CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 08/11
[2011] ZACC 31

In the matter between:

AVIATION UNION OF SOUTH AFRICA	First Applicant
SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS' UNION	Second Applicant
and	
SOUTH AFRICAN AIRWAYS (PTY) LTD	First Respondent
LGM SOUTH AFRICA FACILITY MANAGERS AND ENGINEERS (PTY) LTD	Second Respondent
ALLAN & 204 OTHERS	Third to 207th Respondents

Heard on : 11 May 2011

Decided on : 24 November 2011

JUDGMENT

JAFTA J (Moseneke DCJ, Mogoeng J, Mthiyane AJ and Nkabinde J concurring):

Introduction

[1] This is an application for leave to appeal against the judgment of the Supreme Court of Appeal[1] in terms of which an order granted by the Labour Appeal Court[2] was set aside. The case served before the Labour Appeal Court as an appeal against the judgment of the Labour Court[3] in which an application by Aviation Union of South Africa (Aviation Union) was dismissed.

[2] The key question raised in this matter is whether upon termination of an outsourcing agreement between South African Airways (Pty) Ltd (SAA) and LGM South Africa Facility Managers and Engineers (Pty) Ltd (LGM), the employees of LGM were transferred together with the business in which they were engaged, to a new employer. The business that forms the subject matter of these proceedings is the entity that provided certain services that were rendered to SAA by LGM. The applicants argue that the continued performance of these services by either SAA or a third party, after the termination of the outsourcing agreement, amounts to a transfer as envisaged in section 197 of the Labour Relations Act (LRA).[4]

[1] *South African Airways (Pty) Ltd v Aviation Union of South Africa and Others* 2011 (3) SA 148 (SCA); 2011 (2) BLLR 112 (SCA).

[2] *Aviation Union of South Africa and Others v South African Airways (Pty) Ltd and Others* 2010 (4) SA 604 (LAC); 2010 (1) BLLR 14 (LAC).

[3] *Aviation Union of South Africa and Others v South African Airways (Pty) Ltd and Others* 2008 (1) BLLR 20 (LC).

[4] Act 66 of 1995.

The provisions of section 197

[3] At common law the acquisition and transfer of a business that was in operation led to termination of contracts of employment. If the new owner wished to continue operating the business with the same workers, it would have to conclude new employment agreements with them. Section 197 changed this by providing that certain legal consequences would automatically flow from a transfer of a business as a going concern. One of these consequences is the transfer of the workforce engaged in the transferred business.

[4] It must be mentioned at the outset that the proper interpretation of section 197 is crucial to the determination of the issues raised. It is therefore essential to quote the relevant part of the section. It provides:

> "(1) In this section and in section 197A—
>
> (a) 'business' includes the whole or a part of any business, trade, undertaking or service; and
>
> (b) 'transfer' means the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern.
>
> (2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6)—
>
> (a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;

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

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

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

The parties

[5] The applicants are the Aviation Union and the South African Transport and Allied Workers' Union, which joined the proceedings in this Court as an applicant. Both applicants are trade unions whose members were employees of LGM before the termination of the outsourcing agreement between LGM and SAA. SAA, LGM and 205 employees of LGM are cited as respondents.

Factual background

[6] SAA provides air transport in this country, throughout Africa and in other countries across the world. In the year 2000 it took a decision to outsource certain of its non-core business in order to reduce its maintenance costs which were in excess of R130 million per annum. The decision was in line with the strategy of turning SAA into a profitable entity. To this end SAA put its facilities management operations out to tender. The tender was awarded to LGM.

[7] Following the award, LGM and SAA concluded an outsourcing agreement in terms of which the facilities management operations were transferred from SAA to LGM. The duration of the agreement was to be ten years, commencing on 1 April 2000 and terminating on 31 March 2010. However, SAA retained the option to renew it for a further five years.

[8] The material terms of the agreement were the following: the parties agreed that LGM would provide the services for a fee; the assets and inventory relating to these services were sold to LGM, but on termination of the agreement SAA would be entitled to repurchase them; LGM would be afforded the use of the office space, workshops, airport aprons, computers and the SAA network at all designated airports; upon termination of the agreement SAA would be entitled to have the services transferred back to it or to a third party and obtain assignment of all third party contracts from LGM.

[9] SAA's employees who were engaged in the performance of the services concerned were automatically transferred with the services to LGM, as contemplated in section 197 of the LRA. LGM rendered these services until termination of the agreement by SAA.

[10] In June 2007 SAA terminated the agreement with effect from 30 September 2007. This was due to a breach committed by LGM. In August 2007 SAA put out to tender certain of the services performed by LGM. Three of those services were excluded from

the tender. These were services performed in relation to aircraft movement, trolley maintenance and the manufacture, repair and maintenance of Utility Loading Devices.

[11] LGM requested SAA to delay the termination of the outsourcing agreement until January 2008 on condition that tenders were not published. SAA did not accept this conditional offer to extend the termination. When it became clear to LGM that SAA would not delay the termination date, it contemplated retrenching the employees who were engaged in providing services under the agreement. According to LGM these employees were going to be redundant. In September 2007 LGM invited the applicants to a consultation about the possible retrenchment of its members. A consultation is required, as a preliminary step, by section 189 of the LRA.[5]

[5] Section 189(1) and (2) provides:

> "(1) When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult—
>
> (a) any person whom the employer is required to consult in terms of a collective agreement;
>
> (b) if there is no collective agreement that requires consultation—
>
> i) a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and
>
> ii) any registered trade union whose members are likely to be affected by the proposed dismissals;
>
> (c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals;
>
> (d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.
>
> (2) The employer and the other consulting parties must in the consultation envisaged by subsection (1) and (3) engage in a meaningful joint consensus-seeking process and attempt to reach consensus on—
>
> (a) appropriate measures—
>
> (i) to avoid the dismissals;

[12] While the consultation process between LGM and the applicants was underway, the unions were concerned that their members would lose their jobs. On 14 September 2007 Aviation Union sought an assurance from SAA that upon termination of the outsourcing agreement on 30 September 2007, LGM's employees would be transferred back to SAA. SAA's stance was, however, that there is no legal obligation requiring it to take the workers back.

[13] Aviation Union also sought an undertaking from LGM that it would not terminate the employment of its members, following the termination of the outsourcing agreement. The letter to LGM elicited no response. Faced with the uncertainty over the employment of its members, Aviation Union launched an application in the Labour Court for certain declaratory and interdictory relief against SAA and LGM.

Litigation history

[14] In the Labour Court, Aviation Union sought an order declaring that the termination of the outsourcing agreement between SAA and LGM constituted a transfer of business, as contemplated in section 197 of the LRA. Alternatively, it sought a declarator to the effect that the award of tenders and appointment of third parties to provide the services covered by the agreement, amounted to a transfer of business as envisaged in section 197.

(ii) to minimise the number of dismissals;

(iii) to change the timing of the dismissals; and

(iv) to mitigate the adverse effects of the dismissals."

In addition, Aviation Union sought an interdict restraining SAA from providing or permitting a third party to provide the services in question.

[15] Against LGM, Aviation Union sought an order declaring that the dismissal of its members, occasioned by the termination of the outsourcing agreement, amounted to a dismissal in breach of section 187(1)(g) of the LRA. It also sought an interdict restraining LGM from dismissing its members. The relief sought against LGM was, however, abandoned and consequently it does not feature in these proceedings.

[16] The Labour Court considered the issue it was called upon to decide to be whether section 197 applies to a second outsourcing agreement. In its view, the determination of this question depended on the interpretation of the section. Relying on the definition of the word "transfer", which it construed literally, the Labour Court held that the section does not apply to a second or subsequent outsourcing agreement because the agreement does not involve a transfer by an old employer to a new employer.

[17] The Labour Court held that, for section 197 to apply, the transfer must be facilitated by an old employer to a new one. It found that in a second outsourcing agreement the old employer, which it regarded as the party that initiated and effected the first transfer, does not play the same role. In the light of the clear wording of the definition, the Court further held, section 197 cannot be construed in a way that makes it

apply to a "transfer 'from' one employer to another as opposed to a transfer by the 'old' employer to the 'new' employer".[6]

[18] Regarding the interdict, the Labour Court held that it lacked jurisdiction to restrain SAA from itself providing the services in question or permitting a third party to do so. The Court also held, were the interdict to be issued, it would constitute interference by the Court in a commercial transaction between private parties.

[19] On the facts, the Labour Court found that Aviation Union had failed to establish that a transfer of services from LGM to SAA would occur. Consequently, the application was dismissed.

In the Labour Appeal Court

[20] Dissatisfied with the Labour Court's judgment, Aviation Union appealed to the Labour Appeal Court. In that Court too the case turned on the proper interpretation of section 197, in particular whether the word "by" in the definition of "transfer" can be read to include "from".

[21] The Labour Appeal Court rejected the proposition that the use of "by" signifies that the transferor has a positive role to play in bringing about the transfer. The Court held that the wording of section 197 does not support exclusively the connotation that the

[6] Above n 3 at para 32.

transferor must play an immediate and positive role in bringing about the transfer. The Labour Appeal Court rejected the literal meaning adopted by the Labour Court.

[22] Instead, the Court preferred an interpretation that would advance the purpose of job protection, as opposed to an interpretation that denies protection to employees affected by a second outsourcing agreement. It further held that the literal interpretation of the word "by" was subversive of the protection of employment. The Court held that a departure from the literal meaning of "by" was justified because that meaning would defeat the very purpose for which section 197 was enacted. The Labour Appeal Court concluded that the section applies to a second outsourcing agreement.

[23] In view of the fact that the application was launched and determined before termination of the agreement between SAA and LGM, no facts were placed before the Labour Court on what occurred upon termination of that agreement. In the absence of those facts the Labour Appeal Court held that a limited declaratory order would be appropriate. It granted an order declaring that section 197 is "capable of application when, at the end of the contract between SAA and LGM, the services that were provided by LGM to SAA are transferred to SAA or are contracted out by SAA to another party."[7]

[7] Above n 2 at para 66.

In the Supreme Court of Appeal

[24] SAA appealed the judgment of the Labour Appeal Court to the Supreme Court of Appeal. Challenging the interpretation of section 197 by the Labour Appeal Court, SAA contended that that interpretation was inconsistent with the text of the section. It further submitted that the Labour Appeal Court erred in finding on the facts that there was a transfer of business as a going concern.

[25] The issue that was presented to the Supreme Court of Appeal for determination was whether, upon termination of the outsourcing agreement between SAA and LGM, the services affected by the termination were transferred as a going concern, within the meaning of section 197, either to SAA or a third party.

[26] Upholding the construction contended for by SAA, the Supreme Court of Appeal, in a majority judgment,[8] held that by interpreting the word "by" to mean "from" the Labour Appeal Court distorted the plain meaning of section 197. The majority further held that the Labour Appeal Court had erred in finding that a transfer of services had occurred. The appeal was upheld and the order of the Labour Appeal Court was set aside.

[8] The majority judgment was written jointly by Lewis JA and Ebrahim AJA, with Mpati P and Mhlantla JA concurring.

[27] The minority judgment[9] held, contrary to the findings of the majority, that since LGM was contractually obliged to assist SAA in the further transfer of the services, the debate whether "by" should be construed to mean "from" did not arise. In the view of the minority, there was a transfer by an old employer – LGM – to a new employer – SAA. Relying on clause 27 of the outsourcing agreement between SAA and LGM, the minority held that upon termination of that agreement, there must have been a transfer of services by LGM to SAA. It further held that it was unimaginable that SAA could put the same services to tender if they were not first transferred to SAA. The minority found that there were facts on record which sufficiently supported the order of the Labour Appeal Court.

In this Court

[28] As mentioned earlier, the applicants seek leave to appeal against the majority judgment of the Supreme Court of Appeal. There can be no doubt that the matter raises a constitutional issue. It concerns the proper interpretation of section 197 of the LRA, a statute that was enacted to give effect to the rights in section 23 of the Constitution. As appears below, section 197 was passed to advance and regulate the exercise of the right to fair labour practices, enjoyed by both the employers and the employees.

[29] Leave may also be granted if it is in the interests of justice to do so. The nature of the constitutional issue at stake and its importance, constitute considerations in favour of granting leave. The case concerns the interpretation of provisions which give effect to

[9] The minority judgment was written by Shongwe JA.

section 23 of the Constitution. The interpretation adopted by the Supreme Court of Appeal limits the scope of section 197 and excludes from its operation second and further outsourcing agreements resulting in further transfers of the same business.

[30] As the facts of this case show, outsourcing agreements are usually concluded for a fixed period. If the interpretation by the Supreme Court of Appeal stands, employees who enjoyed protection afforded by section 197 at the stage of the first outsourcing agreement would be left with no protection if the same business is again transferred in terms of a second or further outsourcing agreement. This will be the position regardless of whether the further transfer amounts to a transfer of a particular business as a going concern or not.

[31] The importance of determining the proper meaning of section 197 extends beyond the interests of the applicants. The interpretation by the Supreme Court of Appeal affects all employees who are engaged in a business which is further outsourced. This is another consideration in favour of granting leave.

[32] Although prospects of success on appeal play an important role in this enquiry, they are not determinative.[10] The divergent views expressed by the Supreme Court of Appeal in the two judgments and the views expressed in the judgments of the Labour

[10] *Fraser v Naudé and Others* [1998] ZACC 13; 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at para 10 and *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and Another* [2002] ZACC 30; 2003 (3) SA 513 (CC); 2003 (2) BCLR 182 (CC) at para 17.

Appeal Court show prospects of success. In these circumstances I am satisfied that the interests of justice warrant the granting of leave.

The issues

[33] As stated earlier the main issue is whether upon termination of the outsourcing agreement between SAA and LGM, the services which were provided by LGM in terms of that agreement, were transferred as a going concern to SAA or another entity as envisaged in section 197 of the LRA. The determination of this issue turns on the correct meaning of section 197 and the application of that construction to the present facts. I consider the interpretation issue first.

The proper approach to interpreting section 197

[34] It is important to identify the correct approach to interpreting provisions of the LRA at the outset. Section 3 of the LRA[11] obliges any person interpreting the LRA to adopt a construction that complies with the Constitution and public international law while at the same time giving effect to the LRA's primary objects. These objects are

[11] Section 3(1) 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."

listed in section 1.[12] They include the regulation of and giving effect to the rights entrenched in section 23 of the Constitution.[13]

[12] Section 1(1) of the LRA provides:

> "The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace 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 workplace; and
>
> iv) the effective resolution of labour disputes." (Footnotes omitted.)

[13] Section 23 of the Constitution provides:

> "(1) Everyone has the right to fair labour practices.
>
> (2) 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.
>
> (3) Every employer has the right—
>
> (a) to form and join an employers' organisation; and
>
> (b) to participate in the activities and programmes of an employers' organisation.
>
> (4) Every trade union and every employers' organisation has the right—
>
> (a) to determine its own administration, programmes and activities;
>
> (b) to organise; and
>
> (c) to form and join a federation.
>
> (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

[35] In *National Education Health and Allied Workers Union v University of Cape Town and Others,*[14] (*NEHAWU*) this Court had the occasion to interpret section 197. In that case the correct approach to interpreting the section was defined in the following terms:

> "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 that the workers will be part of that transfer. This will occur if the business is transferred 'as a going concern'."[15]

[36] Section 197 is located in chapter VIII of the LRA which deals with dismissals and unfair labour practices. It promotes the right to fair labour practices, guaranteed by section 23 of the Constitution. This right is enjoyed by the workers and the employers, and consequently the provision serves a dual purpose of advancing both their interests. These interests may sometimes come into conflict.[16]

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(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter the limitation must comply with section 36(1)."

[14] [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC).

[15] Id at para 62.

[16] Id at para 53.

[37] The dual purpose of section 197 was pronounced in *NEHAWU* where this Court said:

> "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 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."[17]

[38] The section achieves its purpose by preserving all contracts of employment between the workers and the owner of the business which is transferred as a going concern. In this way, on the one hand, the workers' employment is safeguarded and, on the other, a new owner is guaranteed a workforce to continue with the operation of the business. Section 197 must be interpreted against this background.

The meaning of section 197

[39] The scheme that emerges from the text is that section 197 alters the common law position flowing from the transfer of business as a going concern. Under the common law a transfer has the effect of terminating all contracts of employment between the transferring employer and the employees of the business. Section 197 is designed to keep

[17] Id.

all contracts of employment extant and substitute the new owner of the business for the previous employer under those contracts.

[40] Section 197(1) defines two key words used in the section. The first is "business" which is defined to include "the whole or a part of any business, trade, undertaking or service". It is apparent from this definition that the section is designed to cover every conceivable business. The second is "transfer". It is defined to mean "the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern."

[41] While the first word defines the types of businesses to which the section applies, the second word defines the act that triggers the application of the section. These definitions are complementary and their role is to facilitate the achievement of the purpose for which the section was enacted.

[42] Section 197(2) lists legal consequences that flow from a transfer of the kind envisaged in the section. These consequences are:

> "(a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;
>
> (b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;

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

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

[43] The text of section 197(2) makes it plain that its application is dependent on the existence of a transfer. It says if a transfer contemplated in the section takes place, the legal consequences it specifies will be activated. For the consequences to be triggered, a business must be transferred as a going concern. Once a transfer of this kind occurs, it automatically carries with it all contracts of employment that existed immediately before the transfer took place. The basket of what is transferred consists of the business and employment contracts. This simultaneous transfer of business and contracts of employment does not require any declaration by a court. The employment contracts are automatically transferred together with the business. The person to whom the business is transferred replaces the employer in terms of those contracts and assumes all obligations of the previous employer. He or she also acquires the contractual rights of the previous employer.

[44] It must be stressed that the key event which brings section 197 into play is the transfer of business as a going concern. The question whether the section applies to a particular case cannot be determined, as the Supreme Court of Appeal did, with reference

to the label of the transaction effecting transfer. The section does not cite transactions to which it applies. Nor does it refer to any labels. Instead, its application must always be determined with reference to three requisites, namely, business, transfer and going concern.

Business

[45] As stated earlier the section would apply to any business provided that the other requirements are met. The aim is to cast the net as wide as possible.

Transfer

[46] For the section to apply the business must have changed hands, whether through a sale or other transaction that places the business in question in different hands. Thus the business must have moved from one person to the other. The breadth of the transfer contemplated in the section is consistent with the wide scope it is intended to cover. Therefore, confining transfers to those effected by the old employer is at odds with the clear scheme of the section.

[47] But whether a transfer as contemplated in section 197 has occurred or will occur is a factual question. It must be determined with reference to the objective facts of each case. Speaking generally, a termination of a service contract and a subsequent award of it to a third party does not, in itself, constitute a transfer as envisaged in the section. In those circumstances, the service provider whose contract has been terminated loses the

contract but retains its business. The service provider would be free to offer the same service to other clients with its workforce still intact.

[48] For a transfer to be established there must be components of the original business which are passed on to the third party. These may be in the form of assets or the taking over of workers who were assigned to provide the service. The taking over of workers may be occasioned by the fact that the transferred workers possess particular skills and expertise necessary for providing the service or the new owner may require the workers simply because it did not have the workforce to do the work. Without the protection afforded by section 197, the new owner with no workers may be exposed to catastrophic consequences, in the event of the workers declining its offer of employment.

Going concern

[49] If the transaction in terms of which a business is transferred specifies that it is or will be transferred as a going concern, it would constitute sufficient proof of that fact. However, this does not mean that where the transaction is silent on this issue, a transfer as a going concern cannot come into existence. Its existence may still be established with reference to objective facts.

[50] The test for determining whether a business was transferred as a going concern or not was laid down by this Court in *NEHAWU*. There the Court said:

> "In deciding whether a business has been transferred as a going concern, regard must be had to the substance and not the form of the transaction. A number of factors will be relevant to the question whether a transfer of a business as a going concern has occurred, such as the transfer or otherwise of assets both tangible and intangible, whether or not workers are taken over by the new employer, whether customers are transferred and whether or not the same business is being carried on by the new employer. What must be stressed is that this list of factors is not exhaustive and that none of them is decisive individually."[18] (Footnote omitted.)

[51] This statement makes it clear that what matters during the factual inquiry is the substance of the transaction as opposed to its form. In determining that, special attention must be paid to specific factors which are capable of illuminating the nature of the transaction under scrutiny. The listed factors are not exhaustive and none of them is decisive of the issue.

[52] Although the definition of business in section 197(1) includes a service, it must be emphasised that what is capable of being transferred is the business that supplies the 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 this is not what the section was designed to achieve is apparent from its scheme, historical context and its purpose. The context referred to here is the alteration of the common law consequences on employment contracts, when the ownership of a business changes hands.

[18] Above n 14 at para 56.

[53] Consistent with this approach is the fact that the operation of the same business by the transferee is in and of itself not determinative of the question whether a transfer as a going concern has taken place. There must be other indicators that support the conclusion that when a business passed to the new owner, it was transferred as a going concern. These indicators include whether assets, employees or customers were taken over by the new owner.

The interpretation by the Supreme Court of Appeal

[54] Tracking the construction of the section contended for by SAA, the Supreme Court of Appeal adopted a different approach in its interpretation of section 197. The majority singled out the word "by" in the definition of "transfer" and gave it an isolated literal meaning. Undue emphasis was placed on that meaning with little regard to the context in which the section appears in the LRA. No account was taken of the purpose of the section and the objects of the LRA.

[55] Determining the operation of the section with reference to a single word is not the correct approach to its interpretation. The whole section must be read in its proper context. Reading section 197 as a whole in the context of where it is located in the LRA and paying sufficient attention to its purpose and the objects of the LRA, reveal that it applies to any transaction that transfers a business as a going concern. It follows that the

majority in the Supreme Court of Appeal erred in holding that the section does not apply to second generation outsourcing agreements.[19]

Remedy

[56] Since I hold that the construction given to section 197 by the Supreme Court of Appeal is incorrect, I must determine the appropriate remedy. In doing so I must first determine what remedy the Labour Court ought to have granted had it not incorrectly interpreted the section. The Labour Court gave it the meaning that was endorsed by the Supreme Court of Appeal and concluded that the section does not apply to the so-called second generation outsourcing agreements. In this regard the Labour Court said:

> "Consequently, I am of the view that section 197 only contemplates first generation outsourcing; in other words, where the business is transferred by the old employer to the new employer and not the so-called second generation transfers."[20]

[57] The Labour Court declined to consider whether on the evidence before it, the applicants had made out a case for a declarator. The order sought was for declaring that the termination of the agreement between SAA and LGM and the supply of the services which were provided by LGM, amounted to a transfer of those services as a going concern as envisaged in section 197 of the LRA. In the notice of motion this relief was framed in two parts, the main and alternative part. The main part relates to a declaration

[19] The phrase "second generation outsourcing agreement" is generally used in reference to a second or further outsourcing agreement in respect of the same business.

[20] Above n 3 at para 32.

that the termination of the outsourcing agreement and the performance of the services concerned by SAA constituted a transfer as a going concern. In the alternative, the applicants sought an order declaring that the award of specified tenders to third parties constituted a transfer of business as a going concern. In addition, the applicants sought an interdict restraining SAA from performing any of the functions which fell under the terminated agreement unless the business covered by that agreement was transferred as a going concern.

[58] Following its interpretation of section 197, the Labour Court confined its ruling to the question of the interdict.[21] The Court held that further suitable relief would be available to the applicants after the award of the tenders. This suggests that the Court thought of deferring its ruling on whether the section applied, to a date subsequent to the award of tenders. But no formal ruling was made in this regard. It dismissed the application with costs.

[59] Having given section 197 a different meaning, the Labour Appeal Court set aside the order of the Labour Court and replaced it with the order set out in paragraph 23. The Court held that this order was designed to settle the legal dispute between the parties and provide them with a framework within which to arrange their legal relationships. The Labour Appeal Court too did not evaluate the facts to determine whether a transfer as defined in the section would have occurred. The Court held:

[21] Id at para 39.

> "On a purposive construction, section 197 covers the situation whereby, after SAA cancelled the initial outsourcing agreement, it invoked clause 27 of the agreement to compel LGM to implement the 'hand-over plan'. The application should not have been dismissed in its entirety. Some declaratory order should have been granted."[22]

The Labour Appeal Court was of the view that a transfer envisaged in section 197 could take place if SAA, which was a party to the cancelled outsourcing agreement, invoked clause 27 of that agreement to compel LGM, another party to the same agreement, to implement the handover plan. This accords with the general common law principle that only parties to a contract may enforce its terms.[23] Aviation Union did not seek to enforce the terms of that agreement. In fact it abandoned all claims against LGM.

[60] It is apparent from the judgment of the Labour Appeal Court that it considered the facts placed on record to be inadequate for determining whether section 197 applies to the case. The Court said:

> "Appellants sought a detailed order that would specify the necessary steps to be taken in terms of s 197 to enforce employee rights. However, to do so would require knowledge of events that took place after October 2007, none of which was contained in the evidence placed before this court. In the circumstances this court would be ill-advised to frame a detailed order which would have legal consequences unbeknown to this court, given the factual matrix placed before it."[24]

[22] Above n 2 at para 64.

[23] *Hillock and Another v Hilsage Investments (Pty) Ltd* 1975 (1) SA 508 (A) at 515.

[24] Above n 2 at para 65.

[61] And in his concurring judgment Zondo JP added:

> ". . . I am of the view that section 197 is capable of application in a situation such as the one under consideration. Whether it indeed applied in this case will depend upon what happened on 1 October 2007. The application was launched before that date and the court a quo dealt with the matter on the basis of papers which did not cover the events of 1 October 2007. Although during the hearing of this appeal I had indicated to the parties that it could be helpful if they informed us in writing through the registrar what happened on 1 October 2007, and they have supplied us with letters dealing with the situation, upon reflection I think that we cannot take such information into account, as we must decide the appeal on the basis of the same information that the court a quo had before it."[25]

[62] The Supreme Court of Appeal disposed of the matter on the basis that section 197 does not apply to a transfer that is not effected by the original employer, as is the position in the present case. The Court held further that there was no evidence supporting the proposition that there was a transfer of a business as a going concern by LGM either to SAA or to another entity.[26]

[63] The narration of how the other courts dealt with the case shows that, for different reasons, none of them embarked on a factual enquiry to determine whether the applicants established that the business in which they were engaged was to be transferred as a going concern. In my view the Labour Court erred in dismissing the application without making a ruling on the claim for a declarator because it was possible that its construction of section 197 could be declared incorrect on appeal. There was a strong prospect that

[25] Id at para 32.

[26] Above n 1 at para 41.

another court might give the section a different meaning. In two previous decisions the Labour Court had given a different meaning to the section.[27]

[64] But assuming that it is open to this Court to grant relief on the claim for a declarator, for the reasons that follow I am not convinced that this is an appropriate option. A declarator would have to be based on the facts as they were presented to the Labour Court at the time it heard the matter. In my view those facts are insufficient to support the finding that the termination of the agreement between SAA and LGM, coupled with the performance of the relevant services by SAA, would constitute a transfer of business as a going concern. Equally the facts do not adequately show that the award of any of the tenders would constitute a transfer envisaged in section 197.

[65] Despite the fact that the terminated agreement entitled SAA to repurchase the assets that were transferred to LGM there is no evidence showing that it had intended to do so. The evidence indicates that SAA had asked LGM to prepare a handover plan. Details of what the plan must contain are not spelt out. But even if the plan was intended to effect transfer it would not be sufficient proof of a transfer as a going concern. This is so because LGM also tendered for the services and if it were to be the successful tenderer there would be no transfer of the assets or indeed the business itself.

[27] *COSAWU v Zikhethele Trade (Pty) Ltd and Another* (2005) 26 ILJ 1056 (LC) and *Nokeng Tsa Taemane Local Municipality and Another v Metsweding District Municipality and Others* (2003) 24 ILJ 2179 (LC).

[66] Moreover, the outsourcing agreement between SAA and LGM did not oblige the latter to effect any transfer of assets purely upon termination. Clause 27 of the outsourcing agreement stipulates that SAA is entitled, and not obliged, to purchase all assets and inventory belonging to LGM which were dedicated to providing the affected services.[28] The same clause provides that in the event of SAA requiring LGM's assistance in transferring certain services to it or a third party, SAA and LGM may agree in writing upon a period within which such assistance may be offered.[29] However the clause makes it plain that whatever period to which the parties may agree, will end on the termination date.

[67] Properly construed, the termination clause did not entitle SAA to demand a handover plan from LGM. It required the parties to agree to the terms and period of the assistance required. Those terms would include fixed assets and inventory which SAA would purchase from LGM. The parties' agreement would have to be reduced into

[28] Clause 27.1.2 provides:

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

[29] Clause 27.1.1 provides:

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

writing. Lastly, if the agreement existed, the period within which assistance was offered would have ended on 30 September 2007.

[68] The only obligation clause 27 imposed upon SAA and LGM is that upon termination, both parties must "surrender any information pertaining to the scope of work belonging to the other party."[30] Everything else was subject to the parties' agreement. There is no evidence showing that an agreement contemplated in clause 27 was concluded by SAA and LGM.

[69] But even if the clause obliged LGM to transfer the business in question to a third party, this would fall short of establishing that a transfer of the business as a going concern will take place. It would still be open to the successful tenderer to reject the proposed transfer because the tender conditions did not impose upon the successful tenderer the obligation to receive transfer. And since none of the tenderers, barring LGM, was a party to the agreement between LGM and SAA there would be no contractual obligation on them to accept the transfer. In those circumstances the rejection would prevent the transfer from taking place.

[70] However, it is true that the services in question are necessary for the proper operation of SAA's core business. All parties accept that the services were not going to

[30] Clause 27.2 provides:

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

be discontinued. Consequently one of two options were to occur after the termination of the outsourcing agreement, either SAA would perform the services itself or appoint another party to do so. The other party includes LGM because it tendered for the same services. In either case, the performance of the same service would continue.

[71] If this were to happen, in my view it would not sufficiently show that there was a transfer as a going concern. It would show that the same services continue to be supplied but that in itself is not adequate to bring the transaction within the ambit of section 197. It must be recalled that what is transferable in terms of the section is not a service itself but a business or entity that provided the service concerned. For a transfer to trigger the application of the section, it must constitute a transfer as a going concern.

[72] In the founding affidavit the applicants claim that a transfer as a going concern would occur. They allege:

> "SAA will either have to provide the services in the cancelled Outsourcing Agreement itself, as it did prior to the Outsourcing Agreement of 2000, or it will have to engage one or more service providers to manage and provide those services to it, with effect from 1 October 2007.
>
> In either of the events . . . part or all of the services or undertaking will be transferred from LGM to one or more other parties as a going concern by virtue of the provisions of section 197."

[73] Although SAA admitted that the services would be provided by the successful tenderer, it however disputed that this would constitute a transfer of the business as a going concern. The deponent to its affidavit said that SAA would continue with the tender process, and that the successful bidder would commence rendering the services. The affidavit accordingly denied that the services or undertakings would be transferred from LGM to any other party by virtue of the provisions of section 197. SAA contended that Aviation Union had failed to establish that any of the services concerned were transferred as a going concern.

[74] The phrase "going concern" has been construed to include not only that the business has changed hands but that it is exactly the same business that continues to operate. We are told that to determine this fact one must look at various factors, none of which is decisive.[31] These factors include whether or not the same business is being carried on by the party who received it. Therefore, proof of the fact that performance of the same services was to continue, albeit under different hands, does not establish a transfer as a going concern. Something more is required.

[75] Another consideration that militates against the granting of relief on the papers, as they presently stand, is that the order sought in this Court will not cover the events that occurred after the date on which the outsourcing agreement was terminated. There is

[31] Above n 14 at para 56.

simply no evidence on what happened except the fact that an interim service provider was appointed whilst the tenders were being considered by SAA.

[76] An order that leaves out of account what eventually happened will not bring finality to the dispute. It will be incapable of being executed. Speedy resolution is a distinctive feature of adjudication in labour relations disputes.[32] That process has already taken long in this case. It should not be extended by fresh litigation aimed at bringing the dispute to its final resolution. The Labour Appeal Court should have remitted the matter to the Labour Court, instead of issuing an order that depended on facts yet to be established. The order, not being an interdict, is indeed unusual.

[77] In the circumstances, the matter must be remitted to the Labour Court for it to deal with the case in the light of this judgment. It is desirable for the parties to seek leave from that Court to lead further evidence, encompassing what occurred to the business after the termination of the outsourcing agreement. The Labour Appeal Court offered

[32] In *Shoprite Checkers (Pty) Ltd v CCMA and others* [2009] 7 BLLR 619 (SCA) at para 34, the Supreme Court of Appeal said:

> "The entire scheme of the LRA and its motivating philosophy are directed at cheap and easy access to dispute resolution procedures and courts. Speed of result was its clear intention. Labour matters invariably have serious implications for both employers and employees. Dismissals affect the very survival of workers. It is untenable that employees, whatever the rights or wrongs of their conduct, be put through the rigours, hardships and uncertainties that accompany delays of the kind here encountered. It is equally unfair that employers bear the brunt of systemic failure."

See also *Strategic Liquor Services v Mvumbi NO and Others* [2009] ZACC 17; 2010 (2) SA 92 (CC); 2009 (10) BCLR 1046 (CC); *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO and Others* [2009] ZACC 10; 2010 (2) SA 269 (CC); 2009 (8) BCLR 779 (CC); and *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and others* [2010] ZACC 3; 2010 (5) BCLR 422 (CC); [2010] 5 BLLR 465 (CC).

this opportunity to the parties but they chose improper means of placing evidence before the Court.

[78] For these reasons I would uphold the appeal and remit the case to the Labour Court.

YACOOB J (Ngcobo CJ, Cameron J, Froneman J, Khampepe J and Van der Westhuizen J concurring):

Introduction

[79] This application for leave to appeal requires us to determine the reach of section 197(1) and (2) of the Labour Relations Act (LRA)[1] and decide whether the transaction at issue is subject to the section. The case involves the correct interpretation of this section. In brief section 197(1) and (2) provide for the transfer of employees from the old employer to the new one, if a business is transferred as a going concern from the former to the latter.

[1] Act 66 of 1995.

[80] I have had the benefit of reading the judgment of my colleague Jafta J. I agree with the conclusion that leave to appeal should be granted and have nothing to add on this aspect.

[81] There is no debate that section 197 "applies to any transaction that transfers a business as a going concern",[2] and that the majority judgment in the Supreme Court of Appeal erred in holding that "the section does not apply to second generation outsourcing agreements."[3] However, this judgment adopts a somewhat different approach to this question. This judgment holds broadly that a permissible meaning of the word "by" inevitably leads to the construction of the section favoured by the Labour Appeal Court (LAC), and that it is unnecessary to equate the word "by" with "from" and conclude that a transfer from one person or entity to another suffices for purposes of section 197.

[82] I cannot agree with Jafta J that a transfer must already have taken place in this case before the applicants are entitled to any relief, nor with the conclusion that the evidence does not justify relief being accorded to the applicants in this Court. There is therefore no need to refer the matter back to the Labour Court for further consideration and the interests of justice require the appeal to be finalised here.

[2] The judgment of Jafta J at para 55.

[3] Id.

[83] This case has its origins in and is primarily concerned with a written agreement entered into between SAA[4] and LGM[5] which admittedly transferred that part of SAA's business concerned with facilities management operations, and represented by the Infrastructure and Support Services departments, to LGM. But the transfer of the facilities management operations business was not to be permanent, in other words the ownership of the business was not to be transferred. LGM acquired the right to conduct the business for ten years[6] with the possibility of renewal for further five year periods. Consequent upon this transfer of business, SAA's employees followed the business to LGM in accordance with section 197(1) and (2). Of importance for the purposes of this case is the fact that SAA had the right to cancel the agreement by which the business was transferred to LGM as a going concern if, amongst other things, there was a material change in LGM's ownership.

[84] The agreement must be read against the background of an agreement that had previously been entered into between SAA and three trade unions.[7] That agreement made it plain that a transfer of business from LGM to SAA was contemplated. The agreement between LGM and SAA, entered into shortly afterwards, is concerned with what may be called the "nuts and bolts" of the transfer of business considered in the earlier agreement.

[4] South African Airways (Pty) Ltd, the first respondent.

[5] LGM South Africa Facility Managers and Engineers (Pty) Ltd, the second respondent.

[6] From 1 April 2000 to 31 March 2010.

[7] Aviation Union of South Africa (Aviation Union), South African Transport and Allied Workers' Union (Transport Union) and SALSTAFF.

[85] LGM became entitled to conduct the business of rendering the service concerned to SAA for a fee. SAA sold to LGM the fixed assets and certain other items concerned with the business of rendering the service and LGM became obliged to sell them back to SAA at reasonable market prices on termination of the agreement. LGM acquired the right to use office space, workshops, the airport apron, computers and computer networks belonging to SAA at all airports for the purpose of the conduct of the business of providing the service. Certain property used for the conduct of the business concerned was also let by SAA to LGM. Finally, LGM became obliged, on the termination of the agreement, to transfer its right to provide the service to SAA either to SAA or a third party nominated by it.

[86] The agreement was cancelled on account of a material change in the ownership of LGM. The cancellation was to take effect on 30 September 2007. SAA required LGM to develop a hand-over plan to give effect to the cancellation. The workers employed by LGM feared that the cancellation of the contract would result in them losing their jobs. The first applicant, one of the employees' trade unions,[8] wrote to SAA seeking an assurance that the affected workers would be transferred to SAA when the cancellation took effect. SAA replied in the negative, contending that it was not obliged in law to do so.

[8] Aviation Union.

[87] Before I present a short account of the decisions of the three courts that have already considered this case, it is appropriate to inform the reader that all these cases were concerned mainly with the meaning of the word "by" in the section, in the context that the section was applicable only in the event of the transfer of a business as a going concern *by* an old employer to a new one. All the previous decisions of courts in this case concerned themselves in one way or another with a statement in *COSAWU*:[9]

> "A mechanical application of the literal meaning of the word 'by' in section 197(1)(b) would lead to the anomaly that workers transferred as part of first generation contracting-out would be protected whereas those in second generation scheme would not be, when both are equally needful and deserving of the protection. The possibility for abuse and circumvention of the statutory protections by unscrupulous employers is easy to imagine. . . . I am in agreement with Todd et al *Business Transfers and Employment Rights in South Africa* . . . that section 197(1)(b) might be better interpreted to apply to transfers 'from' one employer to another, as opposed to only those effected 'by' the old employer."[10]

In the Labour Court

[88] Aviation Union applied to the Labour Court for certain declaratory and interdictory relief aimed at ensuring that the workers would not lose their jobs consequent upon the cancellation. The second applicant (Transport Union)[11] was joined as a respondent[12] in

[9] See *COSAWU v Zikhethele Trade (Pty) Ltd and Another* (2005) 26 ILJ 1056 (LC) (*COSAWU*) as quoted by the Labour Court below n 13 at para 32, the Labour Appeal Court below n 18 at para 58 and the Supreme Court of Appeal below n 22 at paras 17-8.

[10] *COSAWU* above n 9 at para 29.

[11] South African Transport and Allied Workers' Union.

[12] The Transport Union did not participate in the proceedings in the Labour Court, the Labour Appeal Court or the Supreme Court of Appeal.

the application. Aviation Union relied on section 197(1) and (2), and argued that the implementation of the cancellation of the agreement would amount to a transfer of business by the old employer to the new employer within the ambit of these provisions.

[89] SAA admitted that the agreement had been cancelled and indicated that most of the services that had been provided by LGM in terms of the contract had been put out to tender, that the tender process would not be completed by 30 September 2007, and that an interim service provider was to render these services from 1 October 2007 until a service provider(s) was appointed by the tender process. SAA urged before the Labour Court that section 197 was not engaged on these facts because, so the argument ran, there would be no transfer of business by the old employer to the new employer. It seems to have been accepted before the Labour Court that there would be a transfer of business but in any event the focus of the inquiry in that Court was not whether there would be a transfer of a business as a going concern. The focus of the argument in that Court was that any transfer of business that might occur was not a transfer by an old employer to a new one.

[90] The Labour Court[13] saw the case before it as one concerned with what has been dubbed "second generation" contracting out, and delineated the issue to be decided in these terms:

[13] *Aviation Union of South Africa and Others v SAA (Pty) Ltd and Others* [2008] 1 BLLR 20 (LC) (Labour Court).

> "The so-called 'second generation contracting out' takes place where there is a change in the provider of an outsourced service. In other words, the 'old' employer remains the client (in other words, the employer, who initially contracted the service out to the 'new employer', now becomes the outgoing service provider) but the service is removed from the (first or outgoing) service provider and contracted out to another (the second or incoming) service provider. The question which arises is whether there can be a section 197 transfer between the unsuccessful outgoing contractor and the successful incoming contractor. Put differently, the question which arises is whether this 'second outsourcing' constitutes a transfer as contemplated by section 197 of the LRA."[14]

[91] The Labour Court was of the view that section 197 unambiguously covered only those transfers "between two very specific entities."[15] The Court concluded:

> "Consequently, I am of the view that section 197 only contemplates first generation outsourcing; in other words, where the business is transferred by the old employer to the new employer and not the so-called second generation transfers."[16]

[92] The Labour Court expressly disagreed with the *COSAWU* finding that the word "by" in section 197(1) should be read as "from", and that the section should apply to all transfers of business from the old employer to the new employer.[17] The application by Aviation Union was dismissed with costs.

[14] Id at para 26.

[15] Id at para 30.

[16] Id at para 32.

[17] *COSAWU* above n 9 at paras 27-36.

In the Labour Appeal Court

[93] Aviation Union's appeal to the Labour Appeal Court was successful.[18] The Court declared that—

> "section 197 of the Labour Relations Act 66 of 1995 is capable of application when, at the end of the contract between SAA and LGM SA, the services that were provided by LGM SA to SAA are transferred to SAA or are contracted out by SAA to another party."[19]

[94] There were however two separate judgments in the Labour Appeal Court. One was a unanimous judgment (the Labour Appeal Court),[20] while the second, signed only by Zondo JP, was written for purposes of emphasis and amplification. The Labour Appeal Court reasoned that the word "by" has multiple meanings, and that a permissible meaning covers the situation that would arise consequent upon the cancellation: LGM would be obliged to transfer the business either to SAA or to another service provider. In either event the transfer would be one by the old employer to the new one. The Court also held that, even if the word "by" required a positive act by the old employer (which it did not), the "requisite positive action was taken when the initial agreement was concluded between SAA and LGM".[21]

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[18] *Aviation Union of South Africa and Others v South African Airways (Pty) Ltd and Others* 2010 (4) SA 604 (LAC); [2010] 1 BLLR 14 (LAC) (Labour Appeal Court).

[19] Id at para 66.

[20] Written by Davis JA.

[21] Above n 18 at para 62.

In the Supreme Court of Appeal

[95] The Supreme Court of Appeal upheld SAA's appeal against the decision of the Labour Appeal Court.[22] In the understanding of the Supreme Court of Appeal, the Labour Appeal Court "adopted the approach in *COSAWU*".[23] The Court conveyed its approval of the criticism of the *COSAWU* reasoning by Wallis,[24] saying:

> "As Wallis observed of this reasoning, interpreting 'by' to mean 'from' changes the meaning of the definition, and there was no justification for the court's changing the words that the legislature had used after consideration and debate."[25] (Footnote omitted.)

[96] The judgment then concluded that this approach, adopted by the Labour Appeal Court "is not consonant with the approach of the Constitutional Court and this court, and the disregard of the words used by the legislature on the basis of a general 'fairness' principle leads not only to uncertainty, but also to a failure to observe the doctrine of separation of powers."[26]

[97] The Court described the conclusion of the Labour Appeal Court in the following terms:

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[22] *South African Airways (Pty) Ltd v Aviation Union of South Africa and Others* 2011 (3) SA 148 (SCA); [2011] 2 BLLR 112 (SCA) (Supreme Court of Appeal).

[23] Id at para 16.

[24] Wallis "Is Outsourcing In? An Ongoing Concern" (2006) 27 ILJ 1. The writer of this article is now a judge in the Supreme Court of Appeal.

[25] Supreme Court of Appeal above n 22 at para 18.

[26] Id at para 19.

> "Thus the court below held that a literal interpretation of the word 'by' in section 197 was subversive of the very purpose of the section, and found that a purposive construction of the section was warranted."[27]

[98] The Supreme Court of Appeal firmly rejected the approach of the majority in the Labour Appeal Court in the following words:

> "And even if we accepted that such abuse is possible, that is no reason to distort the plain meaning of the section. We accordingly conclude that the Labour Appeal Court erred in adopting an approach, to the interpretation of section 197, which is at odds with the ordinary meaning of the words chosen by the legislature. By interpreting the word 'by' to mean 'from', the court impermissibly distorted the meaning of the word."[28]

[99] The Supreme Court of Appeal did not address the reasoning of the Labour Appeal Court that even if section 197 required a positive act by the transferor, LGM's act in concluding the agreement was sufficiently positive conduct to comply with this requirement.

In this Court

[100] The contentions of the parties in the three Courts that have considered this case were again advanced in this Court with relatively minor differences in emphasis and approach. The Transport Union, in addition to supporting the submissions of Aviation Union, put up argument that the word "by" was at least reasonably capable of the

[27] Id at para 23.

[28] Id at para 32.

construction both trade unions preferred and that this Court should adopt this construction because it is more constitutionally compliant. In view of the conclusion in this judgment concerning the meaning of section 197(1) and (2), the contentions of the Transport Union are not reached. It is necessary to first define the issues. The first issue is concerned with the nature of the transactions that would attract section 197 and, in particular, the meaning of the word "by" in the requirement that it is a transfer by the old employer to the new one which renders the section applicable to it. The second is whether there is sufficient evidence of a transaction of the kind contemplated in section 197 to warrant relief.

[101] Section 197(1) and (2) provide:

> "(1) In this section and in section 197A—
>
> (a) 'business' includes the whole or a part of any business, trade, undertaking or service; and
>
> (b) 'transfer' means the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern.
>
> (2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6)—
>
> (a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;
>
> (b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;

> (c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and
>
> (d) the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer."

[102] I must emphasise immediately that the main area of dispute was not so much what was being transferred but really by whom. The only real issue was whether the transfer would be one by an old employer to a new one. I accept however that there must be evidence that the contemplated transfer is that of a business as a going concern before relief can be granted. I will deal with this issue briefly in the section of this judgment that is concerned with whether any relief is justified.

[103] I think the place to begin is to say a word about the meaning of the concepts "old employer" and "new employer" as contained in the section. The point to be made is that each of these concepts is not static. The concept "once an old employer, always an old employer" does not hold good for the meaning of the section. Nor does the approach: "once a new employer, always a new employer". My understanding on this score perhaps requires no explanation, but a brief one may not be out of place. When a business is transferred successively from one entity to another:

(a) in transfer one by A to B, A is the old employer and B, the new employer;

(b) in transfer two by B to C, B is no longer the new employer but the old one, and C becomes the new employer; and

(c) if transfer two is by B back to A, B will be the old employer and A, who had been the old employer in the first transfer, becomes the new employer in the second transfer.

[104] This view of the meaning of these concepts can now be demonstrated by reference to the circumstances of the case before us. On the assumption that each of the transfers referred to below will qualify as a transfer of business as a going concern, in the transfer:

(a) by SAA to LGM, SAA is the old employer and LGM the new employer;

(b) by LGM back to SAA for whatever reason, LGM is the old employer and SAA the new employer;

(c) subsequently from SAA to a third party, SAA will be the old employer and the third party the new employer; and

(d) by LGM directly to the third party, LGM is the old employer and the third party the new employer.

[105] A further general point must be made. An inquiry whether a transaction falls under the terms of section 197(1) and (2) would be misleading if it focuses solely or mainly on the "generation" of the transfer. It has the potential to bring about an incorrect result. It does not matter in principle what the "generation" of the outsourcing is, or even

whether the transaction is concerned with contracting out at all. The true inquiry is whether there has been a transfer of a 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. A transfer of business may not be covered by section 197 even if it is a "first generation" contracting out. On the other hand, even a "fifth generation" outsourcing could be caught by the section if it is in reality the transfer of a business as a going concern.

[106] The final general observation is that, in determining whether contracting out amounts to the transfer of a business as a going concern, the substance of the initial transaction, more specifically whether what is outsourced is a business as a going concern rather than the provision of an outsourced service remains significant during subsequent transfers. If the outsourcing institution from the outset did not offer the service, that service cannot be said to be part of the business of the transferor. What happens here is simple contracting out of the service, nothing more, nothing less.

[107] There is no transfer of the business as a going concern. The outsourcee is contracted to provide the service, and becomes obliged to do so. And it is the outsourcee's responsibility to make appropriate business infrastructure arrangements. These may include securing staff, letting appropriate property for office or other work space, and acquiring fixed assets, machinery and implements, computers, computer networks and the like. Cancellation of the contract in these circumstances entails only

that the outsourcee forfeits the contractual right to provide the service. The whole infrastructure for conducting the business of providing the outsourced service would ordinarily remain the property of the outsourcee. As we shall see, that is not what happened here, either when the initial outsourcing contract was concluded between SAA and LGM, or when SAA cancelled it.

[108] If, on the other hand, the first outsourcing exercise is really a transfer of part of the business of the outsourcer who has been carrying on the business of the provision of the service until transfer, the question whether the subsequent transfer is merely the transfer of the right to provide the outsourced service or the transfer of a business as a going concern would arise. And that would require an analysis of the terms of the transaction that gives rise to the subsequent event.

"By" or "from"?

[109] The Supreme Court of Appeal held on the meaning of the word "by":

> "The choice of language in section 197 is plain and unambiguous. By the deliberate use of the word 'by', the legislature showed that it intended section 197 to apply to a situation where there are at least two positive actors in the process. The ordinary meaning of the word 'by' requires positive action from the old employer who transfers the business to the new employer."[29]

[29] Supreme Court of Appeal above n 22 at para 31.

[110] This approach the Labour Appeal Court dealt with thus:

> "Wallis . . . says '[w]hat the section says is that that the old employer is a positive actor in the process. This is not what occurs when an institution has concluded a contract for the provision of cleaning services and at the expiry puts it out to tender and the existing contractor loses the tender. In those circumstances the role and function of the old employer is to strive to keep the contract not to transfer all or any part of the business to someone else.' Sophistry aside, there is no compelling reason to conclude, on the wording of section 197(1)(b), that the new employer (i.e. the initial transferee) has not transferred the business to a third party or to the initial transferor. In other words the initial transferee became the employer after the initial transfer. Pursuant to the contract which caused the initial transfer, the existing employer is now obliged to transfer the business to a party which will now become the new employer. Hence the second generation transfer falls within the scope of the definition."[30]

[111] I agree with the approach of the Labour Appeal Court. I might add that it is quite impossible to determine in the air that a "second generation" outsourcing arrangement does or does not amount to a transfer of a business as a going concern. As was said in *NEHAWU*,[31] this determination is wholly dependent on the facts and circumstances of the particular case:

> "The phrase 'going concern' is not defined in the LRA. It must therefore be given its ordinary meaning unless the context indicates otherwise. What is transferred must be a business in operation 'so that the business remains the same but in different hands'. Whether that has occurred is a matter of fact which must be determined objectively in the light of the circumstances of each transaction. In deciding whether a business has been transferred as a going concern, regard must be had to the substance and not the form of

[30] Labour Appeal Court above n 18 at para 60.

[31] *National Education Health and Allied Workers Union v University of Cape Town and Others* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*NEHAWU*).

> 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."[32] (Footnotes omitted.)

[112] One must bear in mind that the legislation, providing as it does for the automatic transfer of employees consequent upon the transfer of a business as a going concern, is aimed at the kind of situation in which the business is transferred as a going concern but the employees are not. In other words, if all the employees involved in the transferred business were indeed transferred to the new employer, the section 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 section 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 section 197, the employees involved in the business have not been transferred. The degree of the relevance of whether employees have been transferred may be limited and may depend on the circumstances of a case. I may make it quite plain that the purpose of this part of the judgment is not to supplant the *NEHAWU* test set out in the previous paragraph.

[32] Id at para 56.

[113] It cannot be doubted that the word "by" must be given its ordinary meaning. We must ask these questions in the inquiry whether a transaction in issue contemplates a transfer of business by the old employer to the new employer. Does the transaction concerned create rights and obligations that require one entity to transfer something in favour or for the benefit of another or to another? If so, does the obligation imposed within a transaction, fairly read, contemplate a transferor who has the obligation to effect a transfer or allow a transfer to happen, and a transferee who receives the transfer? If the answer to both these questions is in the affirmative, then the transaction contemplates transfer by the transferor to the transferee. Provided that this transfer is that of a business as a going concern, for purposes of section 197, the transferee is the new employer and the transferor the old. The transaction attracts the section and the workers will enjoy its protection.

Determination of application of section 197

[114] It will be necessary to examine the agreement in issue to determine whether the rights and obligations it creates provide for the transfer of a business as a going concern by a transferor, the old employer, to a transferee, the new employer. But before I do so, the question of the relevance and appropriateness of an inquiry of this kind must be addressed. This judgment proposes that courts are obliged, if a party to an appropriate case requires, to decide whether rights and obligations imposed by a transaction or an agreement are subject to the provisions of section 197. In other words, courts must

determine, if required, whether the rights and obligations, properly interpreted, call for a transfer of a business as a going concern.

[115] It is true, as Jafta J points out, that section 197(2) says that the consequences mentioned should follow if a transfer of a business as a going concern occurs between the old employer and a new one. But that provision cannot be said to mean that a transfer must have taken place before any court proceedings can be instituted. As is demonstrated here, the dispute about whether an agreement provides for the transfer of a business arises mostly when two circumstances are present: the workers contend that the agreement does entail the transfer of a business as a going concern, and one or other parties to the transfer maintains that the agreement does not contemplate the transfer of employees. That dispute is justiciable and the parties are entitled to have it determined by the application of law in terms of section 34 of the Constitution.[33]

[116] In *SAMWU*,[34] the Labour Appeal Court was, in my view, correct in making orders in respect of an agreement that had not yet been implemented. The relevant part of that order read:

[33] Section 34 of the Constitution provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[34] *SA Municipal Workers Union and Others v Rand Airport Management Co (Pty) Ltd and Others* (2005) 26 ILJ 67 (LAC) (*SAMWU*).

> "1 The written agreement concluded between the first and second respondents which was annexed to the papers in this matter is an agreement to which upon implementation section 197 of the Labour Relations Act 1995 would apply.
>
> 2 The draft agreement which was prepared for signing by the first and third respondents which was annexed to the papers in this matter is an agreement to which section 197 of the Labour Relations Act 1995 would apply if signed and implemented."[35]

[117] The order in *SAMWU* was right because to await the implementation of the agreement results in the perpetuation of the very mischief that the legislature sought to avoid in enacting the section. Take this case. The workers did not get the relief they sought. Unless SAA or the temporary service provider decided to take over the employees, contrary to the contentions of SAA, the workers would have remained with LGM on 1 October 2007. On the assumption that the transaction with which we are concerned, in particular its cancellation, involves the transfer of a business as a going concern, the workers would have been hard done by on 1 October 2007 because they would have been left with LGM. The interim service provider would have sourced its workers and the possibility of the workers at LGM being transferred would be reduced. In my view, the section contemplates a seamless transfer from the old employer to the new one. And this becomes possible only if, when there is a dispute about whether the workers are to be automatically transferred in terms of the transaction concerned, that dispute is determined before the implementation of the agreement.

[35] Id at para 47.

[118] It is common cause, and amply demonstrated in the agreement between SAA and LGM, that that transaction contemplated a transfer of part of the business of SAA to LGM. The question for determination now is whether the provisions of the agreement relative to cancellation, interpreted in the light of the transfer of a business as a going concern which had already taken place, contemplate the transfer of a business as a going concern.

[119] Clause 27 of the outsourcing agreement is concerned with the consequences of cancellation:

> "EFFECT OF TERMINATION
>
> 27.1 On the termination date –
>
> 27.1.1 should SAA desire LGM SA's assistance in transferring certain services and/or functions back to SAA, SAA's affiliates or to a third party, SAA and LGM SA may agree in writing upon a period of transfer assistance ending at termination date. LGM SA shall furthermore, during such transfer assistance period, provide SAA with reasonable access to the services, Fixed Assets and inventory of LGM SA provided that such agreement is reached in writing and provided that any such access does not and will not interfere with LGM SA's ability to provide the services or transfer assistance and that the third parties and SAA affiliates permitted such access comply with LGM SA's security and confidentiality requirements, including execution of an appropriate confidentiality agreement;
>
> 27.1.2 SAA shall be entitled to purchase, at fair market value, all fixed assets and inventory belonging to LGM SA and dedicated only to providing the services in terms of this agreement;

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

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

[120] Does this clause contemplate the transfer of a business or does it contemplate simply the outsourcing of a service? This question must be answered in context. SAA did not effect the mere outsourcing of a service to LGM through the agreement. It did much more. It transferred the business relative to delivering that service. Thus, LGM received transfer of fixed assets and inventory, the use of space at all airports, SAA computers, SAA computer network services and the lease of property necessary to conduct the service. In short as the agreement rightly states, LGM acquired the whole of the infrastructure necessary for the conduct of the business. It did not have to secure property, or computers, or network services or anything of the kind.

[121] The question to be answered now is whether clause 27 of the agreement contemplates merely outsourcing a service to SAA or to a third party or whether it contemplates the transfer of the business operation that delivered the service. The answer to this depends to a large extent on whether LGM, upon cancellation, would be entitled to continue to use the computers and airport space, to lease the property and to keep the fixed assets and inventory. If the assets necessary to operate the business stay with LGM, then the business would not be transferred. If they do not stay with LGM, but go back to SAA, or to another service provider, there is a transfer of business.

[122] And the answer is clearly that these assets will not be kept by LGM. LGM did indeed become obliged to assist SAA in transferring certain services to SAA or to a third party. But the agreement went further. LGM was also obliged to provide SAA with reasonable access to the services, assets and inventory of LGM. LGM became obliged to sell all fixed assets and inventory dedicated only to providing the services in terms of the agreement back to SAA and to transfer or assign all third party contracts to SAA. What is more, both parties were entitled to the surrender of all information pertaining to the scope of work belonging to the other party.

[123] Moreover, the cancellation of the agreement would necessarily mean that LGM would no longer be entitled to the use of property and to the leases already described. In my view, it would be quite impossible for LGM to continue to conduct the business upon cancellation of the agreement. LGM might win a tender or a part of it but that is another transaction.

[124] In the circumstances, the cancellation clause of the agreement contemplated a transfer of the business as a going concern. The only debate was about whether the business as a going concern was to be transferred to SAA or to an interim service provider. As long as there is a transferor, the identity of that entity or person is of no material significance. The agreement contemplates transfer by LGM to SAA or to the interim service provider. It requires a transfer by a transferor, the old employer, to the transferee, the new employer.

[125] The cancellation is thus hit by section 197.

[126] In the circumstances Aviation Union was entitled to a declarator.

Costs

[127] The applicants have succeeded in this Court. There is no reason why Aviation Union should not be awarded costs in all three courts including the costs of two counsel, wherever two counsel were employed and why the Transport Union should not get its costs in this Court.

Order

[128] I therefore make the following order:

1. Leave to appeal is granted and the appeal is upheld.
2. The orders of the Supreme Court of Appeal, the Labour Appeal Court and the Labour Court are set aside and replaced with paragraphs 3 and 4 of this order.
3. It is declared that the cancellation of the agreement between South African Airways (Pty) Ltd and LGM South Africa Facility Managers and Engineers (Pty) Ltd entered into in March 2000 obliges LGM South Africa Facility Managers and Engineers (Pty) Ltd to transfer a business as a going concern within the meaning of section 197(1) and 197(2) of the Labour Relations Act 66 of 1995.

4. South African Airways (Pty) Ltd is ordered to pay the costs of:

    (a) the Aviation Union of South Africa, including the costs of two counsel whenever two counsel were employed in the Labour Court, the Labour Appeal Court, the Supreme Court of Appeal and in this Court; and

    (b) the South African Transport and Allied Workers' Union in this Court.

For the First Applicant:	Advocate JG Van der Riet SC and Advocate I De Vos instructed by Ruth Edmonds Attorneys.
For the Second Applicant:	Advocate S Budlender instructed by Cheadle Thompson & Haysom Inc. Attorneys.
For the First Respondent:	Advocate GJ Marcus SC, Advocate K Pillay and Advocate N Mji instructed by Cliffe Dekker Hofmeyr Inc.