IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT BRAAMFONTEIN)

CASE NUMBER J2206/07
In the matter between:

AVIATION UNION OF SOUTH AFRICA **1ST APPLICANT**

BARNES MR AND 62 OTHERS **2ND TO 64TH APPLICANTS**

And

SOUTH AFRICAN AIRWAYS (PTY) LTD **1ST RESPONDENT**

LGM SA FACILITY MANAGERS AND ENGINEERS (PTY) LTD **2ND RESPONDENT**

TFMC SERCVICES (PTY) LTD **3RD RESPONDENT**

SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS UNION **4TH RESPONDENT**

SOLIDARITY **5TH RESPONDENT**

ALLAN AND 204 OTHERS **6TH TO 209TH RESPONDENTS**

JUDGEMENT

AC BASSON, J

PARTIES

1] The Applicant in this matter is the Aviation Union of South Africa (hereinafter referred to as "AUSA" or "the union"). The individual Applicants are all members of AUSA. The First Respondent is the South African Airways (Pty) Ltd and the former ("old") employer of some of the individual Applicants now employed by the Second Respondent. The contracts of service of some of the individual Applicants were transferred to the Second Respondent LGM SA (hereinafter referred to as "LGM") pursuant to an Outsourcing Agreement in terms of section 197 of the Labour Relations Act 66 of 1995 (hereinafter referred to as "the LRA"). The Third Respondent (TFMC Services (Pty) Ltd) is, however, incorrectly sited as a Respondent in these proceedings and does not have separate legal entity: LGM SA in fact trades as TFMC Services. I will return to the relationship between the relevant parties.

2] This application was only opposed by the First and Second Respondent (the Third Respondent, as already indicated was

incorrectly cited as a Respondent).

NATURE OF THE PROCEEDINGS

3] This was an application for interim relief in terms of which the Applicants sought the following orders: (1) Firstly, the Applicants sought an order declaring that the termination of the Outsourcing Agreement between SAA and LGM with effect 30 September 2007 constitutes a transfer of the whole or part of the undertaking or services provided to SAA by LGM under section 197 of the LRA. (2) Secondly, and in the alternative, that the award of any of the tenders of SAA to a third party will constitute a transfer of a whole or a part of the undertaking or services provided to SAA by LGM under the provisions of section 197 of the LRA. (3) Thirdly, an order declaring that the termination of the employment of any of the individual applicants by LGM in consequence of SAA's termination of the Outsourcing Agreement to be a dismissal in breach of section 187(1)(g) of the LRA unless the contracts of employment of such individual applicants are transferred to another employer in terms of section 197 of the LRA in consequence of all or part of the undertaking or services provided until 30 September 2007 to SAA by LGM. (4) Fourthly, AUSA sought an order interdicting and restraining SAA from providing any or all of the undertakings or

services provided by LGM to SAA until 30 September 2007, either itself or by permitting a third party to do so unless the individual applicants presently employed by LGM are transferred to the new provider thereof in terms of the provisions of section 197 of the LRA. (5) Finally, AUSA sought an order interdicting and restraining LGM from terminating the services of any of the individual Applicants in consequence of SAA's termination of the Outsourcing Agreement unless the contracts of employment of such individual applicants are transferred to another employer in terms of section 197 of the LRA, in consequence of all or part of the undertaking or services provided until 30 September 2007 to SAA by LGM.

4] During argument, counsel on behalf of the Applicants indicated that it no longer sought any relief against LGM (the Second and Third Respondents) and that it only sought relief against the First Respondent (SAA). Counsel further indicated that the Applicants would be satisfied if this Court order SAA to include a clause in the tender document that would compel the successful bidder to employ the employees of LGM in terms of section 197 of the LRA.

BRIEF SUMMARY OF THE RELEVANT FACTS

5] The history of the events leading to the current situation is, to a

large extent, common cause. On 14 March 200 SAA entered into a collective agreement with AUSA, SATAWU and another union in terms of which the Infrastructure and Support Services Departments of SAA which existed at that time were transferred as a going concern to LGM. Under clauses 1.1 and 1.2 of the Transfer Agreement (and subject to some adjustments set out in clauses 2 and 5) all affected employees in the said departments were transferred to LGM without loss of seniority or service recognition and on the same terms and conditions they have enjoyed at SAA.

6] On 7 April 2000 (shortly after the collective agreement (*supra)* was concluded), SAA and LGM concluded a Commercial Agreement for the Outsourcing of the Infrastructure and Support Services Maintenance of SAA (hereinafter referred to as the "Outsourcing Agreement"). This agreement was concluded in consequence of a tendering process which resulted in LGM obtaining the contract for providing the transferred services to SAA. The material provisions of this Outsourcing Agreement are, *inter alia*, the following:

(i) the agreement took effect on 1 April 2000 and would expire at midnight on 31 March 2010 (clause 5.1.2);

(ii) SAA retained an option of renewing the agreement for a further five years from the expiry of the agreement (as per

clause 5.2);

(iii) Assets and inventory of SAA as pertaining to the transferred services were sold to LGM (clause 6) and on termination of the Outsourcing Agreement, SAA will be entitled to repurchase the assets and inventory of LGM dedicated to providing the services under the agreement (clause 27.1.2);

(iv) LGM and SAA agreed that transferred employees were deemed to have been employed by LGM in terms of the provisions of sections 197(1)(a) and 197(2)(a) of the Labour Relations Act 66 of 1995 (hereinafter referred to as "the LRA") (clause 9.1).

(v) LGM is afforded the access it reasonably requires in order to render the services, to the use of office space, workshops, airport apron, computers and network at SAA's facilities at the designated airports (clause 12.1);

(vi) the agreement is administered by a joint executive committee comprising representatives of SAA and LGM (clause 19.1.1);

(vii) on termination of the agreement SAA retains the right to transfer certain services and/or functions back to itself or to a third party (clause 27.1.1) and to obtain transfer or assignment from LGM to SAA of all third party contracts (clause 27.1.3);

(viii) in the event of a change in the controlling ownership of LGM, SAA was entitled to cancel the Outsourcing Agreement.

7] All the individual Applicants employed by LGM was employed either by virtue of the transfer of the undertaking from SAA to LGM in 2000 or on account of being employed by LGM since then. The individual Applicants employed by LGM are engaged in the services provided by LGM to SAA which are set out in the Outsourcing Agreement and described in the tender documents to which reference will be made hereunder.

8] It is common cause that prior to 2007 there was a change in the ownership of LCM. As a result SAA cancelled the Outsourcing Agreement based on the change in ownership provision. SAA made it clear to LGM that it had no obligations under section 197 of the LRA towards LGM staff engaged in the services provided under the Outsourcing Agreement. On 17 August 2007, SAA called on LGM to develop and implement a hand-over plan as per the Outsourcing Agreement. It is furthermore common cause that LGM had taken a decision not to oppose the cancellation of the Outsourcing Agreement.

9] SAA then advertised tenders for the various services presently

performed by LGM. These tenders include tenders for the supply of maintenance on all electrical, mechanical and ground support equipment; the supply of maintenance on all heating, ventilation and air-conditioning equipment; the supply of all building, civil and maintenance services; the supply of all cleaning services; the supply of all garden and landscaping services; and the supply of all maintenance of vehicles. The closing dates for the tenders are all in September 2007. LGM has submitted a bid for one or more of the tenders or intends doing so. SAA, however, alleged that the bid process is at present incomplete and that it only anticipates completing it in mid November 2007.

10] Counsel for SAA informed the Court in argument that a temporary service provider has been appointed to provide the relevant services pending the outcome of the tender process.

11] The details of the tender specifications are identical or very similar save for the necessary variation of the terms required by the scope of the particular services to be provided and the content of the service level agreement for each particular tender which vary because of the services dealt with under each tender.

12] Of relevance is paragraph 1 of section 6 of each tender document

which reads as follows:

> *"1. BACKGROUND TO PROJECT*
>
> *SAA currently uses the services of an established service provider whose contract with SAA is coming to an end soon. This service requirement entails the maintenance of all SAA occupied buildings for the specified period. The company is in pursuit of service excellence and cost competitiveness from a service provider with a proven track record. It is against this brief background that interested and capable bidders are invited."*

13] It is common cause that the special conditions of the tender document, which each bidder must accede to, do not impose any obligation on the successful bidder to accept the transfer to itself of the contracts of employment of former employees of the previous service provider (in this case LGM) engaged in providing one of the services, under section 197 of the LRA.

14] In terms of paragraph 1.3.2 SAA retains the right to retract the bid for tenders at any time from the date of its issue.

15] As a result of the termination of the Outsourcing Agreement,

employees of LGM are now faced with a possible retrenchment. LGM has already taken the first step in this process and a meeting with a facilitator was scheduled for 21 September 2007. Meetings between LGM and the unions had already taken place. The unions were, *inter alia*, informed that LGM was unable to reach agreement with SAA to renegotiate the terms of the Outsourcing Agreement. The union was also informed that SAA had advised that tender bidders should provide their own staff. It is thus, according to the Applicants, clear that SAA would not accept responsibility for the employees of LGM.

16] The Applicant is of the view that, in light of LGM's failure to convey demands made by the unions about the transfer of staff, there is no reason to believe that by consulting with LGM any meaningful conclusion can be reached which addresses the employment security of the individual Applicants. LGM disagrees and is of the view that there is scope for meaningful discussion. It is furthermore contended on behalf of the Applicants that SAA can and should take steps to prevent the possible retrenchment of LGM employees, either by cancelling the tenders and reinstating the Outsourcing Agreement with LGM or it (SAA) could require the successful bidder to give effect to the transfer of contracts of employment of the affected employees of LGM who are engaged in

the service or undertaking to be provided by that bidder when it assumes control of that service or undertaking. SAA contends that this view is without merit and that SAA cannot be compelled in law to do this.

17] On 14 September 2007, partly in an effort to obtain certainty about the employment status of the individual Applicants as from 1 October 2007, and to try and obtain a commitment from SAA to take responsibility for the transfer of the contracts of the individual Applicants, AUSA wrote to the Chief Executive Officer of SAA requesting SAA to confirm that LGM employees would effectively be transferred back to SAA as employees on 1 October 2007 and that they should report for duty on that day. SAA responded that it is not prepared to made the undertaking nor does it accept in law that it is obliged to do so. SAA and LGM maintain that LGM will remain the Applicant's employer on 1 October 2007.

18] It was submitted on behalf of the Applicants that once SAA appoints a third party to provide the services this will amount to, what has been referred to as a "second generation" contracting out. It was submitted, with reference to the decision in *COSAWU v Zikhethele Trade (Pty) Ltd & Another*[1] that the Labour Court has, at

1 (2005) 26 *ILJ* 1056 (LC) at paras [27] – [36].

least on one occasion, decided that such an event can constitute a transfer for the purposes of section 197 in the absence of an agreement between the first and second contractors who are awarded a contract to provide services. See also in this regard *Nokeng TSA Taemane Local Municipality & Another v Metsweding District Municipality & Others.*[2] I will return to a brief discussion of these decisions.

SECTION 197 OF THE LABOUR RELATIONS ACT 66 OF 1995

19] A detailed discussion of the scope and purpose of section 197 of the LRA is not necessary for purposes of this judgement and I will, consequently, confine myself to a brief overview of this section in so far as it may prove to be relevant to the present application.

20] Prior to the inclusion of section 197 in the LRA, workers often had to bear the brunt when a business was sold or where part of a business operation was outsourced due to operational or financial reasons. Workers' work security came under threat simply because common law principles afforded no protection to workers since the "*new*" employer was under no (common law) obligation to employ or to take over the employment contracts of the employees of the

2 (2003) 24 *ILJ* 2179 (LC).

"old" employer: Put differently, the "new" employer was under no obligation to "*take over*" or to "*continue*" with the contracts of employment that existed between the employees and the "*old*" employer once a business was sold (by the "*old"* employer to the "*new"* employer). That is not to say that the employee could not have consented to such a transfer. Employees could consent to such a transfer but that usually only happened where an employee was offered employment with the new employer. Those employees who were not that fortunate were often dismissed on the basis of operational requirements.

21] The legislature[3] acknowledged that fairness dictated that the rights of these vulnerable employees had to be protected in the event of a transfer of a business or part of a business as a going concern and as a result section 197 was included in the LRA. Section 197(1) of the LRA reads as follows:

> *"(1) In this section and in section 197A –*
>
> "business" includes the whole or a part of any business, trade, undertaking or service[4]*; and*

3 Section 197 was first included in the LRA which came into operation on 11 November 1996 but amended in 2002.

4 A transfer of a "service" will typically take place where an employer outsource a core or non-activity or service to another entity rather than to employ personnel to render such a service. See the discussion *infra*.

*(b) "transfer" means the transfer of a business by one employer ("**the old employer")** to another employer (**the new employer")** as a going concern."* (My emphasis.)

22] Subsection (2) sets out the consequences of such a transfer in so far as the parties have not agreed otherwise in terms of subsection (6) of section 197. The remainder of the section sets out the effect and consequences of such a transfer (as a going concern). What is clear from this section is that it has as its purpose the preservation of the contract of service in the event of a transfer as a going concern which in turn would result in the preservation of the employee's work security. In this regard the Constitutional Court in *NEHAWU v University of Cape Town*[5] held that one of the purposes of section 197 of the LRA[6] was to protect workers against unfair job losses[7] and that this section therefore gives rise to an *automatic* transfer of employment contracts from the transferor to the transferee of a going concern.[8] Simply put, where

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5 (2003) 24 *ILJ* 95 (CC).

6 The purpose and objective of section 197 has been stated as follows by the Constitutional Court in *NEHAWU v University of Cape Town* (CC) *supra* at paragraph [53]*: "Its purpose is to protect the employment of the workers and to facilitate the sale of a business as a going concern by enabling the new employer to take over the workers as well as other assets in certain circumstances… In this sense, section 197 has a dual purpose, it facilitates the commercial transaction whist at the same time protection the worker against unfair job losses."*

7 At para [53]. The 2002 amendment of section 197 now specifically provides for an automatic transfer of contracts of service in the case of a transfer as a going concern.

8 At para [71].

a business is sold or transferred as a going concern, the employee will thus as a matter of speaking "follow the work". It has, however, been acknowledged by the Constitutional Court in *NEHAWU (supra)* that there exists a tension between the business interests of the employer and the worker's interest in job security:

> "[W]hat lies at the heart of disputes on transfers of businesses is a clash between, on the one 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."[9]

This dual purpose of section 197 thus requires a balance between the (business) interests of the employer on the one hand and the interest of workers in job security.

23] It is, however, clear from the case law that not every act of a business transfer or an act of outsourcing would as a matter of course constitute a transfer of a business as contemplated by section 197 of the LRA and that much will depend on whether or not the transfer in fact meets the requirements as set out in section

9 At para [52].

197 of the LRA. It appears from a reading of section 197 that three criteria must be satisfied before it may be concluded that a transfer as contemplated by section 197 has indeed taken place:

(i) Firstly, the transaction must constitute a *"**transfer***" as contemplated by section 197. (The interpretation of this first requirement is crucial to the determination of the present dispute and I will return to this point.);

(ii) Secondly, a "***business***" must be transferred which also includes a part of the business, trade, undertaking or service;

(iii) The "business" must be transferred" as a **"*going concern***".

"TRANSFER"

24] Section 197 will apply where a "business" is "transferred" from one employer to another employer "as a going" concern. The Constitutional Court in *NEHAWU v University of Cape Town* held that: "*What is transferred must be a business in operation so that the business remains the same but in different hands"*.[10] It is not necessary for purposes of this judgement to consider what types of

10 At paragraph [56].

transactions will constitute a "transfer". Suffice to reaffirm what has already been accepted by this court in *Schutte & Others v Powerplus Performance (Pty) Ltd &* Another[11] namely that a wide range of transactions are contemplated by this section ranging from a sale, transfer, merger and take over. What is, however, clear is that a transfer can take place in circumstances other than a "sale" and that the Court will have regard to the substance of an agreement to determine whether a business was "*transferred as a going concern*" rather than the form of the agreement.[12] A transaction which involves the outsourcing of certain core or non-activity or service to another entity, is also couvered by the provisions of section 197.[13] In terms of many (typical) outsourcing transactions, the outsourcer also retains control over the outsourced activity.

25] The Constitutional Court offered the following interpretation of the phrase "*going concern*" in *NEHAWU v University of Cape Town* (CC):

"Whether that has in fact occurred is a matter of fact to be

11 (1999) 20 *ILJ* 655 (LC) at 671.
12 See *NEHAWU v university of Cape Town &* Others (CC) at paragraph [56] and Schutte *& Others v Powerplus Performance (Pty) Ltd & Another supra* at 671 B – E.
13 By including the word "service" to the definition of "business", the 2002 amendments clarified the confusion as to whether the outsourcing of a "service" amounted to a "transfer" as contemplated by section 197.

determined objectively in the light of the circumstances of each transaction. In deciding whether a business has been transferred as 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 a business as a going concern has occurred, such as the transfer or otherwise of assets both tangible and intangible, whether or not workers are taken over by the new employer, whether customers are transferred and whether or not the same business is being carried on by the new employer. What must be stressed is that the 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 both be considered in isolation."[14]

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14 The Court in Schutte supra explained with reference to the decision in Spijkers v Geborders Benedik Abattoir v Alfred Benedi en Zonen [1986] 2 CMLR 296: "*The decisive criterion for establishing whether there is a transfer for the purposes for the directive is whether the business in question retains its identify. Consequently a transfer of an undertaking, business or part of a business does not occur merely because its assts are disposed of, Instead it is necessary to consider … whether the business was disposed of a s a going concern, as would be indicated, inter alia by the fact that its operation was actually continued or resumed by the new employer, with the same or similar activities, In order to determine whether those conditions are met, it is necessary to consider all the facts characterising the transaction in question including the type of undertaking or business, whether or not the business' tangible asses, such as building and movable properly are transferred, the value of its intangible asses at the time of the transfer, whether or not the majority of its employees are taken over by the new employer whether or not its costumers are transferred and the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended, It should be noted, however, that all those circumstances are merely singe factors in the overall assessment which must be made and cannot therefore be considered in isolation.".*

SECOND GENERATION CONTRACTING OUT

26] The so-called "*second generation contracting out*" takes place where there is a change in the provider of an outsourced service. In other words, the *"old*" employer remains the client (in other words the employer who initially contracted the service out to the *"new* employer" who now becomes the outgoing service provider) but the service is removed from the (first or outgoing) service provider and contracted out to another (the second or incoming) service provider. The question which arises is whether there can be a section 197 transfer between the unsuccessful outgoing contractor and the successful incoming contractor? Put differently, the question which arises is whether this "*second outsourcing*" constitutes a transfer as contemplated by section 197 of the LRA.

27] On behalf of SAA it was also submitted that if SAA resumes the provision of the services itself, then the services in question will be transferred to it and it will become the employer by virtue of section 197. At the outset it should be stated that there is no evidence to prove that this has indeed taken place. In fact, as already pointed out, SAA had already appointed an interim service provider pending the outcome of the tender process. This court can, therefore, not conclude on the facts that a transfer back to SAA has

or will take place on this basis. I have, nonetheless considered this issue in more detail hereunder.

28] At the outset, I must point out that I am of the view that, if regard is had to the purpose[15] of the section 197 of the LRA which is to protect the work security of employees when a business is transferred as a going concern (although I am not ignoring the right and legitimate need employers have in promoting the efficiency or productivity of their businesses), that preference should be given to a more liberate interpretation rather than a conservative or narrow interpretation of section 197 and that the interpretation applied to section 197 should lean in favour of protecting the rights of employees affected by the often harsh effects of a transfer as a going concern.

29] On behalf of SAA it was submitted that, because of the express

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15 In this regard I am in agreement with the sentiments expressed by the Labour Court in *NEHAWU* at paragraph [12] where the Court stated the following: "In interpreting s 197 the court should adopt a purposive approach consistent with the purpose of the Act and the Constitution of South Africa (Act 108 of 1996); the court must also examine the substance of the transaction and not the form. The court should also adopt a multifaceted approach to the analysis of the transaction, ie not attach more emphasis or importance to one factor over others. In *Foodgro (A Division of Leisurenet Ltd) v Kei (1999) 20 ILJ 2521 (LAC)…. Froneman DJP said at para [11]'The pursuit of economic development by means of a particular interpretation and application of the Act, is however, qualified by the injunction that it must be done in conjunction with other goals, namely those of social justice, labour peace and democratization of the workplace. This is to be done by fulfilling the primary objects of the Act; giving effect to fundamental rights and International Labour Organization obligations; providing a proper framework for collective bargaining and in workplace decision making and effective resolution of labour disputes (ss 1 and 3 of the Act).* "

language of section 197, and specifically the use of the word "*by*" in this section, the Court is prohibited from finding that section 197 is applicable in this instance.

30] I am not persuaded that the wording of subsection (1)(b) of section 197 give rise to an ambiguity or doubt as to what the legislature had intended namely to protect workers affected by a transfer of a going concern between two very specific entities namely the employer (which is specifically identified as the "*old*" employer) to another employer (which is specifically identified as the "*new*" employer). I am further in agreement that it is a trite principle that a court, when interpreting a statute, is enjoined to have regard to the ordinary and literal meaning of the words used, so as to garner the intention of the legislature, unless those works are ambiguous, or to do so would lead to an absurdity. See in this regard *Ngcobo & Another v Van Rensburg & Others.*[16] See also *R v La Joyce (Pty) Ltd & Another*[17] where the Court held as follows:

> *"I think that the cases show that the courts should be slow to depart from the literal meaning of the works used especially where there is no ambiguity."*

16 1999 (2) SA 525 (LCC) at 530G – H.
17 1957 (2) SA 115 (T) at 116A.

31] On behalf of the Applicants it was argued that section 197 should also apply to transfer "*from*" one employer to another as opposed to only those facilitated "*by*" the "*old"* employer to the "*new"* employer. In doing so, so it was argued, the Court will give effect to the purpose of section 197 which is to protect workers whose work security is threatened by a business transfer. Although I am in agreement with the sentiment expressed that section 197 should be read so as to protect the work security of employees affected by a business transfer, I am of the view that it is clear from section 197 of the LRA that the legislature had only contemplated a transfer from the old employer to the new employer and nothing else (the so-called first generation transfer). The intention of the legislature appears to me to be readily apparent from the clear wording of section 197(1)(b). Consequently I am of the view that there does not appear any necessity to read into section 197 words that are not there. See in this regard *Bhayat v Commissioner for Immigration*[18] where the Court held as follows:

> *"The words of a statute never should in interpretation be added to or subtracted from, without almost a necessity."*

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18 1931 AD 125 at 129.

This Court has followed a similar view. See in this regard *Ndima & Others v Waverly Blankets Ltd*[19] where Zondo J (as he then was) stated as follows:

> "I think the fundamental problem which is raised by this part of this matter is how far a court can disregard the language of a statute in seeking to fulfil the purpose of a statutory provision…

I prefer the latter approach, because in that way, the distinction between the roles of parliament and the courts does not become blurred…
Although I well realise that it may very easy for employers to circumvent section 197 if it is held that the transaction in this case did not attract section 197, I am of the view that to hold otherwise would be to go far beyond the acceptable limit to which a court may go in disregarding the language of a statute. I conclude therefore that in this matter the transfer of possession and control relied upon by the applicant was not enough to bring them within section 197 and that section 197 did not apply."

32] Consequently I am of the view that section 187 only contemplates first generation outsourcing: In other words, where the business is transferred by the old employer to the new employer and not the so-called second generation transfers. I have, however, taken note of the decision in the *Zikhitele* case (*supra*) where the Court did come to a conclusion on the specific facts of that matter that a purposive approach to section 197 was indeed necessary. The Court came to the conclusion that -

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19 [1999] 6 BLLR 577 (LC).at paragraphs [72] - [76].

> "A *mechanical application of the literal meaning of the word "by" in section 197(1)(a) would lead to the anomaly that workers transferred as part as first generation contracting-out would be protected whereas those in a second generation scheme would not be, when both are equally needful and deserving of protection. The possibility for abuse and circumvention of the statutory protections by unscrupulous employers is easy to imagine….. I am in agreement with Todd et al Business Transfers and Employment Rights in South Africa …. that s 197(1)(b) might be better interpreted to apply to transfers "from" one employer to another, as opposed to only those effected "by" the old employer*." [20]

Whilst I am in agreement with Murphy AJ that workers affected by a second generation transfer may well equally be in need of protection, I am not persuaded that, in light of the express and unambiguous wording of section 197(1)(b), that it would be appropriate to interpret section 197(1)(b) to also apply to a transfer "*from*" one employer to another as opposed to a transfer by the "*old"* employer to the "*new"* employer. I am of the view that it should be left to the legislature to

20 At paragraph [2].

extend the ambit of section 197(1)(b) to also apply to the so-called second generation transfers. Furthermore, I am of the view that the *Zikhitele*- decision is only authority for the proposition that, where the second business is so closely aligned to the first business that it is in fact identical, section 197 may be applicable. Such a situation would be akin to the so-called piercing of the corporate veil.

33] In the event, I am of the view that section 197 is not applicable in the present case.

34] As far as prayers 5 and 6 of the notice of motion is concerned, I am of the view that this court does not have the jurisdiction to interdict and restrain SAA from providing the services either itself or by permitting a third party to do so unless the individual applicants of LGM is transferred to the new service provider as this would effectively amount to an interference by this Court in civil commercial contracts between parties. I am equally of the view that this Court does not have the jurisdiction to order SAA to include a term in its tender document that will compel the successful service provider to employ the individual applicants employed by LGM on the basis that they were transferred in terms of section 197 of the LRA. This similarly will amount to an undue interference in the civil commercial contract between parties.

35] The Applicants have also relied on the decision in the *Nokeng*-decision in support of their submission that there could be a transfer as a going concern to once the outsourcing agreement has been cancelled. In this case the Court held that a transfer as contemplated in section 197 of the LRA was not restricted to a transfer resulting from an agreement between a transferor and transferee. A transfer is a transaction which is determined by making a value judgement on all the relevant facts of the case. In that particular case Nokeng Local Municipality rendered emergency services (EMS) for Metsweding District Municipality in terms of a written agency agreement. Nokeng terminated the EMS because it could not bear the financial burden. Several meetings were held and it was Nokeng's attitude that the 42 staff members were transferred to Metweding. Metsweding denied that it was their new employer. Nokeng sought an urgent declarator in the Labour Court. The question before the Court was whether or not there had been a transfer as a going concern as contemplated in section 197 of the LRA. In coming to a conclusion, the Court referred to the following passage from the Constitutional Court's decision in *NEHAWU v University of Cape Town & Others*:[21]

21 (2003) 24 *ILJ* 95 (CC) at para [67]. At page 2182 of the *Nokeng*-judgement.

> "The categories of transfer that were dealt with in s 197(1)(a) and 2(a) are not dealt with in the new s 197….. It provides that "the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment"; that the rights and obligations between the old employer and the worker are transferred to the new owner; that the transfer does not interrupt the continuity of the employment'; and that the employment contract "continues with the new employer as if with the old employer"….

The fact that the seller and purchaser of the business have not agreed on the transfer of the workforce as part of the ***transaction*** *does not disqualify the* ***transaction*** *from being a transfer of business as a going concern within the meaning of s 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."* (Own emphasis.)

The relevant passage by Zondo JP reads as follows:

> "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 a transfer of the business as a going concern if any of the other facts that are relevant to a transfer being one as a going concern are absent and there will be* ***transactions*** *where the transferor and transferee will agree that the workforce will not be taken*

*over but the **transaction** will still amount to a transfer of a business as a going concern because of the presence of many or all of the 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 on 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"* (Own emphasis.)[22]

Landman concluded that a –

"*.. transfer as contemplated in s 197 of the LRA is not restricted to a transfer resulting by agreement between a transferor and transferee. A transfer is a **transaction** which is determined by making a value judgement on all the relevant facts. This much is clear from the working of s 197(2) which reads: "If a transfer of a business takes place unless otherwise agreed in terms of subsection (6)*

…

……

Subsection (7) does not stipulate that an agreement

22 At 2182 B – I.

> *should be concluded before a transfer of a business or service as a going concern arises; whether that transfer is pursuant to an agreement or otherwise."*[23]
>
> ……
>
> "Here too, it is unnecessary to decide the issue for I am prepared to assume that the concept of a transfer of a service in terms of s 197 embraces a transfer between an existing agent and a new agent of the same principal ***without the need for an agreement*** *to be conceded between the old and the new agent."* (My emphasis.)

In the *Nokeng-case* the Court concluded after having considered all the factors that there was no transfer as a going concern and that Nokeng remained the employer of the employees. Consequently the application was dismissed.

36] What does emerge from the aforegoing is the following: Where there is a contractual nexus between the old employer and the new employer, that contractual agreement must be evaluated in order to determine whether or not that resulted in a transfer of a service as a going concern as contemplated by section 197. Where it is established that the requirements for a transfer as a going concern

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23 At 2183D – I.

have been satisfied, the protection afforded by section 197 of the LRA namely that the contracts of service by the workers will automatically transfer to the new employer, will follow. However, if the transaction does *not* qualify as a transfer as a going concern, the workers will not be entitled to the protection afforded by section 197. What would be the position if there is no such a contractual nexus? Nokeng appears to be authority for the viewpoint that a contractual nexus is not a pre-requisite for a transfer of a business or service as a going concern. In such a case the facts of the particular case will nonetheless be evaluated in order to determine whether or not there was, despite the absence of an agreement (or transaction), a transfer as a going concern as contemplated by section 197 of the LRA. Factors that may be relevant in this exercise are, *inter alia*, the following: Has there been a transfer of assets or services from the alleged transferor to the alleged transferee?; Does the alleged transferee wish to employ or (as in this case re-employ) the employees of the alleged transferor?; Is there an integration of the services of the alleged transferee with that of the alleged transferor?

37] It is common cause that no agreement exists between SAA and LGM in respect of re-transferring the employees of LGM back to SAA. This much is clear from the facts: SAA has terminated the

outsourcing contract and has made it perfectly clear that it does not want the employees of LGM. The contract also does not make provision for the scenario that once the contract is terminated, employees of LGM (the service provider) will be transferred back to SAA (the old employer). As already indicated, SAA has made it clear that it does not want to employ the employees. There is also no indication on the papers that the services have reverted back to SAA. In light of the aforegoing I am of the view that LGM remains the employer *vis à vis* SAA.

38] In respect of future successful contractors I am equally of the view that it cannot be held that a transfer as a going concern will take place once the new service provider is appointed. Firstly, I am reluctant to make such a pronouncement in respect of a transaction that may or may not come into being. SAA has not yet afforded the contract to a successful bidder. Moreover, SAA can withdraw the tender as any stage. Secondly, an interim service provider has been appointed and it would, in my view, be untenable to order that the workers transfer to the interim service provider only to transfer thereafter to the successful bidder. Although I am of the view that a high premium should be placed on employment security, it certainly could not have been the intention of the legislature in respect of section 197 of the LRA to grant a blanket or unchecked right to

employees to have their contracts transferred from one employer to another.

CONCLUSION

39] In the event I am of the view that the Applicants have failed to show a prima facie right as set out above. The Applicants have also failed to show any irreparable harm particularly in light of the fact that the application is premature in light of the fact that the bidding process has not yet even been completed. The balance of convenience also favours SAA in view of the fact that it will not be able to employ another contractor should it be restrained from doing so. The individual applicants have a suitable remedy at their disposal either in terms of section 189 of the LRA or in terms of appropriate proceedings after the tenders have been awarded.

COSTS

40] I am of the view that costs should follow the result and accordingly it is ordered that the First and further Applicants, jointly and severally are to pay the First and Second Respondents' costs but only in respect of one counsel each.

41] In the event the following order is made:

1. The application is dismissed.

2. The First and further Applicants, jointly and severally are to pay the First and Second Respondents' costs but only in respect of one counsel each.

……..

BASSON, J

DATE OF APPLICATION: 27 SEPTEMBER 2007
DATE OF JUDGEMENT: 1 OCTOBER 2007
APPEARANCES:
For the Applicant: Advocate RG Lagrange
For the Respondent: Advocate C Hinds