IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Not of interest to other Judges

Case No: J1598/16

In the matter between:

SODEXO SOUTHERN AFRICA (PTY) LTD	**Applicant**
and	
SERVEST (PTY) LTD	**First Respondent**
MOATSHE CATERING SERVICES CC	**Second Respondent**
COMMERCEZONE	**Third Respondent**
MUTICHOICE SOUTHERN AFRICA	**Fourth Respondent**
FEDERAL COUNCIL OF RETAIL AND ALLIED WORKERS UNION	**Fifth Respondent**

SOUTH AFRICAN EQUITY WORKERS ASSOCIATION — **Sixth Respondent**

FAITH MOROKO AND 26 OTHERS — **Seventh to Thirty Third Respondents**

TSHIKANI MASHIMBYI AND 19 OTHERS — **Thirty Fourth to Fifty Third Respondents**

Heard: 17 October 2017

Delivered: 11 May 2018

Summary: Application for declaratory order in terms of section 197 of the LRA. Matter concerning contracts to operate staff restaurants and coffee shops at fourth respondent's various MNET sites. Right of use of infrastructure and assumption of control over infrastructure triggering application of section 197. Application granted with costs.

JUDGMENT

BARNES AJ

Introduction

[1] This is an application in terms of section 197 of the Labour Relations Act[1] ("the LRA") in terms of which the applicant seeks orders declaring that:

> "1. It is determined that the termination of the agreement in terms whereof the Applicant provides staff restaurant operations on the MNET sites of the Fourth Respondent and the conclusion of an agreement for the provision of similar services by the First and Second Respondents constitutes a transfer of an undertaking in terms of section 197 of the LRA;
>
> 2. That the employment contracts of the Seventh to Thirty Third Respondents transfer automatically from the Applicant to the First Respondent on the date of transfer, i.e. 1 March 2016;
>
> 3. That the employment contracts of the Thirty Fourth to Fifth Third Respondents transfer automatically from the Applicant to the Second Respondent on the date of transfer, i.e. 1 March 2016."

The Facts

[2] The fourth respondent is Multichoice Southern Africa.

[3] The applicant is the local branch of an international catering company, Sodexo, which enjoyed the contract to operate the staff restaurants and coffee shops at the fourth respondent's MNET sites in Johannesburg and Cape Town for a period of approximately five years from 2010 to 2015.

[1] Act 66 of 1995 as amended.

[4] The "fourth respondent's MNET sites" as described in the pleadings comprise the following:

[4.1] The Randburg MNET site which contains the MNET coffee shop, the MNET restaurant, the Bojangles restaurant and a storeroom.

[4.2] The Randburg Multichoice site which contains the Multichoice coffee shop, Multichoice restaurant, and a storeroom.

[4.3] The Randburg MNET Oak Avenue restaurant; and

[4.4] The Cape Town Multichoice restaurant.

[5] The staff restaurants and coffee shops are all operated within the fourth respondent's premises with the aim of providing employees of and visitors to the fourth respondent with easy access to food and drink at somewhat subsidised rates.

[6] For convenience they will be referred to collectively in this judgment as "the Multichoice staff restaurants."

[7] As to how the Multichoice staff restaurants are operated, it is common cause on the papers that:

> "… the Fourth Respondent would make available to the service provider its existing restaurants, coffee shops, and store rooms and the service provider would then be responsible for the purchase, distribution, preparation and serving of food and drinks provided on the

agreed menus of the restaurants and coffee shops by means of the utilisation of the service provider's own resources including its own staff."

[8] In November 2015 the applicant was given notice that its contract to operate the Multichoice staff restaurants would terminate at the end of February 2016. The applicant was invited to tender for the contract again and did so, unsuccessfully.

[9] In January 2016, it came to the applicant's attention that the contract to operate certain of the Multichoice staff restaurants had been awarded to an entity by the name of Olives and Plates Foods 2 (Pty) Ltd (Olives).

[10] In February 2016, the applicant approached this Court on an urgent basis for an order declaring that the termination of its contract to operate the Multichoice staff restaurants and the conclusion of a contract with Olives to provide the same service constituted a transfer in terms of section 197 of the LRA and that the contracts of employment of the applicant's employees transferred automatically to Olives as a consequence thereof. The applicant' s application was successful.

[11] Subsequent to obtaining judgment against Olives, the applicant established that the contracts to operate some of the Multichoice staff restaurants had been awarded, not to Olives, but to the first and second respondents. The applicant then launched the present application.

[12] This application is opposed only by the second respondent, Moatshe Catering Services CC, which was awarded the contract to operate the fourth

respondent's MNET Oak Avenue restaurant in Randburg.

[13] The first respondent abides the decision of the Court.

[14] The issue for determination is whether the termination of the applicant's contract to operate the Multichoice staff restaurants and the conclusion of contracts with the first and second respondents to provide the same service constitutes the transfer of a business as a going concern in terms of section 197 of the LRA.

The Law

[15] Section 197(1) and (2) of the LRA provide as follows:

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

[16] It is by now well established that whether there has been a transfer of a business as a going concern for purposes of section 197 is a matter of fact, to be determined objectively. This necessarily involves an enquiry into (1) the existence of a transfer from one employer to another, (2) whether there was a transfer of a business (is there an economic entity capable of being transferred?) and (3) whether the business is transferred as a going concern (does the economic entity that is transferred retain its identity after transfer?).[2]

[17] If the transfer meets these criteria, the transferee is substituted automatically for the transferor as the employer of those of the transferor's employees engaged in the business on the date of transfer. The transfer occurs by operation of law, and irrespective of the wishes or intentions of the parties.[3]

[18] It is also well established that section 197 may apply to outsourcing

[2] See *Aviation Union of SA and Another v SA Airways (Pty) Ltd and Others* (2011) 32 ILJ 2861 (CC) ("*SAA*").
[3] *Franmann Services (Pty) v Simba (Pty Ltd and Another* (2013) 34 ILJ 897 (LC) *("Simba")*

arrangements. As this Court noted in the *Simba* judgment:

> "The SAA judgment has also established that there is no reason in principle why s 197 should not apply to outsourcing arrangements. Whether the arrangement is one of an initial outsourcing from a client to a service provider (a 'first generation transfer'), from one service provider to another ('second' and further generation transfers) or a resumption by the client of a service previously outsourced ('insourcing') is not significant; the same test must be applied to each transaction, which must be considered in view of its unique facts and circumstances."[4]

[19] In relation to the requirement that a business be transferred as a going concern, the Constitutional Court in *SAA* held as follows:

> "Although the definition of business in s 197 includes a service, it must be emphasised that what is capable of being transferred is the business that supplies the service rather than the service itself. Were it to be otherwise, a termination of a service contract by one party and the 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 of employment contracts, when the ownership of a business changes

[4] At para 8.

hands."[5]

[20] This does not mean, however, that there need be a transfer of assets in order for there to be a transfer of a business as a going concern. The application of section 197 in circumstances where there is a change in service provider and no assets pass to the transferee but the transferee assumes control of the assets, equipment and infrastructure provided by the client and required for the rendering of the service was considered by this Court in *Unitrans Supply Chain Solutions (Pty) Ltd v Nampak Glass (Pty) Ltd*[6] *("Unitrans").*

[21] *Unitrans* involved the cancellation of a service agreement and the appointment of a new contractor who rendered the same service without interruption from the same premises using the same infrastructure as the old contractor. The Court held that in these circumstances, the right of use of the infrastructure and the assumption of control over the infrastructure necessary to provide the service triggered the application of section 197.

[22] The Labour Appeal Court[7] upheld the judgment in *Unitrans* and went on to endorse the approach adopted by the European Court of Justice in *Abler and Others v Sodexho MM Catering Gesellschaft GmbH.*[8] In that case, a hospital had appointed a service provider to provide catering services to its patients and staff. This service was provided using the hospital's canteen premises and equipment. The termination of the old service provider and the appointment of a new service provider was, in these circumstances, held to constitute the transfer of a business as a going concern.

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[5] At para 52.
[6] (2014) 35 ILJ 2888 (LC).
[7] *Unitrans Supply Chain Solutions (Pty) Ltd & Another v Nampak Glass (Pty) Ltd and Others* (2014) 35 ILJ 2888 (LC)
[8] [2004] IRIR 168 (ECJ).

[23] The LAC, in the *Unitrans* appeal, quoted the following passage of the judgment of the European Court of Justice:

> "The national court, in assessing the facts and characterising the transaction in question, must take into account the types of undertaking or business concerned. It follows that the degree of importance to be attached to each criterion for determining whether or not there has been a transfer within the meaning of Directive 77/187 will necessarily vary according to the activity carried on, or indeed the production or operating methods employed in the relevant undertaking, business or part of a business (references omitted).
>
> Catering cannot be regarded as an activity based essentially on manpower since it requires a significant amount of equipment. In the main proceedings, as the Commission points out, the tangible assets needed for the activity in question - namely the premises, water and energy and small and large equipment (inter alia the appliances needed for preparing the meals and the dishwashers) – were taken over by Sodexho. Moreover, a defining feature of the situation at issue in the main proceedings is the express and fundamental obligation to prepare meals in the hospital kitchen and thus to take over those tangible assets. The transfer of the premises and equipment provided by the hospital, which is indispensable for the preparation and distribution of meals to the hospital patients and staff is sufficient, in the circumstances, to make this a transfer of an economic entity. It is moreover clear that, given their captive status, the new contractor necessarily took on most of the customers of its predecessor."[9]

[24] The LAC expressed the view that *"the approach adopted by the European*

[9] At paras 35 and 36.

Court of Justice in Sodexho accords with the approach which has been adopted to s 197 by the Constitutional Court, both in [the SAA judgment] and in its earlier decision in National Education Health and Allied Workers Union v University of Cape Town and Others."[10]

[25] This Court, in its judgment in the earlier application brought by the applicant against Olives, dealt with facts identical to those in this application in the context of the legal principles set out above. Prinsloo J held as follows:

> "*In casu*, the Applicant was responsible to purchase, prepare and serve the food and drinks on the agreed menus at the restaurants and coffee shops that are operated within the various premises of Multichoice. Multichoice provides the existing restaurants, coffee shops and store rooms and the service provider is responsible to provide the catering service by utilising its own resources and staff."[11]
>
> "The catering service provided at the Multichoice restaurants and coffee shops is an economic entity and constitutes a service for purposes of section 197(1)(a)."
>
> "*In casu* Olives will perform the catering services previously performed by the Applicant at the MNET site, using the same infrastructure owned by the client and necessary for the purposes of continuing the catering services."[12]
>
> "In the circumstances where Olives acquired the right of use of the infrastructural assets and where it will provide the same service from

[10] At para 26.
[11] At para 41.
[12] At para 48.

> the same premises the business was transferred as a going concern and it falls within the ambit of section 197."[13]

[26] These conclusions are in my view correct. The facts in this matter, like those in *Olives*, are on all fours with the facts in the *Unitrans* and *Sodexho* matters. They are all cases in which, while the change in the service provider was not accompanied by the transfer of assets, the right of use of the infrastructure necessary to provide the service and the assumption of control over that infrastructure triggered the application of section 197. The applicant is therefore entitled to the order that it seeks.

[27] In its papers and in argument before me, the second respondent contended that some of the individuals cited as the thirty fourth to fifty third respondents had ceased their employment with the applicant prior to the transfer date of 1 March 2016 and that others were employed by the applicant on fixed term contracts which expired shortly after the transfer. The second respondent contended that the employment contracts of these individuals could not transfer automatically to it. This is correct in principle. As a matter of law it is only the employment contracts of employees employed by the transferor, at the time of transfer, that transfer to the transferee and then only on the terms and conditions of employment which existed at the transferor. The Order I make below shall reflect this.

[28] In my view the requirements of law and fairness dictate that costs should follow the result.

[29] I accordingly make the following order:

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[13] At para 49.

Order

1. It is declared that the termination of the agreement in terms whereof the Applicant provided staff restaurant operations on the MNET sites of the Fourth Respondent (as defined in paragraph 4 of this judgment) and the conclusion of agreements for the provision of the same service by the First and Second Respondent constitutes the transfer of a business as a going concern in terms of section 197 of the LRA.

2. In respect of the contracts to operate the fourth respondent's staff restaurants awarded to the first respondent, it is declared that the employment contracts of those of the seventh to fifty third respondents who were employed by the applicant on 1 March 2016 transferred automatically to the first respondent, on that date, on the same terms and conditions.

3. In respect of the contracts to operate the fourth respondent's staff restaurants awarded to the second respondent, it is declared that the employment contracts of those of the seventh to fifty third respondents who were employed by the applicant on 1 March 2016 transferred automatically to the second respondent, on that date, on the same terms and conditions.

4. The second respondent is to pay the applicant's costs.

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Heidi Barnes

Acting Judge of the Labour Court

Appearances:

For the Applicant:	Advocate Nel
Instructed by:	Lee & McAdam Attorneys
For the Second Respondent:	Advocate Humphries
Instructed by:	Bophela & Majozi Attorneys