IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Case No. JA9/03

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS UNION — **1st Appellant**

ISMAEL MANAMA AND OTHERS — **2nd & Further Appellants**

And

RAND AIRPORT MANAGEMENT COMPANY(PTY) LTD — **1st Respondent**

TURNKEY FACILITY MANAGEMENT (PTY) LTD — **2nd Respondent**

CAPITAL AIR SECURITY OPERATIONS (PTY)LTD — **3rd Respondent**

JUDGMENT

Zondo JP

[1] As Davis AJA says in the judgement that he has prepared in this matter which appears after this one and in which I concur, this matter concerns the application of sec 197 of the Labour Relations Act 1995 (Act 66 of 1995) ("the Act") to outsourcing. The aspect that I wish to deal with is an aspect which, in my view, puts the first respondent's conduct before the 1st August 2002 and after in the correct perspective.

[2] The conduct of the first respondent that I refer to is the fact that prior to the 1st August 2002 it had expressly said that the outsourcing of its security and garden services that it intended to embark upon at that stage would be a transfer of business as a going concern in terms of sec 197 of the Act but subsequent to that date – and in the proceedings in the Labour Court and in this Court, the first respondent's stance was that sec 197 had no application in this matter.

[3] In the above regard reference should be made to a letter dated the 21st June 2002 that the first respondent addressed to Mr M.W. Machaka and other employees. In that letter the first respondent referred to the various discussions that it said had been held since March 2002. In the second, third and fourth paragraphs of that letter Mr Wehmeyer, who dealt with this matter on behalf of the first respondent at the time and deposed to the answering affidavit filed on behalf of the first respondent in these proceedings, wrote thus:

"**Management has, as indicated to you, no option but to outsource the security function in the business as this is not a core function of the business. The function will be outsourced in terms of section 197 of the Labour Relations Act to [the third respondent] with effect from 1 August 2002.**

You will therefore be required to enter into new employment contracts with [the third respondent] as from that date. Should you not find the alternative employment suitable we will be forced and have no alternative but to enter into retrenchment procedures in terms of section 189 of the Labour Relations Act.

I trust that you will consider the alternative employment and that we can reach an amicable agreement."

(Underlining supplied). The date of the 1st August 2002 as the date of implementation was later postponed to the 1st September 2002.

[4] It will be noticed from the first of the three paragraphs of the letter quoted above that the first respondent was saying that it was going to outsource the security function and that this was in terms of sec 197 of the Act. In the second of the three paragraphs quoted above, the first respondent said that the employees would be required to enter into new contracts of employment with the third respondent but that, should the employees not find "**alternative employment suitable"**, it would have no alternative but to enter into retrenchment procedures in terms of sec 189 of the Act.

[5] In a letter dated the 31st July 2002 addressed to the first respondent, the first appellant's attorneys recorded that **"(o)ur clients accept your statements that the transfer of the non-core functions constitutes a 'transfer as a going concern?**

Section 197 of the Labour Relations Act, 1995 is therefore applicable. In these circumstances if the transfer proceeds the employees will, by operation of law, be transferred to [the third respondent] on the same terms and conditions of employment."

[6] On the 1st August 2002 the first respondent sent letters to the employees – including the second and further appellants – informing them that it was terminating their services with effect from the 31st August 2002. The fourth paragraph of that letter read thus: "**Should you wish to be re-employed you are requested to approach the company taking over the services for a position. Should the company require your service prior to the 31st August 2002, [the first respondent] will allow you to take up such employment without any reductions to the pay as set out hereinabove."** In a letter dated the 1st August 2002 addressed by the first respondent to the first appellant's attorneys, the first respondent wrote in its last paragraph: "**In the light of the fact that [the first respondent] intends terminating services, section 197 is not applicable and any application brought for a declaration as stated in your letter will be vigorously opposed."** (Underlining supplied.)

[7] The fact that earlier on the first respondent had mero motu stated quite expressly that the outsourcing was "**in terms of sec 197**" of the Act but that on the 1st of August 2002 it said that sec 197 was not applicable marked an about turn on the part of the first respondent on the issue. The question that arises is why the first respondent made this about turn. Had the first respondent not changed its mind on this, the appellants would probably not have instituted these proceedings. In the first respondent's answering affidavit, Mr Wehmeyer sought to explain it thus in par 34: **"I was always under the erroneous belief that outsourcing of any department of a company is done in terms of section 197 of the Act."** He then went on to say that from the letter concerned it was clear that their intention was that as a result of the outsourcing, the employees would be required to enter into new employment contracts with the third respondent as from such date. He pointed out that the letter did say that, if any employee did not find suitable alternative employment with the third respondent, the retrenchment procedure would be resorted to. Mr Wehmeyer's explanation is deficient in at least one respect. That is that he

does not say what made him change from his belief that the "**outsourcing of any department of a company is done in terms of sec 197 of the Act.**"

[8] The only explanation that I can think of for this apparently inexplicable stance on the part of the first respondent is one which has as its source what the first respondent said in the last sentence of the letter under discussion. In the last sentence the first respondent said: **"In the light of the fact that Rand Airport intends terminating services, section 197 is not applicable**". In particular note must be taken of the first part of that sentence. What that sentence conveys is that the reason why sec 197 was not applicable was because the first respondent was terminating the services of the employees. This statement manifests the first respondent's understanding at the time of when sec 197 applied to a transaction such as the one the first respondent was concerned with. That understanding was that sec 197 of the Act did not apply if there was no agreement for the employees from the transferor to the transferee. In all probability the above understanding of the law with regard to the applicability of sec 197 which the first respondent had as at the 1st of August 2002 has as its source the majority judgement of this Court in **Nehawu v University of Cape Town (2002) 23 ILJ 306 (LAC).** In that matter this Court held that, if the transferor and transferee of a business or part of a business did not agree that the workforce be also transferred from the transferor to the transferee, sec 197 did not apply. That judgement had been delivered in February 2002 and the Constitutional Court had not heard the appeal that was noted to it against that judgment. Accordingly, as at immediately before the 1st August the law relating to sec 197 was as laid down in that judgment.

[9] The Constitutional Court subsequently set aside that judgement. (see **Nehawu v University of Cape Town (2003) 24 ILJ 95 (CC**)). It held that it was not a requirement that the transferor and the transferee agree to transfer the workforce before there could be a transfer of business or part thereof as a going concern in terms of sec 197. In fact with effect from the 1st August 2002 the Labour Relations Amendment Act, 2002 (Act no 12 of 2002) came into operation. One of the amendments it brought about was a definition of the word "business" that included "**service**". Accordingly, to the extent that there may have been doubt before whether transferring a service could fall within the

ambit of sec 197, that doubt was completely removed with effect from the 1st August 2002. That amendment also included sec 187(1)(g) of the Act which in effect outlawed the dismissal of employees because of a transfer of business or part thereof as contemplated by sec 197 or for a reason that is connected with such a transfer. From the 1st August 2002 when sec 187(1)(g) came into effect such a dismissal became automatically unfair.

[10] In the light of the above it, therefore, seems to me that, read against the above background, what the first respondent believed as at the 1st August 2002 was that, if there was an agreement that the employees be transferred, sec 197 would apply but that, if there was no such agreement, sec 197 would not apply. In the first respondent's own understanding the fact that it was dismissing the second and further appellants meant that the transaction was taken out of the ambit of sec 197. I do not think that the first respondent would have taken the stance that sec 197 would not apply to the situation had it taken the view that agreement to transfer the employees to the contractors was not a sine quo non for the application of sec 197 to the situation. I also do not think that the first respondent would have gone ahead and dismissed the employees if it had known that, with effect from the 1st August 2002, which was the day on which it wrote to the second and further appellants dismissing them with effect from the 31st August 2002, the dismissal of employees because of, or, for a reason connected with, a transfer contemplated in sec 197 was automatically unfair.

[11] It seems to me, therefore, that the first respondent's stance as from the 1st August 2002 which it has maintained to date despite the judgement of the Constitutional Court in Nehawu v University of Cape Town referred to above originates from its understanding of what law was at the time but which it seems not to have changed after the Labour Relations Amendment Act, 2002, which contained sec 187(1)(g) came into operation on the 1st August 2002 and after the delivery of the judgement of the Constitutional Court Nehawu case.

Zondo JP

I agree.

Jafta AJA

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JUDGMENT

DAVIS AJA
INTRODUCTION

[1] This appeal concerns the application of sec 197 of the Labour Relations Act, 1996 (Act 66 of 1996) ("**the Act**") to outsourcing. The facts are largely common cause. What is in dispute are the conclusions to be drawn from those facts and the legal issues that arise from them. It is appropriate to first set out the facts and the sequence of events that led to these proceedings.

The facts

[2] First respondent operates and manages Rand Airport. Until 31 May 2000 Rand Airport was an entity owned and managed by the greater Johannesburg Metropolitan Council. On that date, pursuant to a restructuring within the council, first respondent began to run Rand Airport.

[3] At a meeting on 11 March 2002, first respondent informed employees that it was experiencing financial difficulties and wished to discuss this position at a further meeting. At that further meeting on 18 March 2002, first respondent disclosed financial information to employees' representatives, who were asked to proffer solutions to some of the financial problems experienced by first respondent. A number of cost cutting measures were raised and discussed. During the course of the meeting Mr André Wehmeyer, managing director of first respondent, intimated that certain specialized services appeared to be more costly when conducted 'in house' rather than being sub-contracted to a third party.

[4] On 18 April 2002 Mr Wehmeyer wrote a letter to the first appellant in which he stated that five meetings had been held with the staff since 11 March 2002 in which the financial position of first respondent had been discussed. He wrote of the need to 'revisit… the staffing requirements' and then referred to possibilities which had been considered including 'voluntary early retirement, outsourcing or any other possibilities that you may want to be considered'.

[5] Further meetings took place and on 14 June 2002 Mr Wehmeyer informed representatives of first appellant that the intention of first respondent was not to retrench but rather to outsource, a point which was reiterated in a further letter written by Mr Wehmeyer on 16 June 2002.

[6] In a letter addressed to the first appellant on 25 June 2002, the intention of first respondent was set out by Mr Wehmeyer thus:

> 'I also want to inform you that it is the intention of Management to proceed with the proposal of outsourcing the non-core activities as indicated to you before namely Security, Garden Services and Cleaning effective 1 July 2002'.

[7] On 21 July 2002 first respondent gave notice that the non-core functions would be outsourced in terms of section 197 of the Act to a sub-contractor with effect from 1 August 2002. On the same day Mr Wehmeyer again wrote a letter to the affected employees headed 'Retrenchment due to Operational Requirements'. In this letter Mr Wehmeyer informed second appellant that "**Should you wish to be re-employed you are requested to approach the company taking over the services for a position. Should the company require your services prior to 31 August 2002 Rand Airport will allow you to take up such employment without any reductions to the pay set out herein above."** The letters to other employees conveyed the same message.

[8] On 6 August 2002 first and second respondents concluded a written agreement concerning the outsourcing of the gardening service. Attorneys acting on behalf of first appellant enquired as to whether sub-contractors would guarantee the affected workers jobs on application by them, what their conditions of service would be in the event that they were employed and whether they would start as new employees if their applications were successful.

[9] On 13 August 2002 first respondent replied, and recorded, that it was retrenching employees, that it could not comment on whether the relevant sub-contractors would guarantee jobs to retrenched workers, what their conditions of service would be in the event that they were hired and further confirmed that they could commence as new employees if their applications were successful. A similar response was also received from second respondent.

Proceedings in the Labour Court

[10] On the 23rd August the appellants brought an application before the Labour Court as a matter of urgency. The substantive orders that they sought in terms of the notice of motion were in the following terms:

> **"1. …….**
>
> **2. Declaring that the company's (sic) transfer of its garden department to the second respondent [i.e. Turkey Facility Management (Pty)Ltd] constitutes a transfer of part of a business as a going concern, as contemplated in section 197 of the Labour Relations Act, 1995;**
>
> **3. Declaring that the company's (sic) transfer of its security department to the third respondent constitutes a transfer of part of a business as a going concern, as contemplated in section 197 of the Labour Relations Act, 1995;**
>
> **4. Ordering that the contracts of employment of the second and further applicants are transferred from the first respondent to the second and third respondents on the same terms and conditions and without interruption of their service with the first respondent, with effect from the date of the transfer of the security and garden departments."**

[11] The matter was argued before Landman J in the Labour Court. With regard to the security functions, the Labour Court dealt with the matter in the following terms in paragraphs 30-33:.

"30. 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 essential as other services in the long run but are non-core functions.**

31. **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.**
32. **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.

33. I do 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."

[12] With regard to the gardening functions, the Labour Court had this to say in paragraphs 34- and 35:.

" 34. 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.**

35. 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."

[13] In the result Landman J dismissed the appellants' application with costs on the 27th September 2002. Landman J granted the appellants leave to appeal to this Court in respect of the part of the matter that relates to gardening services and refused leave to appeal in respect of that part of the matter that relates to security functions. The Judge President was then petitioned for leave to appeal in respect of the part of the matter that relates to gardening functions. This Court duly granted leave to appeal in regard to that part, hence this appeal.

The appeal

[14] It is common cause that the first respondent sought to outsource its gardening and security services to outside contractors because, apparently, it would be cheaper to have such services provided by contractors. It is also common cause that to this end the first respondent awarded tenders to the second and third respondents for the provision of such services. Subsequent to the second respondent being awarded its tender, a written contract was concluded between itself and the first respondent for it to provide the services for which it had been awarded the tender. It is undisputed that as at the time of the launching of the urgent application in the Labour Court, the first and third respondents had not signed any written contract in terms of which the first respondent would provide the services in respect of which it had been awarded the tender.

[15] The appellant's case is that the contracts of employment of the second and further appellants were transferred automatically to the second and third respondents pursuant to agreements between the first respondent and second respondent in one instance and in another between the first respondent and third respondent. The transfer of contracts of employment that the appellants contended took place is one referred to in sec 197 of the Act. In this regard it is apposite to quote sec197(1) and (2). They read thus:-

"(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, 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 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."

[16] Whether or not the contracts of employment of the second and further appellants have been transferred automatically to the second and third respondents, as the case may be, depends upon whether there has been a transfer of business in one instance from the first respondent to the second respondent and, in another, from the first respondent to the third respondent as contemplated in sec 197 of the Act. In order to determine whether there has been a transfer of business in this case, it is necessary to first have regard to the meaning of the word "**business**" in sec 197.

[17] Section 197 was amended pursuant to Act 12 of 2002. Of particular relevance to the present dispute is the amendment which introduced the concept of 'service' into the definition of 'business' and, hence, of 'transfer' as contained in section 197(1) of the Act. Although not defined in the Act, the common meaning of 'service' as set out in the new Shorter Oxford English Dictionary is 'The provision of a facility to meet the needs or for the use of a person or a person's interest or advantage; assistance or benefit provided to someone by a person or thing; an act of helping or benefiting another; an instance of beneficial, useful or friendly actions; the action of serving, helping or benefiting another; behavior conducive to the welfare or advantage of another; friendly or professional assistance'.

Do security and gardening services constitute a "service" as contemplated in sec 197 of the Act?

[18] Mr Bruinders submitted that the gardening service as well as the security service fell within the term "**service**" in sec 197 of the Act. That would appear to be the way in which first and third respondents also saw the activities of gardening and security. In

clause 20 of the agreement between first and second respondents, it is provided that Annexure A 'being a description of the services to be rendered is attached hereto (and) forms an integral part of this agreement." Annexure A then sets out the services which the second respondent was obliged to undertake, including, for example, mowing, edging and fertilizing of lawn as well as cultivation, weeding, pruning, fertilizing of the planted area. In the similarly drafted agreement that was meant for signature by first and third respondents but had not been signed at the time of the institution of these proceedings, the latter is referred to as the service provider. In the recordal to the agreement it is stated: "**The company requires the guarding and security services to be provided and maintained on the standard required by the South African Civil Aviation Authority".**

[19] Respondents did not dispute the correctness of the submissions made by appellants with regard to 'service' and for good reason. The meaning of the word "**service**" read within the context of second respondent's obligations or third respondent's intended obligations (if it signed an agreement with the first respondent) towards first respondent provide compelling justification for the conclusion that both the gardening and security functions fell within the definition of the word "**service**" as contemplated in section 197(1) of the Act. I, therefore, conclude that the gardening and security services fell within the ambit of the word "**service**" in sec 197 of the Act.

[20] The above conclusion means that the gardening and security services of the first respondent would be capable of being transferred in the manner contemplated in sec 197. Before I can consider whether or not they were so transferred, it is necessary to first consider the meaning of the phrase "**transfer of a business as a going concern**".

What does it mean to transfer a business or a service "as a going concern"?

[21] In the determination of whether a business has been transferred as a going concern, the critical phrase is 'a going concern'. It is not defined in the Act. Understandably this phrase has given rise to intense judicial scrutiny. The starting point of any enquiry must be the minority judgment of **Zondo JP** in **Nehawu v University of Cape Town and Others** 2002 (23) ILJ 306 (LAC). In paragraphs 64 and 65 of that judgement Zondo JP had this to say with regard to the phrase 'a going concern', as it appeared in section 197 of the Act prior to the amendment of 2002:-

'[64] Furthermore, I am of the view that the question whether in a particular case a business has

been transferred as a "**going concern**" is a matter for objective determination. This does not mean that the intentions of the parties are irrelevant but it does mean that the say- so of the parties cannot be conclusive. In my view there are a number of factors that are relevant in determining whether or not a business has been transferred as a going concern. These may include what will happen to the goodwill of the business, the stock-in-trade, the premises of the business, contracts with clients or customers, the workforce, the assets of the business, whether there has been an interruption of the operation of the business and, if so, the duration thereof, whether same or similar activities are continued after the transfer or not and others. I do not think that the absence of anyone of these will on its own mean that the transfer of the business has not been one as a going concern. I would align myself with the approach adopted by the European Court of Justice when, in paras 11, 12 and 13 of its judgment in the Spijkers case, it said:

"[11]…. It appears from the general structure of directive 77/187 and the wording of Article 1(1) that the directive aims to ensure the continuity of existing employment relationships in the framework of an economic entity, irrespective of a change of owner. It follows that the decisive criterion for establishing the existence of a transfer within the meaning of the directive is whether the entity in question retains its identity.

[12] Consequently it cannot be said that there is a transfer of an enterprise, business or part of business on the sole ground that its assets have been sold. On the contrary, in a case like the present, it is necessary to determine whether what has been sold is an economic entity which is still in existence, and this will be apparent from the fact that its operation is actually being continued or has been taken over by the new employer, with the same economic or similar activities.

[13] To decide whether these conditions are fulfilled it is necessary to take account of all the factual circumstances of the transaction in question, including the type of undertaking or business in question, the transfer or otherwise of tangible assets such as buildings and stocks, the value of intangible assets at the date of transfer, whether the majority of the staff are taken over by the new employer, the transfer or otherwise of the circle of customers and the degree of similarity between activities before and after and the duration of any interruption in those activities. It should be made clear, however, that each of these factors is only part of the overall assessment which is required and therefore they cannot be examined independently of each other.'

[65] In my view the position is that there will be cases where the transferor and the transferee agree that the workforce will be taken over by the transferee but the transaction cannot be described as transfer of the business as a going concern if

many of the other factors that are relevant to a transfer being one as a going concern are absent and there will be transactions where the transferor and the transferee will agree that the workforce will not be taken over but the transaction still amount to a transfer of a business as a going concern because of the presence of many or all of the other factors that go to making a transfer of a business to be one as a going concern. Accordingly each transaction must, in my view, be considered in its own merits in the light of all the surrounding circumstances of the transaction before a determination can be made whether it constitutes a transfer of a business as a going concern.' The majority of this Court in that case, namely, Van Dijkhorst AJA with whom Comrie AJA agreed, held that there can be no transfer of a business as a going concern unless both the transferor and the transferee have agreed that the latter takes the former's workforce over as well."

[22] The matter subsequently went to the Constitutional Court. The judgement of the Constitutional Court is reported as **Nehawu v University of Cape Town & others (2003) 24 ILJ 95 (CC).**When the matter was heard by the Constitutional Court, **Ngcobo J,** on behalf of a unanimous Court, said the following in paragraphs 56, 57 and 58 of his judgement:-

" [56] **The phrase "going concern" is not defined in the LRA. It must therefore be given its ordinary meaning unless the context indicates otherwise. What must be transferred must be a business in operation "so that the business remains the same but in different hands". Whether that has occurred is a matter of fact which must be determined objectively in the light of the circumstances of each transaction. In deciding whether a business has been transferred as a going concern, regard must be had to the substance and not the form of the transaction. A number of factors will be relevant to the question whether a transfer of business as a going concern has occurred, such as the transfer or otherwise of assets, both tangible or intangible, whether or not workers are taken over by the new employer, whether customers are transferred and whether or not the same business has been carried on by the new employer. What must be stressed is that this list of factors is not exhaustive and that none of them is decisive individually. They must all be considered in the overall assessment and therefore should not be considered in**

isolation.

[57] There is nothing either in the context or language of section 197 to suggest that the phrase "going concern" must be given the meaning assigned to it by the majority. On the contrary, the purpose of the section and the context in which that phrase occurs suggests otherwise.

[58] The fact that the seller and the purchaser of the business had not agreed on the transfer of the workforce as part of the transaction does not disqualify the transaction from being a transfer of a business as a going concern within the meaning of section 197. Each transaction must be considered on its own merits regard being had to the circumstances of the transaction in question. Only then can a determination be made as to whether the transaction constitutes the transfer of a business as a going concern. In this regard I agree with Zondo JP."

[23] It is also apposite to refer to a statement by Lord Fraser **in Mellon v Hector Powe** [1981] 1 All ER 313 at 317 h-j where, among other things, he said that a business "**is transferred as a going concern 'so that the business remains the same business but in different hands'….whereas"** in the case of a transfer of assets **"the assets are transferred to the new owner to be used in whatever business he chooses".** (See para 61 of **Zondo JP's** minority judgment in Nehawu's case, supra.)

[24] Both **Zondo JP** in his judgment in this Court in Nehawu's case and Ngcobo J in his judgement in the same case in the Constitutional Court were careful to desist from developing an inflexible test. Both emphasized that the list of factors set out in their judgments were not 'exhaustive and that none of them is decisive individually' (**Ngcobo J** at para. 56 and Zondo JP at para 64 and 65). When **Landman J** delivered the judgment of the Court ***a quo***, the law on the transfer of a business as a going concern was as set out in the majority judgment of this Court in the Nehawu case. The Constitutional Court had not yet handed down its judgment. Accordingly, Landman J was bound by the interpretation given in the majority judgment as to the meaning of the phrase "**going concern**". In the majority judgment the test adopted was inflexible. It was 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 goal…in every business**" **(Nehawu v University of Cape Town & others 2002 (23) ILJ 306 (LAC) at 312J- 313 B)**.

[25] Having dealt with the question of when it can be said that there has been a transfer of business as a going concern, the question that arises now is whether there has been a transfer of business as a going concern in this matter. That is the question to which I now turn.

Has there been a transfer of business or service from the first respondent to the second respondent and the third respondent in this matter as a going concern?

[26] Mr Bruinders placed considerable emphasis on the amendment to section 197 which was introduced in terms of Act 12 of 2002 in which the word 'service' was introduced into the definition of business. He submitted that, on the basis of this amended definition a transfer of a business as a 'going concern' included the transfer of a 'service' as a 'going concern'. Mr Bruinders contended that the manner in which the security and gardening services were to be undertaken by the second and third respondents provided an indication that in each case a service would continue to be provided for the same purpose although by another party. Accordingly, so submitted Mr Bruinders, there had been a transfer of the service as a 'going concern'.

[27] In support of this submission Mr Bruinders referred to the decision of the Court of Appeal in **Betts and Others v Brintle Helicopters Limited and Another** 1997 IRLR 361 (CA). In this case, defendant provided helicopter services to and from oil rigs in the North Sea. Until 30 June 1995 this service was conducted in terms of three contracts covering separate sectors of the North Sea. When the contracts were about to expire on 30 June 1995, new contracts were put out to tender and Shell (UK), on behalf of whom the services were to be performed, decided that no single company would be awarded all three contracts. Defendant obtained two of the contracts, and the third which covered the Southern sector went to second defendant. None of the sixty six people who were employed by first defendant to operate this contract were employed by second defendant which fulfilled its contractual obligations from different locations. Seven employees of first defendant claimed that there had been a transfer of an undertaking between first and second defendant, as a result of which they had become employees of second defendant by operation of law. They sought a declaration to this effect.

[28] The Court of Appeal accepted that the provision of helicopter services to and from the oil rigs constituted an undertaking or an economic entity. However, the Court did not find that there had been a transfer of such an undertaking. It appeared to accept the following submission by appellants' counsel:

'Unlike school or hospital cleaning or other labour intensive operations in which…'a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity', the situation in this case was more complex. At risk of over-simplification, the labour force was not

the only asset of the Brintel Beccles operation, and the vast majority of its assets Brintel retained, so the situation here was precisely that envisaged by European Court…in the case of **Suzen'**. (at para 45).

[29] In **Suzen v Zehnacker Gebaudereinigung Gmbh** 1997 IRLR 255 (ECJ) at para 33 the European Court of Justice dealt with EEC Directive 77/187 which covers the transfer of undertakings and said: 'The Directive is to be interpreted as meaning that the Directive does not apply to a situation in which a person who had entrusted the cleaning of his premises to a first undertaking terminates his contract with the latter and, for the performance of similar work, enters into a new contract with a second undertaking, if there is no concomitant transfer from one undertaking to the other of significant tangible or intangible assets or taking over by the new employer of a major part of the workforce, in terms of their numbers and skills, assigned by the predecessor to the performance of the contract.'

[30] On one reading of the judgments in **Betts** and **Suzen** taken together, it may be contended that these decisions stand in the way of appellants' submissions, particularly the conclusion reached in **Betts** that second defendant had 'simply obtained a fresh contract for carrying men and goods to the same oil rig from a different land base, using different helicopters, different crews, but inevitably landing on the same oil rigs and using the same oil rigs facilities' (at para. 45). However, in both **Betts** and **Suzen** the court was not required to apply a definition of business which expressly included the concept of 'service'. Significantly, in the case of **Betts** the provision of helicopters with different crews transporting personnel and goods, albeit to the same oil rig but from a different land base, was held to be an undertaking or economic entity for the purposes of the Directive. The appeal by the providers of the helicopter services succeeded because it was found that no undertaking was transferred. The successful tenderers obtained a contract to provide a service but the key infrastructure was never transferred.

[31] In presenting his argument that there had not been a transfer of business as a going concern in this case, Mr Pauw submitted that the intention of the transferor and the transferee was critical. He submitted that it was clear from the facts of this case that the parties did not intend a transfer of the business or of the services as a going concern. He further submitted that the first respondent was entitled to dismiss the second and further appellants for operational requirements at the time that it did. He submitted that a court should not lightly

conclude that a transfer of business as a going concern had occurred in circumstances where that is not what the parties intended.

[32] I think that the answer to Mr Pauw's contention with regard to the role of the intention of the transferor and transferee is that the question of what determines whether there has been a transfer of a business as a going concern has been dealt with both in the judgement of ZondoJP in this Court in the Nehawu case as well as in Ngcobo J's judgement in the same case in the Constitutional Court. It is clear from those judgments that the intention of the transferor and the transferee does not play a critical role, let alone a decisive role in the determination of such a question. There is no warrant to repeat it here. The answer to Mr Pauw's argument that the first respondent was entitled to dismiss the second and further appellants for operational requirements at the time that it did so is to be found in sec 187(1)(g) of the Act. Sec 187(1)(g) was introduced into the statute by Act 12 of 2002 which came into operation on the 1st August 2002. It provides that a dismissal is automatically unfair "**if the reason for the dismissal is – a transfer, or a reason related to a transfer, contemplated in section 197 or 197A**." Quite clearly the aim of this provision is to make it clear that an employer has no right to dismiss an employee because of a transfer contemplated in sec 197 or 197A or for any reason connected with such a transfer. Where an employer seeks to transfer a business or a part thereof or a service to another employer and such transfer would, if implemented, be a transfer of business or undertaking or service as a going concern as contemplated by sec 197 of the Act and is initially prepared to let the employees go over to the new employer but later dismisses such employees when there is a dispute about the terms and conditions of employment that they will enjoy after such transfer to the new employer – which is what happened in this case - there can be no doubt that the reason for the dismissal of the employees in such a case is either the transfer or a reason connected with such a transfer. Accordingly, the first respondent's dismissal of the second and further appellants was something that the first respondent was not entitled to do and constituted a violation of their right not to be dismissed for such a reason. Sec 187 provides that such a dismissal is automatically unfair.

[33] In this case the appellants' case that there has been a transfer of business or service, as a going concern and, therefore, of the contracts of employment is based, in the first place, on the assertion that in the one instance the first and second respondents and, in another, the first and third respondents, concluded agreements in terms of which the second and third respondents would take over certain functions previously performed by employees of

the first respondent. If there were no such agreements, that would be the end of the appellants' case. If, however, such agreements were concluded, that would not necessarily mean that there had been a transfer of business or service as a going concern but what would have to be inquired into is whether that is a type of agreement that, if implemented, would attract the application of sec 197 of the Act. If the answer was that that is not the type of agreement that would attract sec 197 of the Act if implemented, that would mark the end of the inquiry. If, however, it is a type of agreement which, if implemented, would attract the application of sec 197, the next question would be whether such agreement was implemented. If it was not implemented, then there would not have been a transfer of business or service as a going concern and, therefore, there would not have been a transfer of contracts of employment. If there was implementation, there would have been a transfer of business or service as a going concern and, therefore, also a transfer of the contracts of employment of the relevant employees. In the light of all of this, I turn to consider the position between the first respondent and the second respondent first.

Was there an outsourcing agreement between the first and second respondents and, if so, was the relevant service transferred as a going concern from the first respondent to the second respondent?

[34] There is no doubt that first and second respondents concluded a written outsourcing agreement in terms of which the second respondent was obliged to perform certain functions previously performed by employees of first respondent. A copy of the signed agreement between the first and second respondents was annexed to the papers. The duration of the agreement was initially to be from the 1st September 2002 to the 31st August 2004. In terms of clause 2.1.2 of that agreement, the second respondent had an option to renew the contract for a further two years from the 1st July 2004 to the 30th June 2006. In the last sentence of paragraph 15.5 of the answering affidavit, Mr Wehmeyer, first respondent's managing director, referred to a copy of the memorandum of agreement between the first and second respondents and said that such memorandum of agreement had "**already been finalized…".** The functions which the second respondent was to take over from the first respondent in terms of that agreement are set out in the agreement.

[35] First and second respondents thus concluded an agreement in terms of which second respondent was to take over certain functions previously performed by the first respondent with effect from the 1st September 2002. I am satisfied that the functions which second respondent undertook to perform in terms of their agreement fell within the ambit of "service" as contemplated by section 197 of the Act and that this was an

agreement to transfer a service within the ambit of section 197 of the Act as a going concern. Accordingly, the agreement was an agreement that, upon implementation, would have attracted the application of sec 197 of the Act. If the agreement was implemented, the contracts of employment of the relevant employees would have been transferred from the first respondent to the second respondent.

[36] The question that arises is whether the agreement was implemented. The agreement was to be implemented on the 1st September 2002. The appellants' urgent application was launched in the Labour Court on 23 August 2002, that is eight days before the date on which date the agreement was going to be implemented if everything went according to plan. Appellants did not supplement their papers prior to the hearing before the Court ***a quo*** to give evidence of whether the plan to implement the agreement on 1 September materialised***.*** They could have sought and obtained the leave of the Court a quo to supplement their papers. They did not do so. Accordingly, there is no evidence on the record to show that the agreement was implemented on the 1st September. In the absence of such evidence, I cannot make a finding that the agreement was implemented on the 1st September 2002. Anything might have happened between the launching of the application on 23 August and the intended day of implementation which might have led to the agreement no longer being implemented. I cannot speculate on the issue. There being no evidence whether the agreement was implemented on the 1st September, I cannot make a finding that there was a transfer of business or service as a going concern from the first respondent to the second respondent on the 1st September 2002. If I cannot make a finding that there was such a transfer of business or service as a going concern, equally I cannot make a finding that the contracts of employment of the relevant employees were transferred on the 1st September 2002 from the first respondent to the second respondent. In these circumstances I am unable to find that any contracts of employment of employees were transferred from the first respondent to the second respondent on the 1st September 2002. I now turn to deal with the same issue but now in relation to the first and third respondents.

Was there an outsourcing agreement between the first and third respondents and, if so, was the relevant service transferred from the first respondent to the third

respondent as a going concern?

[37] Essential to the finding of **Landman J** was the conclusion that no contract had been concluded between first and third respondents at the time that appellants launched their application. The question which thus requires determination concerns this particular finding, namely, whether first and third respondents had concluded an outsourcing agreement.

[38] In a letter addressed to Mr W Machaka in the Control Room of the first respondent dated the 21st June 2002 bearing the heading: "**Outsourcing of non-core functions",** Mr Wehmeyer said on behalf of first respondent:

"**Management has, as indicated to you, no option but to outsource the security function in the business as this is not a core function of the business. The function will be outsourced in terms of Section 197 of the Labour Relations Act to Capital Air Security (Pty) Ltd with effect from 1 August 2002.**

You will therefore be required to enter into new employment contracts with Capital Air Security Service (Pty) Ltd as from that date. Should you not find the alternative employment suitable, we will be forced and have no alternative but to enter into retrenchment procedures in terms of Section 189 of the Labour Relations Act.

I trust that you will consider the alternative employment and that we can reach an amicable agreement."

The reference in the extract to Capital Air Security (Pty) Ltd is a reference to third respondent.

[39] In a letter addressed to first appellant on the 25th June 2002, Mr Wehmeyer said that he had made it 'abundantly clear that we want to outsource the non-core activities in the business as it makes business sense to do so.' He said that the affected staff members had been informed that they would have an opportunity to accept or reject the offer of alternative employment. He said further that the intention was that the outsourcing would take effect in respect of security, garden services and cleaning from the 1st July 2002. This date was later altered to the 1st September 2002. In its letters of the 1st August 2002 to the affected employees informing them of their dismissal, first respondent advised the employees that, should they wish to be 're-employed, you are requested to approach the company taking over the services for a position. Should the company require your services prior to 31 August 2002, Rand Airport will allow you to

take up such employment without any reductions to the pay set out herein above.'

[40] In that same letter of 1st August 2002 to the appellants' attorneys, Rand Airport – of which the first respondent seems to be a subsidiary – wrote through Mr Wehmeyer as follows:

"**The aspect of outsourcing was at all stages an option that was discussed between the parties as an alternative to retrenchment. The sections involved are security, what is known as the 'control room and garden services which forms (sic) part of the maintenance department.**

On the 21st June 2002, Rand Airport indicated that it intend (sic) to outsource in terms of section 197. SAMWU choose (sic) only to respond on the 18th July 2002 and apposed (sic) the attended (sic) outsourcing. On 30 July 2002 SAMWU threatened Rand Airport with an urgent application if it intended to proceed with the outsourcing.

Pursuant thereto Rand Airport, having no alternative, decided to terminate the affected staff services."

Later in the same letter Mr Wehmeyer wrote: "**Should any of the effected (sic) staff wish to be employed after 31 August 2002 they are to without fail to approach [the third respondent] who successfully tendered to provide the security services and Turnkey Facilities Management (i.e. the second respondent) who was successful in tendering for the Garden Services.**"

[41] In that same letter of the 1st August 2002 to the appellants' attorneys Rand Airport also said that, prior to the union "**objecting in the manner they did, Rand Airport considered it in the interest of the employees to outsource**." Mr Wehmeyer went on to say in that letter: "**At that point in time [the third respondent] were still fully prepared to enter into an outsourcing agreement with [the first respondent]. Pursuant to the stance taken by [first appellant], [the third respondent], nor (sic) Rand Airport, wish to enter into an outsourcing arrangement/agreement**". In the next paragraph of the letter, Mr Wehmeyer then said: "**In these circumstances, the employees are not to be transferred to [the third respondent] or any other organization."** Rand Airport intends to terminate services which it attempted to avoid through negotiations with [the first appellant] since April 2002" (underlining supplied). It would, therefore, seem from that letter of the first respondent that both the first and the third respondents were no longer willing to proceed with the outsourcing plans in the light of the stance taken by first appellant to the whole matter. I might add that nowhere was it said in the papers that second respondent adopted the same attitude as the third respondent.

[42] Appellants placed no evidence before this Court to dispute the statement by first respondent that both it and the third respondent changed their mind about the outsourcing plans when they realized first appellant's stance towards outsourcing. Admittedly, while in one part of its letter of 1st August 2002 to appellant's attorneys, first respondent suggested that both it and third respondent were no longer willing to go ahead with the outsourcing of some of the first respondent's functions to third respondent, it said in another part of the letter that those employees whom it was dismissing who wanted to be considered for employment by the second and third respondents after the 31st August had to approach those contractors. Later in the letter it expressed its stance thus in regard to any employee "**wishing to tender their services to [the third respondent]:**" "**Should any union member wish to be employed by Capital Air or any other organization, they would firstly need to approach such a company and enter into a new arrangement with them**". The last sentence of that letter read thus: "**In the light of the fact that Rand Airport intends terminating services, section 197 is not applicable …..".**

[43] The ambiguity in third respondent's conduct notwithstanding, there is no doubt that even as late as the 22nd August 2002 - which was a week before the 1st September - there were strong indications that first and third respondents had not abandoned plans for third respondent to take over certain functions from the first respondent. However, this does not remove the hurdle in appellants' way, namely, that there is no evidence to show that an agreement was concluded between first and third respondents and the specific statement by the first respondent that, before the launching of the application in this matter, it and the third respondent had decided not to proceed with their plans in the light of the stance taken by the first appellant towards outsourcing which statement the appellants never challenged.

[44] On the papers before the Court I am unable to conclude that as at the time when the appellants launched the urgent application which led to these proceedings, any agreement had been concluded between the first respondent and the third respondent in terms of which the third respondent would take over certain functions from the first respondent. If I were to say that such an agreement had been concluded, I would not be able to spell out what its terms and conditions were including the duration of the agreement, the fee that the first respondent would pay to the third respondent for the performance of such functions, etc. With regard to the

second respondent all such matters were dealt with in the signed agreement. From the fact that a draft agreement that was to be signed on behalf of the first and third respondents was annexed to the papers albeit unsigned, an inference can be drawn that the parties intended to have a written agreement. That document had not been signed at the time that the appellants launched the urgent application. The appellants, being the party that alleged the existence of an agreement, should have provided evidence of what the terms and conditions were of such agreement. They failed to do so and, in the absence of evidence of such terms, I am unable to uphold their contention that the first and third respondents had concluded an agreement. In my view the fact that a tender had been awarded is not sufficient to found an agreement because, quite clearly, the parties intended to conclude a written agreement that would spell out their respective rights and obligations. They prepared a draft of such agreement but had not as yet signed it when these proceedings were instituted. The result hereof is that I cannot conclude that the two parties did conclude an outsourcing agreement.

[45] The conclusion that no outsourcing agreement had been concluded between the first and third respondents at the time of the launching of the urgent application has the result that there could not be any transfer of business or service as a going concern between the two parties in the absence of such an agreement. Accordingly, there could also not be any transfer of contracts of employment of employees from the first respondent to the third respondent.

[46] In the light of all of the above I am unable to grant the order that the appellants sought in this matter but can only grant a differently formulated order. As to costs I am of the view that it would accord with the requirements of law and fairness if I made no order as to costs.

[47] In the result I make the following order:-

1. The written agreement concluded between the first and second respondents which was annexed to the papers in this matter is an agreement to which upon implementation sec 197 of the Labour Relations Act, 1995 would apply.
2. The draft agreement which was prepared for signing by the first and third respondents which was annexed to the papers in this matter is an agreement to which sec 197 of the Labour Relations Act, 1995 would apply if signed and implemented.
3. There is to be no order as to costs.

Davis AJA

I agree.

Zondo JP

I agree.

Jafta AJA

Appearances:

For the appellants: Adv. T.J. Bruinders SC
Instructed by: Cheadle Thompson & Haysom

For the respondent: Adv P Pauw SC
Instructed by : Marting Hening Attorneys

Date of Judgement: 3 December 2004