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

Case No: JA 51/07

AVIATION UNION OF SOUTH AFRICA	**First Appellant**
Obo BARNES MR AND	
62 OTHERS	**Second to Sixty-Fourth Appellants**

and

SOUTH AFRICAN AIRWAYS (PTY) LTD	**First Respondent**
LGM SOUTH AFRICA FACILITY	**Second Respondent**
TFMC SERVICES (PTY) LTD	**Third Respondent**
SOUTH AFRICAN TRANSPORT AND	
ALLIED WORKERS UNION	**Fourth Respondent**
SOLIDARITY	**Fifth Respondent**
ALLAN AND 204 OTHERS	**Sixth to Two Hundred and Ninth Respondent**

JUDGMENT

ZONDO JP

[1] I have had the benefit of reading the judgment prepared by Davis JA in this matter. I agree with the judgment and the order proposed the end of that judgment. However, I wish to add to the reasons and /or emphasise certain points in support of that judgment and order.

[2] The first respondent, the South African Airways ("**SAA**"), had for some time been employing the second and further appellants to perform certain work but decided to outsource that work or to contract it out to the second respondent, (which I shall refer to by the acronym of "**LGM SA**") for a period of ten years. As this was in March 2000, this meant that the contract or outsourcing arrangement would endure until 2010.

[3] Before outsourcing the work, SAA concluded an agreement with the trade unions whose members would be affected by the contemplated outsourcing including the first appellant which is the Aviation Union of South Africa (AUSA). Two other trade unions which were involved were the South African Transport and Allied Workers Union ("**SATAWU**") and Solidarity. SATAWU is the fourth respondent in these proceedings whereas Solidarity is the fifth respondent. The agreement that SAA entered into with AUSA and the other trade unions was to the effect that it was going to outsource certain specified sections of its work or certain services to LGM SA, that such transfer would constitute a transfer of business as a going concern in terms of sec 197 of the Labour Relations Act, 1995 (Act 66 of 1995 ("**the LRA**") and that the contracts of employment of the employees involved in the performance of those services would also be transferred to LGM SA in accordance with sec 197 and this would not affect their continuity of employment. Generally speaking the agreement was to the effect that their terms and conditions of employment would be the same. That agreement was referred to as the "**Transfer Agreement.**" LGM SA was not party to the Transfer Agreement.

In terms of this agreement the transfer would be effected by no later than the 31st March 2000.

[3] Subsequent to the conclusion of the Transfer Agreement between, on the one hand, SAA and, on the other, AUSA and the other trade unions, SAA concluded an agreement with LGM SA in terms of which it outsourced the services concerned to LGM SA or contracted out to LGM the services concerned. That agreement – between SAA and LGM SA – was called the "**Outsourcing Agreement**".

In terms of the Outsourcing Agreement SAA and LGM SA also agreed that the employees who were in SAA's employ and were performing the services that would be outsourced to LGM SA would have their contracts of employment transferred to LGM SA. SAA and LGM SA also agreed under the Outsourcing Agreement that sec 197 of the LRA applied to that transaction. In due course the performance of the affected services was transferred from SAA to LGM SA. The employees involved in those services including the second and further appellants were also transferred from SAA to LGM SA together with their contracts of employment with effect from 31 March 2000 in terms of the Outsourcing Agreement. In what follows, when I refer to outsourcing or contracting out of work I mean outsourcing or contracting out of work in circumstances where it can be said that there has been a transfer of business or a part thereof within the meaning of sec 197.

[4] The material terms of the Outsourcing Agreement were the following:

(a) the outsourcing agreement would run from 1 April 2000 to 31 March 2010.

(b) upon the expiry of the agreement SAA retained an option to renew it for a further five years.

(c) the assets and inventory of SAA relating to the transferred services were sold to LGM SA.

(d) upon termination of the agreement SAA would be entitled to repurchase assets and inventory of LGM dedicated to the provision of the transferred services.

(e) LGM SA and SAA agreed that the transferred employees were deemed to have been employed by LGM SA in terms of the provisions of section 197(1)(a) and 197(2)(a) of the LRA.

(f) LGM SA was afforded the access it reasonably required in order to render the services, to the office space, workshops, airport apron, computers and network at SAA's facilities at designated airports.

(g) LGM was entitled to an annual fee paid in monthly statements for rendering the outsourced services to SAA.

(h) the agreement was administered by a joint executive – committee comprising representatives of SAA and LGM.

(i) upon termination of the agreement, SAA retained a right to transfer certain services and/or functions back to itself or to a third party and to obtain the transfer or assignment from LGM to SAA of all third party contracts.

[5] At some stage during 2007 SAA gave LGM SA notice of the termination of the Outsourcing Agreement. The termination was going to take effect from 31 September 2007. The reason for the termination was that there was a change in the control of LGM SA resulting from a change in its shareholding and the Outsourcing Agreement gave SAA the right to terminate the Outsourcing Agreement in such an eventuality. Although initially LGM SA seemed to want to challenge the termination of the Outsourcing Agreement in Court, this was not pursued.

[6] Naturally, AUSA wanted to be sure that the termination of the Outsourcing Agreement did not mean job losses for its members. However, its hopes, if it had any, that SAA and LGM SA would accept that sec 197 would apply if SAA transferred back to itself the business that it had transferred to LGM SA or if SAA transferred the business to another party were soon dashed because these two companies took the view that sec 197 would not apply to such situation. In this regard SAA pointed out that there was nothing in the Outsourcing Agreement to the effect that it, i.e. SAA, would transfer the workers back to itself upon the termination of the Outsourcing Agreement if it itself resumed the performance of the concerned services or would transfer the workers to another contractor if it transferred the business to another contractor. SAA went on to say in its answering affidavit in these proceedings that it would discourage potential bidders for the work if they were to be required to take over the workers as well.

[7] The stance taken by SAA was the direct opposite of the stance which SAA had previously adopted with regard to the transfer of the contracts of employment of the employees when it concluded both the Transfer Agreement with AUSA and the other trade unions as well as when it concluded the Outsourcing Agreement with LGM SA. The dispute between AUSA, on the one hand, and SAA and LGM SA, on the other, was about the fate of the workers in the light of the termination of the Outsourcing Agreement. AUSA demanded that, since SAA had called for tenders from bidders interested in having the affected services outsourced to them, it should specify it as a requirement that the successful bidder would have the contracts of employment of the employees transferred to it in terms of sec 197. SAA resisted this and indicated that there was no legal justification for it. AUSA also demanded that, if SAA was going to resume the performance of the services itself, it should agree to have the contracts of employment of the employees involved in such services transferred to itself. SAA was not prepared to agree to this and maintained that there was no legal justification for it. Of course AUSA had no need to require SAA to specify to the bidders that the successful bidder would have to agree to have the contracts of employment of the employees transferred to it because the transfer of the contracts of employment of the affected employees would have occurred automatically and by operation of law if, and, when, indeed, there was a transfer of a business or part of a business or undertaking as a going concern. The agreement of the successful bidder to take the workers would not have been a requirement for the transfer of the contracts of employment to take place. Of course, AUSA may have

wanted to have certainty so as to ensure that there would be no need for litigation in this regard.

[8] It was the refusal of SAA to agree to AUSA's demands in this regard that gave rise to the legal proceedings in the Labour Court which led to this appeal. In the meantime LGM SA was busy initiating a consultation process in terms of sec 189 of the LRA as it was contemplating the dismissal of the employees for operational requirements in the light of the termination of the Outsourcing Agreement. AUSA did not see the need for the dismissal of the employees because, in its contention, the contracts of employment of the employees were supposed to go back to SAA or to be transferred to the successful bidder.

[9] Since the amendment of sec 197 of the LRA in 2002 by the inclusion of the word "**service**" in the definition of "business" in sec 197 to indicate that a transfer of a service also fell under sec 197, it is generally accepted that sec 197 does apply to a situation where company A, which all along has been employing workers to perform certain work, ceases to have that work performed by its workers and contracts with another company, company B, to do that work for it and effectively transfers that business or that part of its business to B as going concern. Indeed, in this case not only is there no dispute that, when SAA contracted its work out to LGM SA, sec 197 applied but in fact a reading of the Outsourcing Agreement reveals that both SAA and LGM SA expressly agreed that sec 197 applied to that transaction.

[10] In this case SAA disputed the appellants' contention that, when the contract between itself and LGM SA came to an end, and SAA decided not to contract the services out to another contractor and decided to do the work itself by using the services of its own employees and effectively reversed the transaction into which it had entered with LGM, sec 197 would apply. In its answering affidavit SAA took this stance without explaining why sec 197 would not apply to the reversal of a transaction to which it had applied when it was entered into in the first place. The only reason I can think of as to why this was SAA's stance is the reason upon which SAA relied in argument to contend that sec 197 could not apply when, at the end of the contract between itself and LGM, it transferred the services concerned to another contractor. That reason is that sec 197 requires that the transfer of the business or undertaking be effected "**by**" the "**old employer**" and in the case of a transfer from B to A in the earlier example, or, from LGM SA to SAA, in the present case, the transfer is not effected "**by**" B or LGM SA but by A or SAA. The argument is that in most cases the outsourcee would be wanting to retain the contract and would be against its reversion to the outsourcer or would be against its award to another party and that, therefore, the transfer either back to the outsourcer or to another party is, in such circumstances, not effected "**by**" the "**old employe**r", the outsourcee, but, by the outsourcer. I turn to deal with the contention.

[11] Sec 197 of the LRA governs what happens to the employees' contracts of employment and the employees' rights and obligations when their employer's business or undertaking is transferred as a going concern by such employer ("**the old employer**") to another

employer ("**the new employer**"). The word "**business**" is defined in sec 197(1)(a) as including a service or a part of any business, trade or undertaking. The word "**transfer**" is defined in sec 197(1)(b) as meaning "**the transfer of a business by one employer ("the old employer") to another employer ("the new employer") as a going concern.**" (Underlining supplied). Sec 197(2) reads as follows:-

> "**(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."

"**Transfer**" in subsection 2 must be understood to mean a transfer as defined in sec 197(1)(b). That is a transfer of a business by one employer ('**the old employer**') as a going concern.

[12] There are two schools of thought about what the word "**by**" means in that definition of "**transfer**". The one school of thought is that the word "**by**" in the context of that definition denotes that the transfer must be effected by the old employer and, if it is not effected by the old employer, it is not a transfer such as is contemplated in sec 197(1)(b) of the LRA and, therefore, has no consequences such as those set out in sec 197. For convenience I shall refer to this school of thought as the "**ordinary meaning**" school of thought. Of course, this is because they argue that the word "**by**" in sec 197 must be given its ordinary meaning. The other school of thought can be referred to as the purposive school of thought.

[13] A careful consideration of the arguments advanced on behalf of the "**ordinary meaning**" school of thought reveals that this school of thought has the literal theory of statutory interpretation as its basis whereas the purposive school of thought adopts the purposive theory of statutory interpretation. Of course, the use of the literal theory of interpretation in interpreting a provision of the LRA appears to me to be outlawed by or at least to be inconsistent with the provisions of sec 3 of the LRA. It is necessary at this stage to refer to the interpretive framework relevant to the interpretation of the provisions of the LRA.

[14] Sec 23(1) of the Constitution - which is part of the Bill of Rights in the Constitution- provides that **"(e)veryone has the right to fair labour practices".** Sec 39(2) of the Constitution provides that **"(w)hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."** Sec 233 of the Constitution deals with the application of international law. It reads:

> **"When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."**

[15] The provisions of s1 and s3 of the LRA must also be taken into account in interpreting s197. Section 1 of the Act states the purpose of the LRA. It provides that the purpose of the LRA is **"to advance economic development, social justice, labour peace and the democratisation of the workplace".** It seeks to achieve this purpose by fulfilling the primary objects of the Act. Those include giving effect to and regulating the fundamental rights conferred by s23 of the Constitution- which includes the right to fair labour practices. Those objects also include giving effect to obligations incurred by the Republic as a member state of the International Labour Organisation.

[16] Section 3 of the Act provides as follows: **"Any person applying this Act must interpret its provisions**:

(a) to give effect to its primary objects;

(b) in compliance with the Constitution;

(c) in compliance with the public international law obligations of the Republic".

It is within the above constitutional and statutory context that the LRA must be interpreted. It is accepted by now that the LRA must be interpreted purposively. Against this background I proceed to attempt to interpret s197 which, of course, must be read within the context of the whole section and the LRA as a whole.

What is the purpose of sec 197?

[17] In **NEHAWU v UCT (2003)24 ILJ 95 (CC)** the Constitutional Court said through Ngcobo J in par 34:

> "**The concept of fair labour practice must be given content by the legislature and thereafter left to gather a meaning, in the first instance, from the decisions of the specialist tribunals including the LAC and the Labour Court. These courts and tribunals are responsible for overseeing the interpretation and application of the LRA, a statute which was enacted to give effect to s 23(1). In giving content to this concept the courts and tribunals will have to seek guidance from domestic and international experience. Domestic experience is reflected both in the equity based jurisprudence generated by the unfair labour practice provision of the 1956 LRA as well as the codification of the unfair labour practice in the LRA. International experience is reflected in the Conventions and Recommendations of the International Labour Organisation. Of course other comparable**

> **foreign instruments such as the European Social Charter 1961 as revised may provide guidance."**

It has been said that security of employment is "**a core value**" of the LRA and is dealt with in chapter VII of the LRA dealing with unfair dismissal (Ngcobo J in NEHAWU v UCT & others at par 42.) The LRA must be purposively interpreted. (NEHAWU v UCT at par 41). In discussing foreign instruments aimed at the safeguarding of workers' rights in the event of the transfer of businesses as a going concern, the Constitutional Court made *inter alia* the point at paragraph, 53 in NEHAWU v UCT that the similarity of the language between sec 197 and the foreign instruments

> **"fortifies the view that central to its purposes is the protection of workers. Sec 197, however, does more than protecting workers against job losses."**

[18] English and European jurisprudence is to the effect that the purpose of the foreign instruments which can be said to serve a similar purpose as our sec 197 is to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded (**Merckx and Neuhuys V Ford Motors Co Belguin SA [1996] IRLR 467 (EC)** at par 3) or, as it was put in **Francisco Hernandez Vidal SA v Gomez Perez & others**; **Sautner v Hoechst AG; Gomez Montana v Claro Sol SA and Red Nacional De Ferrocarriles Espanioles (Renfe) [1999] IRLR 132 (ECJ)** at par 22, "**the aim of Directive 77/187 is to ensure continuity of employment relationships within an economic entity, irrespective of any change of ownership."** The

purpose of section 197 has been articulated definitively by the Constitutional Court which, in NEHAWU v UCT & others at par 53, said: **"Its purpose is to protect the employment of the workers and to facilitate the sale of a business as a going concern by enabling the new employer to take over the workers as well other assets in certain circumstances."** In the last sentence of par 53 of the judgment the Constitutional Court, through Ngcobo J, said: "**In this sense, s197 has a dual purpose, it facilitates the commercial transactions while at the same time protecting the workers against job losses."**

[19] It must be noted that, when the Constitutional Court said that the purpose of sec 197 is twofold, namely, to protect the workers and to facilitate transfers of businesses, it did not mean that the facilitation of transfers lay in the new employer not having to take on the employees who had been employed by the old employer to do the work that forms part of the business that was being transferred. It seems to me that the facilitation that the Constitutional Court had in mind was that the transferee (i.e. the new employer) will not have to look for workers who would do the work nor will it have to train new recruits for work that they had not done before but will have transferred to its employ employees who have been doing the work and have experience in the work. In the result, both purposes of sec 197 as articulated by the Constitutional Court have as their common denominator the continuation of employment of the employees involved in the business that is transferred as a going concern. Accordingly, none of the two purposes of sec 197 is served or achieved by an interpretation of sec 197 that entails job losses or the termination of

the continuation of the employment of the employees who moved with the work when the first outsourcing occurred. In terms of the jurisprudence of the European Court of Justice it seems that the principle underlying Directive 77/187 is that if the business moves, the workers move with it.

[20] Viewed in this manner, the decision by the Constitutional Court to not stop at saying that the purpose of sec 197 is the protection of workers, as does the case law from the European Court of Justice but to also say that it is also the facilitation of transfers of businesses did not, in my view, say anything different in substance to what the jurisprudence of the European Court of Justice says is the purpose of the Directive 77/187, namely, that its purpose is the protection of workers rights. I say this because, when one examines what it is in sec 197 that the Constitutional Court had in mind facilitates transfers or commercial transactions, one finds that the facilitation the Constitutional Court had in mind is the one I have stated above, namely that the business transferee will not have to look for workers to do the work transferred from the transferor who may still have to be trained. The facilitation is not one that is achieved in the absence of the employees who did the work while it was with the transferor. In my view, it is against this understanding of the purposes of sec 197 as articulated by the Constitutional Court that sec 197 must be interpreted to determine its applicability or otherwise to a situation such as the present one where SAA resumes the performance of the work that it had outsourced to LGM SA or where SAA re-outsources the work or the services to another party upon termination of its Outsourcing Agreement with LGM SA.

[21] Views as to the applicability or otherwise of sec 197 to a situation such as the one that we have to grapple with in this matter are divided. There are Judges and legal commentators who take the view that sec 197 does not apply, mainly, if not solely, because they say that in such a case the transfer of the business from the first outsourcee back to the outsourcer is not effected "**by**" the old employer who would be the outsourcee but by the outsourcer who is the new employer in that transaction. They also say that when the contract or services are transferred to another party upon the termination of the contract between the original outsourcer and the first outsourcee, the transfer is not effected "by "**the old employer**" who is the outsourcee because the decision to outsource to another party is not that of the first outsourcee but that of the original outsourcer. This school of thought argues that the use of the word "**by**" in the definition of the word "**transfer**" in sec 197 to denote that the transfer is effected by the old employer was deliberate and the intention was to limit the application of 197 to those transfers which are effected by the old employer and not to extend its application further to other transfers. They argue that the drafters of sec 197 were fully aware of the European jurisprudence in this regard and the wording of other instruments whose aim is the same as the aim of sec 197 and deliberately chose to refer to transfers "**by**" the old employer when they knew that other foreign instruments did not require that a transfer of a business be one effected "**by"** the old employer.

[22] There are also those who take the view that the use of purposive interpretation ensures that sec 197 is interpreted in a manner that

renders sec 197 applicable to the situation such as the one we are dealing with here. In this regard Davis JA has already referred to Murphy AJ's judgment which supports this view. Craig Bosch in *Business Transfers and Employment Rights* in South Africa by Todd et al discusses the issue at paras 2.3.2 at 26 to par 2.4.0 at 35. He, too, expresses a view which belongs to this school of thought. Brassey, dealing with Murphy AJ's approach in this regard, is only able to express the view that Murphy AJ's examination of "**comparative European law, provides some support for the analysis**." (Commentary on the Labour Relations Act at A8-179). Murphy AJ has suggested that to achieve the purpose of sec 197 the word "**from**" must be read into the place of the word "**by"** in sec 197 to avoid the problem created by the use of the word "**by**" in the section.

[23] The most compelling case presented in support of the school of thought that says sec 197 does not apply to a situation where, upon the termination of the contract between the outsourcer and the outsourcee and the work is given to a third party was made by Wallis SC (now Mr Justice Wallis) in his address to the South African Society of Labour Lawyers ("**SASLAW**") which was subsequently published in the Industrial Law Journal. Its title is: "**Is Outsourcing In? An Ongoing Concern.**" It is to be found in (2006) 7 ILJ 1. He had previously delivered another talk on sec 197 which was titled: "**Section 197 is the Medium. What is the Message**?" which appeared in (2000) 21 ILJ 1.

[24] Although Wallis makes the best case that can be made in support of the proposition that sec 197 does not apply when, upon the

termination of the contract between the outsourcer and the outsourcee, the business is transferred to another party, I am of the view that, on balance, the contrary view, namely, that sec 197 does apply to such a situation must carry the day. The main difficulty I have with the proposition that sec 197 cannot apply to such a situation is that that proposition, if accepted, would, in my view, defeat the very purpose of sec 197. As I understand it, those who hold the view that sec 197 does not apply in this situation accept that it applies in the first outsourcing agreement between the outsourcer and the outsourcee if there is a transfer of a business as a going concern but they do not accept that, when there is a further outsourcing to another party and there is a transfer of business as a going concern, sec 197 applies at that stage. In my view this proposition is destructive of the purpose(s) of sec 197, namely, to protect workers against the loss of jobs and the facilitation of a transfer when there is a transfer of business as a going concern.

[25] The proposition is destructive of the purposes of sec 197 because an employer which wants to get rid of its employees in a certain part of its business or who wants to sell its business without the workers would be able to transfer its business by way of outsourcing to an outsourcee, in which case the contracts of employment of the employees would be automatically transferred to another employer, the outsourcee. This would be for a certain period, eg six months or a year or more. At the end of that period the outsourcer would have its business transferred back to itself without the re-transfer back to itself of the contracts of employment of its former employees - on the basis of the argument that such transfer is not effected "**by**" the old employer and,

therefore, sec 197 would not apply. If all the employer wanted to do was to get rid of those specific employees so that it can employ new ones, it would then be free to do so. The workers would no longer be its concern. They would be the concern of the outsourcee. If the employee wanted to sell the business free of the "**burden of workers"** it would be free now to sell the business without the workers.

[26] On the literal meaning of the word "**by**" in sec 197 such third party would get the business free of the "**burden**" of the workers because, although the transaction will be a transfer of a business as a going concern, it will not be a transfer that is effected "**by**" the old employer, the first outsourcee, but will be effected by the outsourcer. In other words what those who rely upon the literal meaning of the section advance is a proposition that allows A, the owner of a business, who wishes to transfer his business as a going concern to B, who does not want to have the contracts of employment of the employees transferred to him when the business is transferred, to first transfer the business or part of the business to C by way of outsourcing for a certain period where he dumps the workers and at the end of the period transfer the business as a going concern to B without the workers. The literal interpretation of sec 197 advanced on behalf of SAA will render sec 197 worthless in respect of outsourcing arrangements.

The European jurisprudence seems to suggest that a transfer of a business as a going concern or as it is put, a legal transfer may occur, in the context of the leasing of a business by one person to another. If that is true of the South African position as well and sec

197 applies to a leasing arrangement, then the use of the literal meaning of the word "**by**" in sec 197 would mean that, when A leases his business to B and there is a transfer of business as a going concern, the contracts of employment of the affected employees would be automatically transferred to B but when, at the end of that lease, the business is transferred back to A or if A at that stage sells it to C and transfers it to the latter as a going concern, sec 197 would not apply because in each of those cases the transferor would be A who in both cases would not be the old employer. Therefore, the acceptance of the literal meaning of sec 197 in regard to the word "**by**" would allow A to do the same thing that it could do prior to the enactment of sec 197, namely, transfer a business as a going concern to someone else without the workers. The difference between the position prior to the enactment of sec 197 and the position now would be that, before sec 197, A could achieve such a transfer of business without a transfer of workers in a straight deal with the person to whom he wished to transfer the business as a going concern whereas, now, A would have to first transfer the business as a going concern to someone else who is not the intended ultimate transferee by way of either a lease or an outsourcing agreement and only transfer it to the intended ultimate transferee at the end of the outsourcing agreement or at the end of the lease agreement. In this way every owner of a business who wants to sell his business without the workers will have "**a vehicle on which to load the workers and a place where to dump them**" before selling his business and transferring it as a going concern to someone else.

[27] It is argued in support of the literal meaning of sec 197 that those who argue that sec 197 applies to the situation under consideration in this case are not entitled to disregard the ordinary meaning of the word "**by**" unless to do so would lead to an absurdity or an anomaly. It is argued that they do not seek to interprete the words of the section but effectively seek to amend the section to read, as was suggested by Murphy AJ, as if in the place of the word "**by**" there was the word "**from**". It is argued that this is not permissible. If the word "**by**" cannot mean anything else other than the literal meaning advanced by those who advance its literal meaning, then I would be inclined to think that the suggestion that the word "**from**" should be read into the provision in the place of the word "**by**" would be justified. In this regard I am of the view that the rule that you do not depart from the ordinary meaning of a word in a statute unless giving that word its ordinary meaning would result in an absurdity or anomaly is a rule that falls under the literal theory of interpretation. It is not necessarily a rule of the purposive theory of statutory interpretation. On my understanding of the theory of purposive interpretation of statutes – which is the one that must be applied in the interpretation of the LRA and, therefore, sec 197, and not the literal theory of interpretation – it is permissible to depart from the ordinary meaning of a word or provision in a statute where to give the word or statutory provision its literal or ordinary meaning would clearly defeat or undermine the clear purpose of the statutory provision concerned. I propose to demonstrate this by reference to not also those relating to cases relating to the interpretation of statutes but only the construction of patent claims in patent law where purposive construction was used.

In **Kammis Ballroom Co Ltd v Zenith Investments (Torque) [1971] ALL ER 850 (HL)**, which appears to be the first case in which Lord Diplock referred in terms to purposive construction, Lord Diplock effectively read an exception into a statutory provision which was not there on there basis of purposive construction .

At 880 Lord Diplock said:

> "**A conclusion that an exception was intended by parliament, and what that exception was can only be reached by using the purposive approach. This means answering the question: what is the subject- matter of Part ll of the Landlord and Tenant Act, 1954? What object in relation to that subject matter did Parliament intend to achieve? What part in that achievement of that object was intended to be played by the prohibition in section 29(3)? Would it be inconsistent with achievement of that object if the prohibition were absolute? If so, what exception to or qualification of the prohibition is needed to make it consistent with that object?"**

At 881 he went on to say:

> "**This is the construction which has been uniformly applied by the courts to the unqualified and unequivocal words in statutes of limitation which prohibit the bringing of legal proceedings after the lapse of a specified time. The rule does not depend on the precise words of prohibition which are used. They vary from statute to statute. In themselves they contain no indication that any exception to the prohibition was intended at all. It is thus impossible to arrive at the terms of the relevant**

> **exception by the literal approach. This can be done only by the purposive approach, viz, imputing to Parliament an intention not to impose a prohibition inconsistent with the objects which the statute was designed to achieve, though the draftsman has omitted to incorporate in express words any reference to that intention**."

[28] In the well-known case of **Catnic Components Limited & Another v Hill & Smith Limited [1982] R.P.C. 183 (HL**), which is the case that, as far as I know, has popularised the doctrine of purposive construction more than any other case, the House of Lords, through Lord Diplock, read into a patent claim that required a "**second rigid support member**" to "**extend <u>vertically</u> from or near the rear edge of the first horizontal plate**" words the effect of which was that even if the support member did not extend vertically but inclined about 8° off vertical that would be taken as falling with the words "**extending vertically**" in the claim because the patentee's purpose could not have been to exclude a support member that was inclined 8° off vertical. That was done in that case because, as Lord Diplock put it, "[**n]o plausible reason [had] been advanced why any rational patentee should [have] wanted to place so narrow a limitation on his invention. On the contrary, to do so would render his monopoly for practical purposes worthless, since any imitator could avoid it and take all the benefit of the invention by the simple expedient of positioning the back plate a degree or two from exact vertical**." If one were adopt the same reasoning in the present case, one would say: No plausible reason has been advanced why the drafters of the LRA should have wanted to place such limitation upon

section 197 as is contended for by those who advance a literal meaning of the provision. On the contrary, to do so would render sec 197 for all practical purposes worthless since any employer who wishes to transfer his business without the workers as a going concern could do so by dumping the workers with another party through an outsourcing or lease arrangement and thereafter transfer his business as a going concern to someone else without the workers. In **Kirin-Amgen Inc v Hoechst Marion Roussel Ltd [2005] ALL ER 169 (HL),** also a case involving the use of purposive construction in patent claims, Lord Hoffmann, writing for the House of Lords, said at par 33 in discussing purposive construction:

> "**An appreciation of that purpose is part of the material which one uses to ascertain the meaning."**

[29] In **Carephone (Pty)Ltd v Marcus NO & others (1998) 19 ILJ 1425(LAC**) rationality or justifiability, though not appearing in sec 145 of the LRA as a ground of review, was read by this Court into sec 145 so as to bring it in line of the interim Constitution. In the same case the words "**subject to**" were read into sec 158 (1)(g) of the LRA to replace the word "**despite**" to bring the provisions of that section in line with the Constitution. In **Sidumo & another v Rustenburg Platinum Mines Ltd & others (2007) 28 ILJ 2005(CC)** reasonableness as a ground of review of CCMA arbitration awards was read into sec 145 in order to bring sec 145 in line with the constitutional requirement that an administrative action must be lawful, reasonable and procedurally fair. This was all in the course of an interpretation of a statute which is required

to be interpreted in accordance with the Constitution and purposively.

[30] Finally, in my view we should not adopt a construction of sec 197 that is at war with the very purposive of the section. I accept that one should be careful in this regard because a Judge is not free to encroach upon the territory of the legislature and begin to rewrite a statutory provision. However, I think it is different where the purpose of the section is clear and certain, as is the case here, particularly after the purposes of sec 197 were definitively pronounced upon by the Constitutional Court in NEHAWU v UCT as stated above. I think that in such a case, if it appears that to give a word its ordinary meaning would defeat the purpose of the statutory provision in question, then the word should not be given its ordinary meaning and should be given one that gives effect to the purpose of the statutory provision and, if there is no other meaning for the word, the Court should read into the statutory provision a word that will give effect to the purpose of the statutory provision and make sense of the statutory provision. There is no licence for the Courts to begin to legislate under the guise of interpretation. In this regard it is apposite to recall Lord Diplock's words in **Naviera SA v Salen Rederna AB [1984] 3 ALL ER 229** where, dealing with a case involving the interpretation of a commercial contract, he said:

> "…**if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense."**

It is difficult for me to see what purpose sec 197 can be said to aim to achieve if the protection which it gives to workers against job losses is as limited as it has to be conceded would be the case if the word "**by"** in the section was read to mean what it normally means. In such a case the protection of workers would be limited to the first outsourcing and nothing more. It may give protection in the case of those outsourcing situations where employers are not trying to get rid of the workers but those are not the situations for which workers need the sec 197 type of protection the most. The situations in which the workers need protection the most is where they dealing with the employers who are trying to get rid of them. That is where sec 197 counts. However, that is where it would not apply if the school of thought that propounds a Literal meaning were to prevail.

[31] In these circumstances I am of the view that sec 197 is capable of application in a situation such as the one under consideration. Whether it indeed applied in this case will depend upon what happened on the 1st October 2007. The application was launched before that date and the Court a quo dealt with the matter on the basis of papers which did not cover the events of the 1st October 2007. Although during the hearing of this appeal I had indicated to the parties that it could be helpful if they informed us in writing through the Registrar what happened on the 1st October 2007 and they have supplied us with letters dealing with the situation, upon reflection I think that we cannot take such information into account as we must decide the appeal on the basis of the same information that the Court a quo had before it.

[32] In the result, for these reasons too, I would allow the appeal in part and dismiss it in part and grant the order proposed in Davis JA's judgment.

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ZONDO JP

DAVIS JA:

Introduction

[33] This is an appeal against a decision of Basson J in which she dismissed an urgent application brought by appellant and its members against first respondent together with second and third respondents.

[34] The application sought to compel respondents to comply with provisions of section 197 of the Labour Relations Act 66 of 1995 ('the LRA') as a result of first respondent's early termination of an outsourcing agreement with second and third respondents (LGM) under which the latter had rendered a variety of services to first respondent. The relief sought was of the following nature:

1. A declaration by the court *a quo* that the termination of the outsourcing agreement or SAA's resumption of part or all of the undertaking or services previously conducted by LGM had gave rise to a section 197 transfer of those operations to SAA.

2. Alternatively, AUSA sought a declaration that if SAA awarded specific tenders to third parties, such an award would constitute a transfer of part or all of the undertaking or services previously conducted by LGM for SAA to the new contractor.
3. A declaration by the court that if the employment contracts of the individual appellants were not transferred in terms of the provisions of section 197, then if they were dismissed by LGM in consequence of the transfer of part or all of the undertaking or services previously provided by LGM to SAA, resulting from SAA's termination of the outsourcing agreement with LGM, such dismissals would be automatically unfair and in breach of section 187(1)(g) of the LRA, AUSA likewise sought to interdict such dismissals on the basis of such a declaration.
4. AUSA sought an interdict restraining SAA from providing any of the services previously provided to it by LGM, by itself or permitting a third party to provide them unless the individual appellants were transferred to the new provider of those services, be it SAA itself, or a third party.

[35] The court *a quo* dismissed this application in its entirety together with costs. It is against this order that appellant has appealed to this court.

The factual matrix

[36] In March 2000, SAA concluded a collective agreement with first appellant and two other unions in terms of which its infrastructure and support services departments were transferred to LGM.

Shortly thereafter, a further agreement for the outsourcing of the infrastructure and support services was concluded between LGM and SAA. The agreement provided *inter alia* that LGM would perform these services until 2010 with the first respondent obtaining an option to renew for a further five years, and that the contract of effected employees would be transferred to LGM pursuant to section 197 of the LRA.

[37] Briefly the following terms of this agreement were material:

I. The agreement took effect 1 April 2000 and would expire at midnight on 31 March 2010.

II. SAA retained an option of renewing their agreement for a further five years from the date of the initial expiry of the agreement.

III. Assets and inventory of SAA as pertaining to the transferred services were sold to LGM and, on termination of the outsourcing agreement, SAA would be entitled to repurchase the assets and inventory of LGM dedicated to providing the services under the agreement.

IV. LGM and SAA agreed that transferred employees were deemed to have been employed by LGM in terms of section 197(1)(a) and 197(2) (a) of LRA.

V. LGM was afforded the access which was reasonably required to render the services to use the office space, workshops, the airport apron, computers and the network of SAA at all designated airports.

VI. Of critical importance to the present dispute was a provision in the agreement (clause 27) that SAA retained a

right to transfer certain services and all functions to itself or to a third party and to obtain transfer or assignment of LGM to SAA of all third party contracts. The complete clause reads thus:

" 27. EFFECT OF TERMINATION

27.1 On the termination date-

27.1.1 should SAA desire LGM SA's assistance in transferring certain services and/or functions back to SAA. SAA's affiliates or to a third party, SAA and LGM SA may agree in writing upon a period of transfer assistance ending at termination date. LGM SA shall furthermore, during such transfer assistance period, provide SAA with reasonable access to the services, Fixed Assets and inventory of LGM SA provided that such agreement is reached in writing and provided that any such access does not and will not interfere with LGM SA ability to provide the services or transfer assistance and that the third parties and SAA affiliates permitted such access comply with LGM SA security and confidentiality requirements, including execution of an appropriate confidentiality agreement;

27.1.2 SAA shall be entitled to purchase, at fair market value, all fixed assts and inventory belonging to LGM SA and dedicated only to providing the services in terms of this agreement;

27.1.3 SAA shall be entitle to obtain transfer or assignment from LGM SA of all third party contracts

27.2 Upon termination of this agreement both parties shall be obliged to surrender any information pertaining to the scope of work belonging to the other party."

[38] In August 2007 SAA generated advertisements calling for tenders for various services performed by LGM in terms of this outsourcing agreement. There was some suggestion by SAA that it intended to extend the outsourcing agreement until January 2008, but LGM declined to accept this offer. In a letter of 17 August 2007, SAA called on LGM to develop and implement the hand over plan in terms of the outsourcing agreement. It also adopted the stance that it had no obligation towards the staff of LGM who had been engaged in the services provided pursuant to the agreement.

[39] The 62 individual applicants were all either transferred in terms of the agreement in 2002 or subsequently employed by LGM, and were all engaged in the services provided by LGM in terms of the agreement.

[40] During 2007 there was change of ownership of LGM. On this basis, SAA considered that it was entitled to cancel the agreement in terms of clause 26.1.2 thereof, which included change of control as a ground for cancellation .On 29 June 2007 it duly elected to so cancel the agreement, thereby invoking the provisions of clause 27.

[41] SAA then advertised tenders for the various services which had been performed by LGM. Of particular importance was the following provision of the tender agreement:

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

[42] The closing date for the tenders was 30 September 2007 but, at the hearing before the court *a quo,* SAA stated that it only anticipated completion of the tender process by the middle of November 2007.

[43] Although not stated in the papers before the court *a quo,* counsel for SAA informed the court at the hearing that a temporary service provider have been appointed to provide the relevant services pending the outcome of the tender process. On 7 September 2007, first respondent and each of the individual appellants received a letter from LGM advising of possible retrenchments in the light of SAA's cancellation on the agreement of 30 June 2007, to take effect as of 30 September 2007.

[44] At a meeting between representatives of first appellant and LGM on 10 September 2007, the management of LGM informed these

representatives that the last working day for LGM would be 30 September 2007; LGM would not render further services to SAA after that date. LGM had obtained advice from senior counsel which indicated that the current position could constitute a transfer in terms of section 197 of LRA and accordingly, LGM had applied to the CCMA for the appointment of a facilitator in terms of section 189A of the LRA.

[45] On 14 September 2007, partly in an effort to obtain certainty about the employment status of these individual appellants as from 1 October 2007, and partly to obtain a commitment from SAA to assume responsibility for the transfer of the contracts of these individual appellants, first appellant wrote to the Chief Executive Officer of SAA requesting it to confirm that the employees would be transferred back to SAA as at 1 October 2007 and that they should report for duty on that date. Initially SAA denied receipt of this letter but it finally responded on 19 September 2007, in terms whereby it indicated that it was not prepared to make any such undertaking, nor did it regard itself obliged to do so under the law.

[46] Basson J correctly framed the key question for resolution of the present dispute as follows:

"The question which arises is whether there can be a section 197 transfer between the unsuccessful outgoing contractor and the successful incoming contractor? Put differently, the question which arises is whether this 'second outsourcing' constitutes a transfer as contemplated by section 197 of the LRA." Basson J then determined the case by way of an interpretation of section 197:

> "*I am of the view that section 197 only contemplates a first generation outsourcing. In other words, where the businesses transferred by the old employer to the new employer and not the so called second generation transfers.*"

On the basis of this interpretation, the court *a quo* held that section 197 was not applicable to the present case. The learned judge then found:

> *"It is common cause that no agreement exists between SAA and LGM back to SAA. This much is clear from the facts: SAA has terminated the outsourcing contract and has made it perfectly clear that it does not want the employees of LGM. The contract also does not make provision for the scenario that once the contract is terminated, employees of LGM (the service provider) will be transferred back to SAA (the old clear that it does not want to employ the employees. There is also no indication on the papers that the services have reverted back to SAA. In light of the aforegoing I am of the view that LGM remains the employer vis-à-vis SAA".*

[47] Notwithstanding a dispute as to whether SAA's appointment of a temporary service provider which provided the relevant services pending the outcome of the tender process had changed the legal position, Basson J accepted the point made by SAA's counsel that it had already appointed an interim service provider, pending the outcome of the tender process. Thus the court stated:

> '*this court can therefore, not conclude on the facts that a transfer back to SAA has or would take place on this basis*'. Accordingly, '*it would in my view, be untenable to order*

that the workers transfer to the interim service provider only to transfer thereafter to the successful bidder'.

The appeal

[48] Two separate questions emerged for determination at the appeal. In the first place, an application was brought by first respondent in terms of section 174 (1) of the LRA for the hearing of further evidence. Secondly, appellants contended that the court *a quo* erred in its narrow interpretation of section 197 of the LRA. It is to the application under section 174 of the LRA that I first turn.

[49] Section 174 (a) of the LRA provides thus:

"*The Labour Appeal Court has the power-*

(a) on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by the Labour Appeal Court, or to remit the case to the Labour Court for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Labour Appeal Court considers necessary…"

[50] In terms of this section, SAA applied to lead the additional evidence set out in the supporting affidavit deposed to by Louisa Zondo, general legal counsel for SAA, whose evidence concerned the payment of severance pay to LGM employees on 30 November 2007 and appellant's acceptance of the termination of their contracts of employment by virtue of a retrenchment process which had been engaged in between themselves and LGM.

[51] Ms Nkosi-Thomas, who appeared on behalf of first respondent, submitted that, as a result of their actions, appellants had elected to accept the termination of their contracts of employment with LGM by way of a retrenchment process and it was therefore non-suited in the appeal. In her view, appellants could not, on the one hand, accept severance packages from LGM, thereby conceding to the fact that the latter continued to be their employer during the period subsequent to 1 October 2007, and simultaneously contend in this appeal that the contracts of employment failed to be transferred either to an interim service provider, to first respondent or to a permanent service provider duly appointed by first respondent. Accordingly, appellants had waived any rights that they may have wished to vindicate in this appeal. The evidence which first respondent wished to place before this court concerned events which occurred subsequent to the matter being heard before the court *a quo*. In terms of section 197(2) of the LRA, a new employer is *'automatically substituted in the place of the old employer'* ; in other words, upon a transfer of a business as a growing concern as contemplated in section 197(1)(a) employees are transferred by law to the new employer; Nehawu v The University of Cape Town and others 2003 (2) BCLR 154 CC at para 71. Thus, had Basson J found that the appellants were entitled to an order declaring that the determination of the outsourcing agreement between SAA and LGM , with effect from 30 September 2007 ,constituted a transfer of the undertaking of the services provided to SAA by LGM in terms of section 197 of the LRA, appellants would have been automatically transferred to a new employer in substitution of their old employer, LGM. Expressed differently, if this court decides that the court *a quo*

erred and that the order should have been granted, it would mean that the appellants would no longer be in the employ of LGM after 30 September 2007, rendering any agreement between them and, what would then be 'their non- existent' employer LGM ,irrelevant to the present dispute. For these reasons therefore, any evidence which first respondent wished to place before this court in terms of its application under section 174 of the LRA is not relevant to the present appeal and the application stands to be dismissed.

The application of section 197 of the LRA: The merits of the appeal

[52] Section 197 (1) and (2) provide as follows:

"s197 Transfer of contract of employment

(1) in this section and in section 197A-

*(a) **'business'** includes the whole or 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 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. "

The facts in this case raised the following key question relating to the meaning and scope of section 197 which required determination insofar as the merits of the appeal was concerned: does section 197 of the LRA cover so called second generation transfers? If the section can be interpreted to extend to such transfers, then the reversion to SAA of the outsourced services which had been undertaken by LGM pursuant to the agreement of March 2000 fell within the scope of this section.

[53] As noted above, the court *a quo* decided this question in the negative. In particular, Basson J relied on the following wording of section 197(1)(b) of the Act which defines the word '*transfer'* to mean '*the transfer of business from one employer to another employer as a going concern'*. Basson J concluded:

"*I am not persuaded that, in light of the expressed and unambiguous wording of section 197 (1)(b), that it would be appropriate to interpret section 197 (1) to also apply to a transfer "from" one employer to another as opposed to a transfer by the "old" employer to the "new" employer."*

Therefore, in her view, the wording of this section did not support the arguments contended for by the appellants, who thus did not stand to be protected by s197.

[54] The court *a quo* held that, in the case of LGM and SAA, the following considerations were to be applied in determining whether there was a transfer of an undertaking from LGM to SAA which would occur once the initial outsourcing agreement had been terminated:

1. There was no agreement between LGM and SAA requiring SAA to retransfer employees from LGM to SAA. SAA had made it plain it did not want LGM employees.
2. Outsourcing agreement made no provision for a reversion of LGM employees to SAA.
3. There was no indication that the services had reverted back to SAA.

[55] In support of these findings, Ms Nkosi-Thomas) submitted that ,in the definition of transfer in section 197(1)(b), the use of the words 'by one employer' as opposed to 'from one employer' to another employer indicated that section 197 required that the old employer had to play an active role in the process of transfer to the new employer. In support of this submission, she referred to an article by MJD Wallis SC 2006 (27) ILJ 1 at 13 in which the learned author writes:

> "*The use of 'by' indicates that the transferor has a positive role to play in bringing about the transfers. Its replacement*

by the word 'from' eliminates ... and reduces the transferor to a passive position to which it may not only not do anything to bring about the transfer but may very possibly … strenuously to resist it."

Thus, Wallis contends that, given that the purpose of section 197 was to balance and protect the interests of both the employee and the employer, it was reasonable for the legislature to have limited the scope of this section to those transfers where two parties decide to bring about a change in ownership of a business (as defined) by whatever means but, not to extend the section to remote situations as would occur in the case of a second generation transfer. The word "by" holds a number of different meanings including 'indicating the medium, means, instrumental or agency, of circumstance, condition, manner, cause, reason' . Shorter Oxford English Dictionary Volume 1.

[56] An examination of the multiple meanings of the word "by" indicates that the confident assertion that the literal interpretation of this section precludes any possible extension to second generation transfers is not justified linguistically. The wording of the section does not necessarily and inevitably support the exclusive connotation that the transferor has to play an immediate, positive role in bringing about the transfer.

[57] By contrast to the approach adopted by Wallis, Murphy AJ (as he then was) in Cosawu v Zikhethele Trade (Pty) Ltd and another (2005) 26 ILJ 1056 LC at 1066 para 29, said:

"I am persuaded that a less literal and more purposive approach is justified in the context of s 197. As stated

earlier, the section is intended to protect the employees whose security of employment and rights are in jeopardy as result of business transfers. A mechanical application of the literal meaning of the word 'by' in s197 (1)(b) would lead to the anomaly that workers transferred as part of first generation contracting-out who is protected whereas those of the second generation scheme would not be, when both are equally needful and deserving of the protection. The possibility of abuse and circumvention of the statutory protections by unscrupulous employees is easy to imagine. As in this case, the danger exists that the employees may not only lose their continuity of their employment but also their severance benefits, for the reason that the old employer having lost its business to the new employer lacks the means to pay its debts."

[58] The approach adopted by Murphy AJ holds the compelling attraction that it serves to prevent the kind of abuse that would subvert the very purpose of the section. The potential abuse of this section by an application of the narrow interpretation adopted by Basson J in the court *a quo* can be illustrated thus: A Company wishes to rid itself of a group of employees who form a discrete business unit within A. It enters into an agreement with B Company whereby the particular business unit which forms a part of A's overall business is transferred as a going concern to B. In short, B will now ensure performance of the operations of that unit. This transaction between A and B can be classified as an outsourcing agreement. The agreement includes the right of A to cancel the outsourcing agreement within a year which would

thereby obligate B to transfer the business back to A. If the literal interpretation adopted by Basson J were to be applied, the entire protection of section 197 afforded to employees in the unit could be circumvented in that, once the business is retransferred to A, the latter would have no obligations to any of the employees pursuant to section 197 of LRA. This result would surely be subversive of the very purpose of section 197 and can only be sustained if the wording of the section could plausibly bear no other interpretation. As noted earlier in this judgment , the wording of the section cannot be construed only to bear the meaning contended for by SAA.

[59] In the present case, the agreement between SAA and LGM provided that SAA could cancel the agreement. Once that right had been invoked, the business would be transferred from LGM to a third party or back to SAA. In short, the old employer, being LGM, would be required to transfer that business to a new employer either SAA or to a third party. There is nothing in the wording of section 197 which inherently prevents its application to such a case.

[60] Wallis at 10 says *'[w]hat the section says is that that the old employer is a positive actor in the process. This is not what occurs when an institution has concluded a contract for the provision of cleaning services and at the expiry puts it out to tender and the existing contractor loses the tender. In those circumstances the role and function of the old employer is to strive to keep the contract not to transfer all or any part of the business to someone else.'* Sophistry aside, there is no compelling reason to conclude,

on the wording of section 197(1)(b) , that the new employer(i.e. the initial transferee) has not transferred the business to a third party or to the initial transferor. In other words the initial transferee became the employer after the initial transfer. Pursuant to the contract which caused the initial transfer, the existing employer is now obliged to transfer the business to a party which will now become the new employer. Hence the second generation transfer falls within the scope of the definition.

[61] Assume however, that the word "by" must be interpreted to connote a positive action on the part of the old employer (in this context LGM) as contended for by respondent. On the particular facts of this case, the requisite positive action was taken when the initial agreement was concluded between SAA and LGM which afforded SAA rights to compel LGM to act by means of a transfer of the business back to SAA or to a third party.

[62] In my view, the approach to section 197 adopted by the Court *a quo* is neither inexorably congruent with the literal wording of the section nor with the facts of the present dispute Hence , the conclusion it reached cannot be supported. Further, the application of the provisions of section 197 is clearly incongruent with the purpose of this section as already outlined. The interpretation of section 197(1)(b) as proposed does no violence to the wording of the section and is manifestly congruent with the purpose of section 197 read as a whole.

[63] Accordingly, I find that the court *a quo* erred in the approach that it adopted to section 197. On a purposive construction, section 197

covers the situation, whereby, after SAA cancelled the initial outsourcing agreement, it invoked clause 27 of the agreement to compel LGM to implement the 'handover plan'. The application should not have been dismissed in its entirety. Some declaratory order should have been granted..

[64] Appellants sought a detailed order that would specify the necessary steps to be taken in terms of section 197 to enforce employee rights. However, to do so would require knowledge of events that took place after October 2007, none of which was contained in the evidence placed before this court. In the circumstances this court would be ill advised to frame a detailed order which would have legal consequences unbeknown to this court, given the factual matrix placed before it. For this reason, the order granted is designed to settle the legal dispute between the parties and provide them with a framework within which to arrange their legal relationships.

[65] For these reasons the following order is made:

1. The appeal is upheld to the extent of the declaratory order in 3 below.
2. There is to be no order as to costs on appeal.
3. The order of the Court a quo is set aside and replaced with the following order:

' (a) The application for an interdict is dismissed.

(b) The application for a declaratory order is granted only to the extent of the declaratory order in (i) below.

(i) It is hereby declared that sec 197 of the Labour Relations Act, 1995 (Act 66 of 1995) is capable of application when, at the end of the contract between SAA and LGM SA, the services that were provided by LGM SA to SAA are transferred to SAA or are contracted out by SAA to another party.

(ii) There is to be no order as to costs."

_____

DAVIS JA

I agree

_____

ZONDO JP

I agree

_____

LEEUW JA

Appearances

For the appellant	**:**	**Adv R Lagrange & Adv H Van de Riet**
Instructed by	**:**	**Ruth Edmonds Attorneys**
For the respondents:		**L Nkosi-Thomas**
Instructed by	**:**	**Nkaiseng Cheina Baba Pienaar & Swart Inc;**
		Cheadle Thompson & Haysom Inc; Solidarity Union; Allan & 204 Others
Date of judgment	**:**	**9 October 2009**