order:

[72.1] the application is dismissed;

[72.2] each party is to bear its own costs.

Date of judgment

[73] This judgment is handed down electronically by circulation to the parties' representatives by email, as envisaged in the Judge President's Directives: *Special Arrangements to Address COVID-19 Implications for All Litigation in the Pretoria and Johannesburg High Courts* [2020] ZARC 9 (25 March 2020) and [2020] ZARC 14 (2 April 2020), as well as the *Revised Supplementary Directive in re Court Operations in the Pretoria and Johannesburg High Courts during the Extended Covid-19 National Lockdown and for the Remainder of Term 2/2020* [2020] ZARC 33 (17 April 2020), as revised on 24 April 2020. The date and time of hand-down of the judgment is deemed to be 10h00 on 6 May 2020.

VM MOVSHOVICH
ACTING JUDGE OF THE HIGH COURT

³³ *Lawyers for Human Rights v Minister in the Presidency* 2017 (1) SA 645 (CC), para [19].

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Second Respondent's Counsel:	HS Goosen
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Date of Hearing:	19 November 2019
Date of Judgment:	6 May 2020