IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN, JOHANNESBURG)

Case no: JA 43/06

In the matter between:

Ponties Panel Beaters Partnership **Appellant**

and

National Union of Metal Workers
of South Africa **First Respondent**
David Mahlalela
& Others **Second to Further Respondents**

Judgment

Tlaletsi AJA,

Introduction

[1] This is an appeal against a judgment that was handed down by **Ngcamu AJ** sitting in the Labour Court in a dispute between the appellant and the respondents concerning an alleged transfer of a business in terms of Sec 197 of the Labour Relations Act 66 of 1995 ("the Act"). Before the appeal can be considered it is

necessary to set out the factual background to the dispute. I propose to do so below.

The facts

[2] The first respondent is a registered trade union. The second and further respondents are the employees who were at all relevant times members of the first respondent. They are 29 in total and were all employed by *Ponties Truck and Commercial CC* ("Ponties 1"). Ponties 1 conducted a business of panel beaters at 25 Cruse Crescent, Vintonia, Nelspruit. On 28 February 1997 Ponties 1 dismissed the second and further respondents from its employ for a reason based on its operational requirements.

[3] The union together with the second and further respondents challenged the fairness of the dismissal and instituted an action against Ponties 1 in the Labour Court in which they alleged that their dismissal was automatically unfair. There is nothing on the record to inform us what the alleged reason for the dismissal was. Whilst the action was still pending, Ponties 1 ceased trading. Another entity known as *Ponties Truck and Trailer CC* ("Ponties 2") commenced its operations as a panel beater from the same premises, using the same personnel and the same telephone and fax numbers that had been used by Ponties 1. Ponties 2 employed several of the workers who had been dismissed by Ponties 1. The precise date when Ponties 2 commenced its operations is not provided. Nothing turns on this as the dispute does not relate to this employment relationship.

It has not been disclosed in the papers how Ponties 2 came about to conduct the business as described above. The relationship between Ponties 1 and Ponties 2 is also not disclosed. The first respondent has attached a copy of part one of the "Amended Founding statement" of Ponties 2 to its founding affidavit. Only the particulars of the "Accounting Officer" and the address of the Close Corporation are depicted. The actual members of the corporation are not reflected. It is common cause that the respondents joined Ponties 2 as a respondent in their then pending litigation with Ponties 2.

[4] It is not disputed that during the course of the litigation referred to above, the employees of Ponties 2 were informed that Ponties 2 was changing its name to *Triponza Trading* and that the employees were expected to enter into new contracts of employment. The reason provided for this requirement was that it was necessary to do so because of the litigation in which Ponties 2 was joined as a party. At the time the management of Ponties 2 comprised Van Rooyen, Johan Barnard, Margherita Raubenheimer and Henriette Brits. They were supervised by one Pontaleon Esterhuizen. It has since become apparent from the evidence that Triponza Trading was officially registered under the name "*Triponza Trading 455 CC"* ("Triponza"). It is not disputed that Pontaleon Esterhuizen was the sole member of Ponties 1 and Ponties 2.

[5] During the latter part of 2002, Triponza began its business as a panel beater under the trading name "Ponties Panelbeaters". It

operated from the same premises, used the same postal address, fax and telephone numbers previously used by Ponties 2. It also employed the same employees that were previously employed by Ponties 2. It also operated under the supervision of Pontaleon Ersterhuizen. The names of the members of Triponza reflected on the "Founding Statement" of the Close Corporation attached to the founding affidavit are Christian Johan Barnard and Margherita Susara Raunbenheimer. It would appear that these are the same people who formed part of the management of Ponties 2 under the supervision of Pontaleon Esterhuizen. They each held 50% interest in the Close Corporation. The Close Corporation was incorporated on 13 March 2002 and, according to the Registrar of Close Corporations' endorsement on form CK 2, the "Amended founding Statement" was registered on 28 May 2002 which is the same date provided as the date of the changes in the particulars of members of the Close Corporation.

[6] The matter between the respondents and Ponties 1 and Ponties 2 was heard by **Zilwa AJ** during May 2002. On 3 June 2003 **Zilwa AJ** handed down his judgment. He found the dismissal of the employees, including second and further respondents, to be automatically unfair and ordered Ponties 1 and Ponties 2 jointly and severally to pay a total amount of R706 113-84 to the individual employees as well as the costs of the action. It must be pointed out that the judgment by Zilwa AJ indicate that the order made was by default as the application for condonation for the late filing of the exception was dismissed. This application was preceded by an unsuccessful application for condonation for

late filing of the appellant's statement of defence before Ngcamu AJ.

[7] On 9 June 2003 a notice was issued to all staff on behalf of Triponza. The Notice read thus:

> "9 June 2003
> Attention ALL PERSONEL (sic)
> WE RECEIVED A NOTICE FOR LIQUIDATION OF TRIPONZA. THE WORK IN PROGRESS OF CURRENT VEHICLEs WILL BE CARRIED OUT UNTIL WORK IS COMPLETED. (sic)
>
> WE HEREBY GIVE NOTICE THAT ON FRIDAY SOME OF THE PERSONAL(sic) WLL BE TERMINATED.
>
> NEGOTIATIONS IS (sic) IN PROGRESS WITH OTHER COMPANIES TO SEE IF THEY ARE PREPARED TO TAKE OVER THE COMPANY AND THE EMPLOYEES.
>
> THANK YOU
> MANAGEMENT"

[8] On 12 June 2003 the first respondent launched an urgent application in the Labour Court for, *inter alia*, an order interdicting Triponza from terminating the employees' services without proper compliance with Sections 189 and 189A read with Section 197B of the Act. On 13 June 2003 **Landman J** granted an interim order interdicting Triponza from dismissing its employees. The interim order was confirmed by **Gamble AJ** on 6 August 2003.

[9] It is common cause that on 15 July 2003 the appellant entered into a written agreement with *"Pontie Esterhuizen (Pty) Ltd"* in terms whereof the appellant purchased the assets belonging to

Pontie Esterhuizen (Pty) Ltd. The parties to the agreement are reflected as 'Pontie Esterhuizen EDM BPK (Verkoper)' and 'Ponties Panelbeaters Partnership (Koper).' The one page agreement reflects that the purchaser was purchasing all the assets necessary for the conduct of the business at a purchase price of R500 000-00. It was further recorded that the said assets appeared on a list attached to the agreement and that the aforesaid assets were still on the premises described as "25 Cruse Singel, Vintonia, Nelspruit." The particulars of the person who concluded and signed the agreement on behalf of 'Pontie Esterhuizen EDMS BPK' are not provided. It is also not disclosed whether the close corporation has connection to Pontaleon Esterhuizen who was the sole member of Ponties 1 and Ponties 2. It is, however, not in dispute that the assests referred to in the agreement are the same assets that were used by Ponties 1 and Ponties 2 to conduct the panel beating business on the same premises.

[10] It is the respondents' case that around June 2003 Pierre Johan Potgieter ("Potgieter")— who is conducting the business of the appellant as a sole proprietor and also the deponent to the answering affidavit in the Court *a quo*— informed the employees of Triponza that he was taking over the business of Trinpoza. The respondents state further that although some of the employees (including Ngala) were retrenched during late August 2003, the bulk of the employees of Triponza continued to do what was their normal work from the same address as Triponza.

They further state that Potgieter advised these employees of their dismissal.

[11] In response to the above, Potgieter denied that he bought the business of Ponties 1, Ponties 2 or Triponza as "appears to be alleged". He stated that he only purchased the assets of a panel beating business which were, according to Potgieter, "apparently previously rented by Ponties 1, Ponties 2 and Triponza from "Pontie Esterhuizen (Pty) Ltd." He denied ever advising the employees of their dismissal as alleged. He mentioned that he already knew when he purchased the aforesaid assets that he would require the services of 'people' in order to operate the business. He stated that as a result he spoke to a number of the "former" employees of Triponza, who had experience in the panel beating business. These employees, he continued, informed him of a history of "court cases" and further told him that they would make it impossible for him to run the business if he did not employ them. He named a certain Mr Ngala as one of the former employees he spoke to at the time.

[12] Potgieter stated that with the assistance of one Mr Melg Welmans ("Welmans") of NOMESA—an employer's organisation that was advising him— he approached the first respondent in order to resolve the 'outstanding issues'. He mentioned that subsequent to the discussions with one Alfred Mashegoane— the deponent to the founding affidavit and the Regional Legal Officer of the first respondent— it was agreed that:

"(a) *[Potgieter] would employ 23 people in order to continue with a retrenchment process and pay them a package based on their years of service;*

(b) *that the 23 "people" were the same 23 employees previously employed by Triponza;"*

(c) that [Potgieter] would retain 10 employees and be entitled to commence business on the 1st September 2003;

(d) that the remainder of the 23 "people", would receive severance packages in full and final settlement of any dispute which the union may have had against him. It is not clear from the record whether the "23 people" were the only employees that were employed by Ponties 2.

[13] According to Potgieter the settlement agreement included an indemnity in his favour against any judgment previously obtained by the first respondent against Ponties 1, Ponties 2 and Triponza, and that the agreement was entered into specifically to avoid the appellant incurring any liability for their debts. Potgieter attached as annexure "E", a letter dated 2 September 2003 addressed to the secretary of the first respondent. He states that the letter sets out the agreement which was reached the previous day with the respondent. The body of the said letter dated 2 September 2003 and addressed to the secretary of the respondent reads thus:

"TRIPONZA

In pursuance to the meetings we had in the recent past regarding Triponza, I wish to confirm that we reached agreement on the following issues:

1 Mr. Potgieter, further referred to as the investor, will be renting the building with the intention to start a similar business in the same premises,

2 He consequently agreed to take over the contracts of employment of all existing union members and consulted with the union in their presence on retrenchment.

3 The parties agreed on who would be offered a position in the said business and who would be paid a severance benefit. (Refer to Annexure A)

4 The union members who elected to take up a position in the new business, will receive recognition for their years of service since the time of Ponties Panel Beaters, and will be given a contract of employment to sign.

5 Apart from the above, the investor takes no responsibility of whatever nature for any claim whosoever (sic) arising out of the employment relationship between Triponza or its predecessors. This includes claim for leave against Triponza as well as the judgment of the labour court in the existing litigation between NUMSA and Ponties Truck and Trailer.

This letter will be referred to as annexure "E"

[14] Potgieter stated further that Aaron Mahlalela, a shop steward of the first respondent, at all relevant times confirmed the veracity of the agreement personally, and together with his fellow employees who were employed in terms of the agreement. He stated further that Mahlalela obtained permission from these fellow employees to sign a confirmatory affidavit attached to the answering affidavit. In his confirmatory affidavit Mahlalela confirmed the contents of Potgieter's affidavit insofar as it refers to him.

[15] In the replying affidavit, Mashegoane admitted that an agreement was reached with the first respondent and Ponties Partnership to the effect that all Triponza employees would be "transferred" to Ponties Partnership. He stated that this agreement was not reached with him personally but with a certain Mavi Ncongwane ("Ncongwane") who represented the first respondent. Mashegoane denied that he had any dealings with Potgieter and Welmans and as such could not have been party to the agreement. Ncongwane has filed an affidavit to confirm the allegations made by Mashegoane about him.

[16] Ncongwane confirmed the respondent's version with regard to the settlement agreement. He mentioned that two meetings were held in respect of the 'transfer' from Triponza to Ponties Partnership; and

[16.1] that at first Potgieter insisted that he be indemnified by the first respondent against any claim the first respondent had against Triponza;

[16.2] that first respondent refused to accede to the demand on the basis that first respondent was of the view that the transfer from Triponza to Ponties Partnership was one of a going concern;

[16.3] that Potgieter left the room;

[16.4] that Ncongwane made it clear to Welmans that first respondent would not "shift" on its view;

[16.5] that at the second meeting which was only attended by Welmans on behalf of the appellant, an agreement was reached to the effect that all Triponza's employees were to be transferred to Ponties Partnership and that in the event of any employee being retrenched, Ponties partnership would pay them a severance package which would recognise their prior service period with Triponza;

[16.6] that the issue of "indemnification" was not raised at this specific meeting;

[16.7] that certain employees were retrenched and they indicated to him (Ncongwane) that they did not intend to challenge the fairness of their retrenchments; and that they were paid

retrenchment packages in accordance with the agreement referred to above; and

[16.8] that the agreement was not in full and final settlement of any claims and that neither first respondent nor the individual respondents, ever, agreed to indemnify Potgieter or Ponties Partnership.

[17] The respondents denied that first respondent received annexure "E". With regard to the participation of Mahlalela, the respondents' version is that Mahlalela only became a shop steward in 2004 and could not have entered into any agreement on behalf of the second and further respondents in a representative capacity. At the time that according to Potgieter, he entered into an agreement with him, namely, about September 2003.

[18] Having considered the parties' respective versions as well as the documents on record, the following facts. emerge as common cause:

(a) the appellant conducts a panel−beating business which is the same business that was conducted by Triponza, Ponties 1 and Ponties 2.

(b) the appellant's business is operated from the same premises that Triponza, Ponties 1 and Ponties 2 conducted their business.

(c) the appellant employs a substantial number of the employees who were previously employed by Triponza, Ponties 1 and Ponties 2.

(d) the appellant paid severance packages to employees of Triponza that it did not employ and, in doing so, took into account their period of service with Triponza.

(e) the employees employed by the appellant were paid at the same rate of pay and using the same clock numbers and machinery as were used during Triponza time.

(f) the former manager of Triponza, one Mr Van Rooyen, was retained by the appellant and continued as manager of the business.

(g) the appellant is using the same telefax and telephone numbers that were used by Triponza.

(h) the appellant is operating under a trading name which has some striking similarity with that of Ponties 1 and Ponties 2.

(i) Naturally the appellant's clientele is the same as that which used to be Triponza's clientele.

Proceedings in the Labour Court

[19] The respondents contended that the business of Ponties 2 was transferred to the appellant as a going concern. This aspect was denied by the appellant. A dispute arose between the parties. The respondents thereafter approached the Labour Court for relief.

[20] The respondents then brought an application in the Labour Court seeking an interdict and declaratory orders to the effect that;

a) the business of Ponties Trucks and Trailer CC ["Ponties 2"] was transferred to Triponza Trading 455 CC (in liquidation) as a going concern in terns of section 197 of the Act;

b) that the business of Triponza Trading 455 CC (in liquidation) was later transferred to the appellant (Ponties Panelbeaters Partnership) as a going concern in terms of sec 197 of the Act and;

c) that the appellant be ordered to pay the second and further respondents an amount of R706 113-84 plus interest in terms of the judgment handed down against Ponties Truck and Trailer CC by the Labour Court plus costs.

[21] The defence raised on behalf of the appellant in the Labour Court, was, in a nutshell, to the effect that there had not been a transfer of a business as a going concern as contemplated by sec 197 of the Act from Ponties 2 to the appellant. In the alternative, and in the event that the Labour Court found that there was in law a transfer as contemplated by the provisions of sec 197 of the Act, the appellant then contended that there was an agreement reached on or about 1st September 2003 in terms whereof the appellant would not be held liable for whatever happened to Ponties 1, 2 and Triponza. The appellant contended that the said agreement was in full and final settlement of any claims and disputes and that the respondents were not entitled to claim any payment from the appellant.

[22] After considering and analysing a number of decisions, the Court *a quo* held, *inter alia*, as follows:

> *"In the light of the fact it is not the assets of Triponza that were purchased, the argument that Ponties 3 only purchased the assets cannot stand and I reject it. The fact that Triponza simply allowed Ponties 3 to operate the business without any proper sale of business points to a donation by Triponza and therefore a transfer of business. The business being carried on is that of Triponza. This is confirmed by the use of the same employees and the premises. These point out to one thing that is, the transfer of business as a going concern. I have not lost sight of the fact that in selling the assets Ponties Esterhuizen was attempting to defeat the judgment."*

The Labour Court found further that *"there was no waiver by the applicants and that transfer of business in terms of section 197 has taken*

place making Ponties 3 liable to satisfy the order of court." " Ponties 3" by the Labour Court is to the appellant.

[23] The Labour Court thereafter granted the orders sought by the respondents. The appellant sought and was refused leave by the Labour Court leave to appeal to this Court. The application was refused. The appellant thereafter petitioned the Judge President of this Court and was granted leave to appeal against the whole judgment of the Labour Court.

The appeal

[24] Before us the appellant challenged the correctness of the decision of the Labour Court. Firstly, it was argued that the Court a quo erred in finding that there had been a transfer as a going concern of the business of Triponza to the appellant. This argument was, on the main, based on the contention that what was sold were the assets belonging to an entity which was not itself conducting the business. It was further contended that the respondents had not shown that the business had not been discontinued and that it was a business still in operation when the appellant commenced operations. The second ground relied upon to challenge the judgment of the Labour Court was that, even if it could be found that there had indeed been a transfer of Triponza business as a going concern to the appellant, the Labour Court erred in finding that the respondents had not "waived" their rights to execute against the appellant the judgment which they had obtained against Ponties. In support of

this ground the appellant relied on paragraph 5 of Annexure "E". I now turn to consider the law.

The Law on the transfer of business and contracts of employment

[25] The relevant provisions of sec 197 read:

"(1) In this section and in section 197A–

(a) 'business' includes the whole or a part of any business, trade, undertaking or service; and

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

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

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

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

(c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and

(d) the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer."

[26] It is important to note that the word "business", *per se,* is not defined. It is however said to include the whole or any part of

any business, trade, undertaking or service (sec. 197(1)(a). Likewise, the phrase "a going concern" is also not defined but it has been the subject of judicial pronouncement. The now authoritative and applicable interpretation is that enunciated by **Zondo JP** in his minority judgment in **National Education Health and Allied Workers Union v University Of Cape Town & Others** (2002) 23 ILJ 306 (LAC.) The learned Judge President had the following to say after reviewing the various relevant international authority on the subject (at 337f—338g):

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

'[11] ... It appears from the general structure of directive 77/187 and the wording of Article 1(1) that the directive aims to ensure the continuity of existing employment relationships in the framework of an economic entity, irrespective of a change of owner. It follows that the

decisive criterion for establishing the existence of a transfer within the meaning of the directive is whether the entity in question retains its identity.

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

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

[65] In my view the position is that there will be cases where the transferor and the transferee agree that the workforce will be taken over by the transferee but the transaction cannot be described as a transfer of the business as a going concern if many of the other factors that are relevant to a transfer being one as a going concern are absent and there will be transactions where the transferor and the transferee will agree that the workforce will not be taken over but the transaction will still amount to a transfer of a business as a going concern because of the presence of many or all of the other factors that go to making a transfer of a business to be one as a going concern. Accordingly each transaction must, in my view, be considered 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." (my emphasis)

[27] The above approach was endorsed by the Constitutional Court on further appeal in the same matter in: **National Education Health and Allied Workers Union v University of Cape Town & Others** (2003) 24 ILJ 95 (CC). **Ngcobo J,** writing on behalf of a unanimous Court, had this to say (at 119E—120B):

"[56] The phrase 'going concern' is not defined in the LRA. It must therefore be given its ordinary meaning unless the context indicates otherwise. What 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 none of them is decisive individually. They must all be considered in the overall assessment and therefore should not be considered in isolation. " (my emphasis).

See also: **SA Municipal Workers Union & others v Rand Airport Management Co. (Pty) Ltd & others** (2005) 26 ILJ 67 (LAC)

Was Triponza's business transferred to the appellant as a going concern ?

[28] It is clear from the above authorities that the fact that the appellant did not purchase the business but only the assets is one of the factors that should be considered, together with many others, to determine whether it can be said that it is the same economic entity that was conducted by Triponza which is now in the hands of the appellant. Counsel for the appellant submitted that in applying the test to determine whether there has been a transfer of a business as a going concern, we should also consider the following factors:

[28.1] that Triponza was liquidated on or about 9 June 2003;

[28.2] that Potgieter only became involved in August 2003 (2 months later) when he started talking to the employees of Triponza; and

[28.3] that appellant commenced his business on 1 September 2003 after several discussions with the first respondent.

He submitted that these factors, when considered together with the others, lead to only one conclusion and that conclusion is that Triponza's business was not transferred as a going concern as contemplated in sec 197 of the Act.

[29] Counsel for the appellant could not state with certainty when the business of Triponza was closed. We invited him to refer us in the record when and for how long the business was closed but he could not do so. What he asked us to do though, was to draw an inference that, because Triponza was liquidated on 9 June 2003 and that the appellant only commenced with the business on 1 September 2003, the business should have been closed for the interim period. He argued that it was for the respondents to have shown that the business remained active as an economic entity from 9 June 2003 until 1 September 2003.

[30] In my view, the conclusion that the business of Triponza was closed for some time is not the most plausible inference that can be drawn from the proven facts. Firstly, we already know that the respondents had during that period instituted proceedings in the Labour Court to interdict Triponza from dismissing its employees. A rule *nisi* was granted on 13 June 2003 and was confirmed on 6 August 2003. During this time the employees were still employed by the Triponza. Secondly, on the appellant's own version, the purchase of the assets was concluded on 15 July 2003 on which day the rule *nisi* was still in operation. It has not been disclosed when Potgieter took possession of the assets. However, the purchase of the assets

took place whilst the employees were still employed and Potgieter was aware of their employment relationship with Triponza at the time. Thirdly, the evidence by the respondents to the effect that, although some of the employees were retrenched during August 2003, the bulk of the employees of Triponza continued to operate a panel beating business from the same address, has not been denied. In these circumstances I am of the view that the inference we were urged to draw is one which cannot properly be drawn in this case.

[31] Even if it could be said that there was an interruption in the business, same could not have been of such a long period that it could be said that it broke the connection between the business of Triponza and that of the appellant. It is important to note that on the appellant's own version it knew that when Potgieter purchased the assets, his intention was to operate the same business as that of Triponza and that is why he approached the employees of Triponza who he conceded, he knew they had experience of operating a panel beating business. The fact that the business was closed should not in itself be a factor that would prevent the applicability of sec 197 of the Act. There is also the fact that assets which the appellant bought which it needed for the business were bought not from Triponza but "Pontie Esterhuizen (Pty) Ltd." In my view this does not change the picture at all. The fact of the matter is that Triponza had leased the same assets to conduct the business. The appellant did not lease them but bought them. Indeed, as stated in paragraph 9 above the agreement between the appellant and

Pontie Esterhuizen (Pty) Ltd reflects a provision to the effect that the appellant was purchasing all the assets necessary for the conduct of the business. In that agreement it was stated that the assets in question were still on the premises from which Triponza had conducted the business and from which the appellant sought to conduct its business too. In my view the fact that the assets which the appellant bought in order to run the business were not bought from Ponties 2 but from a third party is no basis, on the facts this case, to conclude that Triponza's business was not transferred to the appellant as a going concern.

[32] To answer the question whether Triponza's business was transferred to the appellant as a going concern one must have regard to the factors set out in the passage quoted in par 26 above from **Zondo JP's** judgment which, as I have said, were approved by the Constitutional Court in **Nehawu v University of Cape Town**. It is not necessary to repeat them here. When one has regard to those factors in that passage and has regard to the facts set out in para 18(a) to (i) above there can only be one conclusion to be reached. That is Triponza's business was transferred to the appellant as a going concern. This means therefore that the finding of the Labour Court that the business transferred as a going concern as contemplated in sec 197 of the Act is correct. The finding that Triponza's business was transferred as a going concern to the appellant means that the appellant stepped into the shoes of Ponties 2. I now proceed to consider the question whether the respondents "waived" their

rights to enforce the judgment of the Labour Court against the appellant.

The waiver argument.

[33] At the outset Counsel for the appellant submitted that there is a dispute of fact on the parties' versions of both the appellant and the respondents and that because the respondent had not requested the Labour Court to refer the matter to oral evidence, the version of the appellant, which was the respondent in the Court a quo should be preferred. The said dispute of fact relate to the circumstances around the terms of the agreement between Potgieter and the first respondent purportedly captured in Annexure E. As authority for the submission, reliance was placed on the following decisions: **Plascon Evans Paints v Van Riebeck Paints** 1984 (3) SA 623 (AD) and **Fry's Metal Services Ltd v National Union of Metal Workers of South Africa and Others** (2003) 24 ILJ 133 (LAC) at 150 F-J. In the light of the view that I take of this matter I find it not necessary to discuss the two authorirties referred to above. I say this because the record bears testimony to the fact that counsel for the respondents submitted, in the court *a quo,* that the matter could be determined on the papers, "*but in so far as [the Court] has concerns about the indemnity/ amnesty/ waiver agreement then the implications of that, that crisp issue should [be referred] to oral evidence to be dealt with in cross-examination.*" The submission made on behalf of the appellant therefore lacks merit.

[35] During argument, counsel for the appellant was requested to address us on the nature and or status of Annexure "E" with specific reference to paragraph 5 thereof. In response counsel for the appellant submitted that the letter did not constitute a waiver but constituted a "settlement agreement" which is binding on the union and all its members. He argued that the respondents were therefore barred by clause 5 from enforcing the judgment of the Labour Court against the appellant. He submitted that clause 5 is to the effect that the first respondent and the appellant agreed that the first respondent, acting on behalf of the second and further respondents, indemnified the appellant from the judgment which had been obtained by the first and further respondents against Ponties 1 and Ponties 2. The appellant's case is therefore that the agreement is not a waiver but an agreement which according to counsel may not have been properly drafted. He submitted that it however records what the intention of the parties was at the time, which must be given effect to.

[36] It is in my view imperative that the meaning of clause 5 of the letter be understood first before deciding the issue whether the disputes of facts arising from the circumstances in which the letter was written can be decided. The starting point is to consider the wording of the clause in order to ascertain what it conveys. When reading Annexure E it is clear from the opening paragraph that an agreement was reached on 'issues' that followed the information clause. The issues in paragraphs 1,2,3

and 4 are clear and common cause. It is only paragraph 5 which has its own information clause. The words "*apart from the above*" seems to remove the balance of the contents of paragraph 5 from the issues that have been agreed upon "*in pursuance to the meetings [the parties] held in recent past regarding Triponza*". What follows thereafter is, in my view, a statement by Potgieter that he was not accepting liability for any claim arising out of the employment relationship between Triponza or its predecessors and the respondents. The claims included "leave claims" and the judgment of the Labour Court.

[37] Nowhere in annexure "E" did the first respondent state that Potgieter was being indemnified against any claims and judgments or where it was stated that the respondents accept that they would not enforce the judgment of the Labour Court against Potgieter or the appellant. The letter merely recorded what, according to the writer thereof had been agreed upon from the various meetings which are the issues listed in paragraphs 1,2,3 and 4 and thereafter informed the addressee that, apart from that, the "investor" was "taking no responsibility" for the matters mentioned in the balance of the paragraph. There is nothing in paragraph 5 that suggests that there was any agreement reached on the contents of paragraph 5. It seems to me that Potgieter or the appellant was merely reserving to himself the right to dispute any claim by the union to enforce the judgment as well as any claim for leave against him or the appellant.

[38] Apart from the fact that annexure "E" is not signed there is also no proof from the appellant that the letter was transmitted to the first respondent. There is no proof that the respondents received the letter. Since it is the appellant's case that the document is not a waiver it shall not be necessary to consider whether the requirements for a valid waiver have been met. By this I am not being unkind to counsel for the respondents who had prepared argument in his head of argument to persuade us that the requirements for a valid waiver have not been met should the appellant claim that paragraph 5 of Annexure "E" is a waiver. Suffice it to say that the appellant would have carried the burden to prove that paragraph 5 contains a waiver.

[39] I therefore come to the conclusion that there is nothing in paragraph 5 of Annexure "E" that prevents the respondents from enforcing the judgment of the Labour Court against the appellant. I further find that paragraph 5 of Annexure 'E' does not amount to an agreement. Accordingly, the appeal must fail. In my view the requirements of the law and fairness dictate that no order as to costs should be made in this case.

[40] In the result I make the following order:

(a) The appeal is dismissed.

(b) Each party is to pay its costs.

_____

Tlaletsi AJA

I agree

_____

Zondo JP

I agree

_____

Jappie JA

Appearances:

For the appellant: Mr AP Brandmuller

Instructed by: Brundmullers attorneys

Cheadle Thompson & Haysom Inc

For the respondents: Mr C Orr

Instructed by: Cheadle Thompson and Haysom Inc

Date of the judgment: 02 September 2008

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