IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Case No: JS 39/05

In the matter between:

ANDREW KOLOKO BUYS **APPLICANT**

and

IMPALA DISTRIBUTORS **FIRST RESPONDENT**

PREMIER FOODS **SECOND RESPONDENT**

JUDGMENT

MOLAHLEHI AJ

Introduction

1] The applicant , Mr Buys, in this matter challenged his retrenchment by the respondents on the basis that it was in contravention of the provisions of section 197 of the Labor Relations Act 66 of 1995 (the LRA). The applicant's employment was terminated on 07 March 2003.

Background Facts

2] The applicant was initially employed by the second respondents

(Premier Foods) in Polokwane dating back to 10 October 1981 as a warehouse controller and was subsequently promoted in 1985 to the position of warehouse supervisor.

[3] After his retrenchment during April 2000, by Premier Foods the applicant continued to work on a month to month fixed term contract until July 20002.

[4] Thereafter, the applicant was appointed by the first respondent on a three month's fixed term contract from the 01 August 2002 which ended on the 31 October 2002. The applicant was then appointed by the first respondent on a permanent basis commencing 01 November 2002 and was retrenched 07 November 2003.

[5] On the 25 February 2003, the first respondent through the National Organisation for Employers South Africa (NOESA) advised the applicant that his position was redundant and that it was contemplating a retrenchment and accordingly invited him to a consultation.

[6] Following an inquiry as to which criteria was used to select him, the first respondent again through NOESA addressed a letter dated 07 March 2003, wherein it was indicated that the criteria, was last in first out (LIFO).

[7] During cross-examination the applicant conceded that he was retrenched by Premier Foods during April 2002 and received the amount of R77 867.47 as a package. He claimed to have been forced to sign the fixed term contract; and that he signed it for fear

of losing his job.

[8] The first witness, Mr Doktor, the managing member of the respondent testified that the respondent has since 2002 rented premises from Premier Foods.

[9] As concerning the relationship between the respondent and Premier Foods, Doktor, testified that he was approached and invited to tender for the distribution of certain products by Premier Foods. The respondent obliged, its tender was successful and subsequently an agreement though never signed was concluded and implemented by both parties.

[10] The agreement which was for a period of 5 years was renewable depending on good performance by the respondent. The relationship was also governed by the undated letter of intent which amongst others provided:

> "*Re: Letter of Intent: Appointment to manage and operate warehouse and distribution functions for Limpopo region. This serves to confirm that you have been selected Premier Foods Logistics to manage and operate their housing and distribution activities in the Limpopo region. You have indicated that you will operate from the current depot facility in the Limpopo, pending extensions to your own warehouse facility"*

[11] After indicating what the distribution area would be, the expected monthly tons (of 2000), the rate per ton (at R190,00 per ton) and

the estimated monthly cost, the letter set out the activities of the respondent as follows:

- *Management of stock and consignment from Pemier Foods.*

    - *Order processing through pick slips, route/load planning to invoice on the Accpacc system (order captured and pricing change to be done by Premier Foods' telesales Center)*

    - *Delivery to customers*

    - *Collection of returned stock on approved pick-up notice*

    - *Reconciliation of deliveries and capture of output on the Accpac system*

    - *Recovery of stock of as per Premier Foods' guideline*

[12] As stated earlier this was a five year agreement which allowed the respondent the use of the warehouse of Premier Foods. The respondent also had the option to purchase the Premier Foods fleet at a market value to be determined at a later stage. The ownership of the stock on the premises remained the property of Premier Foods.

[13] The delivery process entailed Premier Foods printing the invoice from its computers and then handing the same to the first respondent. The first respondent would after delivery and payment of the invoice hand back the bulk invoices to Premier Foods.

[14] The price for delivery was based on an expected tonnage which was on average 2000 a month. The respondent did not however have control over the monthly allocation of the tonnage.

[15] The drop in the tonnage resulted in the respondent running the business at a loss. Unsuccessful attempts were, according to the respondent, made to have Premier Foods to increase the tonnage. Instead the respondent was informed by Premier Foods that the tonnage would not be increased and that Premier Foods would be doing its own direct deliveries. Furthermore, during January 2003, Premier Foods informed the first respondent that it would not abide by its original undertaking to provide 2000 tons per month.

[16] In his testimony, Doktor relied on a graph to illustrate the drop in a tonnage as a result of the position which was adopted by Primier Foods. This evidence was not contested by the applicant.

[17] In addressing this problem the respondent decided to flatten its top management structure. Consequently the position of the applicant became redundant.

[18] Attempts at consultation failed because of the attitudes of the applicant who according to the first respondent refused to meet

with the designated representative of the respondent.

[19] The applicant contended that his service was longer than that of Willimse who was retained after his retrenchment. He based his argument on the contention that Primier Foods had transferred its warehousing function to the respondent as a going concern in terms of s 197(g) of the LRA.

Automatic unfair dismissal.

[20] The applicant abandoned his reliance on racial discrimination in as far as the automatically unfair discrimination was concerned. He based his automatic unfair dismissal on the provisions of s 197 read with the provisions of s 187 of the LRA.

[21] The applicant contended that his dismissal was automatically unfair because it was as a result of the transfer of the warehousing function from Premier Foods to the first respondent.

[22] The relevant provisions of s 197 reads as follows:

> "(*l) In this section and Section 197 A*
>
> a) "business, includes the whole or a part of any of any business, trade, undertaking or Service; and
>
> b) 'transfer' means the transfer of business by one *employer('the old employer') to another 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 our old employer immediately before the date of transfer;*

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

c) *anything done before the transfer by for 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"

[23] The applicant in support of its case relied on the case of *South African Municipal Workers Union v Rand Airport Management, Company (Pty) Ltd* unreported judgment *case no: JA 9/03*.While the principles in *Rand Airport* (supra) are apposite to the inquiry in this case, the facts are slightly different in that that case, the

employer had expressly stated that the function would be outsourced in terms of section 197(g) of the LRA; and the employees were advised that they would be required to enter into a new employment contracts with the new employer.

[24] The amendment to the LRA which came into effect on 01 August 2000, removed any doubt that may have existed whether transferring a service could fall within the ambit of s 197. Included in the amendment was also the provisions of s 187(1) (g) which prohibits the dismissal of the employees because of a transfer of a business or part thereof as contemplated by s 197.

[25] There is no requirement that there should be an agreement between the old and new employer to agree to the transfer of employees before it can be said that a transfer of business or part thereof as a going concern in terms of s 197 has taken place. See *NEHAWU v University of Cape Town* (2003) 24 ILJ 95.

[26] The issue of whether or not there was an agreement to outsource the warehousing as a going concern was not an issue for the respondent. The contention of the respondent was that warehousing function was never transferred as a going concern by Primier Foods to it.

[27] The question of whether a business has been transferred as a "going concern" was considered by Zondo JP in *NEHAWU v University of Cape Town and Others* 2002 (23) ILJ 306 (LAC). The court held that the question of whether a business has been transferred as a

going concern is a matter to be objectively determined.

[28] The intention of parties as derived from what they say is relevant but not conclusive of whether the transfer as a going concern has occurred. The factors to take into account in the inquiry as to the nature of the transfer are stated by Zondo JP in the *NEHAWU case* (at Para 64) include:

> *"… What will happen to the good will of the business, the stock-in-trade, the premises of the business, contract 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 actions are continued after the transfer or not and others".*

[29] In agreeing with Zondo JP and writing judgment for the Constitutional Court in the same matter of *NEHAWU*, Ngcobo J said:

> "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 has 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 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."

[30] The applicant sought to suggest that transfer as a going concern should be assessed in relation to the time frames related to the outsourcing and the dismissal. The fact that an employee was dismissed for operational reasons shortly after his/ her transfer does not automatically mean that the dismissal was automatically unfair. *See Fancourt Express (Pty) LTd v SA Transport and Allied Workers Union and Another* (2006) 27 ILJ 2537 (LAC).

[31] In *Van der Velde v Business and Design Software (Pty) Ltd and Another* (2006) ILJ 1738 (LC), the employee was retrenched before a merger. The court held that it would be absurd to suggest that every dismissal that would have occurred but for the transfer must inevitably be construed as automatically unfair.

[32] The issue for consideration in the current case is whether there was a transfer of service or business from Premier Foods to the first respondent as a going concern and also whether the dismissal of the applicant was as a result of this transfer.

Analysis of the facts

[33] The history and the facts of this case do not support the version of

the applicant that outsourcing amounted to a transfer as a going concern. Even if it was to be assumed that there was a transfer as a going concern, it cannot, in my view, be said that the dismissal was as a result thereof. The case of the applicant is unsustainable even on the assumption that the outsourcing of the warehouse resulted in a transfer as a going concern.

[34] The applicant was as indicated earlier retrenched by Premier Foods during April 2002. Thereafter the applicant and Premier Foods entered into a fixed term contract which was terminated 31 July 2002, at a salary of R 7854.67 per month.

[35] Under cross-examination, when asked why he signed the letter containing the terms of the fixed term contract, the applicant stated that he signed it because he was told that all moneys due to him had been paid.

[36] The applicant further stated that he enquired as to why Premier Foods did not offer him and other employees, probably those affected by the retrenchment, an opportunity to set up a company. It is not clear what this means but it would seem to relate to Premier Foods assisting him and other employees setting up a company to tender its services to Premier Foods.

[37] However, what is clear is that the applicant accepted that his employment with Premier Foods was terminated as a result of operational reasons. This evidence confirms the version of the respondent that Premier Foods was at that stage faced with

financial difficulties and considered outsourcing certain functions as a measure to sustain its business.

[38] On 23 July 2002, the applicant signed a three months fixed term contract with the respondent. The applicant testified that he was told to sign and when he enquired as to why, he was told he could go if he did not want to sign the contract.

[39] In terms of his fixed term contract with the third respondent, the applicants monthly salary was R5 233-95. He testified that he was opposed to the reduction but the respondent implemented the reduction nevertheless.

[40] This version is not persuasive and must be rejected. The applicant was not a reliable witness. The correct version on straightforward issues could only be extracted from him through cross-examination. He for instance conceded to the retrenchment by Premier Foods after being cross-examined about the amount of R 77 867. 43, he received from Premier Foods. When questioned about his fixed term contract with Premier Foods, his answer which evaded the question was "*they ask one to continue assisting until they found someone else.*"

[41] If indeed the reason for the outsourcing was intended to avoid Premier Foods having to dismiss the applicant, the guestion is; why did the respondent not dismiss him when his fixed term contract expired before appointing him permanently.

[42] The reasons given by the applicant why he signed the various

contract does not make sense. He claims to have signed the month to month contract with Premier Foods for fear of losing his job. This does not make sense because by that time he had already lost his job through retrenchment.

[43] Turning to the nature and effect of the outsourcing agreement, it was undisputed that the outsourcing followed soon after Premier Foods had a strategic workshop where it was apparently agreed that because of the economic difficulties there was a need to outsource certain functions.

[44] In the first instance the applicant did not dispute the evidence of the respondent that it was only part of the warehouse and distribution functions, which were outsourced to the first respondent and that Premier Foods continued to deliver direct to its own clients. In this regard the evidence of Doktor, was that in January, Premier Foods decreased its allocation of tonnage to the first respondent and increased its delivery to its own clients, was not challenged by the applicant. This evidence was not challenged by the applicant.

[45] In addition to what is stated above there are several other factors that militates against the conclusion that the outsourcing amounted to a transfer as a going concern. I agree with the first respondent that, the factors listed in the respondent's heads of argument, point very clearly that there is no basis upon which it can objectively be said that the outsourcing amounted to a transfer as a going concern. These factors are:

- The respondent only took on part of the functions of

the warehousing and distribution;

- Premier Foods retained a large portion of its own warehousing and distribution functions for the Polokwane area;

- Premier Foods continued to deliver direct to its own clients, and actually increased such deliveries as time went on;

- The agreement was entered into for a limited period of time, and Premier Foods could cancel the agreement at any time in the event of it not being satisfied with the performance of the respondent of its obligations, or for other reasons;

- The functions of the Respondent were performed from premises owned by Premier Foods;

- The computer system of Premier Foods was used in the performance of the function;

- All contracts with the customers of Premier Foods was done by Premier Foods itself;

- The invoices were issued by Premier Foods/ Kemlud;

- Debit and credit control was handled by Premier Foods/ Kemlud;

- The agreement did not make provision that the staff of Premier Foods be taken over by the Respondent, however, the Respondent offered to take on certain staff members in light of the trauma associated with the termination of their fixed term contracts;

- The functions taken over by the Respondent did not constitute a business entity or unit on its own and could not generate any income on its own, it was actually an expense/ cost of Premier Foods.

[46] The other factor that goes against the argument that the outsourcing was a transfer as a going concern is that the outsourcing was for a fixed period of five years and Premier Foods could take back the function at any time and the tonnage, was as what happened in January, reduced without reference to the first respondent. Except for being compensated for distribution per ton, there was no other advantage the respondent received from the outsourcing agreement.

[47] I have already indicated that the case of the applicant was that his dismissal was automatically unfair arising from a transfer as a going concern in terms of s 197 of the LRA. In the heads of argument the applicant argued that the relief it sought was firstly in the form of a declaratory order, declaring that his dismissal from the employment of Premier Foods was a dismissal in the context of section 197 of the LRA.

[48] Even if it was to be the case, I do not belief that the case of the applicant would have been sustainable. While there was some suggestion that the dismissal by the respondent was per se unfair, this was not pleaded in the alternative to the claim of automatically unfair.

[49] The applicant did not challenge the evidence of the respondent in as far as the substantive fairness was concerned. The respondent had shown through the evidence of Doktor that the respondent was faced with economic difficulties, due to the reduction in the monthly tonnage from Premier Foods.

[50] In so far as procedural fairness was concerned, the first respondent demonstrated its effort to consult with the applicant. Those efforts were only conceded to by the applicant under cross-examination. It is apparent that the attitude of the applicant was that he was not willing to consult with the person designated by the first respondent. He insisted in speaking directly to the respondent's members. I find in this regard that the applicant frustrated the consultation process if it was to be found that dismissal by the respondent per se was put in issue.

[51] While I am critical of the applicant as a witness, I recognize that the issue of determining whether a transfer as a going concern is a technical point that may best be resolved in most instances through litigation. In this context it seems to me that it was not unreasonable for the applicant to institute these proceedings. It would therefore, in my opinion be unfair to burden him with costs.

Order:

[52] In the circumstances the application of the applicant is dismissed.

[53] There is no order as to costs.

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MOLAHLEHI AJ

Judge of the Labour Court

Date of Hearing: 10 May 2007

Date of Judgement: 19 September 2007

APPEARANCES:

For the Applicant: K **Mahlase of Mahlase, Nonyanu-Mahlase Attorneys**

For the Respondent(s): **Adv E Kromhout**

Instructed by: **Gideon Ferreira & Partners Inc**