REPUBLIC OF SOUTH AFRICA

Reportable

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Case no: PA 08/10

In the matter between:

PE PACK 4100CC	**Appellant**
and	
ADAM SANDERS	**First Respondent**
CELL C PROVIDER COMPANY (PTY)	**Second Respondent**
ADVANCE WORX 119 (PTY) LIMITED	**Third Respondent**
C WORX 12(PTY) LIMITED	**Fourth Respondent**

Heard: **09 November 2012**

Delivered: **22 January 2013**

Coram Davis JA, Hlophe AJA and Landman AJA (Landman AJA dissenting)

Summary: Transfer of business as a going concern by virtue of s 197 of the LRA- whether s 197 of the LRA applies in a case of franchise agreements. - no transfer of a business occurs in franchise agreements –franchise agreements fall outside the scope of s 197 of the LRA- appeal upheld.

JUDGMENT

DAVIS JA

Introduction

[1] Second respondent is a cell phone service provider which sells airtime contracts, accessories, pre-paid starter packs, handsets and renewals to members of the public. Second respondent has a business model in terms of which it develops its business on a franchise basis. Third and fourth respondents were franchise operations of the second respondent. Second respondent cancelled the franchise agreements with the third and fourth respondent with effect from 30 April 2010. Second respondent then concluded a franchise agreement with the appellant which was effective from 1 May 2010.

[2] It appears that second respondent remained the lessee of the business premises in which appellant conducted its business. The furniture and fittings on the business premises remained the property of second respondent. The stock on the business premises, which remained the property of the third and fourth respondents, was not transferred by them to the second respondent but was removed from the business premises upon the cancellation of the franchise agreements.

[3] Pursuant to the cancellation of the franchise contracts, first respondent was advised by Mr Brett Barlow, the managing director of third and fourth respondents, to enter into consultations with him regarding retrenchment. First respondent then consulted his attorney of record, who approached second respondent, demanding an acknowledgement that the latter accepts that s 197 of the Labour Relations Act ('LRA')[1] applied to the first respondent and that his employment contract would automatically be transferred to the new franchisee. Second respondent adopted the attitude that it was not buying back the franchise undertakings from first respondent's employers. In its view, it had merely terminated the franchise as it was entitled to do in law; hence s 197 was inapplicable.

[1] 66 of 1995.

[4] However, first respondent adopted the view that appellant was bound by the provisions of s 197 of the LRA and, that there had been a transfer of the business from third and/or fourth respondent to the appellant. Accordingly s 197 of the LRA afforded protection to first respondent.

[5] This argument found favour with the court *a quo* which ordered;

> '1. The takeover of the businesses of the third and fourth respondents by the second respondent (appellant) is declared to constitute the transfer of businesses as going concerns as is contemplated in s 197 of the Labour Relations Act no 66 of 1995 as amended.
>
> 2. Second respondent is declared to have automatically taken the applicant into his/its employ with effect from 1 May 2010 on the same terms and conditions as those which applied to his employment with third and fourth respondents immediately prior to 1 May 2010 as is contemplated in s 197 aforesaid.
>
> 3. Second respondent is ordered to pay the applicants costs on the High Court scale as between party and party.'

It was against this decision that the appellant approaches this Court after the appellant had successfully petitioned the Judge President for leave to appeal.

[6] For completion, it should be noted that the initial appellant, PE Rack 4100 CC, has been substituted by Ko W-ENIM Investment Holdings (Pty) Ltd. The latter is the party with whom the second respondent concluded franchise agreements in relation to the franchise operations in Queenstown and King Williams Town. These events occurred after the delivery of the judgment by De Swardt AJ in the court *a quo*.

[7] The crisp question for determination in this dispute is whether s 197 of the LRA applies in a case of franchise agreements.

The finding of the court *a quo*

[8] Third and fourth respondents owned and ran franchise operations of second respondent in Queenstown and King Williams Town. These stores are now owned and run by the appellant. The nature of the franchise/franchisee relationship in terms of the franchise agreement is that the franchisee conducts business for its own account and not on or behalf of the franchisor.

[9] The business is made up of three main components, the franchise agreement with second respondent, limited assets and a few employees. According to the papers placed before the Court, the entire infrastructure, including premises and furniture and fittings, operating systems belongs to and is provided by second respondent.

[10] After analysing the nature of this business, De Swardt AJ in the court *a quo* found as follows:

> 'In the instant case, if one were to take snapshot of the businesses conducted by the third and fourth respondents before 30 April 2010, one would find an outlet selling cell phone contracts, and pay-as-you-go airtime, where customers could bring in their cell phones for repairs or could enquire about a variety of problems which they experienced around their use of Cell C's products. A snapshot taken of the businesses on 1 May 2010 or on any day thereafter, would reveal a similar picture. The businesses remained located in exactly the same place, the telephone numbers remained the same, the nature of the business remained the same. The only visible difference would ostensibly have been that there were some new faces behind the counter. Indeed, as Mr Kirchmann pointed out in argument, customers who had brought their cell phones in for repair prior to 1 May 2010, would collect these after 1 May 2010 once these had been repaired. Potential customers who came into either of the shops prior to 1 May 2010 to enquire about cell phone contracts, could come back on, or after, 1 May 2010 to conclude the contract.'[2]

[2] *Sanders v Cell C Provider Company (Pty) Ltd and Others* [2010] 9 BLLR 973 (LC) at 978G-979A..

[11] On appeal, the issue was whether the wording of s 197 can bear the weight of this finding of the court *a quo*.

Section 197 and franchise agreements

[12] To the extent that it is relevant, s 197 provides as follows:

> '**Transfer of contract of employment**. – (1) In this section and in section 197 A
>
> (a) "business" includes the whole or a part of any business, trade, undertaking or service; and
>
> (b) "transfer' means the transfer of a business by one employer ("the old employer") to another employer ("the new employer") as a going concern.
>
> (2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6) –
>
> (a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;
>
> (b) all the rights and obligations between the old employer and the employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;
>
> (c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer, and
>
> (d) the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer.'

[13] The critical question is whether a transfer as contemplated in s 197 (1) (b) applies in this case, in which case the consequences set out in (2) would apply.

The nature of the business model as outlined is thus the key to the resolution of the problem. As Jafta J said in *Aviation Union of South Africa v SA Airways (Pty) Ltd:*[3]

> 'But whether a transfer as contemplated in section 197 has occurred or will occur is a factual question. It must be determined with reference to the objective facts of each case. Speaking generally, a termination of a service contract and a subsequent award of it to a third party does not, in itself, constitute a transfer as envisaged in the section. In those circumstances, the service provider who contract has been terminated loses the contract but retains its business. The service provider would be free to offer the same service to other clients with its workforce still intact.
>
> For a transfer to be established there must be components of the original business which are passed on to the third party. These may be in the form of assets or the taking over of works who were assigned to provide the service.'

[14] As Mr Myburgh, who appeared together with Mr Hollander on behalf of the appellant, correctly observed that this *dictum* raises two questions which must be answered in order to determine the application of the section:

(i) Does the transaction concerned create rights and obligations that require one entity to transfer something in favour of/or for the benefit of another or to another?

(ii) If the answer to (i) is in the affirmative, does the obligation imposed within the transaction contemplate a transferor who has the obligation to effect a transfer or allow a transfer to happen and a transferee who received the transfer? If the answer to this question is in the affirmative, then the transaction constitutes a transfer for the purposes of s 197.

[15] In order to answer these questions, it is useful to reflect, albeit briefly, upon the nature of a franchise agreement. In a franchise agreement one party (the

[3] 2012 (2) BCLR 117 (CC) at paras 47 – 48.

franchisor) grants the other party (the franchisee), in exchange for remuneration, the right to conduct a business (franchise business) within the franchisor's network for the purposes of selling certain products on the franchisee's behalf and in the franchisee's name, and whereby the franchisee has the right and the obligation to use the franchisor's trade name or trademark and other intellectual property rights, the know-how and the business method. The essential elements which characterize a franchise relationship are: a) granting the right to operate the franchisor's method of business, which mainly includes licensing the use of intellectual property rights and know-how (the business package); b) selling certain types of products (distribution contract); c) the franchisee's independence: in the franchisee's name and on the franchisee's behalf; d) (direct or indirect) financial remuneration for the franchisor.[4]

[16] In *Longhorn Group (Pty) Ltd v The Fedics Group (Pty) Ltd and Another,*[5] Zulman J (as he then was) cited with an approval the following passage:

> 'It is important for this honourable court to appreciate that in terms of the franchise agreement the first respondent is not in the position of an independent operator. It has to follow detailed instructions as laid down in the franchise agreement and to all intents and purposes operates as a servant or employee of the applicant in regard to the conduct of the franchise operation.'

[17] This description is relevant to the present proceedings. When second respondent terminated the franchise agreements with third and fourth respondents, it did so in terms of contractual entitlements which flowed from the nature of the franchise agreement. Once second respondent had terminated the franchise agreement with the third or the fourth respondents, it was free to enter into a new franchise agreement which it did with the appellant. The appellant was now placed in a situation where it had to follow the detailed instructions as laid down in the franchise agreement operating under the control of the second respondent.

[4] Hesselink *et al The Commercial Agency, Franchise and Distribution Contracts* (2006) at 230.
[5] 1995 (3) SA (WLD) 836 at 843B.

[18] In short, appellant had not acquired the business as a going concern from either third or fourth respondent. It cannot be said therefore that components of the business operated by third or fourth respondent had then been passed onto the appellant. What effectively had taken place was that the license to operate a business on behalf of second respondent had been terminated by the latter, insofar as third and fourth respondents were concerned. This was not the equivalent situation to that of an outsourcing agreement. The franchisor continued to hold the core assets. They remained those of the franchisor, being second respondent, both before and after the agreement had been concluded. There was thus no transfer of infrastructural assets which would sustain an argument that there was a transfer of a going concern. Once the core assets remained intact, that is in the ownership of the second respondent as the franchisor, it becomes difficult to see how a transfer of a business pursuant to s 197 (1) has taken place.

[19] There was an attempt by the first respondent to contend that the outsourcing system, in particular the law relating to second generation outsourcing, such as occurred in *Aviation Union of SA supra,* was applicable to this case. But in that case, it was clear that South African Airways (SAA) and the second respondent had concluded an outsourcing agreement in terms of which certain operations of SAA were transferred to second respondent. It was agreed that second respondent would provide defined services for a fee. The assets and inventory relating to services were sold to second respondent on termination of the agreement which provided that SAA would be entitled to repurchase them.

[20] It was clear that, in terms of the initial outsourcing agreements, s 197 applied to the affected employees. The question arose as to what occurred when SAA cancelled the agreement with second respondent. The Constitutional Court held that it did not matter whether second respondent transferred the business back to SAA which would later transfer the business to a temporary service provider or whether second respondent transferred the business directly to a temporary

service provider. In either case, there was a transfer of the business by the old employer to a new employer.

[21] Great care must be taken before applying the 'outsourcing' jurisprudence to a franchise operation. The argument presented to this Court did not take sufficient account of the specific relationships generated by a franchise agreement. Tanya Wokers captures the point thus:

> 'Franchises are not free to develop their businesses as they see fit. Because they are buying into the franchisors' business model, franchisors exercise a great deal of control over the way in which their franchisees do business. This is a very unusual business relationship because, although franchisees tend to own the assets of their businesses, someone else is entitled to tell them how to function. This leads to a relationship that is 'highly intimate and interdependent' (see Gillian K Hadfield "Problematic Relations: Franchising and the Law of Incomplete Contracts' (1990) 42 *Stanford LR* 877 at 963). It is a primary role of franchisors to protect the interests of their networks and to develop their brands. Franchisors therefore have the right to ensure that they are able to protect those interests through the terms of their agreements with franchisees. Franchisors usually dictate the location of franchisees' businesses, how the franchisees are to advertise or what selling methods they must adopt. The appearance of their premises, what products can be bought and sold, book-keeping methods, hours of business, qualification and appearance of staff, prices and so on.'[6]

In the present case, no such transfer of infrastructure took place. The franchisor continued to control the process. The franchisee operated at the behest of the franchisor and accordingly, when the franchise agreement was terminated and a new agreement was entered into with the appellant, no transfer of a business as a going concern had taken as was the case in *Aviation Union*, *supra*.

[22] In support of its argument that s 197 of the LRA was applicable, first respondent referred this Court to a decision of the European Court of Justice in *Carlito Abler*

[6] Tanya Wokers 'The franchise relationship and the problem of encroachment: *Silent Pond Investments CC v Woolworths (Pty) Ltd*' (2008) 20 *South African Mercantile Law Journal* 402 at 404)

and others v Sodexho MM Catering Gesellschaft GmBH [2004] IRLR 168 which had been referred to by Van Niekerk J in *Fransman Services (Pty) Ltd v Simba (Pty) Ltd and Another* (unreported Labour Court case J1978/12, delivered on 30 August 2012). That case concerned a catering company which held a contract for the management of catering services in a hospital. The question arose as to whether employees who had worked for another catering company, which had previously supplied the same services under a contract which had been terminated by the hospital, were now entitled to benefits similar to those set out in s 197 of the LRA and which finds its European equivalent in Directive 77/187 of the EEC of 14 February 1977.

[23] The hospital authority employed a catering undertaking to supply meals and beverages to patients and hospital staff at a price based on a day of catering per person. To that end it made available to the catering undertaking, water and energy as well as its premises, including the hospital kitchen together with the necessary equipment. The argument for the employer of the first contracting company was that the Directive applied to a situation in which a contracting authority, which awarded a contract for the management of catering services in the hospital to one contractor, then terminated the contract and concluded another contract for the supply of the same services with a second contractor, in circumstances where the second contractor employed a substantial part of assets previously used by the first contractor and subsequently made available to it by the hospital authority and where, the second contractor refused to take on employees of first contractor. The Court upheld this argument, finding that the Directive must be interpreted to apply to this form of transfer of undertaking.

[24] In my view, this case is far closer to the facts of *Aviation Union, supra* than to a franchise agreement which has inherently different rights. A change in franchisees is conceptually different to the facts of *Sodexho* and produces a different result. The franchise agreement gives rise, in effect, to a joint venture (JV) business between the franchisor and franchisee. In terms thereof, there is a *quid pro quo* for the right to carry on the franchise business and the concomitant

use of the franchisor's assets by the franchisee (including, in this matter, an entitlement to occupy the premises leased by the franchisor) in the form of a franchise fee and/or a share of the profits. Upon the termination of this franchise agreement, the JV business dissolves, with the franchisor retaining the assets. The franchisee's right to carry on the franchise business comes to an end and concomitantly the business of the franchisee come to an end.

[25] When the new franchise agreement was concluded, this gave rise to a new JV business between the franchisor and the new franchisee, independent of the first JV agreement or business, with the use of the assets (including the use of the premises leased by the franchisor) being made available to the new franchisee as a *quid pro quo* or a franchise fee / share of the profits.

In the case of the change in franchisees, (a) there is no client (or middle entity) in the franchising context – it being bilateral and not a tripartite relationship; (b) while the franchisor makes the use of assets available to the new franchisee, it does so after the first JV business is dissolved and as part of the formation of an entirely new and independent business with the new franchisee; and (c) there is no transfer of the use of the assets from the old to the new franchisee; instead the use of the assets is housed in an entirely new and independent business.

[26] The only important similarity between *Sodexho* and this case is that certain of the infrastructure are employed by the second contractor and franchise. However, in the franchise agreement, the entire infrastructure remains under the control of the franchisor. Although it may be used by the franchisee, the latter operates at the behest of the franchisor pursuant to a new agreement. It cannot therefore be said that what was referred to in the European Court was a franchise agreement. Accordingly this decision is not authority in respect of the application of s 197 of the LRA to franchise agreements in general or the facts in the present dispute, in particular.

[27] In my view, there was no transfer of a business which falls within the scope of s 197 of the LRA. The appeal therefore succeeds and the following order is made:

1. The judgment of the court *a quo* is set aside and substituted with the following order:

    1.1 The application is dismissed with costs.

2 The first respondent is ordered to pay the appellant's cost of this appeal.

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Davis JA

Hlophe AJA concurred

Dissenting judgment

LANDMAN AJA

[28] I have had the privilege of reading the draft of the majority judgment. I agree with my brother Davis JA that the crisp question in this appeal, is whether s 197 of the LRA applies in a case of franchise agreements. I regret that I differ from him as regards the answer to this question.

[29] What must first be established is whether the old franchisee operated a business as contemplated by s 197 of the Labour Relations Act 66 of 1995 (the LRA)[7]. Section 197(1)(a) provides that a '"business" includes the whole or a part of any business, trade, undertaking or service.' The business must be transferred as a

[7] 66 of 1995.

going concern. See section 197(1)(b). The Constitutional Court in *NEHAWU v University of Cape Town*[8] had cause to consider the meaning of "going concern" and had this to say:

> '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 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 that none of them is decisive individually. They must all be considered in the overall assessment and therefore should not be considered in isolation.
>
> The fact that the seller and the 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 a business as a going concern within the meaning of s 197. Each transaction must be considered on its own merit, 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.' [footnotes omitted]

[30] Before considering whether a business was transferred as a going concern, I need to set out some of the terms and conditions and operating circumstances of the franchise in question and to add to discussion by my brother Davis JA of the nature of a franchise agreement.

[8] 2003 (3) SA 1 (CC) at paras 56 and 58.

[31] The following has been culled from the papers regarding the franchise operations of the second respondent. The description of the parties has been altered.

- On the termination date, the old franchisee would only remove items from the premises which belonged to it and would leave the store in a good condition;
- The old franchisee will assist in a 'handover and transition process".
- The lease agreements for the premises from which the old franchisees run their businesses are held in the name of the franchisor which sub-lets the premises to the old franchisees. No notice of termination of the lease agreements has been given. An inference is made that it is intended to run some business from those premises.
- The leased premises had earlier in the year undergone a major revamp costing in the region of R800 000.00 for each premises.
- The old franchisees have been requested to transfer Telkom landlines into the name of the franchisor.
- The businesses have to continue. If they were not to continue, the franchisor would lose market share to other cell phone operators.
- There would be no business to deal with the ongoing queries and customer issues that the old franchisors deal with on a daily basis. If nobody performed such functions, the result would be extremely frustrated and dissatisfied customers and the adverse publicity that would flow from such a lack of service would be intolerable for a business such as that of the franchisor.
- Franchisees country-wide received essentially the same notice of termination and have been told to not disclose information.

- The franchisor has terminated the franchise agreements of the old franchisees on due notice and is in the process of concluding a new franchise agreement with the new franchisee. The new franchise agreement will contain standard terms and conditions.

- The new franchisee will be effectively sub-leasing premises and fittings from the franchisor who remains the owner of the fittings and the lessee of such premises.

- The new franchises intends to enter into a new licensing agreement with the franchisor in terms of which the new franchisee will be entitled to procure new customers and facilitate the conclusion of airtime contracts between the franchisor and the new customers.

- The business of the old franchisees, namely the procuring of new customers and facilitation of the conclusion of airtime contracts between the franchisor and the new customers and the earning of ongoing airtime commission on such contracts, ended when the franchisor terminated its franchise agreements with the old franchisees.

- The old franchisees have removed all their possessions and stock from the premises and therefore there has been no transfer of stock or movable property from the old franchisees to the new franchisee.

- The franchisor paid ongoing airtime commission to the old franchisees during the subsistence of the franchise agreements. The old franchisees' entitlement to ongoing airtime commission ended when the franchise agreements terminated. Therefore the franchisor will not be paying any ongoing airtime commission earned on such airtime contracts to either the new or the old franchisees.

[32] A franchise is intended to bring customers under the impression that they are dealing with the franchisor. To facilitate this, there are a good number of

contractual provisions in a franchise agreement which all serve to compel the franchisee to conduct its activities in a very specific manner. It is unnecessary to set them out.

[33] The business of the old franchisee, in this appeal, consists in utilising the brand of the franchisor, its get-up, business model, obeying its rules of business, working in premises supplied by it, dealing with its customers, repairing or acting as a channel for repairs of its products, dealing with complaints about the products, retaining customer data and collecting funds, and selling exclusively the franchisor's products.

[34] What is important is that this illusion that the business is operated by the franchisor must be maintained also on termination of the franchise. Once the contract is terminated, it is desirable that the customers return to the same premises, where they will find the same brand, the same get-up, their contracts, the same goods and method of doing business.

[35] I return to the question at hand and consider the major incidents of the alleged transfer in the light of *NEHAWU* and *Spijkers Gebroeders Benedik Abbatoir v Alfred Benedik en Zonen* [1986] 2 CMLR 296 (ECJ) on which it is based.

[36] I arrive at the following:

(a) The type of business involved. A franchise is involved in this appeal. A franchise has its own peculiar framework.

(b) Whether there was a transfer of tangible assets: Nothing tangible was transferred save that by vacating the premises belonging to the franchisor and returning the keys it may be said that there was a transfer of possession of the premises back to the franchisor (for transmission to the new franchisee).

(c) Whether there was a transfer of intangible assets? The illusion and all that compiled the illusion was transferred as above.

(d) Whether the franchisee's staff was transferred? There was no agreement involving the employees; nor was there a need for one. No express agreement. But some employees went over to the new franchisee.

(e) Whether the customers were transferred? The customer's account and their patronage would be linked to the brand and shop or premises and when the franchise is terminated it could be said that they are transferred to the franchisor. Certainly they cannot be taken away by the franchisee.

(f) The duration of any interruption to the business activity? Here there was a minimal interruption which fits the nature of a franchise.

(g) In addition one must ask what the franchisee took away. The answer appears to be stock and not much else. Certainly not the right to trade with the brand name and get up.

[37] It is necessary to elaborate on some issues. It is not essential that the assets of the "old employer," here the old franchisee should belong to that employer for purposes of a transfer. See *Carlito Abler and others v Sodexho MM Catering Gesellschaft GmBH* [2004] IRLR 168.

[38] The question whether the old franchisee takes anything away so as to be able to continue its business requires further comment. This aspect is important. Jafta JA in *Aviation Union of South Africa v SA Airways (Pty) Ltd* [9]says:

> 'Speaking generally, a termination of a service contract and a subsequent award of it to a third party does not, in itself, constitute a transfer as envisaged in the section. In those circumstances, the service provider who contract has been terminated loses the contract but retains its business. The service provider would be free to offer the same service to other clients with its workforce still intact.'

[39] To answer this question one must hark back to the nature of a franchise and the relationship of a franchisee to a franchisor.

[9] 2012 (2) BCLR 117 (CC) at para 47.

[40] The nature of the relationship between a franchisor and franchisee has been recently the subject of scrutiny in several American judgments. The franchisor has been held vicariously liable for the wrongful acts of the franchisee in the course of the franchise business. See *Patterson v Domino's Pizza* 2012 Cal. App. LEXIS 753. I need not to decide and I do not decide this appeal on the basis of such a relationship.

[41] In addition, the question of a restraint must loom large in this appeal. What does the old franchise carry away? Can he continue another business after termination of the franchise? The old franchisee cannot continue doing what it was doing prior to the termination of the franchisee. To continue he would have to obtain a franchise with another brand or operate independently ie differently to the way it operated before as a franchisee. This distinguishes it from the situation with which Jafta J was dealing.

[42] This leads me to conclude that a stable economic entity changes hands when a franchise is terminated. It reverts to the franchisor.

[43] Was there a transfer from the old employer to the new employer? It could be said that there has been no such transfer because the franchisor does not intend operating the shop. The franchisor intends extending a franchise to a new franchisee. In this case, taking into account the nature and *modus operandi* of a franchise, it may be said that the franchisor intendeds to seamlessly transfer the operation of the shop to the new franchisee. The old franchisee knows that this will happen and so does the new franchisee. In these circumstances, there has been transfer of an undertaking, albeit an indirect one, from the old franchisee (old employer) to the new franchisee (new employer). The franchisor fulfils the role of a self interested conduit been the old and new franchisees.

[44] In my view, the construction of the matter which I have proposed embraces the twin aims of section 197 of the LRA as expressed by Ngcobo J (as he then was) in *NEHAWU*. He said:

'(b) The true meaning of s 197

The proper approach to the construction of s 197 is to construe the section as a whole and in the light of its purpose and the context in which it appears in the LRA. In addition, regard must be had to the declared purpose of the LRA to promote economic development, social justice and labour peace. The purpose of protecting workers against loss of employment must be met in substance as well as in form. And, as pointed out earlier, it also serves to facilitate the transfer of businesses. The section is found in a chapter that deals with unfair dismissal. Construed against this background, the section makes provision for an exception to the principle that a contract of employment may not be transferred without the consent of the workers. Subsection (1) says so and it makes it possible to transfer the business on the basis that the workers will be part of that transfer. This will occur if the business is transferred "as a going concern".'[10]

[45] In the case of the transfer on the termination of a franchise, it is possible to harmonise both goals. The employees who are the face of the business remain in place as a result to the seamless transfer and with it the job security of the employees is protected. The construction which I have placed on the matter does not impair the respective rights of the parties save in the way that s 197 intends.

[46] I would dismiss the appeal with costs.

AA Landman

Acting Judge of the Labour Appeal Court

[10] *NEHAWU* at para 62.

APPEARANCES:

FOR THE APPELLANT:	Adv AT Myburgh SC and Adv L Hollander
	Instructed by Petersen Hertog and Associates
FOR THE FIRST RESPONDENT:	Mr Kirchmann of Kirchmanns Inc