CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 2/02

NATIONAL EDUCATION HEALTH AND ALLIED WORKERS UNION	Applicant
versus	
UNIVERSITY OF CAPE TOWN	First Respondent
SUPERCARE CLEANING (PTY) LTD	Second Respondent
METRO CLEANING SERVICES CC	Third Respondent
TURFMECH CC	Fourth Respondent
ECO ENVIRONMENT (PTY) LTD	Fifth Respondent

Heard on : 17 September 2002

Decided on : 6 December 2002

JUDGMENT

NGCOBO J:

Introduction

[1] This is an application for leave to appeal against the judgment and order of the Labour Appeal Court (LAC)[1] dismissing an appeal by National Education, Health and

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[1] *NEHAWU v University of Cape Town and Others* 2002 (4) BLLR 311 (LAC).

Allied Workers Union (NEHAWU), the applicant, against the judgment and order of the Labour Court.[2] The central question in this application concerns the meaning of section 197 of the Labour Relations Act, 1995 (LRA)[3]. It is whether, in terms of section 197, upon transfer of a business as a going concern, the workers are transferred automatically with the business without a prior agreement to that effect between the transferor and transferee employer. Apart from this question, the application also raises important questions in relation to appeals from the LAC, namely, whether such appeals lie to the SCA, the procedure to be followed in appeals from the LAC to this Court and the circumstances in which this Court will hear such appeals.

Factual Background

[2] This case had its origin in a decision taken by the University of Cape Town (UCT), the first respondent, during 1997 to outsource certain of its non-core activities which were performed by members of NEHAWU. These activities were mainly cleaning, gardening and sports ground maintenance services. UCT appointed four contractors, the second to fifth respondents, to perform these services. Save for Supercare Cleaning (Pty) Ltd (Supercare), the second respondent, none of the other respondents participated in the proceedings either in the courts below or in this Court.

[2] *NEHAWU v University of Cape Town and Others* 2000 (7) BLLR 803 (LC).

[3] Quoted in para 44.

[3] Since the decision to outsource was bound to result in the loss of employment for members of NEHAWU, UCT held consultations with it on the reasons for outsourcing and the possible dismissal of workers who were performing the services to be outsourced. Despite these consultations the dispute between UCT and NEHAWU remained unresolved. UCT went ahead with the implementation of outsourcing and retrenchment. It gave notice to some two hundred and sixty-seven workers of the termination of their employment and stated that retrenchment benefits would be paid. Not content, the workers tendered to continue their employment with UCT and to commence employment with the contractors when the transfers occurred.

[4] UCT rejected this offer and invited the workers to apply for employment with the contractors instead. UCT had stipulated in its contracts with the contractors that the latter should favourably consider the employment of the workers. Most of the workers accepted the invitation and a majority of those who applied were accepted. However, many workers did not continue working for the contractors for very long. Apparently, the contractors employed them on conditions less favourable than those on which they had been employed by UCT. In particular, they were paid far less than UCT had paid them.

[5] NEHAWU subsequently brought an urgent application in the Labour Court seeking declaratory relief.[4] It sought an order declaring that: (a) the outsourcing of the non-core activities was a transfer of a part of UCT's business, trade or undertaking as

[4] Other relief not relevant to these proceedings was also claimed.

a going concern within the meaning of section 197(1)(a) of the LRA; (b) the employment contracts of the affected workers were transferred automatically to the contractors in terms of section 197(2)(a) of the LRA; and (c) the termination of the workers' employment contravened section 197(2)(a) and was of no force and effect.

The proceedings in the Labour Court

[6] Mlambo J, who heard the matter in the Labour Court, took the view that section 197 does not provide for automatic transfer of contracts of employment in the case of a transfer of a business as a going concern. He expressed the view that the contracts of employment can only be transferred without the consent of the employees if the seller and purchaser of the business agree that the contracts of employment will be transferred together with the business. Mlambo J disagreed with an earlier decision of the Labour Court in *Schutte and Others v PowerPlus Performance (Pty) Ltd and another*[5] in which Seady AJ had concluded that: (a) section 197 protects the workers against the loss of their jobs in the event of a transfer of a business in the circumstances contemplated in section 197(1)(a); and (b) the contracts of employment are transferred automatically when a business is transferred in the circumstances set out in section 197(1).

[7] But Mlambo J was confronted with the decision of the LAC in *Foodgro (A division of Leisurenet Ltd) v Keil*[6] where the LAC reached the same conclusion as

[5] 1999 (2) BLLR 169 (LC); 1999 (20) ILJ 655 (LC).

[6] 1999 (9) BLLR 875 (LAC).

Seady AJ both as to the purpose and the meaning of section 197. While expressing the view that the interpretation of section 197 in *Foodgro* is incorrect, he nevertheless considered himself bound by that decision.[7] However, on the facts he found that the outsourcing involved in this case did not amount to a transfer of a going concern as contemplated in section 197. He dismissed the application and made no order as to costs.

[8] NEHAWU appealed to the LAC. UCT and Supercare cross-appealed only on the issue of costs.

The proceedings in the LAC

[9] The majority of the LAC dismissed the appeal.[8] It took as its starting point the meaning of the phrase "going concern" in section 197 and held that a business is transferred as a going concern only if its assets, including the workforce, are transferred. As the majority put it, "to say that there can be a sale of a business as a going concern without all or most of the employees going over is to equate a bleached skeleton with a vibrant horse."[9] The transfer of a business as a going concern, the majority held, requires a prior agreement between the transferor employer and the transferee employer that the workers or a majority of them "are part and parcel of the transaction."[10] It concluded that as there had been no prior agreement between UCT

[7] *NEHAWU v University of Cape Town and Others* above n 2 at para 23.

[8] Van Dijkhorst AJA wrote the judgment of the majority (with Comrie AJA concurring). Zondo JP dissented.

[9] *NEHAWU v University of Cape Town and Others* above n 1 at para 104.

[10] Id at para 105.

and the contractors that the workforce would be transferred as part and parcel of the transaction, there was no transfer of a business as a going concern as contemplated in section 197(1)(a).

[10] It went on to consider the decision in *Foodgro*. It held that the question whether contracts of employment are transferred automatically in circumstances set out in section 197 had not been in issue in *Foodgro* and that the remarks of that court in this regard were *obiter*. It found that the decision in *Foodgro* did not prevent a finding that section 197(1) must be "interpreted so as to limit its scope to cases where the transfer follows upon an agreement between the seller and the purchaser defining the subject matter of the sale as the business as a going concern (i.e. employees included)".[11] In view of their conclusion on the law, the majority did not consider the facts. It accordingly dismissed the appeal and awarded costs both in the Labour Court and the LAC to UCT and Supercare.

[11] The minority judgment reached a contrary result on the law and also found it unnecessary to consider the facts. It held that the purpose of section 197 was to protect the workers[12] and that the question whether a business has been transferred as a going concern is a matter for objective determination. Each transaction must be considered on its merits.[13] It concluded that the contracts of employment are

[11] Id at para 117.

[12] Id at para 68.

[13] Id at para 65.

transferred automatically to the transferee employer regardless of whether the two employers agreed that the workers would be transferred as part of the transaction.[14]

[12] The present application for leave to appeal is a sequel to the proceedings in the LAC. The first question that arises is whether this Court has jurisdiction to determine this application.

Jurisdiction

[13] NEHAWU contends that the interpretation of section 197 of the LRA adopted by the majority of the LAC infringes the rights of the workers to fair labour practices conferred by section 23(1) of the Constitution. That is a constitutional issue. So too is the contention raised by NEHAWU that the interpretation of section 197 adopted by the majority of the LAC fails to promote the spirit, purport and objects of the Bill of Rights. Section 39(2) of the Constitution provides that "[w]hen interpreting any legislation . . . every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."[15] It is not necessary, however, to deal with section 39(2) in this application.

[14] Id at para 94.

[15] See also *S v Boesak* 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 14; *Carmichele* v *Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 4; *Fredericks and Others v MEC for Education and Training, Eastern Cape and Others* 2002 (2) BCLR 113 (CC) at para 10.

[14] The LRA was enacted "to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution."[16] In doing so the LRA gives content to section 23 of the Constitution and must therefore be construed and applied consistently with that purpose. Section 3(b) of the LRA underscores this by requiring that the provisions of the LRA must be interpreted "in compliance with the Constitution". Therefore the proper interpretation and application of the LRA will raise a constitutional issue. This is because the legislature is under an obligation to "respect, protect, promote and fulfil the rights in the Bill of Rights."[17] In many cases, constitutional rights can only effectively be honoured if legislation is enacted. Such legislation will of course always be subject to constitutional scrutiny to ensure that it is not inconsistent with the Constitution. Where the legislature enacts legislation in the effort to meet its constitutional obligations, and does so within constitutional limits, courts must give full effect to the legislative purpose. Moreover, the proper interpretation of such legislation will ensure the protection, promotion and fulfilment of constitutional rights and as such will be a constitutional matter. In this way, the courts and the legislature act in partnership to give life to constitutional rights.

[15] On behalf of UCT it was contended that where one is dealing with a statute that gives effect to fundamental rights guaranteed in the Constitution, the only constitutional matter that may arise relates to the constitutionality of its provisions. If it were not so, the argument went, then this Court would have jurisdiction in all labour

[16] Section 1(a) of the LRA. The reference to section 27 must now be taken as a reference to section 23 of the Constitution.

[17] Section 7(2) of the Constitution provides:

> "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

matters. This contention has no merit. In relation to a statute a constitutional matter may arise either because the constitutionality of its interpretation or its application is in issue or because the constitutionality of the statute itself is in issue. A challenge to the manner in which the statute has been interpreted or applied does not require the litigant to challenge the constitutionality of the provision the construction of which is in issue. Moreover in the case of a statute such as the one in issue in this application which has been enacted to give content to a constitutional right, the proper interpretation of the statute itself is itself a constitutional matter.

[16] What must be stressed here is the point already made, namely, that we are dealing with a statute which was enacted to give effect to section 23 of the Constitution, and as such, it must be purposively construed. If the effect of this requirement is that this Court will have jurisdiction in all labour matters that is a consequence of our constitutional democracy. The Constitution ". . . is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control."[18] Our constitutional democracy envisages the development of a coherent system of law that is shaped by the Constitution.

[17] The decision in *NAPTOSA and Others v Minister of Education, Western Cape, and Others*[19] relied upon by UCT is distinguishable from the present case. That case

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[18] *Pharmaceutical Manufacturers Association of SA and Others; in re: Ex parte application of President of the RSA and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 44.

[19] 2001 (2) SA 112 (C).

concerned the appropriateness or otherwise of granting relief directly under section 23(1) of the Constitution without a complaint that the LRA was constitutionally deficient in the remedy it provides. The court was concerned that granting relief directly under section 23(1) would encourage the development of two parallel streams of labour law jurisprudence, one under the LRA and the other under section 23(1). The court considered this to be "singularly inappropriate". It was in this context that the court remarked that it could not "conceive that it is permissible for an applicant, save by attacking the constitutionality of the LRA, to go beyond the regulatory framework which it establishes."[20] In this application, NEHAWU does not require us to go beyond the regulatory framework established by the LRA. The issues in this case are different from and nothing like those in NAPTOSA. The dictum relied upon by UCT has no application here and there is no need to express any opinion on the correctness of that decision.

[18] I am therefore satisfied that this Court has jurisdiction to hear this application. This does not mean that this Court will as a matter of course hear appeals against decisions of the LAC dealing with the interpretation and application of the LRA. Considerations that are relevant to that issue are dealt with later in this judgment. But first there is a procedural issue that must be considered.

Procedure to be followed in appeals from the LAC to this Court

[20] Id at 123I–J.

[19] NEHAWU brought this application in terms of rule 20 which governs appeals from the Supreme Court of Appeal (SCA).[21] The appeals from all courts other than the SCA are governed by rule 18.[22] The proper procedure for bringing appeals from the LAC to this Court is a matter of some controversy and uncertainty. This arises from the decision of the LAC in *Kem-Lin Fashions v Brunton and Another*[23] in which the court held that no appeal lies from the LAC to the SCA and that rule 18 of the rules of this Court has no application. In reaching its conclusion, the court relied upon section 167(3) of the LRA which gave the LAC a status equal to that of the SCA. It is necessary to resolve this issue now.

[20] It must be stressed at the outset that we are concerned here with a constitutional matter, a matter which is not within the exclusive jurisdiction of the Labour Court. The provisions of the LRA which give the LAC a status equal to that of the SCA and constitute it as the final court of appeal can have no application in constitutional matters.[24] Those provisions can apply only to matters that are within the exclusive

[21] Rule 20(1) states that:

> "An appeal to the Court on a constitutional matter against a judgment or order of the Supreme Court of Appeal shall be granted only with the special leave of the Court on application made to it."

[22] Rule 18(1) states that:

> "The procedure set out in this rule shall be followed in an application for leave to appeal directly to the Constitutional Court where a decision on a constitutional matter, other than an order of constitutional invalidity under section 172 (2) (a) of the Constitution, has been given by any court other than the Supreme Court of Appeal irrespective of whether the Chief Justice has refused leave or special leave to appeal."

[23] 2002 (7) BLLR 597 (LAC) at paras 3 - 5.

[24] In support of the contention that an appeal from the LAC lies to this Court and that rule 20 is the appropriate rule, reliance was placed on the following provisions of the LRA:

- Section 167(2) of the LRA which provides that:

jurisdiction of the LAC and the Labour Court (whether these provisions are constitutional need not be decided now). The reliance on those provisions for the contention that rule 20 applies to appeals from the LAC to this Court is therefore misplaced.

[21] The starting point is the Constitution. It recognises two highest courts of appeal and assigns specific jurisdiction to each. As was pointed out in *Pharmaceutical Manufacturers Association of SA and another: in re ex parte President of the RSA and Others*,[25] the Constitution makes provision for a jurisdictional scheme different to that provided for in the interim Constitution.[26] The SCA is the highest court of appeal except in constitutional matters.[27] Its jurisdiction in constitutional matters is only

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"The Labour Appeal Court is the final court of appeal in respect of all judgments and orders made by the Labour Court in respect of the matters within its exclusive jurisdiction."

- Section 167(3) of the LRA which provides:

  "The Labour Appeal Court is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which the Appellate Division of the Supreme Court has in relation to matters under its jurisdiction."

- Section 173(1) of the LRA provides:

  "Subject to the Constitution and despite any other law, the Labour Appeal Court has exclusive jurisdiction - (a) to hear and determine appeals against the final judgments and the final orders of the Labour Court; and (b) to decide any question of law reserved in terms of section 158(4)".

- Section 183 of the LRA which provides that:

  "Subject to the Constitution and despite any other law, no appeal lies against any decision, judgment or order given by the Labour Appeal Court in respect of - (a) any appeal in terms of section 173(1)(a); its decision on any question of law in terms of section 173(1)(b); or (c) any judgment or order made in terms of section 175."

[25] 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC).

[26] Id at para 28.

[27] Section 168(3) of the Constitution.

limited by section 167(4) which reserves certain matters for the exclusive jurisdiction of this Court.[28] However, its orders of invalidity are subject to confirmation by this Court in terms of section 172(2)(a). This Court is the highest court in respect of all constitutional matters, and decisions of all other courts on constitutional matters are accordingly subject to appeal to this Court.

[22] It follows that an appeal from the LAC on a constitutional matter does lie to the SCA. However, there is nothing which prevents a litigant from appealing directly to this Court pursuant to section 167(6)(b) of the Constitution read with section 16(2) of the Constitutional Court Complementary Act, 1995 and rule 18 of the rules of this Court.

[23] Rules of this Court distinguish between appeals from the SCA and appeals from courts other than the SCA. Appeals from the SCA are governed by rule 20, while those from other courts are governed by rule 18. Rule 20 therefore cannot be applicable in an appeal from the LAC to this Court on a constitutional matter. It deals in specific terms with appeals against a judgment or order of the SCA. The LAC is not the SCA. Nor is it the equivalent of the SCA in respect of appeals on constitutional matters. Rule 18 is the appropriate rule. It applies to appeals from all courts other than the SCA. The LAC is such a court. NEHAWU should therefore have followed the procedure laid down in rule 18 when appealing the decision of the

[28] Section 167(4) of the Constitution.

LAC to this Court. It follows that I do not agree with the conclusion reached by the LAC in *Kem-Lin Fashions v Brunton and Another*.[29]

[24] It is understandable that NEHAWU brought this application in terms of rule 20. If it had attempted to invoke rule 18, it would have been confronted with the decision of the LAC in *Kem-Lin Fashions* which held that rule 18 was not applicable. It would not have obtained the required certificate. In these circumstances, NEHAWU's application in terms of rule 20 should be treated as an application for a direct appeal in terms of rule 18 and the failure to comply with rule 18 should be condoned.

The interests of justice

[25] The decision to grant or refuse leave to appeal is a matter for the discretion of this Court. In deciding that question, the interests of justice are crucial. Whether it is in the interests of justice to grant leave to appeal is the function of a number of factors. One such factor is the prospects of success. The applicant must show that there are reasonable prospects that this Court "will reverse or materially alter the judgment if permission to bring the appeal is given."[30] However, as was pointed out in *S v Boesak*,[31] the prospects of success, though important, are not decisive.

[29] Above n 23.

[30] Rule 18(6)(a)(iii).

[31] Above n. 15 at para 12.

[26] That said, an important factor in considering the prospects of success in this application is the fact that members of the LAC and the Labour Court are divided on the proper construction of section 197.[32] This factor alone suggests, at least *prima facie*, that there are prospects of success. It is true that the LAC, like all courts, is bound by the doctrine of precedent, and should not depart from its own decisions unless it is satisfied that they are clearly wrong. Nevertheless, given the clear division amongst the labour judges, it is desirable for this Court to consider the issue.

[27] It is also true that section 197 has since been amended, but the purpose of the amendment is to clarify the section. Nevertheless, there are further considerations that weigh in favour of the application being heard.

[28] In the first place, this is the first occasion on which this Court has had to consider and define the approach it will take to the interpretation of a provision which is part of legislation aimed at giving effect to a constitutional right. We have held in this judgment that the correct approach is one in which the legislature and the courts have a tandem duty to give full effect to the Constitution. And it is necessary for this Court to apply this approach in the present matter. Secondly, the application affects some two hundred and sixty-seven workers who have lost their employment. And

[32] At least five members of the specialist court hold a view that is different to that held by the majority in this case. As pointed out earlier, the Labour Court in *Schutte and Others v Powerplus Performance (Pty) Ltd* and another above n 5, the LAC in *Foodgro (A division of Leisurenet Ltd) v Keil* above n 6 and Zondo JP in this case found that section 197(1)(a) provides for the automatic transfer of a contract of employment upon the transfer of a business in the circumstances set out in the subsection. By contrast, Mlambo J in the Labour Court and the majority of the LAC in this case held that the transfer of contracts of employment is dependent upon a prior agreement between the seller and the purchaser that the contracts of employment will be transferred as part of the transaction - *NEHAWU v UCT and Others* above n 1 at para 20.

thirdly, the application also raises important questions in relation to appeals from the LAC, in particular, whether such appeals lie to the SCA, the procedure to be followed from the LAC to this Court, and the circumstances when this Court will hear such appeals.

[29] Before considering the merits of the appeal it is necessary to consider the circumstances when this Court will hear appeals from the LAC that are within its jurisdiction.

The hearing of appeals from the LAC

[30] The jurisdiction of this Court to hear appeals from the decisions of the LAC dealing with the interpretation and application of the LRA raises the question whether this Court should hear such appeals as a matter of course. The LAC is a specialised court which functions in a specialised area of law. The LAC and the Labour Court were specifically established by Parliament in order to administer the LRA. They are charged with the responsibility for overseeing the ongoing interpretation and application of the LRA and development of labour relations policy and precedent. Through their skills and experience, judges of the LAC and the Labour Court accumulate the expertise which enables them to resolve labour disputes speedily.

[31] By their very nature labour disputes must be resolved expeditiously and be brought to finality so that the parties can organise their affairs accordingly. They affect our economy and labour peace. It is in the public interest that labour disputes

be resolved speedily by experts appointed for that purpose. This Court will therefore be slow to hear appeals from the LAC unless they raise important issues of principle. The present application raises such issues.

[32] In these circumstances, I am satisfied that this Court should hear this appeal.

Section 23(1) of the Constitution

[33] The relevant constitutional provision is section 23(1) which provides that:

> "Everyone has the right to fair labour practices."

Our Constitution is unique in constitutionalising the right to fair labour practice. But the concept is not defined in the Constitution. The concept of fair labour practice is incapable of precise definition. This problem is compounded by the tension between the interests of the workers and the interests of the employers that is inherent in labour relations. Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgment. It is therefore neither necessary nor desirable to define this concept.

[34] The concept of fair labour practice must be given content by the legislature and thereafter left to gather 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 section 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 unfair labour practice in the LRA. International experience is reflected in the Conventions and Recommendations of the International Labour Organisation.[33] Of course other comparable foreign instruments such as the European Social Charter 1961 as revised may provide guidance.[34]

[35] That is not to say that this Court has no role in the determination of fair labour practices. Indeed, it has a crucial role in ensuring that the rights guaranteed in section 23(1) are honoured. In the *First Certification Judgment*[35] this Court remarked in relation to section 23 in general:

> "The primary development of this law will, in all probability, take place in labour courts in the light of labour legislation. That legislation will always be subject to constitutional

[33] The ILO Conventions that come to mind are the so-called Fundamental ILO Conventions. These are Conventions that have been identified by the ILO Governing Body as being fundamental to the rights of human beings at work irrespective of levels of development of individual member States. These rights are a precondition for all the others in that they provide for the necessary implements to strive freely for the improvement of individual and collective conditions of work. They are: Freedom of Association and Protection of the Right to Organize Convention, 87 of 1948 ratified by South Africa on 19 February 1996; Right to Organize and Collective Bargaining Convention, 98 of 1949 ratified on 19 February 1996; Forced Labour Convention, 29 of 1930 ratified on 5 March 1997; Abolition of Forced Labour Convention, 105 of 1997 ratified on 5 March 1997; Discrimination (Employment and Occupation) Convention, 111 of 1958 ratified on 5 March 1997; Equal Remuneration Convention, 100 of 1951 ratified on 30 March 2000; Minimum Age Convention, 138 of 1973 ratified on 30 March 2000; and Worst Forms of Child Labour Convention, 182 of 1999 ratified on 7 June 2000.

[34] The European Social Charter, 1961 guarantees amongst other things the right to just conditions of work (Article 2); the right to a fair remuneration (Article 4); the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex (Article 20); the right to protection in cases of termination of employment (Article 24); and the right to dignity at work (Article 26).

[35] *In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).

> scrutiny to ensure that the rights of workers and employers as entrenched in NT 23 are honoured."[36]

Although these remarks were made in the context of collective bargaining, they apply no less to section 23(1). This Court also has an important supervisory role to ensure that legislation giving effect to constitutional rights is properly interpreted and applied.

[36] Counsel for NEHAWU contended that the rights guaranteed in section 23(1) are guaranteed to the workers only and not the employers. He relied upon the word "everyone" in section 23(1) which he submitted refers to human beings and not to juristic persons and upon the pre-constitutional labour law jurisprudence which he submitted demonstrates that the concept of unfair labour practice was applied to workers only. This contention cannot be upheld.

[37] The entitlement to constitutional rights depends upon the nature of the rights and the nature of the juristic person.[37] In the *First Certification Judgment*, this Court rejected the contention that "everyone" in Constitutional Principle II refers only to natural persons. It held that "many universally accepted fundamental rights will be fully recognised only if afforded to juristic persons as well as natural persons".[38] The

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[36] Id at para 67.

[37] Section 8(4) states that:

> "A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person."

[38] *First Certification Judgment above* n 35 at para 57.

crucial question is whether the right to fair labour practices is available to employers who are juristic persons. There is nothing in the nature of the right to fair labour practices to suggest that employers are not entitled to that right.

[38] Fairness is not confined to workers only. In *National Union of Metalworkers of SA v Vetsak Co-operative Ltd and Others*[39] Smalberger JA held that:

> "Fairness comprehends that regard must be had not only to the position and interests of the workers, but also those of the employer, in order to make a balanced and equitable assessment."[40]

Nienaber JA, who wrote the majority judgment expressed a similar view and held that:

> "The fairness required in the determination of an unfair labour practice must be fairness towards both employer and employee. Fairness to both means the absence of bias in favour of either. In the eyes of the LRA of 1956, contrary to what counsel for the appellant suggested, there are no underdogs."[41]

[39] Nor is there anything, either in the language of section 23(1) or the context in which that section occurs, which supports the narrow construction contended for by counsel. On the contrary, the context suggests that the word refers to every person and it includes both natural and juristic persons. Where the rights in the section are guaranteed to workers[42] or employers[43] or trade unions or employers' organisations,[44]

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[39] 1996 (4) SA 577 (A).

[40] At 589 C–D.

[41] At 593G–H.

[42] Section 23(2) which provides that:

as the case may be, the Constitution says so explicitly. If the rights in section 23(1) were to be guaranteed to workers only, the Constitution would have said so. The basic flaw in the applicant's submission is that it assumes that all employers are juristic persons. That is not so. In addition, section 23(1) must either apply to all employers or none. It should make no difference whether they are natural or juristic persons.

[40] In my view the focus of section 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed.

"Every worker has the right –
(a) to form and join a trade union;
(b) to participate in the activities and programmes of a trade union; and
(c) to strike."

[43] Section 23(3) which provides that:

"Every employer has the right to –
(a) to form and join an employers' organisation; and
(b) to participate in the activities and programmes of an employers' organisation."

[44] Section 23(4) which provides that:

"Every trade union and every employers' organisation has the right to –
(a) to determine its own administration, programmes and activities;
(b) to organise; and
(c) to form and join a federation."

The Labour Relations Act

[41] The declared purpose of the LRA "is to advance economic development, social justice, labour peace and the democratization of the workplace."[45] This is to be achieved by fulfilling its primary objects which includes giving effect to section 23 of the Constitution. It lays down the parameters of its interpretation by enjoining those responsible for its application to interpret it in compliance with the Constitution and South Africa's international obligations.[46] The LRA must therefore be purposively construed in order to give effect to the Constitution. This is the approach that has been adopted by the LAC and the Labour Court in construing the LRA.[47]

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[45] Section 1 of the LRA provides that:

> "The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the work-place by fulfilling the primary objects of this Act, which are—
>
> (a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution;
> (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;
> (c) to provide a framework within which employees and their trade unions, employers and employers' organisations can—
> (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
> (ii) formulate industrial policy; and
> (d) to promote—
> (i) orderly collective bargaining;
> (ii) collective bargaining at sectoral level;
> (iii) employee participation in decision-making in the work-place; and
> (iv) the effective resolution of labour disputes."

[46] Section 3 of the LRA provides:

> "Any person applying *this Act* must interpret its provisions—
> (a) to give effect to its primary objects;
> (b) in compliance with the Constitution; and
> (c) in compliance with the public international law obligations of the *Republic*."

These obligations flow from international instruments such as the Conventions of the ILO that have been ratified by South Africa and other relevant international instruments that are binding on South Africa.

[47] *Schutte and Others v Powerplus Performance (Pty) Ltd and Another*, above n. 5 at paras 24 – 25; *South African National Security Employers Association v TGWU & Others (1)* 1998 (4) BLLR 364 (LAC) at para 21; *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 89 (LAC) at paras 22 – 23.

[42] Security of employment is a core value of the LRA and is dealt with in Chapter VIII. The chapter is headed "Unfair Dismissals". The opening section, section 185, provides that "[e]very employee has the right not to be unfairly dismissed." This right is essential to the constitutional right to fair labour practices. As pointed out above, it seeks to ensure the continuation of the relationship between the worker and the employer on terms that are fair to both. Section 185 is "a foundation upon which the ensuing sections are erected."[48]

[43] It is against this background that section 197, which forms part of the chapter on unfair dismissals, must be understood and construed.

Section 197

[44] Section 197 provides:

> "(1) A contract of employment may not be transferred from one employer (referred to as 'the old employer') to another employer (referred to as 'the new employer') without the employee's consent, unless –
>
> (a) the whole or any part of a business, trade or undertaking is transferred by the old employer as a going concern; or
>
> (b) the whole or a part of a business, trade or undertaking is transferred as a going concern –
>
> (i) if the old employer is insolvent and being wound up or is being sequestrated; or
>
> (ii) because a scheme of arrangement or compromise is being entered into to avoid winding-up or sequestration for reasons of insolvency.

[48] Brassey: "Commentary on the Labour Relations Act" (1999) Vol 3 (Juta, Cape Town) at A8: 1.

(2) (a) If a business, trade or undertaking is transferred in the circumstances referred to in subsection (1)(a), unless otherwise agreed, all the rights and obligations between the old employer and each employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and each employee and, anything done before the transfer by or in relation to the old employer will be considered to have been done by or in relation to the new employer.

(b) If a business is transferred in the circumstances envisaged by subsection (1)(b), unless otherwise agreed, the contracts of all employees that were in existence immediately before the old employer's winding-up or sequestration transfer automatically to the new employer, but all the rights and obligations between the old employer and each employee at the time of the transfer remain rights and obligations between the old employer and each employee and anything done before the transfer by the old employer in respect of each employee will be considered to have been done by the old employer.

(3) An agreement contemplated in subsection (2) must be concluded with the appropriate person or body referred to in section 189(1).

(4) A transfer referred to in subsection (1) does not interrupt the employee's continuity of employment. That employment continues with the new employer as if with the old employer.

(5) The provisions of this section do not transfer or otherwise affect the liability of any person to be prosecuted for, convicted of, and sentenced for, any offence."

The purpose of section 197

[45] There is divergence of opinion among the members of the LAC and the Labour Court on the purpose of section 197. The one view, represented by the majority

judgment of the LAC in this case is that its primary purpose is to facilitate the transfer of businesses.[49] The other view, represented by the minority judgment in the LAC in this case, maintains that the primary purpose of section 197 is the protection of workers in the event of the transfer of the business.[50] The latter view seeks support in comparable foreign instruments and cases construing such instruments.

[46] It seems to me that the answer lies somewhere in between. That an important purpose of section 197 is to protect the workers against the loss of employment in the event of a transfer of a business cannot be gainsaid. This conclusion is fortified not only by the effect of the section, but also by the very fact that the section was inserted in a chapter that deals with unfair dismissal. As pointed out earlier, at the core of this chapter is the right of the workers not to be dismissed unfairly. In addition, further support for this view can be found in comparable foreign instruments and foreign case law construing these instruments.

[47] The comparable foreign instruments I have in mind are those that have been considered in the context of section 197, namely, the Acquired Rights Directive 77/187 EEC adopted by the European Commission in 1977[51] and the British Transfer

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[49] *NEHAWU v UCT and Others* above n 2 per Mlambo J and *NEHAWU v UCT and Others* above n 1 per Van Dijkhorst AJA.

[50] Zondo JP in the present case in the LAC; Froneman DJP in the *Foodgro case* above n 6 and Seady AJ in the *Schutte case* above n 5.

[51] The relevant provision of the Council Directive provide:

> Article 1(1):
> "This Directive shall apply to transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger.";

of Undertakings (Protection of Employment) Regulation, 1981/1794 (TUPE) which was enacted pursuant to the Directive.[52] While there are differences in language and

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Article 3:

"1. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee.
Member States may provide that, after the date of transfer within the meaning of Article 1(1) and, in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from contract of employment or an employment relationship.

2. Following the transfer within the meaning of Article 1(1), the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.
Member States may limit the period for observing such terms and conditions, with the proviso that it shall not be less than one year.

3. Paragraphs 1 and 2 shall not cover employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States.
Member States shall adopt the measure necessary to protect the interests of employees and of persons no longer employed in the transferor's business at the time of the transfer within the meaning of Article 1(1) in respect of rights conferring on them immediate or prospective entitlement to old age benefits, including survivors' benefits, under supplementary schemes referred to in the first subparagraphs."

Article 4:

"1. The transfer of an undertaking, business or part of a business shall not in itself constitute grounds for dismissal by the transferor or the transferee. The provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce.
Member States may provide that the first subparagraph shall not apply to certain specific categories of employees who are not covered by the laws or practice of the Member States in respect of protection against dismissal."

2. If the contract of employment or the employment relationship is terminated because the transfer within the meaning of Article 1(1) involves a substantial change in working conditions to the detriment of the employees, the employer shall be regarded as having been responsible for termination of contract of employment or of the employment relationship."

[52] Regulation 5 under the heading "Effect of relevant transfer on contracts of employment, etc." provides as follows:

"(1) Except where objection is made under paragraph (4A), a relevant transfer shall not operate so as to terminate the contract of employment of any person by the transferor in the undertaking or part transferred but any such contract which would otherwise have been terminated by the transfer shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) Without prejudice to paragraph (1) above [but subject to paragraph (4A) below], on the completion of a relevant transfer –

(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract, shall be transferred by virtue of this Regulation to the transferee; and

context in which these instruments are applied, they nevertheless "provide some insight for proper interpretation and application of section 197."[53]

[48] Directive 77/187 of the Council of the European Communities in substance provides that upon a transfer of an undertaking, business or part thereof to another employer by reason of a measure or legal transfer, the rights and obligations arising from a contract of employment shall be transferred to the new employer.[54] Its Preamble declares, amongst other things:

(b) anything done before the transfer is completed by or in relation to the transferor in respect of that contract or a person employed in that undertaking or part shall be deemed to have been done by or in relation to the transferee.

(3) Any reference in paragraph (1) or (2) above to a person employed in an undertaking or part of one transferred by a relevant transfer is a reference to a person so employed immediately before the transfer, including, where the transfer is effected by a series of two or more transactions, a person so employed immediately before any of those transactions.

(4) Paragraph (2) above shall not transfer or otherwise affect the liability of any person to be prosecuted for, convicted of and sentenced for any offence.

(4a) Paragraphs (1) and (2) above shall not operate to transfer his contract of employment and the rights, powers, duties and liabilities under or in connection with it if the employee informs the transferor or the transferee that he objects to becoming employed by the transferee.

(4b) Where an employee so objects the transfer of the undertaking or part in which he is employed shall operate so as to terminate his contract of employment with the transferor but he shall not be treated, for any purpose, as having been dismissed by the transferor.

(5) [Paragraphs (1) and (4a) above are] without prejudice to any right of an employee arising apart from these Regulations to terminate his contract of employment without notice if a substantial change is made in his working conditions to his detriment; but no such right shall arise by reason only that, under that paragraph, the identity of his employer changes unless the employee shows that, in all the circumstances, the change is a significant change and is to his detriment."

[53] *Foodgro* above n 6 at para 18.

[54] The Preamble to the Directive provides that:

> "Whereas economic trends are bringing in their wake, at both national and Community level, changes in the structure of undertakings, through transfers of undertakings, businesses or parts of businesses to other employers as a result of legal transfers or mergers;
>
> Whereas it is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded;".

> "Whereas it is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded;".

[49] Foreign case law that has construed Directive 77/187 has held that the purpose of the Directive was to protect the workers against the loss of employment in the event of the transfer of a business. In the case of *Landsorganisatioen i Danmark for Tjenerforbundet i Danmark v Ny Molle Kro*[55], the European Court of Justice held that:

> "It follows from the preamble and from those provisions that the purpose of the directive is to ensure, as far as possible, that the rights of employees are safeguarded in the event of a change of employer by enabling them to remain in employment with the new employer on the terms and conditions agreed with the transferor."[56]

[50] The title of the Regulations that were promulgated by the United Kingdom pursuant to this Directive, namely, "Transfer of Undertakings (Protection of Employment) Regulation", 1981, evidences an intention to protect the workers. The effect of these regulations is to protect workers against unfair dismissals in the event of the sale of a business.[57]

[51] These foreign instruments are aimed primarily at the protection of workers. The similar language employed in section 197 and its inclusion in a chapter dealing

[55] [1987] ECR 5465.

[56] Id at para 12.

[57] *Betts and Others v Brintel Helicopters Ltd and Another* [1997] IRLR 361 at para 17. See also Steven D. Anderman 'Labour Law: Management Decision and Workers' Rights' (1988) 3rd ed (Butterworths) at 200.

with unfair dismissal, fortifies the view that central to its purposes is the protection of workers. Section 197, however, does more than protecting workers against job losses.

[52] What lies at the heart of disputes on transfers of businesses is a clash between, on the one hand, the employer's interest in the profitability, efficiency or survival of the business, or if need be its effective disposal of it, and the worker's interest in job security and the right to freely choose an employer on the other hand. The common law provided little protection to workers in these situations. Under common law the sale of a business, whether as a going concern or not, often resulted in the loss of employment. The new owner was under no obligation to employ the workers. The Industrial Court, acting under the unfair labour practice provisions of the 1956 LRA, did however, attempt to remedy the situation.[58] Van Dijkhorst AJA also recognised that under the common law "the employees were the worst off." They were confronted with a take-over and lost their employment."[59] Later the transferring employer incurred the statutory obligation to pay severance benefits. This obligation no doubt had an impact on the cost of the sale of businesses. In short, the situation led to the retrenchment of workers, the payment of severance benefits and escalated costs in a way that inhibited commercial transactions.[60] On the whole, the situation had

[58] See for example *Kebeni and Others v Cementile Products (Ciskei) (Pty) Ltd and Another* (1987) 8 ILJ 442 (IC) at 449.

[59] *NEHAWU v UCT and Others* above n 1 at para 106.

[60] The Explanatory Memorandum to the draft Labour Relations Bill, GG No 16259 of 10 February 1995, said in relation to the transfer of undertakings:

> "The draft Bill explicitly deals with the employer's rights and obligations in the event of a transfer of an undertaking. This resolves the common law requirement that existing contracts must be terminated and new ones entered into, which leads to the retrenching of employees,

potential to impact negatively on economic development and the promotion of labour peace.

[53] Section 197 strikes at the heart of this tension and relieves the employers and the workers of some of the consequences that the common law visited on them. Its purpose is to protect the employment of the workers and to facilitate the sale of businesses as going concerns by enabling the new employer to take over the workers as well as other assets in certain circumstances. The section aims at minimising the tension and the resultant labour disputes that often arise from the sales of a businesses and impact negatively on economic development and labour peace. In this sense, section 197 has a dual purpose, it facilitates the commercial transactions while at the same time protecting the workers against unfair job losses.

The meaning of section 197

(a) The reasoning of the majority

[54] Central to the reasoning in the majority judgment is the finding that in the context of section 197 the transfer of a business "as a going concern" only occurs where the workers are transferred as part of the transaction. According to the majority where the two employers agree to sell a business as a going concern, "the necessary implication is that they agree that the employees or a material part thereof are part and parcel of the transaction."[61] It reasoned, as previously noted, that to say that there can

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the paying of severance benefits etc and escalates costs in a way that inhibits these commercial transactions."

[61] *NEHAWU v UCT and Others* above n 1 at para 109.

be a transfer of a business as a going concern without the transfer of all or most of the workers "is to equate a bleached skeleton with a vibrant horse."[62] This finding forces the majority to conclude that section 197 must be interpreted "so as to limit its scope to cases where the transfer follows upon an agreement between the seller and the purchaser defining the subject matter of the sale as . . . a going concern (ie with the employees included)."[63]

[55] There are two difficulties with this construction. The first has to do with the meaning of a transfer of a business as a going concern and the second relates to the failure by the majority to take sufficient account of the fact that of section 197 has the important purpose of protecting workers against loss of employment in the event of the transfer of business. I will deal with each in turn.

"Going concern"

[56] The phrase "going concern" is not defined in the LRA. It must therefore be given its ordinary meaning unless the context indicates otherwise. What is transferred must be a business in operation "so that the business remains the same but in different hands." [64] Whether that has occurred is a matter of fact which must be determined objectively in the light of the circumstances of each transaction. In deciding whether

[62] Id at para 104.

[63] Id at para 117.

[64] *Lloyd v Brassey* [1969] 1 All ER 382 at 384H, a decision cited with approval by the House of Lords in *Melon and others v Hector Powe Ltd* [1981] 1 All ER 313 at 314c; *Manning v Metro Nissan – A Division of Venture Motor Holdings Ltd and another* (1998) 19 ILJ 1181 (LC) at para 42; See also *General Motors SA (Pty) Ltd v Bester Auto Component Manufacturing (Pty) Ltd and another* 1982 (2) SA 653 (SE) at 657H.

a business has been transferred as a going concern, regard must be had to the substance and not the form of the transaction.[65] 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.

[57] There is nothing either in the context or the language of section 197 to suggest that the phrase "going concern" must be given the meaning assigned to it by the majority. On the contrary, the purpose of the section and the context in which that phrase occurs suggests otherwise.

[65] A review of the case law construing comparable instruments, the Council Directive 77/187/EEC of 14 February 1977 and Transfer of Undertakings (Protection of Employment) Regulations, 1981, demonstrates that the question whether there has been a transfer of an undertaking within the meaning of the instrument is a question of fact which must be determined, regard being had to all the circumstances of the transaction. It is particularly significant, however, that even though the instruments themselves do not use the term "going concern", yet, the case law construing them interpret the transfer of a business within the meaning of these instruments in the context of a transfer of a business as a going concern. Thus in *Kenmir, Ltd v Frizzell and Others* [1968] 1 All ER 414 at 418E – G, Widgery J said the following of and concerning the question whether a transaction amounted to a transfer of a business within the meaning of the United Kingdom's Transfer of Undertakings (Protection of Employment) Regulations 1981: "In deciding whether a transaction amounted to the transfer of a business, regard must be had to its substance rather than its form, and consideration must be given to the whole of the circumstances, weighing the factors which point in one direction against those which point in another. In the end, the vital consideration is whether the effect of the transaction was to put the transferee in possession of a going concern, the activities of which he could carry on without interruption." In *Spijkers v Gebroeders Benedik Abbatoir v Alfred Benedik en Zonen* [1986] 2 CMLR 296 at paras 11, 12 & 15, the European Court of Justice in considering whether a transfer within the meaning of the Directive 77/187 has occurred held that: "the decisive criterion for establishing the existence of a transfer within the meaning of the directive is whether the entity in question retains its identity." And went on to hold that "It should be made clear, however, that each of these factors is only a part of the overall assessment which is required and therefore they cannot be examined independently of each other.". . . "In order to establish whether or not such a transfer has taken place in a case such as that before the national court, it is necessary to consider whether, having regard to all the facts characterising the transaction, the business was disposed of as a going concern, as would be indicated inter alia by the fact that its operation was actually continued or resumed by the new employer, with the same or similar activities."

[58] The fact that the seller and the purchaser of the business have not agreed on the transfer of the workforce as part of the transaction does not disqualify the transaction from being a transfer of a business as a going concern within the meaning of section 197. Each transaction must be considered on its own merit regard being had to the circumstances of the transaction in question. Only then can a determination be made as to whether the transaction constitutes the transfer of a business as a going concern. In this regard I agree with Zondo JP. [66]

The Protection of Workers

[59] In the second place, the construction adopted by the majority does not take sufficient account of the important interest that workers have in job protection.

[60] The majority judgment makes the application of section 197 conditional upon whether the two employers agree on whether the workers will be part and parcel of the transfer of business. This requirement offers the transferor and transferee some scope to structure their agreement so as to avoid the impact of section 197. They would be entitled but not obliged to make provision for the transfer of workers as part of the transaction and the workers would be bound by that agreement. Parties to such a

[66] *NEHAWU v UCT and Other*s above n 1 at para 65.

transaction would no doubt take that fact into account should they wish to transfer the business without the workforce. [67]

[61] This approach renders section 197 in many cases a voluntary obligation. If the new employer does not wish to be obliged to take on the workers of the old employer on their existing terms and conditions, it will simply refrain from agreeing to take over the workers. The majority decision therefore has the potential to deny to the workers protection against job losses and leaves their protection solely in the hands of the employers.

(b) The true meaning of section 197

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

[67] For a criticism of an asset-based test to determine whether a transfer as a going concern has taken place, see generally Paul Davies: "Taken to the Cleaners? Contracting Out of Services Yet Again" (1997) 26 Industrial Law Journal (UK) 193 at 196.

that the workers will be part of that transfer. This will occur if the business is transferred "as a going concern".

[63] Subsection (2) tells us the consequences that flow from a transfer of a business as a going concern as contemplated in subsection (1). It refers back to subsection (1) which envisages two categories of transfer: one from a solvent employer and the other, broadly speaking, from an insolvent employer. In both instances, the transfer of the business as a going concern results in the transfer of the workers to the new business. The section makes a distinction between contracts of employment, on the one hand, and rights and obligations that flow from such contracts on the other. "All the rights and obligations" must include all the terms and conditions of the contracts of employment. It therefore does not matter, from a practical point of view, that subsection (2)(a) does not explicitly provide for the transfer of contracts of employment. The section is premised on the continuity of employment of the workers which is not interrupted by the transfer contemplated in subsection (1). "That employment", subsection (4) says, "continues with the new employer as if with the old employer."

[64] Reading the section as a whole, and, in particular, having regard to the fact that all the rights and obligations flowing from employment with the transferring employer are transferred to the new employer in the case of a solvent business; that in the case of an insolvent business the contracts of employment are transferred; that the transfer of business does not interrupt the workers' continuity of employment; the inference

that the transferee employer takes over the workers and that the transferee employer is, by operation of law, substituted in the place of the transferor employer is irresistible. It follows by necessary implication.

[65] If there is any doubt on this score, the recent amendment to section 197 puts matters beyond doubt by providing that "the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment".[68] Indeed its declared purpose is ". . . the clarification of the transfer of contracts of employment in the case of transfers of a business, trade or undertaking as a going concern".[69]

[66] It is permissible to refer to a subsequent statute if it throws light on the meaning of a provision in an earlier statute. In a separate concurring judgment, in *Patel v Minister of the Interior and Another,*[70] Schreiner JA said the following:

> "There is authority for the view that Acts of Parliament, without having been passed for the express purpose of explaining previous Acts, may nevertheless be used as "legislative declarations" or "Parliamentary expositions" of the meaning of such Acts . . . . It is not surprising that Court's are cautious in the use of this aid to interpretation, since it is usual for later legislation to amend rather than to declare the meaning of earlier statutes on the same topic. It is, of course, the function of the Courts to expound the true interpretation of the law, including statute law, but where Parliament has clearly shown in a later Act what it meant by an earlier one it seems to

[68] Section 197(2)(a).

[69] See Preamble to the Amendment.

[70] 1955 (2) SA 485 (A) at 493A - D; see also *Kantor v Macintyre, NO and Another* 1958 (1) SA 45 (FC) at 48C-E; *Ormond Investment Company v Betts* 1928 AC 143 (HL) at 156.

> me to be not only helpful but even proper to have regard to the later Act in interpreting the earlier. Where a suitable occasion arises for the use of the principle of Parliamentary exposition a Court should not hesitate to use it because of any apparent awkwardness arising out of the notion of an Act's bearing one meaning or being of doubtful meaning before the passing of a later Act, and having a different or an unquestionable meaning after the later Act has come into force. If there were an express declaration by Parliament of the meaning of the earlier Act the position would be clear."

[67] The categories of transfers that were dealt with in section 197(1)(a) and 2(a) are now dealt with in the new section 197. The categories of the transfers that were dealt with in section 197(1)(b) and (2)(b) are now dealt with in section 197A. Although the new section 197 uses different language, its effect is the same as the old section 197. It provides that "the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment"[71]; that the rights and obligations between the old employer and the worker are transferred to the new owner;[72] that the transfer does not interrupt the continuity of employment; and that the employment contract "continues with the new employer as if with the old employer."[73] In all the circumstances, the recent amendment fortifies the conclusion that upon the transfer of a business contemplated in section 197, workers are transferred to the new owner of the business.

[71] Section 197(2)(a).

[72] Section 197(2)(b).

[73] Section 197(2)(d).

[68] In contending that the workers are not automatically transferred in the circumstances described in section 197(1)(a), reliance was placed upon the draft Bill[74] that preceded the LRA as well as the recent amendment to section 197[75]. It was

[74] The draft Labour Relations Bill is contained in GN 97 of 1995 dated 10 February 1995. The relevant provision, section 92 provides under the heading "Transfer of Contract of Employment":

> "(1) Save as provided by subsection (2), no contract of employment shall be transferred from one employer to another without the consent of the employee.
>
> (2) Where a trade, business or undertaking is transferred as a going concern, either in whole or in part, the contracts of employment of all employees employed at the date of the transfer shall automatically be transferred to the transferee.
>
> (3) All the rights and obligations between each employee and the transferor at the date of the transfer shall continue to apply as if they had been rights and obligations between the employee and the transferee, and anything done before the transfer by or in relation to the transferor in respect of each employee shall be deemed to have been done by or in relation to the transferee.
>
> (4) Where a trade, business or undertaking is transferred, either in whole or in part, in circumstances where the trade, business or undertaking is being wound up for reasons of insolvency, the contracts of all employees employed at the date of the transfer shall automatically be transferred to the transferee, but all rights and obligations between each employee and the transferor at that date shall remain rights and obligations between each employee and the transferor, and anything done before the transfer by the transferor in respect of each employee shall be deemed to have been done by the transferor.
>
> (5) A transfer such as is referred to in subsection (2) or (4) shall not interrupt the employee's continuity of employment, and such continuity shall continue with the transferee as if with the transferor.
>
> (6) The provisions of this section shall not transfer or otherwise affect the liability of any person to be prosecuted for, convicted of and sentenced for any offence."

[75] The relevant portion of the new Section 197 provides under the heading "Transfer of contract employment" as follows:

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

submitted that these two show that section 197 did not contemplate that the contracts of employment will be transferred automatically in the circumstances described in section 197(1)(a). In view of the conclusion I have reached as to the clarificatory effect of the recent amendment on section 197, the argument based on the new section must be rejected.

[69] In relation to the original draft LRA Bill much is made of the fact that section 92(2) expressly provided that in the event of the transfer of a business as a going concern, the contracts of employment "shall automatically be transferred to the transferee." As pointed out earlier, the absence of an express reference in section 197(2)(a) to the effect that the contracts of employment are transferred automatically, is of no consequence. The effect of the section is that the new employer takes over the workers and all the rights and obligations flowing from their contracts of employment. By operation of law, the new employer is substituted in the place of the old employer in respect of all contracts of employment.

[70] The majority of the LAC took the view that the purpose of the section is to facilitate the sale of businesses as a going concern by enabling the parties to the

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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.

(3) (a) The new employer complies with subsection (2) if that employer employs transferred *employees* on terms and conditions that are on the whole not less favourable to the *employees* than those on which they were employed by the old employer.

(b) Paragraph (a) does not apply to *employees* if any of their conditions of employment are determined by a collective agreement."

transaction to take over employees as well as other assets. Based on this finding, the judgment concluded that there cannot be a transfer within the meaning of section 197 unless the two employers agree that the workers will be transferred as part of the transaction. In doing so it looks only at that aspect of the legislative purpose which concerns the interests of employers. But the purpose of the legislature involves protecting the interests of both the employers and workers. Employers are at risk as far as severance pay is concerned. Workers are at risk in relation to their jobs. Properly construed section 197 is for the benefit of both employers and workers. It facilitates the transfer of businesses while at the same time protecting the workers against unfair job losses. That is a balance consistent with fair labour practices.

Conclusion

[71] I conclude that upon the transfer of a business as a going concern as contemplated in section 197(1)(a), workers are transferred to the new owner. The fact that there was no agreement to transfer the workforce or part of it between UCT and the contractors did not, as a matter of law, prevent a finding that the outsourcing was a transfer of a business as a going concern. Whether the outsourcing constituted the transfer of one or more businesses as a going concern is a question that has yet to be determined.

[72] It follows therefore that NEHAWU is entitled to leave to appeal and, in the event, the appeal must be upheld. As the LAC did not reach the facts, this case must be sent back to the LAC for consideration in the light of this judgment.

Costs

[73] Parties were all agreed that the costs in these proceedings must follow the result. Nothing suggests otherwise. UCT and Supercare must bear the costs of the appeal in this Court, jointly and severally, and on the basis of the employment of two counsel. The LAC ordered NEHAWU to pay the costs of the appeal. All the parties in these proceedings are private institutions. Each supported an interpretation of the statutory provision that was to its advantage or to the advantage of its constituency. NEHAWU succeeded. It is therefore just and equitable that UCT and Supercare should be ordered to pay the costs of the abortive proceedings in the LAC jointly and severally and on the basis of the employment of two counsel.

Order

[74] In the result the following order is made:

(a) NEHAWU is granted leave to appeal.

(b) The appeal is upheld with costs, such costs to include costs consequent upon the employment of two counsel.

(c) The order of the Labour Appeal Court dismissing the appeal by NEHAWU with costs is set aside.

(d) UCT and Supercare are ordered to pay the costs in the Labour Appeal Court, such costs to include costs consequent upon the employment of two counsel.

(e) The case is sent back to the Labour Appeal Court for it to deal with the matter in the light of this judgment.

Chaskalson CJ, Langa DCJ, Goldstone J, Kriegler J, Madala J, Mokgoro J, O'Regan J, Sachs J and Yacoob J concur in the judgment of Ngcobo J.

For the applicant:	M.J.D Wallis SC and A.A Gabriel instructed by Cheadle Thompson and Haysom Inc., Cape Town.
For the first respondent:	W.R.E Duminy SC and R.G.L Stelzner instructed by Deneys Reitz Inc., Cape Town.
For the second respondent:	G.J Marcus SC and A.M Breitenbach instructed by Bowman Gilfillan Inc., Johannesburg.