

SILCS

SIBER INK'S LABOUR LAW CASE SUMMARIES

ISSN 1810-7451

NUMBER 23 OF 2010

3 Labour Court judgments, 5 pages



Siber Ink

Written by

ULRICH STANDER

BA LLB LLM IRPD

**ADVOCATE OF THE HIGH COURT OF SOUTH AFRICA
Maserumule Consulting**

ELSABE HUYSAMEN

LLB LLM

**ATTORNEY OF THE HIGH COURT OF SOUTH AFRICA
Maserumule Consulting**

&

LARRENEA LE SAR

LLB, P. GRAD. DIP (L.E.A.D)

**ATTORNEY OF THE HIGH COURT OF SOUTH AFRICA
Le Sar Attorneys**

Published by Siber Ink CC, B2A Westlake Square, Westlake Drive, Westlake 7945.
© Siber Ink CC

These *Labour Law Case Summaries* may not be copied or forwarded without permission from
Siber Ink CC

Subscriptions: subs@siberink.co.za or fax (+27) 086-514-5276

IN THIS ISSUE:

<i>Express Personnel Services v Gertenbach NO & Others</i>	2
<i>Sanders v Cell C Provider Company (Pty) Limited & Others</i>	2
<i>SASBO obo Boughey v Nedbank Limited</i>	3

Please note that there will be a charge levied for the full text of judgments ordered. This charge will be page-based, and will depend on whether we have the judgment in electronic form or have to scan it first. In either event it will be emailed to you. If you require a quote in advance of supply of the judgment, please indicate this in your email request for the judgment (click on the link and add 'Please quote first' in the body of the mail). If this is not added, we shall supply the judgment and invoice you.

FLYNOTES

Express Personnel Services v Gertenbach NO & Others

Labour Court D806/08 15 March 2010 6 pages

Cele J

SILCS 2010:23 [click here to order judgment](#)

Review application to set aside award – commissioner ordered three months' salary compensatory order in favour of employee

Employer failed to plead facts and law on which it sought to prove commissioner committed a defect – application dismissed

[Read Summary](#)

Sanders v Cell C Provider Company (Pty) Limited & Others

Labour Court P260/10 10 May 2010 14 pages

De Swardt AJ

SILCS 2010:23 [click here to order judgment](#)

Application for order declaring transfer of business as a going concern – dispute whether s 197 applicable – cancellation of franchise agreement – issue of new franchise agreement

Business remained the same – s 197 aimed at safeguarding employee

Transfer as a going concern – application granted

[Read Summary](#)

SASBO obo Boughey v Nedbank Limited

Labour Court JS380/08 7 April 2010 23 pages

Molahlehi J

SILCS 2010:23

[click here to order judgment](#)

Application for order to reinstate – employee refusing to accept demotion as a result of alleged incompatibility or retrenchment based on redundancy

Employer's actions substantively and procedurally unfair – application granted

[Read Summary](#)

SUMMARIES

Express Personnel Services v Gertenbach NO & Others

This was an unopposed application to review and set aside the award issued by the second respondent ('the commissioner') in favour of the third respondent ('the employee'), a previous employee of the applicant ('the employer'). The award was a three months' salary compensatory order.

The employee applied for an employment position with Hillside Aluminium, a labour broker, which would supply labour to the employee. In anticipation of being appointed to that position, the employee presented herself for a prescribed medical examination, which was conducted by Dr Dhaniram. The medical doctor advised the employee that she could not be allowed to work in a hot environment because of her body mass, which was below the required minimum, and because she had not passed the exercise test she was subjected to. However, the written test results did not disqualify her completely for the employment position she was interested in because they indicated that she was 'fit with limitations'.

The employer and employee then signed a contract of employment, in terms of which she was to commence employment as an In-Service Student, in the Chemical Engineering section of the employer. The employer's consultant advised the employee telephonically that she was medically unfit to work in the designated area and that she (the consultant) needed to cancel the employment contract of the employee. The employee was aggrieved by the cancellation of the contract and referred an unfair dismissal dispute for conciliation and arbitration.

At arbitration, the commissioner found the dismissal to have been substantively fair but procedurally unfair. He ordered the employer to compensate the employee by paying three months' salary.

The employer raised a number of grounds for review. However, it failed to plead the facts or law on which it sought to prove that the commissioner had committed a defect. The court found that citing the grounds of review as they appear in s 145 of the Labour Relations Act 66 of 1995 can never be enough, and that the matter of how the defect is alleged to have been committed must be identified and pleaded. The court held that the application should therefore fail on that point alone.

Furthermore, by referring to *Sidumo & another v Rustenburg Platinum Mines Ltd & Others* [2007] 12 BLLR 1097 (CC), the court was of the view that the decision reached by the commissioner on procedural fairness could not be described as a decision that a reasonable decision-maker could not reach.

In the result, the application was dismissed, with no order as to costs.

[Return to flynotes](#)

Sanders v Cell C Provider Company (Pty) Limited & Others

The applicant ('the employee') applied for an order declaring that the transfer of the business of the third and fourth respondents ('the old employers') to the second respondent ('the new employer') was a transfer of a business as a going concern, as contemplated in s 197 of the Labour Relations Act 66 of 1995 ('the LRA').

The first respondent ('Cell C') had previously entered into two franchise agreements with the old employers. The employee had been employed by the old employers as General Manager since 2002. During March 2010, the old employers received notice of termination of the franchise agreements from Cell C, in terms of which the agreements would terminate on 30 April 2010. Based on Cell C's recommendation, the old employers informed the employee that it would enter into consultations with him and other staff members as to their retrenchments. Cell C and the new employer claimed that s 197 was not applicable in this matter, as Cell C had simply terminated the franchise agreements with the old employers, whereupon a new agreement had been entered into with the new employer.

The court referred to the matter of *National Education Health and Allied Workers Union v University of Cape Town and Others* (2003) 24 ILJ 95 (CC), wherein the Constitutional Court ('the CC') had made it clear that the purpose of s 197 was two-fold. Firstly, it was aimed at protecting workers against the loss of employment in the event of the transfer of a business, and, secondly, it was aimed at facilitating the sale of a business as a going concern.

The CC had also held that the mere fact that there was no agreement to transfer the workforce as part of the transaction did not preclude the transaction from constituting a transfer of the business as a going concern within the meaning of s 197. The CC had also referred to the matter of *Aviation Union of SA on behalf of Barnes & Others v SA Airways (Pty) Ltd & Others* 30 ILJ 2849 (LAC), in which matter the issue of second-generation outsourcing had been discussed by the Labour Appeal Court ('the LAC').

In that matter, the LAC had held that s 197 also governed the situation where a business was transferred '*from*' one employer to another, as opposed to confining the ambit of the section to the more literal meaning of the word '*by*' used in the section. A literal interpretation of s 197 would have defeated the purpose of s 197, to the extent that this section was aimed at safeguarding the employment of employees.

The court in the present matter held that, if compared, the business conducted by the old employers prior to 30 April 2010 was similar to the business conducted by the new employer as of 1 May 2010. For instance, the business remained located in exactly the same place, the telephone numbers remained the same, and the nature of the business remained the same. Therefore there had clearly been a transfer of the business, as a going concern, from one employer to another. The freedom which Cell C had in conducting its business in the manner it deemed best did not retract from the rights employees who were affected by these business decisions had.

In the result, the application was granted, with costs.

[Return to flynotes](#)

SASBO obo Boughey v Nedbank Limited

The applicant ('the employee') sought an order directing the respondent ('the employer') to reinstate him in the position he occupied prior to his dismissal for operational requirements.

At the time of his dismissal, the employee was employed by the employer as an Area Manager: Sales. The employee submitted that in a meeting convened during November 2006, he was told that he had to accept a demotion, owing to alleged leadership problems on his side, and if he did not accept the demotion, his position would be made redundant. After refusing to accept the demotion, the employee was handed a 'Notice of Intended Retrenchment' (issued in terms of s 189 of the Labour Relations Act 66 of 1995 ('the LRA')). The employer argued that the employee had refused to engage with it in relation to issues in respect of shortcomings in his management style.

The court turned to a discussion of s 189 of the LRA. In relation to substantive fairness, the court held that it was trite that there was no distinction between a dismissal arising from economic reasons, and restructuring based on other business considerations. In order to prove that the dismissal was substantively fair, the employer had to show that the dismissal was genuinely justified by the employer's operational requirements as aforesaid, and that the dismissal was effected as a measure of last resort. The consulting parties also had to reach consensus on the selection criteria to be implemented in deciding which employees were to be dismissed, and in the event of the parties failing to reach such an agreement, the employer had to prove that the selection criteria it adopted were fair and objective.

The court held that on an analysis of the facts, and even on the version of the employer itself, it was clear that the underlying reason for the employee's dismissal had been something unrelated to operational reasons. The employer's case had been based on 360-degree feedbacks received in terms of the employee, the exit interviews conducted with other employees, and complaints raised against the employee by a colleague.

The court held further that if the employee had indeed excelled in all other areas of his work, as confirmed by the employer, then it was unclear why the employee had not been provided with training in leadership skills. In fact, the picture created by the employer's version was rather one of poor performance as opposed to a dismissal for operational reasons. The court in any event held that the employer had failed to prove alleged poor leadership on the part of the employee.

The procedure followed in retrenching the employee had also been completely unfair, for various reasons, which, among others, included that the employer had failed to consult the employee's trade union, as required by s 189(1) of the LRA, and the employer had failed to comply with the terms of its own retrenchment policy.

In the result, the employee's dismissal was held to be both substantively and procedurally unfair, and the employer was ordered to reinstate the employee, the employer to pay the employee's costs.

[Return to flynotes](#)



SILCS is published by Siber Ink CC and is compiled by [Ulrich Stander](#) and Elsabe Huysamen of Maserumule Consulting, and Larrenea Le Sar, a practising attorney.

www.siberink.co.za

www.masconsulting.co.za