IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Reportable

CASE NO J 195/14

In the matter between:

UNITRANS SUPPLY CHAIN SOLUTIONS (PTY)	**First Applicant**
UNITRANS HOUSEHOLD GOODS LOGISTICS (PTY) LTD	**Second Applicant**

and

NAMPAK GLASS (PTY) LTD	**First Respondent**
TMS GROUP INDUSTRIAL SERVICES (PTY) LTD T/A VERICON	**Second Respondent**
THE EMPLOYEES LISTED IN ANNEXURE A TO THE NOTICE OF MOTION	**Third and further respondents**

Application heard: 20 February 2014

Judgment delivered: 24 February 2014

JUDGMENT

VAN NIEKERK J

Introduction

[1] In *Aviation Union of South Africa & another v South African Airways & others* 2012 (1) SA 321 (CC), the Constitutional Court settled the controversy concerning the meaning of the word 'by' in s 197 (1) (b) of the Labour Relations Act. The Supreme Court of Appeal had held that the definition of transfer in subsection (1) *('the transfer of a business by one employer … to another employer…'*) had the consequence that s 197 did not apply to a transfer of a business from one service provider to another ('second' and any further generation transfers) or the resumption by the client of a service previously outsourced ('insourcing'). The basis of the SCA's decision, simply put, was that 'by' does not mean 'from'. The Constitutional Court reversed that decision and held that the word 'by' should not be afforded its literal meaning and that s 197 applies, potentially at least, to any transaction in terms of which the whole or part of a business is transferred as a going concern, irrespective of whether the transfer is occasioned by the outsourcing of services, and regardless of the 'generation' of the transfer.

[2] As the present case illustrates, that principle is more easily stated than applied. The applicants seek an order declaring that the termination of an agreement to provide services concluded between the first applicant and the first respondent (Nampak) and the simultaneous appointment of the second respondent (TMS) to render the services to Nampak, constitutes a transfer for the purposes of s 197 of the LRA. The application is opposed by TMS. Nampak does not oppose the application, and abides by the decision of the court.

[3] The application raises two crisp issues. The first concerns the status of the first applicant. The first applicant is the entity that until 31 January 2014, was contracted to provide the services to Nampak. But it is not the employer of the third to further respondents, the affected employees. For tax-related or other reasons, they are all employed by the second applicant, which does no more than supply their labour to the first applicant. In these circumstances, TMS contends that the first applicant cannot be the 'old employer' for the purposes of s 197; the 'old employer' is the second applicant, which on the applicants' own version, intends to transfer nothing to TMS. The second issue is whether, on the assumption that the first applicant can be said to be the 'old employer' for the purposes of s 197, the transaction assumes the form of a transfer of the whole or part of a business as a going concern from the first applicant to TMS, thus triggering the application of s 197.

Factual background

[4] The material facts are not in dispute. Nampak manufactures glass products such as bottles, for on-sale to customers such as breweries and food manufacturers. Nampak's factory premises houses the manufacturing, warehousing, distribution and management functions in a single premises. Warehousing and distribution of glass products form an essential part of Nampak's glass manufacturing business. Manufactured glass products are received into stock directly from the manufacturing plant (which is adjacent to the warehouse), and are dispatched from the warehouse, loaded onto trucks and transported to customers. Originally, Nampak employed all staff in these divisions. During 2007, Nampak began a process of outsourcing portions of its warehousing and distribution functions, by appointing labour brokers to provide staff for some of the warehousing functions, such as forklift drivers and storekeepers (under Nampak management), and by appointing an external transport company to handle distribution, under Nampak's control.

[5] A series of transactions took place between 2007 and 2011, in which it appears that Nampak experimented with various degrees of outsourcing, and with various suppliers. During April 2011, Nampak and Unitrans concluded a warehousing agreement setting out the terms of service that Unitrans was to provide to Nampak. Briefly, Unitrans was to manage the warehousing and distribution planning function on Nampak's behalf. This entailed Unitrans providing the managers, logistics specialists, forklift operators and warehouse staff necessary to run the warehousing and distribution operations on a 24/7 basis, using Nampak's premises, assets and IT systems.

[6] Unitrans duly provided the services described in the warehousing agreement until it expired on 31 January 2014. The services are fully described in the agreement, and are discussed in more detail below. Minor informal variations to services were agreed to with Nampak, and Nampak took back control of a few of the functions listed in the warehousing agreement, during the months preceding its expiration on 31 January 2014.

[7] During October 2013, Unitrans informed Nampak that it did not intend submitting a bid for a renewed contract or agreeing to an extension of the contract. Nampak was informed that Unitrans regarded s197 as applicable to the appointment of a new service provider or the insourcing of the work by Nampak. During early January 2014, discussions recommenced regarding the conclusion of an agreement in terms of s 197(6), and practical arrangements for a handover. Negotiations continued until the expiration of the agreement on 31 January 2014, but these ultimately proved to be unsuccessful.

[8] As of 1 February 2014, TMS has taken over the rendering of services to Nampak. Unitrans staff that have presented themselves to continue working have, as of 1 February, been refused access to the Nampak premises.

[9] Nampak has directly employed two former Unitrans employees to perform the

same functions. During September 2013, Nampak took direct control of a portion of the services provided by Unitrans in terms of the Warehousing Agreement, namely control of pallet and packaging returns from customers. The Unitrans employee (Govender) responsible for this function was hired directly by Nampak to perform the same function. A key employee, Alvin Anthony, who has crucial knowledge and experience of the Nampak systems, and of the warehousing and distribution functions, resigned from his employment with Unitrans on 31 January 2014, and took up employment with Nampak on 1 February 2014, and performs the same functions as before.

[10] TMS does not dispute that it has entered into a service provider agreement with Nampak to render warehousing and auditing facilities to Nampak, with effect from 1 February 2014. TMS disputes however, that it has taken over any person employed by the applicants or the first respondent or any assets, (whether corporeal or incorporeal), goodwill or intellectual property from either the applicants or Nampak. TMS contends that it engages 'entirely its own resources' to perform the services to Nampak. What TMS does not disclose is precisely what services it has been contracted to tender to Nampak. The answering affidavit deposed to by the managing executive of TMS is coy, to say the least. It is replete with denials, averments of denials of any knowledge of the assertions made in the founding affidavit, and in respect of many key averments, seeks to put the applicants to the proof of what they assert. This is a singularly unhelpful approach to adopt in proceedings such as the present. Be that as it may, what is not in dispute is that TMS now provides the services previously provided by the first applicant to Nampak. The terms on which it does so are obviously relevant to the present enquiry, and I address this issue below.

Relevant legal principles

[11] Section 197(1) provides:

"(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 sub-section (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 transfer continue in force as if there 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 the new employer; and

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

[12] To the extent that they require further repetition, what follows is a brief summary of the relevant principles. Section 197 seeks to vary the common law consequence of the transfer of a business as a going concern. At the level of policy, the section seeks to preserve security of employment in these circumstances, and to facilitate the transfer of businesses. Once a transfer of the kind identified by s 197(1) occurs, all contracts of employment that existed immediately before the transfer took place are automatically transferred to the transferor (the 'new employer'), by operation of law, together with the business. The transferee replaces the transferor as the employer party in terms of the contracts of employment and assumes all obligations of the previous employer.

The new employer also acquires the contractual rights of the previous employer.

[13] For s 197 to apply, there are three conditions, all of which must be met simultaneously. These are:

a. a transfer;

b. of a business (the transfer must be of the whole or part of a business);

c. as a going concern.

[14] The label that parties attach to the transaction under scrutiny is not relevant. As Jafta J stated in the *SAA* judgment at paragraph [44]–

> "It must be stressed that the event which brings s 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."

[15] Each the three requirements that in combination trigger the application of s 197 have been interpreted by the South African courts, by and large, using the language of the European Court of Justice in the application of the Business Transfers Directive applicable in the European Union. That court has held, in summary, that a transfer must relate to an economic entity (defined to mean an organised grouping of persons and assets facilitating the exercise of an economic activity that pursues a specific objective), and a determination of whether that entity retains its identity after the transfer.

[16] Outsourcing agreements, in principle at least, meet these criteria least where the agreement is one of an initial outsourcing from a client to a service provider (a 'first generation' transfer). The meaning of a 'transfer' in the context of the

outsourcing of services was discussed in the *SAA* judgment by Jafta J, who said the following:

> [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 part….'

[17] In relation to the requirement that a business be transferred as a going concern, the court emphasised that what matters during the factual enquiry is its substance rather than its form. At paragraph [52] of the judgment, Japhta J said:

> '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] This is consistent with the often quoted statement by the Eourpean Court of Justice in *Spijkers v Gebroeders Benedik Abattoir v Alfred Bendik en Zonen BV* [1986] 2 CMLR 296 (ECJ), that '*an entity cannot be reduced to the activity entrusted to it*' (See also *Süzen v Zehnacker Gebaudereinigung GmBH Krankenhausservice* [1997] IRLR 255 (ECJ)). The point is reinforced in paragraph [75] of the *SAA* judgment in relation to the 'going concern' requirement:

> 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. 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 service was to continue, albeit under different hands, does not establish a transfer as a going concern. Something more is required.'

[19] In *Franmann Services (Pty) Ltd v Simba (Pty) Ltd & another* (2013) 34 *ILJ* 897 (LC), a case that concerned a decision by a labour broker to terminate a contract to supply labour to its client, this court said the following:

> 'In other words, the test for determining whether a business (including a service) has been transferred as a going concern must incorporate all of the components of the transferring entity to determine whether that entity is essentially the same after the transfer. This is an enquiry that extends beyond the function being provided (see Craig Bosch 'Section 197 of the Labour Relations Act: The Next Generation' in *Labour Law into the Future: Essays in Honour of D'Arcy du Toit* (Juta Cape Town) at p. 185). This formulation broadly reflects the jurisprudence of the European Court of Justice. The general rule remains that in *Süzen v Zehnacker Gebauderenigung GmbH Krankenhausservice* [1997] IRLR 255 where the court held that the mere fact that the service of the old and the new awardees of a contract is similar does not support the conclusion that an economic entity has been transferred. – 'an entity cannot be reduced to the activity entrusted to it'. The high water mark for the applicant is *Carlito Abler v Sodhexo MM Catering Gesellschaft GmbH* [2004] IRLR 168, a case that concerned a change in service providers contracted to provide catering at a hospital. The court held that there was a relevant transfer in circumstances where the new contractor utilised substantial parts of the assets (the hospital kitchen and its equipment) previously used by the outgoing contractor but owned by the client. In effect, there was the transfer of a licence to use the client's facilities. The present case is not analogous. The applicant supplies only labour – it does not provide a service that requires the use of the first respondent's infrastructure, at least not in the sense that it is afforded control over that infrastructure for the purpose of providing the contracted service.

[20] The parties are agreed that on the facts, the present case is distinguishable from *Franmann*, at least in the sense that the first applicant's function was not limited to the supply of labour. What the case raises is the application of s 197 where there is a change in service provider, in circumstances where there are no assets that pass to the transferee, but the transferee assumes control of assets and equipment (more accurately, an infrastructure) provided by the client and which is required for the services to be performed.

Who is the 'old employer?"

[21] As I have indicated, it is not disputed that the first applicant was the party to the contract to provide the services to Nampak, and that the second applicant was no more than the employer of the persons who were engaged to discharge the first applicant's obligations to Nampak. It is also not disputed that the affected employees are all employed by the second applicant. It is also common cause that the second applicant has no contractual obligations to Nampak, and that there will be no transfer of any description as between the first applicant and Nampak. That being so, TMS submits, there is no transfer as s 197 is thus not triggered.

[22] The starting point in the determination of whether the entity that employs the affected employees is of any significance is the purpose of s 197. In *National Education Health and Allied Workers Union v University of Cape Town & others* (2003) 24 *ILJ* 95 (CC), the Constitutional Court held that s 197 must be construed as a whole, in the light of the declared purpose of the LRA, i.e. to promote economic development, social justice and labour peace. While s 197 serves the dual purpose of protecting employment security and facilitating the transfer of businesses, the purpose of protecting workers against loss of employment must be met in substance and form (at paragraph [62] of the judgment). As the same court observed in *SAA*, s 197 is located in a chapter of the LRA that seeks to promote the right to fair labour practices, a right guaranteed by s 23 of the Constitution (at paragraph [36] of the judgment). This is the context against which the definition of 'transfer' must be construed, and in particular, in which a meaning must be ascribed to the term 'old employer'.

[23] It has been suggested in relation to application of the European Directive that the employees transferred are those actually working in the business at the material time, irrespective of who, in formal terms, is their employer (see N Smit 'Labour law implications of the transfer of an undertaking' unpublished LLD

thesis, Rand Afrikaans University, 2002). Prof Smit also refers to *Duncan Web Offset (Maidstone Ltd v Cooper* 1995 IRLR 633 (EAT), where the Employment Appeal Tribunal remarked:

> 'Industrial tribunals will be astute to ensure that the provisions of the Regulations are not evaded by devices such as service companies, or by complicated group structures which conceal the true position. Thus it may well be possible to say, in any given case, that if the person always and only works on Y's business, then X was employing him on behalf of and as an agent for Y. Alternatively, there may be circumstances in which X may be regarded as a party to the transfer, even if not expressly named in the contract of sale. Or, on the other hand, it may be that the employee remained employed by X who had other work for him to do.'

[24] It should be recalled that this court has not hesitated, on the facts, to recognise and give effect to an employment relationship, and specifically, to recognise a party as the true employer despite the labels that the parties have attached to their relationship, and despite the confines of any contracts between them. This is particularly so in relation to unfair dismissal claims, where employers have relied on a variety of agreements and constructions that seek to avoid designating a person contracted to provide services as an 'employee'. In these circumstances, the courts look beyond the label to the substantial relationship between the parties, and have always given effect to substance over form. In the present instance, it is not disputed that the affected employees were engaged by the second applicant for the sole purpose of providing services in terms of the agreement between the first applicant and Nampak. It is also not disputed that the reason for their employment by the second applicant was related to considerations relevant to the group structure, and that at all material times, they were assigned by the second applicant to work under the supervision and control of the first applicant. Further, the second applicant was the entity listed on the invoices provided to Nampak for work performed in terms of the warehousing agreement. There is therefore support on the undisputed evidence for the

conclusion that the first and second applicants ought for present purposes to be as a single entity.

[25] I do not for a moment suggest that the purpose of the second applicant employing the affected employees was to circumvent s 197 (indeed, the applicants seek to enforce the section). But as the decision in *Duncan Web Offset* illustrates, if the court were to adopt a more rigid interpretation, the protections of s 197 might easily be avoided by the creation of distinct legal entities established for that purpose. Employers might simply ensure that employees are always employed by an entity different to the entity in which the assets and activities that form a particular business are housed. It seems to me that the identity of the 'old employer' for the purposes of s 197 ought to be determined in a manner that gives effect to substance rather than form, and that regards a *de facto* employer as the transferor or 'old employer'.

[26] For these reasons, in my view, the fact that the affected employees are employed by the second applicant does not preclude the application of s 197 where there is a transfer of a business as between the first applicant and TMS.

Is there the transfer of a business as a going concern?

[27] A useful starting point to determine the existence of any transfer as a going concern is the contract between Unitrans and Nampak. The first applicant's principal obligation in terms of the agreement is to render the services in accordance with an attached service level agreement. Briefly, Unitrans was to manage the warehousing and distribution planning function on Nampak's behalf. This entailed Unitrans providing the managers, logistics specialists, forklift operators and warehouse staff necessary to run the warehousing and distribution operations on a 24/7 basis, using Nampak's premises, assets and IT systems. The services defined in annexure A to the agreement require Nampak to provide the first applicant with suitable warehousing facilities,

suitable office space and infrastructure, including telephone instruments and lines, computers, equipment and access to Nampak's software. Nampak is also required to provide gas in such quantities as required to operate the forklift trucks to be used in the provision of the services. Also significant Nampak's agreement to supply what is termed 'the products', a list of items ranging from computers, to desks and chairs, filing trays, trolleys, waste bins, shelving and the like. These and other facilities are described in the agreement as 'the infrastructure'.

[28] TMS has elected not to take the court into its confidence by disclosing the terms of its contract with Nampak (other than to refer to it as a service provider agreement) or by providing any substantial information as to the factual circumstances on which its engagement will proceed. Given the nature of the relationship between the first applicant and Nampak, and the terms on which the first applicant rendered services in terms of the warehousing agreement, it is not unreasonable to conclude that the service to be rendered by TMS and the assets used in the performance of those services will be the same or substantially the same as those utilised by the first applicant in the performance of its obligations until 31 January 2014. The services that TMS has been contracted to perform can only be performed at the Nampak production facility, i.e. at the same site and fixed premises. It is also reasonable to assume that TMS will make use of the same equipment and IT systems that were used by the first applicant, including forklifts, furniture and the JD Edwards computer system (a system that appears to be driven by Nampak's software, enabling the movement of stock to be tracked.) All of these assets are the property of Nampak, and were used by the first applicant. There is nothing in the papers before me to indicate that they will not be utilised by TMS. TMS concedes that prior to 1 February, its employees observed the manner in which the affected employees performed services in terms of the warehousing agreement. The only purpose for this can be to ensure a smooth transition when TMS commenced rendering the services on 1

February, performing exactly the same tasks as those previously performed by the affected employees. TMS places much store on the assertion that it does not intend to take transfer of any assets from either Nampak or the first applicant. This submission loses sight of the relevance of the assumption of a comprehensive right of use of Nampak's assets to in effect, continue the same business.

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

[30] To the extent that the contractual right to provide warehousing services now vests in TMS, the same assets are used to provide those services and the activities conducted at Nampak's behest are substantially the same as those performed by the first applicant prior to 1 February, the business performed by the first applicant has transferred as a going concern to TMS. To use the language of the warehousing agreement, the infrastructure that passed to the first applicant when it assumed obligations in terms of the contract reverted to Nampak, and has been made over to TMS. This is not unlike the situation in *Allen & others v Amalgamated Construction Co Ltd* [2000] IRLR 119 (ECJ), where the ECJ affirmed the principle that the fact that ownership of the assets required to run an undertaking does not pass to the transferee is not decisive, and does not preclude a transfer for the purposes of the Directive. The comprehensive right of use of the infrastructure and the assumption of control over that infrastructure are the key triggers.

[31] This brings the present matter squarely within the scope of the principle

established by *Sodhexo*, where a change in service providers triggered the equivalent of s 197 in circumstances where the incoming contractor is permitted the right of use of infrastructural assets owned by the client necessary for the purpose of continuing the relevant service. The LAC recently considered *Sodhexo*, and impliedly appeared to approve of its application by distinguishing it on the facts in a case that concerned the cancellation of a franchise agreement and the appointment of a new franchisee. (see *PE Pack 4100 CC v Saunders* [2013] 4 BLLR 348 (LAC)). Given the importance attached by the Constitution to comparative law and the application by the Constitutional Court of the principles established by the ECJ in relation to the application of s 197, I see no reason to depart from this principle.

[32] I am satisfied on the evidence before me that the assumption of the right of use of the infrastructural assets by TMS in circumstances where it will provide the same services from the same premises, without interruption, constitutes a transfer as a going concern. In my view, in these circumstances, s 197 applies and the affected employees are employed, by operation of law and on the same terms and conditions, by TMS.

[33] Finally, there is no reason why costs should not follow the result. Neither party contended any differently.

I make the following order:

1. The termination of the warehousing agreement between the first applicant and second respondent and the conclusion of an agreement for the provision of similar services by the second respondent constitutes a transfer in terms of s 197 of the Labour Relations Act, 66 of 1995.
2. The contracts of the third to further respondents transfer automatically from the second applicant to the second respondent on the date of the transfer.

3. The second respondent is to pay the costs of the application, such costs to include the employment of two counsel.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

APPEARANCES

For the applicants: Adv. AT Myburgh SC, with him Adv G Fourie, instructed by Bowman Gilfillan Inc.

For the first respondent: Adv. A Snider, instructed by DLA Cliffe Dekker Hofmeyr

For the second respondent: Adv. F Boda, instructed by Assenmacher Attorneys