IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C 565/2009

In the matter between:

FOOD AND ALLIED WORKERS UNION Applicant

and

THE COLD CHAIN (PTY) LTD First Respondent

FREEZERLINES (PTY) LTD Second Respondent

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JUDGMENT

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FRANCIS J

Introduction

1. The applicant brought an urgent application duly amended for the following relief:

"1.1 Dispensing with the provisions of the rules relating to times and manner of service referred to therein and allowing the matter to be heard as one of urgency in terms of Rule 8 of the Rules of the above Honourable Court.

1.2 Ordering that a Rule Nisi be issued calling upon the First and Second Respondents to appear and show cause on a date and time to be determined by this Honourable Court why an Order in the following terms should not be made:

2.1 The proposed agreement between first and second respondents in terms of which second respondent will provide distribution and warehousing services to the customers of first respondent's Port Elizabeth branch is an agreement to which upon implementation s197 of the Labour Relations Act would apply.

2.2 Interdicting and restraining the First Respondent from dismissing any of the Applicant's members employed by it for a reason related to the aforesaid transfer;

2.3 In the extent that the First Respondent has either terminated the services of Applicant's members, that such dismissals be declared unlawful and void;

Alternatively,

That the aforementioned relief be made pending the outcome of proceedings to be referred to this Honourable Court.

2.4 Ordering that the costs of this application be paid by those Respondents who oppose this application;

2.5 Ordering that the provisions of rule 2.1,2.2 and 2,3 shall operate with immediate effect as an interim Order pending the Order being made final on the return day of the Rule Nisi".

2. The application was opposed by the first respondent. It gave an undertaking that it would not go on with the dismissals of the applicant's members pending the outcome of this application. The application was opposed on the grounds that section 197 of the Labour Relations Act 66 of 1995 (the Act) is not applicable to the facts of this matter, the proposed transaction not being a transfer of business nor a transfer of a business as a going concern.

The background facts

3. The applicant is the Food & Allied Workers Union (FAWU) which brought this application on behalf of its members who are employed by the first respondent, Cold

Chain (Pty) Ltd. The second respondent is Freezerlines (Pty) Ltd.

4. The first respondent provides outbound supply chain distribution for the manufacturers of perishable food products to its customers in the retail industry. These manufacturers are referred to by first respondent's deponent as "principals". First respondent provides sales, merchandising, warehousing, transport/distribution and debtors administration functions for and on behalf of its principals. The first respondent has twelve distribution centres nationwide. This matter concerns the operations of its Port Elizabeth branch. The second respondent has operations in George and Port Elizabeth. First respondent employs 181 employees nationally. Eighty-seven employees, inclusive of management employees, are employed at the Port Elizabeth branch.

5. On 22 June 2009 the first respondent sent a notice in terms of section 189(3) of the Act inviting the applicant to consult about the possibility of dismissals based on operational requirements. The section 189 notice states that the categories of employees which may be affected are those employed in transport, warehousing and administration. The notice advised the applicant that due to economic loss, the first respondent was considering the possibility of outsourcing the transport (distribution) and warehousing functions of its Port Elizabeth operations to the second respondent and contemplated retrenching between 38 and 49 employees as a consequence of the outsourcing.

6. The first facilitation meeting took place under the auspices of the Commission for Conciliation, Mediation and Arbitration (the CCMA) on 9 July 2009. The applicant

raised the concern that if the warehousing and distribution functions were to be outsourced to the second respondent, this ought to involve a transfer of the employees' employment contracts to the second respondent in terms of section 197 of the Act. The first respondent denied that this was the case.

7. On 23 July 2009 the applicant received a letter from the first respondent recording its formal position. It referred to the meeting of 9 July 2009 and stated that the name of the potential outsource company is Freezerlines. It stated amongst others the following:

"4. However, these measures did not improve the financial position of the Company. Thus, the Company considered the possibility of outsourcing the warehousing and distribution functions of the Port Elizabeth distribution centre. When it became evident that the possibility of outsourcing the warehousing and distribution functions of the Port Elizabeth distribution centre was a viable option, the Company engaged with Freezerlines to explore the possibility further. While exploring the possibility of an outsourcing arrangement with Freezerlines the Company considered whether or not a possible outsourcing arrangement with Freezerlines could amount to a transfer of a business as a going concern as contemplated in section 197 of the Labour Relations Act ("the LRA"). After conducting a factual enquiry, it became apparent that the possible outsourcing arrangement would not amount to a transfer of a business as a going concern and that accordingly section 197 would not apply to such an arrangement and thus the employees would not automatically transfer to Freezerlines. At this point in the Company's investigations it became apparent that if the Company were to

outsource to Freezerlines, there was a possibility of retrenchments. As such, the Company engaged the Union and potentially affected employees in a consultation process.

5. *During the discussions with Freezerlines, and once it was clear that section 197 would not apply to the proposed transaction, the Company consulted with Freezerlines on the possibility of Freezerlines offering employment to potentially affected employees, in the event that the Company were to enter into an outsourcing arrangement with Freezerlines. Freezerlines informed the Company that if the Company outsourced to Freezerlines, it would not be a viable option for Freezerlines to offer employment to any of the Company's employees as Freezerlines employs its own employees and does not require additional employees.*

6. *The Company is of the view that in the event that its warehousing and distribution function is outsourced to Freezerlines, it would be able to reduce its costs significantly. The proposed outsourcing to Freezerlines would ensure the financial viability of the Port Elizabeth distribution centre.*

7. *The Company has suffered huge financial losses at the Port Elizabeth distribution centre for the past few years. These losses have increased significantly in the last year and thus drastic steps need to be taken to address this problem. The warehousing and distribution departments of the Port Elizabeth distribution centre are the most expensive departments. As I have already pointed out, the Company has attempted to address the situation by cutting costs, trying to secure additional business and cutting down of the use of casual employees. However, this has not addressed the situation and the financial losses suffered by the Company have increased significantly, with*

the result that unless drastic steps are taken, the Port Elizabeth distribution centre will be unable to continue to operate. The Company is of the view that the proposed outsourcing of the warehousing and distribution functions is a viable means to address the financial crisis.

10. In an attempt to avoid/minimise the number of possible retrenchments, the Company will once again engage with Freezerlines as to whether, in the event that the Company enters into an outsourcing arrangement with Freezerlines, it has vacancies that could be offered to potentially affected employees. I will revert to you on the outcome of these discussions as soon as possible."

8. On 29 July 2009 a second facilitation meeting was held. The first respondent was asked for details about the proposed transaction. It advised that it was intended that the second respondent would take over the warehousing and distribution functions of the first respondent. No assets, contracts or anything else would be transferred to the second respondent. The warehousing function would be carried out at the second respondent's premises and not the first respondent's premises. The first respondent's vehicles would not be transferred to the second respondent and the second respondent would use its own vehicles. The applicant adopted the view that the facilitation process ought to be suspended whilst the applicant sought a declarator from this Court regarding the applicability of section 197 of the Act.

9. The first respondent's attorneys in a letter addressed to the applicant dated 31 July 2009 repeated that the first respondent was considering the possibility of outsourcing the warehousing and distribution function of the Port Elizabeth distribution centre and that, as such, there is a possibility that retrenchments may follow. It recorded that on

29 July 2009 during a facilitation meeting at the CCMA, the applicant informed the first respondent that it was of the view that the section 189A process should be suspended as it felt that its members should be transferred to the outsource company as part of a section 197 transfer. The first respondent denied that the process falls within the ambit of section 197 and viewed the attempts to suspend the facilitation process as an endeavour to delay the finalisation of the process. It intended to go on with the process and invited the applicant to participate in the process. The 60-day period referred to in the Act ends on 22 August 2009 and an application for a declarator would be opposed.

10. The applicant's attorneys in a letter dated 3 August 2009 to the first respondent's attorney stated *inter alia* that the first respondent had given notice on 22 June 2009 to the applicant in terms of section 189(3) of the Act of its proposal to retrench certain of the applicant's members employed at the Port Elizabeth operations. The purported reason for the proposed retrenchment was the desire to cut expenses by outsourcing the transport (distribution) and warehousing functions of the Cold Chain business to 'Freezerlines'. It was anticipated that 38 to 49 employees would be retrenched. During a subsequent exchange of correspondence during the facilitation process, it has emerged that the first respondent's Port Elizabeth operation employs 87 persons. It would appear further that the proposed outsourcing and retrenchments would essentially amount to the Port Elizabeth operation being left with only management, administration and sales/merchandising staff. From the details provided of the proposed outsourcing, it would appear that Freezerlines would perform the warehousing and distribution functions previously performed by the first respondent, who would no longer perform any of these functions at its Port Elizabeth operation.

In exchange for the transfer of the operations, Freezerlines will pay the first respondent some form of 'fee" on a quasi-rental basis. The applicant has informed the first respondent of its view that the contemplated outsourcing constitutes a transfer for the purposes of section 197 of the Act, and that the first respondent was not permitted to proceed with the retrenchments of its members and that they either abandon the outsourcing initiatives or effect a transfer within the stipulations of section 197(2) or section 197(6) of the Act. An assurance was sought that the first respondent would withdraw its proposed retrenchments and thereafter effect any outsourcing that might take place in terms of section 197 and should such an assurance not be given this Court would be approached on an urgent basis for a declarator. The first respondent was requested to provide reasons in fact and in law why the outsourcing does not constitute a section 197 transfer.

11. On 4 August 2009, the first respondent's attorneys sent a letter to the applicant's attorneys in which it was agreed that the 60-day period would be extended until 5 September 2009 to enable the applicant to proceed with this application. It is envisaged that 40 jobs, essentially those in warehousing and transport, and 2 in administration, out of a total of 87 would be affected by the decision to restructure its operations and use second respondent as a sub-agent. This amounts to nearly 46% of the posts currently in the first respondent. The first respondent did not believe that as a matter of fact or law the proposed arrangement constituted a transfer in terms of section 197 of the Act. It could therefore not accede to the applicant's demand. It reserved the right to expand on the reasons why the proposed arrangement did not constitute a transfer in terms of section 197 of the Act.

12. The application was filed on 13 August 2009 and set down for a hearing on 4 September 2009.

The parties contentions

13. The applicant contended in its founding papers that a transfer would indeed take place between the first and second respondents. It is apparent from annexure "MT3" which is a schedule of the number of staff at the first respondent's Port Elizabeth operations that there are 87 employees and that the transfer of the warehousing and distribution functions would account for the jobs between 44 and 54% of the employees. Once the outsourcing and retrenchments take place, the first respondent will only be left with sales, administration and management services. Warehousing and distribution is a core part of the first respondent's business and is a clear and discreet part of the business. This much is apparent from the first respondent's website. Whilst the applicant has not had sight of the outsourcing agreement, it understands that it will involve no more than the second respondent providing the warehousing and distribution functions thus far provided by the first respondent. There will be no change in the nature of the services provided, and the second respondent's services will presumably be subject to the direction of the first respondent's administration and sales staff. The business transferred is thus done so as a going concern. It knows of no reasons why the outsourcing should not be regarded as a transfer within the meaning of section 197 of the Act.

14. The first respondent denied that the proposed transaction will result in the transfer of a business, part of a business, trade, undertaking or service as a going concern. The Port Elizabeth distribution centre will continue to provide sales/order taking,

merchandising and debtors' administration services directly for its principals. The warehousing and transport services will be provided by the second respondent as sub-agent of the first respondent. There is no written outsourcing agreement between the first and second respondent. Section 197 does not apply to its decision to appoint the second respondent as a sub-agent to render these functions since there will be no transfer of a part of a business as a going concern. These services will continue being rendered to first respondent's principals, the only difference being that first respondent will not be doing so directly as the principals agent, but instead through the sub-agency of second respondent, and second respondent will supply the necessary equipment, employees and facilities to do so. The first respondent simply wishes to restructure its operations in an economically viable and more efficient manner, using the service of a sub-agent to render the requisite services while remaining liable to its principals in terms of various agency agreements with them. The second respondent will henceforth provide the warehousing and distribution functions, from its own premises, using its own vehicles, for and on behalf of the first respondent, as its sub-agent. There is in the circumstances no transfer of any business entity or service as a going concern. The warehousing and distribution services will not retain their identities and will thus not be the same business services but in different hands. Second respondent's service model is different to that of first respondent, hence the fact that it can render the services more efficiently and cost effectively. The rendering of the services as a combined service will also be entirely different and increase the aforementioned benefits. The warehousing and distribution function of both first and second respondents are not autonomous stand alone entities - there is no warehousing or distribution division with its own assets, the assets belong to first respondent and will not transfer to the second respondent. The contracts with the principals and with

the customers, first respondent's name and goodwill and stock-in trade, all belong to the first respondent and will remain with the first respondent following the conclusion of the transaction. In addition to this, neither these functions can be separated out nor can they continue to operate should first respondent cease to operate. The first respondent is contractually bound to its principals to provide a total service and whether it does so itself or through its sub-agents, it remains liable to the principals. In the circumstances the warehousing and distribution functions of the first respondent do not constitute separate economic entities capable of separate transfer as a going concern and the appointment of second respondent to render such services as a sub-agent of first respondent will not constitute the transfer of a business or a service as a going concern for the purposes of section 197 of the Act.

Analysis of the facts and arguments raised

15. The only issue to be decided by this Court is whether the proposed agreement between the first and second respondents in terms of which the second respondent will provide distribution and warehousing services to the customers of first respondent's Port Elizabeth branch to be an agreement to which, upon implementation, section 197 of the Act would apply. The respondent opposed the application on the grounds that section 197 finds no application on the facts of this matter, the proposed transaction not being a transfer of a business nor a transfer of a business as a going concern.

16. Section 197 of the Act provides as follows:

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

(2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6) -

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

(b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as is 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.

(6) (a) An agreement contemplated in subsection (2) must be in writing and concluded between - (i) either the old employer, the new employer, or the old and new employers acting jointly, on the one hand; and (ii) the appropriate person or body referred to in s189(1), on the other."

17. The leading case dealing with the concept of transfer as a going concern is *National Education Health & Allied Workers Union vs University of Cape Town & Others* (2003) 24 ILJ 95 CC where the test is set out as follows:

"The phrase 'going concern' is not defined in the LRA. It must therefore be given its ordinary meaning unless the context indicates otherwise. What is 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 a business as a going concern has occurred, such as the transfer or otherwise of assets both tangible and intangible, whether or not the 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 this list of factors is not exhaustive and none of them is decisive individually. They must be considered in the overall assessment and therefore should not be considered in isolation".

18. Section 197 of the Act is designed to protect workers. The central test is an objective one and regard must be had to the substance of the transaction rather than the form. All the relevant factors in the particular circumstances of the case must be taken into account. What this amounts to is taking a snapshot of the entity before the transfer and assessing its components. That picture is then compared with the one of the business after the transfer to establish whether it is substantially the same business but in different hands. There is obviously not an inflexible test to decide whether a business or service is a going concern. Each transaction is to be considered on its own merits, regard being had to the circumstances of the particular transaction.

19. In *Schatz v Elliott International (Pty) Ltd & Another* (2008) 29 ILJ 2286 (LC) Van Niekerk AJ (as he then was) examined the nature of the underlying transaction which would trigger the operation of section 197. He held at paragraph 37 that the following conditions should be satisfied:

19.1 there is a transfer by one employer to another;

19.3 the transferred entity must be the whole or part of the business; and

19.3 the business must be transferred as a going concern.

20. The interpretation of section 197 of the Act cannot be affected by a court applying its mind to whether the proposed transaction would remain commercially viable if section 197 were to be applicable. It might follow that the second respondent if the application is granted may need to engage the applicant in a restructuring exercise. If this were to occur, the section 189 exercise would be found in its proper place.

21. In the present matter this Court is concerned with what is being contemplated and not with what has in fact happened. The applicant in essence contends that the nature of the transaction contemplated should involve the transfer of their jobs to the second respondent and as their jobs are being transferred to the second respondent so too should they. Their jobs should follow the part of the business or the service that is being transferred.

22. The first question is whether the subject of the transfer is a business or service as defined. If the answer is in the affirmative then the next question is whether the nature of the contemplated transaction will involve the transfer of that business as a going concern.

23. It is clear from the first respondent's version that the first and second respondents both fall within the Imperial Group and as such are sister companies. The first respondent procures perishable food from manufacturers or their principals. Part of its business then provided outbound warehousing and transportation for its principals to their customers in the retail industry. Another part of its business provides merchandising, sale representative and a debtor's administration services to first respondent's principals. The second respondent performs essentially the same functions albeit on behalf of different principals. Under the proposed transaction first respondent will cease to operate a distribution and warehousing function and it will pay the second respondent to perform these functions on its behalf. The deal will be structured in this way because the first respondent has a contractual obligation to provide a national service to its customers or principals. The first respondent may use what it calls sub-agents to assist it when this would be desirable.

24. It is clear from the papers filed that the first respondent's distribution/transport and warehousing functions form a significant part of the first respondent's business. From a Group perspective the Group is seeking to leverage economies of scale by transferring a part of first respondent's business to the second respondent. The transaction does not take the form of a conventional sale of a business but is submitted that a conventional sale is not required for the protections afforded by section 197 of the Act to employees to become applicable.

25. There is no doubt that the first respondent could, nationally at least, have sold its Port Elizabeth based warehouse and transport business to second respondent. Had it done

so then the customers, assets and workforce would have constituted a business as defined. Does 'the package' which is now contemplated cease to be a business because first respondent intends to hold onto its trucks, the contract with its customers, for which it has no choice and retrench the employees who were employed in this part of the business? The decision in *SAMWU & Others v Rand Airport Management Company (Pty) Ltd &* Others (2005) 26 ILJ (LAC) makes it clear that the term 'business' in section 197 carries a far wider meaning than the ordinary dictionary definition. The Court *a quo* had held that the gardening services were merely an activity and they would merely be such in the hands of Turnkey. Referring to the dictionary definition of the word 'service' the LAC pointed out that 'service' includes the provision of 'assistance or benefit provided to someone' and 'an act of helping or benefiting another'. This being the case the security and gardening services were clearly a 'business' within the meaning of section 197. Even if the transport and warehousing functions to be transferred from first to second respondent do not constitute part of first respondent's business within the meaning of section 197, they certainly fall within the realm of a service. The services which were previously being supplied by the first respondent to its Port Elizabeth customer base will, should the transaction go ahead, will be provided by second respondent.

26. The next question that is to be decided is whether there will be a transfer as a going concern. In *NEHAWU*, the Constitutional Court, referring to the jurisprudence of the European Court of Justice, said that this leg of the test is best summarised by asking whether there has been a transfer of an economic entity that retains its identity after the transfer has taken place. This would be indicated *inter alia* by the fact that the operation was actually continued or resumed by the new employer, with the same or

similar activity; whether or not tangible assets, such as buildings and movable property, are transferred; the value of its intangible assets 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 customers are transferred; the degree of similarity between the activities carried on before and after the transfer; and the period, for which those activities were suspended. The Court stressed that this list of factors was not an exhaustive list and that none of them was decisive individually.

27. I share the views expressed in *Aviation Union of South Africa and Others v SAA (Pty) Ltd and Others* (2008) 1 BLLR 20 (LC) where it was held that in interpreting section 197 preference should be given to a more liberal interpretation rather than a conservative or narrow interpretation. The interpretation applied to section 197 should lean in favour of protecting the rights of employees who may be affected by the often harsh effects of a transfer as a going concern. The minority judgment in *NEHAWU v University of Cape Town and Others* (2002) 23 ILJ 306 (LAC) after referring to the European Court of Justice jurisprudence, that the purpose of provision such as this is to ensure the continuity of existing employment relationships in a framework of an economic entity, irrespective of a change of owner.

28. Applying the yardstick referred to above it is my finding that what is being contemplated is the transfer of a business as a going concern. The nature of the business operations that will continue to be done is virtually identical whether they are performed by the first or second respondent. Although a deal has been structured on the premise that first respondent nationally retains its customers in effect these customers are being taken over by second respondent. In either where intangibles

such as goodwill and customers are located appears to be of no great significance as the ultimate shareholder of both businesses is the same in each case. But for the decision not to transfer the employees the majority of the employees would have been taken over by the second respondent. The fact that the trucks are not being transferred over is not important as there will be no suspension at all of the economic activities as second respondent apparently does not require these additional trucks to provide a full service to the customers that it will inherit.

29. It is clear from the facts placed before me and the arguments presented that what is being contemplated is the transfer of a business or service as a going concern.

30. The application stands to be granted.

31. I do not believe that this is a matter where costs should follow the result. The parties do have an ongoing relationship.

32. In the circumstances I make the following order:

32.1 The proposed agreement between the first and second respondents in terms of which second respondent will provide distribution and warehousing services to the customers of first respondent's Port Elizabeth branch is an agreement to which upon implementaion section 197 of the Act would apply.

32.2 The first respondent is interdicted and restrained from dismissing any of the applicant's members employed by it for reason related to the aforesaid

transfer.

32.3 There is no order as to costs.

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FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT	:	CS KAHANOVITZ INSTRUCTED BY CHEADLE THOMPSON & HAYSOM
FOR FIRST RESPONDENT	:	RGL STELZNER INSTRUCTED BY VAN DER WESTHUIZEN VOS & HORN INC
DATE OF HEARING	:	8 SEPTEMBER 2009
DATE OF JUDGMENT	:	30 SEPTEMBER 2009