IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO: JS 958 / 02

First Applicant

Second and further Applicants

and

RAND AIRPORT MANAGEMENT COMPANY

First Respondent

ENT (PTY) LTD Second Respondent

CAPITAL AIR SECURITY OPERATIONS

Third Respondent

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JUDGMENT

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LANDMAN J:

1. The South African Municipal Workers Union and its members employed by Rand Airport Management Company (Pty) Ltd (Rand Airport) seek, as a matter of urgency,

a declaratory order that the outsourcing of certain functions by the Rand Airport to the Turnkey Facility Management (Pty) Ltd (Turnkey) and Capital Air Security Operations (Pty) Ltd (Capital Air) constitutes the transfer of two businesses as going concerns for the purposes of s 197 of the Labour Relations Act 66 of 1995. Ancillary relief which flows from the primary declarator is also sought.

2. This application has been brought by way of urgency. Mr Bruinders, who appeared for the applicants, submitted that it is clearly to the benefit of all the parties for the issues raised in the application to be determined prior to the dismissal of the employees on 31 August 2002. The respondents contend that the application is not urgent, as alternative remedies are available to the employees.

3. The applicants have abridged the time periods in this matter in accordance with the dictum in *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another* 1977 (4) SA 135 (W).

tter of urgency. Some time would be required for reflection and preparation of a judgment. It must have e an interdict, this could not be done by 31 August 2002. However, I do not intend striking this matter cy into account in considering the question of costs.

5. On 18 April 2002 Rand Airport informed both the Union and the employees that it was facing difficulties and that steps needed to be taken to address the situation. Outsourcing was noted as a possibility.

6. At a meeting held between the Union and Rand Airport on 14 June, Rand Airport stated that it did not intend to retrench any employees but to outsource its non-core functions. This was confirmed in a letter dated 18 June.

7. On 20 June Rand Airport informed the Union that if the Union accepted the outsourcing there would be no need for the retrenchments.

8. On 25 June Rand Airport stated that it intended to proceed with the outsourcing of, *inter alia,* the security and garden services with effect from 1 July.

9. On 21 July all security employees were handed a circular which stated that the employees' "function will be outsourced in terms of section 197 of the Labour Relations Act" to Capital Air, effective from 1 August.

10. The applicant's attorneys wrote to Rand Airport on 31 July "confirming" that Rand Airport had typified the outsourcing as a transfer in terms of s 197 of the Labour Relations Act. The letter stated that, in the circumstances, the terms and conditions of employment of the employees with the new employers would have to remain the same.

11. On 1 August all the employees in the gardening and security services were handed letters informing them that they would be retrenched with effect from 31 August. They were also advised to apply for a position with the companies taking over the services.

12. Rand Airport responded to the letter from the Union's attorneys of 31 July. Rand Airport declared that it had no alternatives available to it and it had decided to terminate the effected staff services. Capital Air would provide security services and Turnkey would provide gardening services. The letter concluded "in the light of the fact that Rand Airport intends terminating services, section 197 is not applicable".

13. On 7 August the Union's attorneys wrote a letter to Rand Airport requesting details of the terms and conditions of employment at Capital Air and Turnkey. Rand Airport responded, but did not provide any of the details. These details were requested from Capital Air and Turnkey. They made it clear that the terms and conditions which would be offered to the employees would not be the same as those which they enjoyed at Rand Airport.

14. The Labour Relations Act 12 of 2002 came into operation on 1 August 2002. Section 197 (as amended) applies in this case. The relevant portions of s 197 read as follows:

> "(1) In this section and in section 197A -
>
> (a)`business' includes the whole or a part of any business, trade, undertaking or service; and
>
> (b) `transfer' means the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern.

(2) If a transfer of a business takes place ...

(a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;

(b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and employee;

(c) ...

(d) the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer."

15. Mr Bruinders submitted that the debate on the automatic nature of s 197 has been settled explicitly by the new amendments. For s 197 to come into operation three requirements are necessary:

(a) there must be a transfer;

(b) the transfer must be of a whole or part of a business; and

(c) the transfer must be as a going concern.

16. Mr Bruinders submitted that in considering the facts of this matter, the following aspects are significant:

17.

16.1 Rand Airport, at all relevant times, explicitly contended that the outsourcing would be a transfer in terms of s 197;

16.2 It was only because the Union held the view that such a transfer implied that the employees' terms and conditions of employment should remain uncharged that Rand Airport contended that it now had no alternative but to terminate their services;

16.3 Rand Airport then contended that as it intended terminating the employees' services, s 197 was no longer applicable.

16.4 Rand Airport, Capital Air and Turnkey now contend that the outsourcing is not a s 197 transfer because that was never the intention of the three parties.

18. Mr Bruineders developed his argument, referred to the authorities and submitted that the gardening and security functions had been transferred as going concerns and that the application should be granted.

19. Before examining the contentions of Mr Bruinders it is necessary to make some

observation regarding s 197 of the LRA. The word ”service” has been added to the phrase “business, trade or undertaking”. P A K le Roux “Consequences arising out of the sale or transfer of a business: Implications of the Labour Relations Amendment Act” 2002 CLL 61 at 62 says:

> “The fact that a business is defined to include a service may be an indication that it was intended to typify outsourcing as a going concern, but this is not necessarily the case”.

And at 64, Le Roux says:

> “A business is defined to include “the whole or part of any business, trade, undertaking or service”. The reference to the concept of a `service’ in the definition was apparently inserted at the insistence of COSATU to ensure that most, if not all, outsourcing operations are regarded as transfers of a business as a going concern. Whether this will achieve its purpose remains to be seen. It is at least arguable that it will not. The mere fact that a `service’ is included within the definition of a business does not necessarily mean that the business will be transferred as a going concern. This will probably remain a question of fact”.

20. In my view the addition of “service” does not significantly alter the reach of s 197. It merely clarifies the position that a business, to use a general term, may consist mainly or only of the rendering of services to another or other persons for profit or otherwise. A service or part of a service may be transferred as a going concern. The meaning of a service is a question of law. Once this has been determined one asks whether the facts

amount to a service or part of a service.

21. Craig Bosch observes that: "While it is relatively easy to identify when the whole of any business, trade or undertaking is being transferred, a likely point of contention especially relevant to outsourcing exercises is what constitutes a *part* of a business, trade or undertaking, the transfer of which will activate s 197." These observations apply to a equally to a service or a part of a service.

22. As Bosch points out, Wallis "Section 197 is the medium. What is the message?" (2000) 21 ILJ 1 at 5 takes the view that a part of a business is "an identifiable component or unit of a business, be it a division, a branch, a department, a store or a production unit". Seady AJ held in **Schutte v Powerplus Performance (Pty) Ltd** (1999) 20 ILJ 655 (LC) that a transfer can take place where a part is severable from the entire business.

23. Section 197, as amended, is designed to protect the interests of employees in circumstances where the old employer would otherwise have dismissed them for reasons relating to its operational requirements eg where the old employer disposes or transfer its business, or part of its business, to another (the new employer). This protection is conferred upon employees when a business (as defined) is transferred to another as a going concern. The transfer must be a going concern in the sense of a functioning business with a prospect of continuing. If there were to be a mere transfer of assets or possibly the capacity to render a service, the transferee would be saddled with employees but may or may not have any work for them to perform and would

have to incur the costs of retrenching them (with or without any indemnity from the transferor). This is not what the legislature intended. Hence the emphasis on the transfer of "a going concern".

24. Fairness and equity would favour that employees engaged in support functions be protected especially where they are vulnerable workers. But considerations of equity may only play a role once the requirements of the law have been met.

25. In this case the only questions, though not easy questions, are whether the old employer's transfer of the functions relating to the gardening and cleaning functions to Turnkey, is the transfer of part of a business as a going concern. And whether the similar outsourcing of the security function also constitutes such a transfer. The two questions are independent of each other even though there may be an overlapping of facts. I have some difficulty in conceiving that a support function, as necessary as it may be, ordinarily constitutes a business or a part of a business. This is not to say that the door is closed, merely that, read with the concept of a going concern, it may be more difficult to find this to be so. But each case must be evaluated on its own merits.

26. In **Société Perrier Vittel France v Comité d'établissement de la source Perrier de Vergeze** 20 ILLR 157. The court is reported to have decided that:

> "Applying European and French regulations, the Supreme Court stated that an `Autonomous economic entity' was constituted by: (i) an organized unit in which there are people as well as personal estate, properties, stocks, ... (ii) which can

make it possible to run a business (`economic activity') for a specific goal'... The court examined the facts and concluded: 'thus, the unit which was to be transferred did not have specific employees and tools, its goals were not its own goals (but those of the company). Transferring part of the business to another company consisted, in this case, of a `dismemberment' of central departments of the Company (outsourcing) which could not lead to a compulsory transfer of the contracts of employment of the employees who worked in this unit to the other employer (by application of section L 122-12)."

27. **Suzen v Zehnacker Gebaudereinigung Gmbh Krankenhause Service** 1997 IRLR 255 is a case where the European Court of Justice emphasised that in determining whether:

"the conditions of transfer of an entity are met, it is necessary to consider all the facts characterising the transaction in question, including in particular the type of undertaking or business, whether or not its tangible assets such as buildings and moveable property, are transferred, the value of its tangible assets at the time of transfer, whether or not its customers are transferred, and the period, if any, for which those activities were suspended.... An entity cannot be reduced to the activity entrusted to it." See also **Spijkers v Gebroeders Benedik Abattoir CV** [1986] ECR 1119 (ECJ) and **Francisco Hernandez Vidal SA v Gomez Perez and others; Santer v Hoechst AG; Gomez Montana v Claro Sol SA and Red Nacional De Ferrocarriles Espanoles (Renfe)** [1999] IRLR 132 (ECJ).

28. The concept a concern in the phrase "a going concern", must be intended, to refer to the business (as defined). In relation to a commercial activity it means "... that the shop is being kept open instead of being closed up and the customers are being kept together, so that if the purchaser wishes to keep on the business he can do that". Per Madden CJ quoted by Kannemeyer J in **General Motors SA (Pty) Ltd v Besta Auto Component Manufacturing (Pty) Ltd and another** 1982 (2) SA 653 (SE). These cases were cited with apparent approval by Mlambo J in **National Education Health and Allied Workers Union v University of Cape Town and others** (2000) 21 ILJ 1618 (LC).

29. The majority of the Labour Appeal Court, in **National Education Health and Allied Workers Union v University of Cape Town and others** (2002) 23 ILJ 306 (LAC), held that:

> "A business is a going concern only if its assets, movable and immovable, tangible and intangible, are utilized in the production of profit (or, in the case of an undertaking, the attainment of its goals... In every business its employees are a vital component and in labour intensive industries the major asset. To say that there can be a sale of a business as a going concern without all or most of the employees going over is to equate a bleached skeleton with a vibrant horse". At 312J-313B.

30. I am bound by this definition of a going concern. I would have held that in enacting the unamended s 197 and the amended s 197, the legislature had in mind "a going

concern" where the parties have not agreed that employees go over. But, as a matter of law, are deemed by s 197 to accompany the transfer of a going concern and so become employees of the transferee.

31. I shall deal with the security functions and the declarator requested in this regard. But firstly I should note some common facts and considerations:

    (a) Rand Airport conducts the business of providing an airport and related services to the aviation industry.

    (b) the cleaning and security services are as essential as other services in the long run but are non-core functions.

32. Capital Air co-ordinates the functioning of the shift system at Rand Airport. This includes its own staff and the nine or so security officers of Rand Airport. This is done because Rand Airport did not have sufficient staff to provide night shift nor co-ordinate the roster system. Rand Airport required 24 security members but had only 9 and therefore had early on contracted with Capital Air to provide a service. The security officers of Rand Airport were not integrated with Capital Air in terms of the reporting lines. Rand Airport guards wear a different uniform. Rand Airport has its own security equipment. Its security guards do not report to Capital Air's managers. Capital Air would treat Rand Airport's security guards as new employees. Any applicants for positions at Capital Air must be able to be registered with Security Industry Regulatory Authority.

33. Most importantly Capital Air and Rand Airport have not concluded an outsourcing agreement. Whether they do so or not is said to be dependent on the outcome of this application launched by the applicants on an urgent basis for a declaratory order. This application was launched on the basis that Rand Airport had concluded an agreement with Capital Air to replace its existing security operations. This supposition, on the version of Capital Air (which I must accept on these papers) has not taken place. Capital Air and Rand Airport are awaiting the outcome of this application before deciding whether to outsource the security operations to Air Capital. Capital Air opposes this application; especially as it has been brought on an urgent basis.

34. I do not think it desirable to grant a declaration on a set of facts which may not come to pass. Nor do I think it permissible to provide advice so that Rand Airport and Capital Air can decide whether to enter into a contract; more so, where they do not seek this declaration.

35. This brings me to the relief sought in regard to the gardening function. The following facts and circumstances considered cumulatively persuade me that the gardening services of Rand Airport do not constitute part of a business (as defined) and that there can be no transfer of this function as a going concern.

    (a) the gardening functions form part of maintenance services;

    (b) these services form part of the non-core activities of Rand Airport.

(c) Rand Airport outsourced the garden functions to Turnkey. The garden services which Turnkey is to render include cutting grass, pruning and trimming trees, weeding, landscaping and watering. Cleaning services will also be provided. This contract is to run until 31 April 2004 and may then be terminated on three months notice.

(d) Rand Airport and Turnkey, on their version, which must be accepted, did not intend to transfer the applicants working in the gardens.

(e) Gardening services is not an entity. It has no separate management structure, no own goals, no assets, no customers and no goodwill. It is merely an activity and will be such in the hands of Turnkey. It is not intended to make a profit or gain some other advantage.

(f) the gardening function is being outsourced for a limited period.

36. Even if I were persuaded that the gardening functions constitute a part of a business and that it was transferred, it would not constitute the transfer of a going concern within the meaning assigned to this term by the Labour Appeal Court in the **NEHAWU v UCT** case. See Craig Bosch "Two wrongs make it more wrong, or a case for minority rule" 2002 SALJ 501 at 511 who is of the view that the meaning of "a going concern" attributed to it by the LAC has survived the amendments to the LRA. As stated earlier I am bound by this decision.

37. In the premises the application is dismissed with costs, including the costs of two counsel.

SIGNED AND DATED AT BRAAMFONTEIN THIS 27TH DAY OF SEPTEMBER 2002.

A A Landman

Judge of the Labour Court

g: 3 September 2002

ent: 27 September 2002.

Adv T Bruinders instructed by Cheadle Haysom and Thompson for the applicants.

Adv P Pauw SC instructed by Martin Henning for the respondents.