IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN
CASE NO: J1196/03

In the matter between:

NUMSA

Applicant

and

Staman Automatic CC

1ST

Respondent

JOBMATES LABOUR SERVICES (PTY) LTD 2nd

Respondent

JUDGMENT

LANDMAN J:

On 13 August 2002 I made the following order:

1. It is declared that the transfer of the NUMSA employees' employment contracts is not a transfer within the contemplation of section 197 of the Labour Relations Act 66 of 1995.
2. The first respondent is interdicted and restrained from transferring those employment contracts to the second respondent.

These are the reasons for making this order.

Facts

Staman Automatic CC produces turned components for the electronic, automotive, construction, appliances and furniture industries. The components are produced in three departments. These departments carry out Staman's core functions. Staman has also human resources management and payroll functions.

It is undisputed that Staman is not in the business of financial management or payroll administration.

Staman employs 44 employees. The bulk of these employees carry out its core functions. They are machine operators and general workers. Numsa represents the lastmentioned employees.

At the beginning of 2003, upon the advice of Jobmates Labour Services (Pty) Ltd, Staman decided to 'out source its employees'. Numsa got wind of Staman's intention and through its attorney, it sought an undertaking that the transfers would not be implemented on or before 15 March 2003 or it would seek relief in this Court.

Staman's attorneys gave an undertaking. Further developments transpired. Numsa's attorneys were informed that a written agreement for the transfer of Numsa's members from Staman to Jobmates was being formalised and that the intention was to transfer Numsa's members on 1 June 2003.

The written agreement is dated 7 July 2003. It purports to transfer Staman's rights and obligations under the employment contracts with its employees to Jobmates, a temporary employment services provider or labour broker. The transfer purportedly took place on 13 March or will take place on 15

August 2003. I am requested to adjudicate this matter without making a distinction between employees who have been transferred and those who await transfer.

The agreement provides in its preamble:

> *"1 Whereas the main business of Staman is to specialize in the mass produced turned components CNC turning and CNC machining and to accomplish that it needs individuals to perform its services*
>
> 2 *And whereas the main business of Jobmates is to provide employees as the temporary employment service and related matters which include but is not limited to industrial relations, human resources, administration of labour, other related issues and the administration of payrolls*
>
> 3 *And whereas Staman will out source the services provided by the employees related to industrial relations, human resources, administration of labour related issues and the administration of payrolls provided by the employees as identified elsewhere in*

this agreement."

The main body of the agreement provides, inter alia:

Clause 2.1- "*Object and Motivation - Staman has considered various alternatives to enable it to focus on its core business and to address the new business to maximize its efficiency in the most cost effective way."*

Clause 2. 2- "*Staman has accepted the principle that its efficiency will be enhanced by outsourcing services to specialist contractors."*

It should be noted that the word "service" is defined in the agreement and means "*services provided by the individuals as identified in the annexure "A" and "B" of the agreement to Staman in its cam auto lathes section, the second operation section, the CAC machinery centres and the CAC automatic lathes section which is inclusive of general assistance."* (clause 1. 2. 7)

Clause 2.3- "*The object of this agreement is to transfer services from Staman to Jobmates in the interests of the affected parties as a going concern within the ambit of section 197."*

Clause 3 –"*The parties agree that the service is a part of Staman's business for the purpose of section 197 of the Act and thus agree that the services is a transferable service as a going concern."*

Clause 5.1- "*As contemplated in section 197 of the Act Job Mates has on 12th / 13th March 2003 automatically been substituted for Staman as the employer of the (group one) employees on the basis that Job Mates now employs the employees on terms and conditions that are on the whole not less favourable to the employees than the terms and the conditions on which they are employed by Staman."*

Clause 6.1- "*As contemplated in section 197 of the Act Job Mates will on the 15th of August 2003 automatically be substituted for Staman as the employer of the (group two) employees*

on the basis that Job Mates will employ the employees on terms and conditions that are on the whole not less favourable to the employees than the terms and the conditions on which they are employed by Staman."

Clause 8- "*It is recorded that the employees will be transferred to Job Mates from Staman and that the employees will receive from Job Mates at least the same remuneration and conditions of employment as they used to before the transfer."*

The agreement further provides that Staman pays Jobmates a monthly fee of R12 500 for an indefinite period.

The only question to be determined is whether the transfer of the employees between Staman and Job Mates, as provided for in the written contract between them, is a transfer of a going concern as contemplated by section 197 of the Labour Relations Act 66 of 1995.

Section 197 reads as follows:

"Transfer of the contract of employment

(1) In this section and in section 197A -

1. ‘business’ includes the whole or a part of any business, trade, undertaking, or services; and

2. ‘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, unless otherwise agreed in terms of subsection (6)-

(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 the 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 the

employee;

(c) anything done before the transfer by or in relation to the old employer, including the *dismissal* of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and

(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.

(3) (a) The new employer complies with subsection (2) if that employer employs transferred *employees* on terms and conditions that are in the whole not less favorable to the *employees* than those on which they were employed by the old employer.

(b) Paragraph (a) does not apply to all *employee*s if any of their conditions of employment are determined by a

collective agreement.

(5) (b) Unless otherwise agreed in terms of subsection (6), the new employer is bound by-

(mmmmmmmmmmmmmmmmmmmmmmmmmmmmmm mmmmmmmmmmmmmmmdccclii) any arbitration award made in terms of this Act, the common law or any other law;

(mmmmmmmmmmmmmmmmmmmmmmmmmmmmmm mmmmmmmmmmmmmmdcccliii) any *collective agreement* binding in terms of section 23; and

(mmmmmmmmmmmmmmmmmmmmmmmmmmmmmm mmmmmmmmmmmmmmdcccliv) any *collective agreement* binding in terms of section 32 unless a commissioner acting in terms of section 62 decide otherwise.

(8) For a period of 12 months after the date of the

transfer, the old employer is jointly and severally liable with the new employer to an *employee* who becomes entitled to receive a payment contemplated in subsection (7) (a) as a result of the *employee's dismissal* for a reason relating to the employer's *operational requirements* or the employer's liquidation or sequestration, unless the old employer is able to show that it has complied with the provisions of this section.

(9) The old and new employers are jointly and severally liable in respect of any claim concerning any term or condition of employment that arose prior the transfer."

Interpreting section 197

Section 197 must be interpreted, as Mr Bruinders, who appeared for Numsa, submitted purposively by reading its provisions in context, doing justice to its ordinary grammatical meaning, giving effect to Constitutional rights and the objects of the LRA and by having regard to its apparent scope, purpose and background. See **S v Makwanyane** 1995 (3) SA 391 (CC) at 404-405.

The purpose of the old s 197 has been described as follows:

"What lies at the heart of disputes on transfers of business is a clash between, on the other hand, the employer's interest in the profitability, efficiency or survival of the business, or if need be its effective disposal of it, and the worker's interest in job security and the right to freely choose an employer on the other hand. The common law provided little protection to workers in these situations. Under common law sale of business, whether as a going concern or not, often resulted in the loss of employment. The new owner was under no obligation to employ the workers. The Industrial Court, acting under the unfair labour practice provisions of the 1956 LRA, did not attempt to remedy the situation. Van Dijkhorst AJA also recognized that under common law the employees were the worst off. They were confronted with a take-over and lost their employment. Later the transferring employer incurred statutory obligation to pay severance benefits. This obligation no doubt had an impact on the cost of the sale of businesses. In short, the situation led to the retrenchment of workers, the payments of severance benefits and escalated costs in a way that inhibited commercial transactions. On the whole, the situation had potential to impact negatively on economic development and the promotion of labour peace.

Section 197 strikes at the heart of this tension and relieves the employers and the workers of some of the consequences that the common law visited on them. Its purpose is to protect the employment of the workers and to facilitate the sale of the businesses as going concerns by enabling the new employer to take over the workers as well as minimizing the tension and the resultant labour disputes that often arise from the sale of businesses and impact negatively on economic development and labour peace. In the sense, s197 has a dual purpose, it facilitates the commercial transactions while at the same time protecting the workers against unfair job losses."

See **National Education Health & Allied Workers Union v The University of Cape Town & Others** (2003) 24 ILJ 95 (CC) 118 at pars 52 and 53.

The correct approach, in determining whether there has been a transfer of a business as a going concern, is to decide -

(a) Whether there is a business, trade, undertaking or service,

(b) if so, has it been transferred as a going concern?

See Harvey **Industrial Relations and Employment Law** Part F

paragraph 66.04 and **Cheesman v R Brewer Contracts Ltd** [2001] IRLR 144 (EAT).

Mr Bruinders submits that there is no "service" which can be transferred. Mr M S M Brassey SC (with him Adv P Buirski) argued to the contrary. Mr Brassey has set out in some detail the law regarding the concept of service. I rely upon this.

> The word "business" is accorded a very wide meaning. It means the whole or any part of any business, trade, undertaking or service. Cf Bosch, "Transfers of Contracts of Employment in the Outsourcing Context" (2001) 22 ILJ 840, 848.

Mr Brassey submitted that while the list forms a genus, the word "service" is no more general than any of the words which precede it. Prima facie therefore each word, taking into account consideration its context, must be construed according to its ordinary meaning. See **S v Cocklin en Ander** 1971 (3) SA 776 (A) 781 and **Moodley v Scottburgh/Umzinto North Local** 2000 (4) SA 524 (D) 531. The word "business" has a wide meaning, more extensive than "trade". See **Modderfontein Deep Levels Ltd and Another v Feinstein** 1920 TPD 288 at

290. Against this background it is important to ascribe a meaning to the word "service" as it appears in section 197(1) (a). According to the **Oxford English Dictionary** service means :

> "*the act of helping or doing work for another or for a community etc., secondly work done in this way, thirdly an assistance or benefit given to someone for the provision of a system of supplying a public need E. g transport or often in plural the supply of water, gas, electricity, telephone etc.; a public or crown department or organization employing officials working for the State (civil or secret service); the provision of what is necessary for the installation and maintenance of a machine or etc. or operation, assistance or advice given to customers after the sale of goods, the verb service means provide service or services for especially maintain or to maintain or repair a car, machine or etc.; to supply with a service,"*

Webster's Dictionary defines "services" as "acts or instances of helping or benefiting, conducts contribution to another's advantage or welfare or benefit." See also **Commissioner for Inland Revenue v Transvaal Bookmaker's Association Co-operative Ltd** 1953 (3) SA 203 (T) 206H**.**

The old section 197 did not, as does the present, define the meaning of "business", nor did it include the word "service" in the phrase business, trade, undertaking or service".

The amendment to section 197 has not changed the general purpose of this section. It is aimed rather at clarification. Mr Brassey submitted that generally when the legislature uses different words in later legislation, a change in the intention is intended. See **Du Plessis v Joubert** 1966 (4) SA 60 (O) 65F.

A court should be slow to come to the conclusion that the words used are tautologous or superfluous and that should rather at the outset be supposed that every word is intended to have the same effect or to be of some use. See **Wellworths Bazaars Ltd v Chandlers Ltd and Another** 1947 (2) SA 37 (A) 43, **Schutte & Others v Powerplus Performance (Pty) Ltd and Another** (1999) ILJ 665 (LC) 667J- 668A.

Mr Brassey submitted that by widening the definition of the word "business" the legislature has intended that an outsourcing transaction could fall within the parameters of the section. He submitted that the legislature by including the word "service" in the definition of the word "business" in

s 197 meant that the whole part or part of any business, trade,

undertaking or act of doing work for another could be the legitimate subject of transfer.

Even under the old section 197 the Labour Court was prepared to hold that an outsourcing transaction constitutes a transfer in terms of section 197. See the views of Mlambo J in **National Education Health Allied Workers Union v University of Cape Town** (2000) 21 ILJ 1618 (LC) 1632 D-E:

> *"In this regard it is possible that some outsourcing exercise could be of a permanent nature, and this type could amount to a transfer of a business. Each case must be considered on its own merits."*
>
> See also Bosch *(supra)* and **National Education Health & Allied Workers Union v University of Cape Town** (2003) 24 ILJ 95 (CC) 102 F-G and 125 B.

PAK le Roux "C*onsequences arising out of the sale or transfer of a business",* February 2002, **Contemporary Labour Law** vol. 11 no 7 61 at 62 states that:

> "The fact that a business is defined to include a 'service' *may be an*

indication that it was intended to typify outsourcing as going concern transfer but this is not necessarily the case."

He further goes on to state at 64:

"The business is defined to include the whole or part of any business, trade, undertaking or service. The reference to the concept 'service' in the definition was apparently inserted at the insistence of COSATU to ensure that most of it 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 business does not necessarily mean that business will be transferred as a going concern. This will probably remain a question of fact."

In **SAMWU v Rand Airport Management Co (Pty) Ltd & Others** [2002] 12 BLLR 1220 (LC), this Court concluded that a "service" for the purpose of section 197 (1) (a) must embody an entity with a separate management structure, with its own goals assets customers and goodwill and that accordingly the transfer of the "gardening function" of the Rand Airport did not constitute a

part of business as defined and that there was no transfer of this function as a going concern (see para 34). Mr Brassey submitted that the decision is clearly wrong. It is unnecessary for the purposes of this case to reconsider the **Rand Airport** decision.

English and European Law is conveniently summarized**Whitewater**

Leisure Management Ltd v Barnes [2000] IRLR 456 (EAT). Its summar

is reflected in Harry Part F paragraph 66.04 and reads:

" (i) As to whether there is an undertaking, there needs to be found a stable, economic entity whose activity is not limited to performing one specific works contract, an organised grouping of persons and of asset enabling (or facilitating) the exercise of an economic activity which pursues a specific objective....;

(ii) ... such an undertaking ... must be sufficiently structured and autonomous but will necessarily have significant assets, tangible or intangible;

(iii) In certain sectors, such as cleaning and surveillance,

the assets are often reduced to their most basic and the activity is essentially based on manpower;

(iv) An organised grouping of wage- earners who are specifically and permanently assigned to a common task may, in the absence of other factors of production, amount to an economic entity;

(v) An activity of itself is not an entity; the identity of an entity emerges from the other factors, such as its workforce, management, style, the way in which its work is organised, its operating methods and, where appropriate, the operational resources available to it."

The Numsa employees are regular employees of Staman. They place their labour potential at the disposal of their employer and become entitled to remuneration. They work with either the machines that produce plastic products, machine operators or they are general workers. They are not employed to render a service on behalf of Staman. They are employed to render a service **to** Staman. Their work is connected to the machines. The machines are part of Staman's infrastructure. Staman has no intention of parting with its machines by

selling or disposing of them. There is clearly no transfer of the machines or the business. This is evident from the “transfer of business agreement” and the description of business.

The employees constitute, in a sense, a group of employees dedicated to the production of Staman’s products. It may well that they comprise a grouping of wage-earners who are specifically and permanently assigned to a common task. It is said that “the main business of Staman is to specialize in mass produced components, CNC turning and CNC machining, and to accomplish that, it needs individuals to perform certain services” The words emphasized are not borne out by Staman’s answering affidavit. The employees render services to Staman and perform tasks. On the other hand as the transfer agreement provides: “the main business of Jobmates is to provide employees as a Temporary Employment Services and related matters which includes but is not limited to, industrial relations human resources, administration of labour, other related issues and the administration of payrolls.”

The services of the employees, in this case, are not an economic identity that will retain its identity after the purported transfer. That the employees may not see a difference as regard their job functions, because they will be contracted back to perform the same functions at Staman does not mean that they retain their previous identity. What Staman and Jobmates seek to do is to define the

employees by reference to their employment status and not as a stable economic entity. See **Wynnwith Engineering Co Ltd v Bennett & Others** [2002] IRLR 170 (EAT). The position may well be different if the employees were not employees of Staman but employees of a contractor who is contracted to perform the production activities for Staman. See the unreported case of **Nokeng tsa Taemane Local Municipality and Another v Metsweding District Municipality and Other** Case no JS 227/03 [LC]) where this question was raised but not decided.

In the result I am satisfied that there is no "service" which can be transferred. The requirements for an interdict have been fulfilled. Accordingly the order granted on the 13th August 2003 was made.

SIGNED AND DATED AT BRAAMFONTEIN ON 17 SEPTEMBER 2003

_____

A A LANDMAN
JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR APPLICANT: Adv T J Bruinders instructed by Ruth Edmonds Attorneys

FOR RESPONDENT: Adv M S M Brassey SC and Adv P Buirski instructed by Hlatswayo Du Plessis Van der Merwe Nkaiseng

DATE OF HEARING: 05 August 2003

DATE OF ORDER: 13 August 2003