REPUBLIC OF SOUTH AFRICA

Reportable

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA58/2014

In the matter between:

TMS GROUP INDUSTRIAL SERVICES

(PTY) LTD T/A VERICON **Appellant**

and

UNITRANS SUPPLY CHAIN SOLUTIONS (PTY) LTD **First Respondent**

UNITRANS HOUSEHOLD GOODS

LOGISTICS (PTY) LTD **Second Respondent**

NAMPACK GLASS (PTY) LTD **Third Respondent**

AFFECTED EMPLOYEES LISTED IN ("A")

TO THE NOTICE OF MOTION **Fourth to Further Respondents**

Heard: **24 June 2014**

Delivered: **06 August 2014**

Summary: Transfer in terms of s197 of the LRA- Employer entering into warehousing agreement with new transferee after termination of initial warehousing agreement with old transferee. New transferee carrying on the same warehousing activity previously conducted by former transferee, using

transferor's computer systems and other equipment . New transferee performing the services on the premises of transferor. Evidence justifying conclusion that there was a transfer of a business as a going concern from the old employer to a new employer. Court *a quo*'s judgment upheld. Appeal dismissed with costs.

Coram: Waglay JP, Tlaletsi DJP and Davis JA

JUDGMENT

DAVIS JA

Introduction

[1] This is an appeal against a judgment of Van Niekerk J sitting in the court *a quo*. The learned judge held that the termination of a warehousing agreement between first and third respondent and the conclusion of an agreement for the provision of similar services between third respondent and appellant constituted a transfer of an undertaking as contemplated in s 197 of the Labour Relations Act 66 of 1995 (LRA). Pursuant to this finding, the court *a quo* held that the employment contracts of fourth and further respondents, who were employed by second respondent, transferred automatically to appellant with effect from the date of transfer, being 1 February 2014. With the leave of the court *a quo*, appellant has appealed this decision to this Court.

The facts

[2] First respondent conducts the business of providing supply chain solutions for clients. Mr van Esch, in an affidavit on behalf of first respondent, describes this business as, in effect, the management of the "end to end" movements of goods. This entails, *inter alia*, the following:

1. Taking receipt of client's products;

2. checking the packaging to ensure quality control;

3. ensuring that faulty products are returned to the production line;

4. performing production counts and stock takes;

5. storing and stockholding of products and performing stock integrity management functions.

6. maintaining goods in a state of readiness for despatch to customers of the client;

7. identifying, repairing and/or replacing damaged or faulty packaging;

8. coordinating and scheduling the despatch function, to ensure efficient distribution of product locally and across our borders utilising available resources;

9. engaging with third party transport providers to ensure sufficient supply of vehicle for planned deliveries;

10. coordinating arrangements for urgent and non-scheduled deliveries with various stakeholders/third parties.

11. managing and planning the process of despatch by preparing appropriate documentation and facilitating the loading of products on to despatch trucks;

12. compiling and maintaining records of South African revenue services supporting documentation for cross border deliveries;

13. planning, coordinating and facilitating inter-facility transfers of products both locally and to national infrastructure;

14. coordinating with customer for delivery of the product;

15. managing return of used and/or faulty products;

16. monitoring and reporting on service levels of third party transportation provider;

17. proof of delivery documentation conciliation, reporting and follow up;

18. secure storage / retention of relevant documents on behalf of Nampak;

19. material handling equipment inspection and coordination of third party repairs;

20. accident and incident investigation.

[3] Third respondent conducts a business as a manufacturer of a wide range of glass products. These glass products are stored on site in warehouses to await dispatch to the customers of third respondent. In 2007, third respondent changed its method of business by outsourcing the warehousing service. To this effect, on 15 April 2011; first and third respondents concluded a warehousing agreement which commenced on 1 February 2011 and was terminated by the effuxion of time on 31 January 2014.

[4] The staff, who were employed to discharge first respondent's obligations under the warehousing agreement, from May 2011 were employed by second respondent. In his answering affidavit Mr van Esch described second respondent as a wholly owned subsidiary of first respondent, forming part of a specialised goods business unit within the first respondent; that is a business unit which specialised in providing management warehousing services to clients.

[5] Mr van Esch continues:

> 'I reiterate that the affected employees worked exclusively on a Nampak contract and were not assigned to other contracts held by the first or second applicant. This is not a situation where a flexible temporary labour is provided by a labour broker…the second applicant was an entity listed on invoices provided by Nampak for work in terms of the warehousing agreement as to the Second

> Applicant Nampak Warehousing Agreement. This was purely an accounting function within a Unitrans Group and had no actual impact on the contract itself.'

[6] With the termination of the agreement between first and third respondents by the effluxion of time on 31 January 2014, third respondent entered into a relationship with the appellant which commenced providing services to third respondent on 1 February 2014. These services related to warehousing and distribution.

[7] I have employed the term 'relationship' to describe the arrangements between appellant and third respondent for, as van Niekerk J observed in the court *a quo*, "appellant did not take the court into its confidence by disclosing the terms of its contract with third respondent not did it provide any significant information as to the factual circumstances as to how this relationship was to proceed. In a supplementary affidavit deposed to by Mr Sarel Greyvenstein on behalf of appellant, it was averred that 'the first and second respondents (appellant and third respondent in this appeal) commenced with discussing and negotiating terms and conditions related to such services and agreed verbally for certain warehouse services to be rendered by the Second Respondent to the First Respondent. A number of material terms and conditions, including, but not limited to pricing and costs have not yet been agreed to between the First and Second Respondents resulting in a written agreement not having yet been concluded". I shall return to the nature of the relationship between appellant and third respondent.

[8] In the initial answering affidavit deposed to on behalf of the appellant by Mr Basson, appellant claims that when it began to perform services on behalf of third respondent it did not take over "in any manner, whatsoever, any person previously employed by the Applicants or the First Respondent nor any assets whether fixed, movable, corporeal or incorporeal, goodwill or intellectual property from neither the Applicants or the First Respondent". Hence it contends there is an inadequate evidential basis for the finding that s 197 of the LRA is applicable to it.

The court *a quo*

[9] In his judgment, van Niekerk J found, notwithstanding the paucity of information provided to the court by appellant, with regard to its relationship with third respondent, the only reasonable inference to draw was that the services rendered by appellant and the assets used in the performance of these services were substantially the same as those which had been utilised by the first respondent in the performance of its obligations until the termination of its contract with third respondent on 31 January 2014. The services that the appellant was contracted to perform could only have been performed at the production facility of third respondent, at the same site and within the same premises as first respondent had previously discharged its obligations under its contract with third respondent. Absent any averment to the contrary, it was also reasonable to conclude that appellant would make use of the same equipment and IT systems that had been employed by first respondent, including forklifts, furniture and a computer system that was driven by the software of third respondent, enabling the movement of stock to be tracked. All of the assets were and remained the property of third respondent and had been employed by the first respondent and, in all probability, by the appellant in the discharge of its obligations to third respondent.

[10] On this basis van Niekerk J concluded:

> 'The warehousing service provided by the first applicant to Nampak constituted an economic entity, or, put another way, an organized grouping of resources. This comprises, at least, the contractual right to perform the services, the assets owned by Nampak but used by the affected employees, the specific activities, performed by the affected employees and the employees themselves. This economic entity constitutes a service for the purposes of s 197 (1).'

[11] Van Niekerk J went further to hold that, to the extent that a contractual right to provide warehousing services now vested in appellant, the very same assets, which were used to provide the same services by first respondent to third

respondent were now employed by the appellant; hence the infrastructure that was used to discharge the obligations of appellant passed from first respondent, upon the assumption of its obligations pursuant to the contract to third respondent and upon the conclusion of the initial contract. They were then made over to appellant after appellant had entered into its relationship with third respondent.

The appeal

[12] Mr Kennedy, on behalf of appellant, relied heavily for his main submission that no business had been transferred within the meaning of s 197 of the LRA upon the decision in *Aviation Union of South Africa and Another v SA Airways (Pty) Ltd and Others*:[1]

> 'For a transfer to be established there must be components of the original business which are transferred onto a third party. These may be in a form of assets or the taking over of workers who are assigned to provide the service.'

[13] On the facts of this case, Mr Kennedy further argued that, while appellant accepted that it concluded an agreement with third respondent concerning a provision of warehousing and auditing services and that it commenced providing these services with effect from 12 February 2014, no written agreement had been entered into between the parties. All material terms relating to pricing and costing had not yet been agreed and indeed the negotiations concerning these terms had been suspended as a result of the litigation which had given rise to this appeal.

[14] As a final argument, Mr Kennedy contended that while first respondent had been a party to a contract to provide services to third respondent, second respondent alone was the employer of fourth and further respondents; hence s 197 could not apply even if a business was transferred from first respondent to appellant.

[1] [2012] 3 BLLR 211 (CC) at para 48.

[15] To bolster his argument that no transfer had been undertaken Mr Kennedy relied on the case of *Betts v Brintel Helicopters Limited* [1997] ICR 792 (CA). In this case plaintiffs were employed by a company providing helicopter services from three mainland bases in terms of contracts with an oil company to transfer men and goods to and from oil rigs to the North Sea from its base in Beccles. When these contracts expired on 30 June 1995, the 'Beccles contract' was awarded to another contractor, which did not take over any of the existing staff nor equipment and operated from a different helicopter base. The court *a quo*, granted a declaration that the plaintiffs became employees of the second contractor on the ground that there had been a transfer of an undertaking for the purpose of the 1981 Regulations made by the Secretary of State under s 2 of the European Community Act of 1972. The court found that the second contractor continued to perform the same services as the first contractor had performed under the 'Beccles contract'.

[16] On appeal this decision was reversed. The Court of Appeal held that the undertaking comprised a stable economic entity and not merely the performance of a service or activity. The court held that the decisive criterion for determining that there had been a transfer of an undertaking was that the economic entity retained its identity in the hands of the transferee. There could be no transfer on the termination of one fixed term contract for services and the commencement of another contract to provide essentially similar services, unless there was a concomitant transfer of significant assets or the taking over by the new employer of a major part of the work force. The Court noted that the first contractor's operation constituted an 'undertaking' which comprised of helicopters, infrastructure, staff and a contractual right to land on oil rigs and the use of these facilities, even if the right to land on the oil rigs had been transferred to the second contractor, or the transfer of only a limited part of the original undertaking did not amount to the transfer of an undertaking. The undertaking, in its entirety, retained its identity in the hands of the second contractor; hence there had been no transfer of an undertaking for the purposes of the Regulations.

[17] On the strength of this decision, Mr Kennedy submitted that the mere fact that the service provided by the old and new contractors could be considered to be similar, on its own and without more did not justify the conclusion that there had been a transfer of an economic entity pursuant to s197 of the LRA.

[18] In further support for this argument, he referred to *National Education Health and Allied Workers Union v University of Cape Town and Others*:[2]

> '…in deciding whether a business had been transferred as a going concern regard must be had to the substance and not the form of the transaction. A number of factors will be relevant to the question whether a transfer of a business as a going concern has occurred, such as the transfer or otherwise of assets both tangible and intangible, whether or not workers are taken over by the new employer, whether customers are transferred and whether or not the same business is being carried on by the new employer. What must be stressed is that this list of factors is not exhaustive and that none of them is decisive individually. They must all be considered in the overall assessment and therefore should not be considered in isolation.'

[19] Applying these *dicta* to the facts of the present dispute, Mr Kennedy submitted that the appellant had denied taking over, in any manner whatsoever, any assets of a fixed, movable corporeal or incorporeal, nature, goodwill or intellectual property from either first or third respondent. It had asserted that it "engaged entirely with its own resources" to perform the services which it rendered to third respondent. No assets "whether tangible or intangible machinery and implement, computers and computer networks" had been taken over from either first or third respondent and it had no intention of so doing.

[20] In short, appellant's case was that it had simply concluded an agreement for the provision of services with third respondent. This was insufficient to trigger off the consequences of s 197 of the LRA. In distinguishing between a business and the provisions of a service, the Constitutional Court in *Aviation Union SA* had said:

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[2] 2003 (2) BCLR 154 (CC) at para 56.

> 'It must be emphasised that what is capable of being transferred is the business that supplies service and not the service itself. Were it to be otherwise, a termination of a service contract by one party and its subsequent appointment of another service provider would constitute a transfer within the contemplation of the section that is not what the section was designed to achieve as apparent from its scheme, historical context and its purpose.'[3]

I turn to evaluate this set of primary submissions made on behalf of appellant.

Evaluation

[21] Our courts have been influenced by and have had regular regard to European law's Business Transfers Directive (2001/2003/EC) and have employed the consequent jurisprudence in the interpretation of s 197 of the LRA. See for example *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and Others*: (decision of the LAC: 29 May 2014).

[22] In European law, a change in service provision can give rise to a transfer of an undertaking. The following summary from Wynn-Evans *The Law of TUPE Transfers* (2013) at 60-61 is particularly instructive with regard to a service provision change ('SPC'):

> 'An SPC occurs on a change (other than on a one-off or short term basis or in relation to the supply of goods) to the identity of the person who has the conduct of activities to which an organised grouping of employees has principally been dedicated for a particular client. According to the 2009 Guidance SPCs 'concern relationships between contractors and the clients who hire their services'. The Consultation Response indicated that the term describes situations where a contract to provide a business service to a client is let, re-let or ended by bringing it in house'.

For there to be an SPC certain other requirements must be satisfied-first, there must be an organised group of employees principally dedicated to that contract or activity prior to the transfer for there to be an SPC and, second, the contract

[3] *Aviation Union SA* at para 52.

award must be on an ongoing rather than on a one-off and short-term basis and not relate to the supply of goods. This additional and alternative concept of a relevant transfer was introduced with the objective of ensuring clarity in the application of the transfer legislation to situation such as outsourcing, in-housing, and the rendering of contracts from one contractor to another.

[23] In *Metropolitan Resources Ltd v Churchill Dulwich Ltd (in liquidation) and Others,*[4] the purpose of the SPC regulations was further described thus:

> 'To remove or at least alleviate the uncertainties and difficulties created, in a variety of familiar commercial settings, by the need under TUPE 1981 to establish the transfer of a stable economic entity which retained its identity in the hands of the alleged transferee, particularly in the case of the labour intensive operation.'

[24] In summary, the SPC regulations, seek to address the problem of outsourcing. Thus these regulations cover the case where an activity is not carried out by A on its own behalf but is carried out instead by B on behalf of A. The activity which is carried out then ceases to be carried out by B on behalf of A and is then carried out by C, the new contractor on behalf of A.

[25] The scope of these provisions is well illustrated in the decision in *Carlito Abler v Sodhexo MN Catering Gesellshaft GmbH.*[5] In this case, a hospital had appointed a service provider to provide catering services to its patients and its staff. This service was to be provided by using the hospital's canteen premises and equipment. The termination of the old service provider and the appointment of a new service provider was held to constitute a transfer of the business as a going concern and the Transfers Directive was held to be applicable. Of particular relevance to the present dispute is the following passage from the judgment of the Court:

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[4] [2009] IRLR 190 (EAT) at para 27.
[5] [2004] IRLR 168 (ECJ).

> 'The national court, in assessing the facts characterizing the transaction in question, must take into account the type of undertaking or business concerned. It follows that the degree of importance to be attached to each criterion for determining whether or not there has been a transfer within the meaning of Directive 77/187 will necessarily vary according to the activity carried on, or indeed the production or operating methods employed in the relevant undertaking, business or part of a business (*Süzen*, paragraph 18, and *Hidalgo*, cited above, paragraph 31).
>
> Catering cannot be regarded as an activity based essentially on manpower since it requires a significant amount of equipment. In the main proceedings, as the Commission points out, the tangible assets needed for the activity in question – namely, the premises, water and energy and small and large equipment (inter alia the appliances needed for preparing the meals and the dishwashers) – were taken over by Sodexho. Moreover, a defining feature of the situation at issue in the main proceedings is the express and fundamental obligation to prepare the meals in the hospital kitchen and thus to take over those tangible assets. The transfer of the premises and the equipment provided by the hospital, which is indispensable for the preparation and distribution of meals to the hospital patients and staff is sufficient, in the circumstances, to make this a transfer of an economic entity. It is moreover clear that, given their captive status, the new contractor necessarily took on most of the customers of its predecessor.'[6] (my emphasis)

[26] In my view, the approach adopted by the European Court of Justice in *Sodhexo*, *supra*, accords with the approach which has been adopted to s 197 by the Constitutional Court, both in *Aviation Union SA*, *supra* and in its earlier decision of *National Education Health and Allied Workers Union v University of Cape Town and Others*:[7]

> '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

[6] *Sodhexo* at para 35-36.
[7] 2003 (3) SA 1 (CC) at para 56.

> 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 employee, whether customers are transferred and whether or not the same business is being carried on by the new employer. What must be stressed is that this list of factors is not exhaustive and that none of them is decisive individually.' See also *Aviation Union of SA*, *supra* at para 50-51

[27] The indicated approach is thus not to apply s 197 section in a literal or formalistic fashion but rather to enquire into the substance of the transaction in question. For this reason, Yacoob J in *Aviation Union of SA*, *supra* dismissed an argument which in the present case proved to be one of the major points pressed by Mr Kennedy on behalf of the appellant, namely that appellant had not taken over any of the erstwhile employees. To this Yacoob J said:

> 'If all the employees involved in the transferred business were indeed transferred to the new employer, the s 197 inquiry would become irrelevant. It only has application where, on a proper construction of the transaction in issue, the business is transferred as a going concern without the concomitant transfer of employees. The evaluation whether s 197 applies to a particular transaction will ordinarily arise where it is contended that the business has been transferred as a going concern but that, contrary to the provisions of s 197, the employees involved in the business have not been transferred.'[8] See also the judgment of this Court in *City Power (Pty) Ltd, supra* at para 25.

[28] Mr Kennedy relied on an article by Malcolm Wallis ("It's not Bye-Bye to By: Some reflections on s 197 of the LRA" 2013 (34) ILJ 779) in support of his submission that there had been no transfer from third respondent to appellant; that is a transfer from third respondent acting as "an old employer" to appellant as "new employer" as had occurred in *Aviation Union of SA*, *supra*. In this connection Wallis writes as follows:

[8] *Aviation Union of SA* at para 112.

> 'I venture to suggest the majority of, instances the new tender will be let in advance of the expiry of the old and, if a new contractor is appointed, the transition from one to the other will be relatively seamless.
>
> Whilst the principal is the agency by which that occurs, the principal is not the employer of the affected workers and that employer (the old employer for the purposes of s 197) had not affected any transfer. All that they can do is withdraw from the scene. In those circumstances the position remains that the transfer has not been a transfer of the old employer. The principal is the party that causes the transfer of the business not the old employer. The judgment of the CC not only does not alter that, it reinforced it. That conclusion should not be obscured by the outcome of the litigation, which was driven by the peculiar facts of that case.' at 796 -797.

[29] Yacoob J in *Aviation Union of SA, supra* at para 103-104 made it perfectly clear that the application of s 197 of the LRA was not dependent upon a static conception of the concepts of "old employer" and "new employer". Thus, in a case where transfer 1 is by A to B, A is the old employer and B is the new employer. If transfer 2 takes place from B to C, B is no longer the new employer but the old employer and C becomes the new employer. As Yacoob J said: 'the true enquiry is whether there has been a transfer of the business as a going concern by the old employer to the new employer. That evaluation is complex enough without it being burdened with questions about the "generation of outsourcing". at para 105

[30] In this case, the service which was provided was that of warehousing. It was initially provided to third respondent by first respondent. As in the case of *Sodhexo*, *supra,* the warehouse operation services constituted a discrete business. At the date of the inception of its agreement with third respondent, appellant assumed the right to use third respondent's assets and infrastructure in order to continue to provide the same service to third respondent as it had previously been provided by first respondent. As Mr van Esch said in his answering affidavit, the warehouse services, which were presently performed by

the appellant can only be performed at the production facility of third respondent. Thus, the services are "performed at the very same site and fixed premises as the services that were performed by Unitrans in terms of the Warehousing agreement." Appellant was required to make use of the same equipment and IT systems that were previously employed by first respondent including forklifts, computers, printers, a computer system as well as other assets such as furniture.

[31] This uncontested evidence provided the basis by which to determine whether there has been a transfer of business as a going concern by an old employer to a new employer. The concept of a going concern is not a novel concept within South African law. For example, s 11(1)(e) of the Value Added Tax Act of 1981 refers to an enterprise … "which is disposed as a going concern". The term "going concern" is well known in comparative value added tax jurisprudence. The New Zealand High Court, in interpreting the equivalent concept in New Zealand legislation, which legislation formed the basis of the South African Value Added Tax Act, said the following about the meaning of going concern: "The activity must be one which is handed over to the transferee in such a state that it may be carried on by the transferee if he so wishes." *CIR v Smith's City Group Ltd* 1992 (14) NZTC 9,140 at 9,143.

[32] This *dictum* is particularly illuminating in the present case. The activity which was carried on by first respondent flowed from the relationship entered into between appellant and third respondent. The necessary facilities were handed over to the appellant in a state in which appellant was able to carry on the very same activity which had previously been conducted by first respondent. It performed these services on the premises of third respondent. It employed third respondent's computer systems and other equipment and carried on the same activity of warehousing described in the evidence provided by virtue of third respondent's Mr van Esch. This evidence justifies the conclusion that there was a transfer of a business as a going concern from the old employer to a new employer.

[33] This approach to s 197 is not novel. It flows from the decisions of the Constitutional Court in *Nehawu*, *supra* and *Aviation Union of SA*, *supra* as well as two recent decisions of this court, *City Power, supra* and *Hydro Color Inks (Pty) Ltd v Chemical Energy Paper Printing Work and Allied Workers Union* (2011) 32 ILJ 2617 (LAC) at paras 12-13 and para 16.

[34] Much of the argument of appellant appears to be based, at least implicitly, on a complaint regarding the policy which informs s 197. This policy seeks to protect workers in situations involving a direct transfer of a whole or a part of a business as a going concern and thus the employment of those workers by the other party, which takes over the whole or part of that business.

[35] Clearly the demarcation between those cases which are deserving of protection under s 197 and those which fall outside of the protected scheme are dependent upon a comprehensive engagement with the specific facts of each case. However, the difficulty that may arise regarding demarcation does not in itself throw the policy into doubt. It may be argued that if the new provider of a service does not employ the affected workers, the latter become redundant from the perspective of their current employer and could well be retrenched. Retrenchment, it could be further argued, then arises from the economic circumstances of the initial service provider's business. This situation is then no different from a retrenchment which occurs, whether there is a down turn in the market or a reduction in the demand for the employer's services or products. Dismissal in effect then takes place for operational requirements. As Wallis notes at 805, to extend protection to workers in this situation under the guise of 'second generation outsourcing' or any similar label distorts the statutory protection given to workers in the context of retrenchment and provides a certain limited class of workers with greater protection than those similarly situated. But the section is clear: where there is a direct transfer of a whole or part of a business as a going concern in which the employment of workers are employed, these workers are afforded particular statutory protection in terms of s 197. That is the clear policy of the legislation and must be sensibly applied, no matter whether arguments

about potential overlap of relief may potentially be raised. The challenge is to engage fully with the particular facts.

[36] In the present case, a business was transferred as a going concern: that is the business of warehousing products of third respondent. For all reasons set out in this judgment, the service provided by first applicant and now by appellant in terms of the warehousing agreement, which was entered into between first and third respondent and the same service which is now provided to third respondent by the appellant, constitutes a business sufficiently demarcated to justify the conclusion that when this business was taken over by appellant upon the conclusion of the contract by way of the effluxion of time between the first and third respondents, there was a transfer of the business as going concern. On the facts of this dispute, there is no basis by which to interfere with this conclusion reached by the court *a quo*.

[37] That leaves two further arguments for consideration. As noted, Mr Kennedy attacked the findings of the court *a quo* that first and second respondents ought, for the purposes of this application, to be treated as a single entity. Mr Kennedy submitted that the affected employees were employed by second respondent and that the operation and functioning of the second respondent was not dependent upon the functions and operations of first respondent. Thus, the affected workers could be retained and utilised within the independent operations of second respondent without any threat to their job security.

[38] That submission, however, runs counter to the evidence which was given by Mr van Esch. In his answering affidavit, he averred that second respondent was a wholly owned subsidiary of first respondent. He averred further that second respondent was not a labour broker nor did it render labour broking services to other entities within the Unitrans group. According to Mr van Esch, these employees (fourth and further respondents) worked exclusively on a contract entered into with third respondent and were not assigned to other contracts held by first or second respondent. Mr van Esch's affidavit makes it clear that it was

first respondent which was the *de facto* employee of the affected employees. Accordingly, this case fits directly within the scope of the *dictum* of the European Court of Justice in *Albron Catering BV v FNV Bondgentoten*:[9]

> 'Within a group of companies, there are two employers, one having contractual relations with the employees of that group and the other non-contractual relations with them, it is also possible to regard as a "transferor", within the meaning of Directives 2001/23, the employer responsible for the economic activity of the entity transferred which, in that capacity, establishes working relations with the staff of that entity, despite the absence of contractual relations with those staff.'

[39] The undisputed evidence clearly indicates that the real employer in this case, prior to the termination of the agreement with third respondent, was first respondent. Were Mr Kennedy's submission to be upheld, it would create a simple escape device for employers who wish to evade the legitimate scope of s 197 by the creation of a group structure in which employees were formally employed by company B, albeit that it was company A for whom they in reality performed exclusive services. Once more the finding of the court *a quo* is, in my view, unassailable.

[40] There were some suggestions, albeit made more softly by Mr Kennedy, concerning the absence of a written agreement between the appellant and third respondent. This harks back to my tentative use of the word 'relationship' between appellant and third respondent. It was common cause that appellant had performed the warehousing services previously conducted by first respondent as from 1 February 2014. Further, as noted Mr Basson, in an affidavit deposed to on behalf of appellant on 6 February 2014 'TMS has entered into an agreement with the first respondent effective 1 February 2014 to render warehousing and auditing services to the first applicant.' That averment is dispositive of the argument that the absence of a final written agreement precluded the application of s 197 of the LRA to appellant.

[9] (2011) IRLR 76 (ECJ) at para 31.

[41] In my view, the approach which was adopted by the court *a quo* is consistent both with the decisions of the Constitutional Court as analysed in this judgment and the jurisprudence of this Court, in particular *City Power*, *supra* and *Hydro Color Ink (Pty) Ltd, supra*.

[42] For all of these reasons therefore, the appeal is dismissed with costs, including the costs of two counsel.

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Davis JA

I agree

_____

Waglay JP

I agree

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Tlaletsi DJP

APPEARANCES:

FOR THE APPELLANT: Kennedy SC

Instructed by Assenmacher Attorneys

FOR THE FIRST AND SECOND	
RESPONDENTS:	Myburgh SC and Adv GA Fourie
	Instructed by Bowman Gilfillan INC