

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. JA2/2005

In the matter between:

AST HOLDINGS (PTY) LTD

APPELLANT

and

ANDRE ROOS

RESPONDENT

J U D G M E N T

McCALL AJA

[1] This is an appeal against part of the judgment of Tlaetsi AJ in the Labour Court, handed down on 20 October 2004, in an application brought by the respondent in this appeal (hereinafter referred to as “the respondent”), against the appellant.

[2] The respondent had been employed by the appellant and was dismissed on or about 11 June 2002. He contended that his dismissal was both substantively and procedurally unfair and brought the application in the Court *a quo* against the appellant for a declaration to that effect, compensation in accordance with the provisions of the Labour Relations Act No. 66 of 1995 (“the Act”) and costs.

[3] It was not disputed in the application that the respondent was entitled to be paid severance pay but there was a dispute regarding the period of service which had to be taken into account in calculating the severance pay

due to him.

- [4] The respondent's claim in the Court *a quo* was successful and the learned Judge, in addition to making a declaratory order to the effect that the respondent's dismissal was substantively fair but procedurally unfair, and ordering the appellant to pay compensation and costs made the following order:-

"3. The respondent is ordered to pay the applicant severance pay equal to the applicant's years of service calculated from 14 December 1970 until the date of dismissal, at the rate of two weeks' remuneration per each year of completed service totalling an amount of R395 002-64. The respondent shall be entitled to deduct any amount already paid to the applicant as severance pay arising out of the present dismissal."

The appellant sought leave to appeal only against the aforesaid order relating to severance pay and the order for costs of the application in the Court *a quo*. Leave to appeal was granted, resulting in this appeal.

- [5] In order to understand how the issue regarding severance pay arose, it is necessary to set out the background facts which are largely common cause:-

- (i) The respondent had previously been employed by Iscor Ltd ("Iscor"), having commenced such employment on 14 December 1970, and was a manager in the IT Department of Iscor at the time of the sale referred to below.
- (ii) In terms of a written agreement signed on 31 July 1998 Iscor sold its IT Division ("ITI") to the appellant, as a going concern, with effect from the effective date.
- (iii) The "effective date" was stated to be the commencement of business on 1 July 1998, notwithstanding the date of signature of the agreement.
- (iv) It was agreed that all risk and benefit attaching to the ITI business and the assets sold in terms of the agreement would pass to the appellant on the effective date and that Iscor would have no further responsibilities in regard to the conduct of the ITI business after the effective date.

(v) Notwithstanding the provision regarding the effective date it was provided that the whole of the agreement, other than certain specified clauses, would be subject to the fulfilment of certain “conditions precedent” by not later than 14 September 1998.

(vi) The agreement provided that as the appellant was buying the ITI business as a going concern it would, as from the effective date, employ all employees who were employed by the ITI business before the effective date on the same terms and conditions as those on which they were employed by Iscor on 1 July 1998. However, the agreement provided that this did not preclude the appellant from “renegotiating, as from the effective date the terms and conditions of the employees identified in Appendix 10”, which included the respondent.

(vii) Although there is a dispute about the date upon which, and precisely how, the respondent’s contract of employment was transferred from Iscor to the appellant, it is not disputed that the said agreement of sale resulted in a transfer of part of the business of Iscor to the appellant and that the transaction was one which was subject to the provisions of section 197 of the Act before its substitution by s.49 of Act 12 of 2002.

(viii) On 21 August 1998 a letter was addressed to former employees of Iscor, including the respondent, signed jointly by one Van Zyl and one De Klerk, on behalf of Advanced Software Technologies Group (“AST”). The letter began:-

“We have pleasure in confirming the purchase of Information Technology from Iscor (ITI) as a going concern, by the Advanced Software Technologies Group (AST).”

After describing AST the letter continued:-

“An important cornerstone of the transaction is the fact that the continued employment of all ITI staff has been secured, without any change to the current conditions of employment. In order to give effect to the above you will be required to exercise one of the following options.”

The first option was to “Accept the transfer to AST”, in which case two further options became available, which were particularised as follows:-

“1.1 *Continue the employment under the same conditions of employment as at Iscor*

This will result in you becoming an employee of AST without any change to your current conditions of service or your current retirement fund and medical scheme membership.

1.2 *Accept the conditions of employment offered by AST*

This will result in your becoming a new employee on the conditions of service that are offered by AST, as outlined in appendix A enclosed herewith. The AST conditions of service

are in line with those of the Information Technology (IT) industry and are more flexible than Iscor's."

- (ix) The letter proceeded to give particulars of the benefits which would accrue by accepting the conditions of service offered by AST, which included qualification for a pre-listing share allocation "at virtually no cost".
- (x) The second option was described as follows:-
 - "2. *Decline the transfer to AST*
 You have the option not to transfer to AST. However Iscor sold ITI as a going concern. In future, IT Services will be provided by AST in terms of a service agreement entered into by the two parties. As Iscor has now effectively divested from ITI individuals who decide not to accept the transfer to AST may become redundant and may face retrenchment."
- (xi) The letter continued:-
 - "You have until 18 September 1998 to exercise your option to transfer to the AST Group. Please confirm your choice by completing and signing page 3 of this letter before then.
 Having exercised the option to transfer to the AST Group, you have until 30 October 1998 to decide on the conditions of service that will be applicable to you."
- (xii) On 8 September 1998 the respondent signed an acceptance of an offer to purchase 30 000 shares in Advanced Software Technologies Ltd, which was to be listed on the Johannesburg Stock Exchange on 9 September 1998, at a pre-listing purchase price of 1 cent per 100 shares. In this document the respondent purported to confirm, *inter alia*, that:-
 - "I have accepted employment in the AST Group through its subsidiary AST Holdings (Pty) Ltd (hereinafter collectively referred to as AST), as a new employee on the conditions of employment offered by AST."
- (xiii) On 18 September 1998 the respondent signed the document confirming that he had accepted the choice of transferring to AST.

(xiv) There was apparently discussion about the employees' entitlement to recognition of their length of service with Iscor and on 10 October 1998 Van Zyl sent a memorandum to all ex ITI employees which contained the following:-

"3 YEARS GUARANTEE RATIONALISATION"

The selling of ITI as a going concern to AST resulted in the termination of employee's years of service with ISCOR.

Some of the employees were uncomfortable with this situation as they are of the opinion that years of service could be to their benefit in case of rationalisation.

Because of this perceived risk I would like to give every ex ITI employee the assurance that should they be rationalised within their first three years of service at AST, all previous years of service within ISCOR will be considered as part of their rationalisation packages.

I would like to emphasise that this transfer to AST was done to retain our ITI employees in future and there is no inclination whatsoever to reduce the number of our employees or embark on a rationalisation program."

(xv) On 30 October 1998 a document confirming the structuring of the total package offered by AST and setting out that package was signed by the respondent under the words:-

*"Acceptance of the conditions of employment offered by AST:
I, the undersigned, hereby confirm my acceptance of the AST conditions of employment."*

(xvi) After retrenchment discussions had taken place between the appellant and the respondent, the respondent received a letter dated 11 June 2002 advising that 31 July 2002 would be the effective date of his retrenchment, following which he was formally retrenched.

[6] The relevant portions of s. 197 of the Act, before its substitution provided as follows:-

"197. Transfer of contract of employment.

(1) A contract of employment may not be transferred from one employer (referred to as "the old employer") to another employer (referred to as "the new employer") without the employee's consent, unless –

(a) the whole or any part of a business, trade or undertaking is transferred by the old employer as a going concern; or

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

the old employer will be considered to have been done by or in relation to the new employer.

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

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

[7] There is no dispute between the parties that severance pay was payable to the respondent on the basis of two weeks' salary for every year of service. What is in dispute is the length of service of the respondent which had to be taken into account in this calculation. The respondent had been paid severance pay of R52 898,07, being two weeks salary for every year of service with the appellant, calculated from 1 November 1998, being the day after the respondent's acceptance of the appellant's new conditions of employment.

[8] The appellant contends that since the ITI business of Iscor was transferred to the appellant as a going concern as contemplated by section 197 of the Act with effect from 1 July 1998, all employees of the Iscor IT division, including the respondent, became employees of the appellant as from 1 July 1998, automatically, by operation of law. This meant, argued Mr Snyman for the appellant, that the appellant became the employer of the former Iscor employees "as if it had always been the employer". He said:-

"Therefore, when the appellant embarked upon its restructuring exercise to change the employment conditions of employees, by agreement with such employees, to conform to IT conditions of employment on 21 August 1998, the issue of the transfer of undertaking and Section 197 had come, been implemented, given effect to, and had gone."

He said that it was clear from the undisputed evidence that all employees, including the respondent, knew that the acceptance of appellant's conditions of employment and the issue of free shares were subject to all employees agreeing to become a *new employee* and forfeiting the length of service the employee had with Iscor. Mr Snyman argued that even the AST length of service from 1 July 1998 to 1 November 1998 was forfeited from the outset together with the Iscor years of service, by the agreement between the appellant and

employees on the new conditions of employment, the *quid pro quo* being the improved conditions of employment, benefits and free shares. He submitted that the respondent's true complaint related to the share price of the shares because employees had envisaged a share price in excess of R10 per share but when retrenchment ultimately took place in 2002, the share price was a fraction of this.

[9] In essence it was, as I understood it, the appellant's contention that the ITI business of Iscor was transferred to the appellant with effect from 1 July 1998, thereby giving effect to the provisions of s. 197 of the Act. The result was that the affected Iscor employees became employees of the appellant from 1 July 1998 and it was permissible for the appellant thereafter to enter into an agreement with the employees to forfeit their years of service with Iscor in exchange for the new and better conditions of employment offered by the appellant and the issue of shares.

[10] Counsel for the respondent, Mr Landman, supported the judgment of the Court *a quo* on two grounds.

[11] The first ground may be summarised as follows:-

- (a) Since the sale of ITI involved the transfer of part of Iscor's business as a going concern (*National Education Health and Allied Workers Union v University of Cape Town and Others* (2003) 24 ILJ 95 (CC) at 111 (para [56]) ("*Nehawu*"), s 197 of the Act applied to the transaction.
- (b) S 197 does not preclude the employer involved in a transfer of a business referred to therein from offering the employees the choice of continuing to be employed by the old employer or accepting employment with the new employer on the same or new terms, when effecting transfer of the employees' contracts.
- (c) Upon a proper construction of the evidence, including the documentary evidence, the transfer of the ITI business did not, as contended by the appellant occur on 1 July 1998 and, on the contrary, the transfer process was

still continuing when the memorandum of 10 October 1998 was sent by van Zyl.

(d) Accordingly, when the respondent, on 30 October 1998, accepted the conditions of employment offered by the appellant he did so in the context of a s 197 transfer.

(e) The transfer of the respondent's contract of employment was accordingly subject to the provision in s 197(4) that:-

“A transfer referred to in sub-section (1) does not interrupt the employee's continuity of employment. The employment continues with the new employer as if with the old employer”,

(relying on *Foodgro, a division of Leisure Net Ltd v Keil* (1998) 20 ILJ 2521 (LAC) at para [21.22] (“Foodgro”))

(f) On the basis of *Foodgro* the interruption of the respondent's continuity of employment was forbidden by s 197(4).

(g) Accordingly the appellant's attempt to alter the date of commencement of the respondent's contract of employment was unlawful.

That, in essence, is what the learned Judge in the Court *a quo* found when he said:-

Having found that the negotiations relating to forfeiture of the continued years of service were done within the context of the transfer Section 197(4) becomes applicable. It prohibits the parties from entering into an agreement which alters an employee's continuity of employment (*Foodgro* (supra) at 2529A). This means that the years of service at ISCOR should have been taken into account when applicant's severance pay was calculated in accordance with the rate which was the respondent's policy at the time.”

[12] The second ground relied upon by the respondent was that on the probabilities, based on the evidence before the Court *a quo*, the appellant mistakenly thought that the respondent had lost his years of service with Iscor upon transfer of the ITI business as a going concern in July 1998, and, consequently:-

- (a) the appellant could not have intended that by becoming a “new employee” the respondent would lose his Iscor years of service;
- (b) the respondent was misled at the time of agreeing to become a new employee into believing that his years of service had already been lost and in signing the acceptance letter of 30 October 1998 he was misled as to the consequences attached to becoming a “new” employee and cannot be bound to such a consequence.

[13] Before the appeal was heard the respondent’s counsel submitted Supplementary Heads of Argument raising two issues.

[14] The first issue was really an amplification of the respondent’s contention that the appellant was wrong in contending that the ITI business was transferred to the appellant as a going concern in terms of s 197 of the Act with effect from 1 July 1998, in the light of the judgment of van Niekerk AJ in the recent case of *Van der Velde v Business & Design Software (Pty) Ltd & Another* (2006) 27 ILJ 1225 (LC) (“*Van der Velde*”). That judgment deals with the determination of the date of transfer in a transaction contemplated by s 197 and, counsel submitted, supported the finding of the Court *a quo* that the options put to the respondent regarding his choice of employer and, thereafter, his conditions of employment, had to be exercised within the context of a s 197 transfer. On that basis the respondent did not transfer with all his existing rights intact and did not enjoy continuity of employment if he is bound by the terms of the contract relied upon by the appellant.

[15] The second issue raised in the respondent’s supplementary heads was the respondent’s entitlement to severance pay in terms of s 41 of the Basic Conditions of Employment Act, No. 75 of 1997, as amended (“the BCEA”).

[16] S 41(2) of the BCEA provides for severance pay on dismissal of an employee for reasons based on operational requirements.

[17] The respondent's counsel contended that upon a proper interpretation of the BCEA, the parties were not able to conclude a contract which excluded the respondent's years of service with Iscor, alternatively, that such an agreement was of no force and effect inasmuch as its effect was to reduce the number of years of service that can be taken into account when determining severance pay in accordance with s 41 of the BCEA. Mr Landman also relied upon s 4 of the BCEA. He argued that the only manner in which one could alter the effect of the provisions of s 41 was by substituting a term of the contract of employment more favourable to the employee (s 4(c)), which did not apply here. He also relied on s 84(1) of the BCEA and submitted that if it were to be held that the respondent concluded a "new" contract of employment with the applicant in 1998, then s 84(1) required the appellant to take into account for the purposes of determining the length of the respondent's employment with the appellant, for the purposes of s 41 of the BCEA, the respondent's previous period of employment. This was, so it was argued, because the break between being an employee of Iscor and becoming a "new employee" was less than twelve months.

[18] Since it was not clear whether the new BCEA of 1997 applied, the parties were given leave to file additional written heads of argument, which they did.

[19] In his supplementary heads of argument Mr Snyman, for the appellant, drew attention to the fact that the BCEA of 1997 was assented to on 26 November 1997, but only came into effect on 1 December 1998 (GN 112 of 1998 in Regulation Gazette No. 6342, Vol. 401 of GG No. 19453, dated 13 November 1998).

[20] It was common cause that the transaction in terms of which the respondent agreed that he would become a new employee with effect from 1 November 1998 took place on 30 October 1998. Therefore at the time when the transaction took place the BCEA 75 of 1997 did not apply but the BCEA 3

of 1983 did. The BCEA 3 of 1983 contained no provision whatsoever relating to severance pay or the calculation thereof as a minimum statutory basic right of employment.

[21] Mr Snyman submitted that the respondent's argument that s 5 of the BCEA of 1997 applied, which provides that: "This Act or anything done under it takes precedence over any agreement, whether entered into before or after the commencement of this Act." could not be correct. To apply s 41 of the BCEA 75 of 1997 retrospectively to 30 October 1998 simply because termination of the respondent's employment took place on 11 June 2002, would be contrary to the presumption against retrospectivity. When the new BCEA 75 of 1997 came into operation on 1 December 1998, (assuming that it may have introduced s 41 as a basic right of an employee not susceptible to contractual change), the date of employment for the purpose of s 41 had, before the commencement of s 41, been agreed between the parties to be 1 November 1998 and this was the date that applied in all respects in terms of s 41.

[22] To the extent that the respondent relied on s 84 of the BCEA, that provision did not apply because:

- (a) there was no break of service in this case, but an agreement to give up years of service;
- (b) s 84(2) requires that any payment made or leave granted during a previous period of employment must be taken into account. In this case, if s 84 applied, the shares, increased remuneration and benefits received by the respondent would have to be taken into account.

[23] Finally, Mr Snyman contended that at the time when the transaction was concluded on 30 October 1998 the issue of severance pay was embodied in s 196 of the Act 66 of 1995 which was repealed on 1 December 1998 in terms of s 95(5) of the BCEA 75 of 1997. S 196 was not, at the relevant time, a basic condition of employment. Moreover the Act never contained provisions such as those in the BCEA of 1983 and 1997 that an agreement may only exclude a basic

condition of employment to the extent permitted by the BCEA. Therefore the appellant and the respondent were entitled to agree, in exchange for certain benefits, that the respondent would become a new employee of the appellant without that being prohibited in any way by the Act.

[24] The respondent's counsel replied to the appellant's supplementary heads.

[25] In *Nehawu* the Constitutional Court dealt with the proper approach to the construction of s 197 of the Act and came to this conclusion in para [64]:

“Reading the section as a whole, and, in particular, having regard to the fact that all the rights and obligations flowing from employment with the transferring employer are transferred to the new employer in the case of a solvent business; that in the case of an insolvent business the contracts of employment are transferred; the transfer of business does not interrupt the workers’ continuity of employment; the inference that the transferee employee takes over the workers and that the transferee employer is, by operation of law, substituted in the place of the transferor employer is irresistible. It follows by necessary implication.”

[26] The Constitutional Court was not required to and did not, as pointed out by counsel for the respondent, consider the question of whether the old and/or prospective new employer is/are entitled to offer the employees the choice of continuing to be employed by the old employer or accepting employment on the same or new terms with the new employer when effecting the transfer of the business, trade or undertaking in question. Counsel for the respondent pointed out that in the case of *Fourie and Others v Iscor Ltd* (2000) 21 ILJ 2018 (LC) at 2032, para [8.15], (“*Fourie*”) a case dealing with the very agreement of sale under consideration in this case, Damant AJ referred to the fact that neither party had argued that the kind of arrangement contemplated by the agreement, which gave employees a choice of continuing to be employed elsewhere within Iscor was not permissible in terms of s 197, but made no finding in that regard.

[27] I agree that there is nothing in s 197 of the Act which would preclude the employers from offering an employee the choice of transferring to the new employer or staying with the old employer and that the giving of such a choice to an employee would not detract from the purpose of s 197. Indeed, the reference in s 197(1) to the employee's consent contemplates that the employee may be consulted regarding the transfer of his contract of employment from one employer to another although, as observed by Damant AJ in *Fourie* in para [8.14], Iscor could have compelled the employees to transfer against their consent in cases falling within s 197(1)(a), that is to say in the case of a transfer of the business as a going concern.

[28] There is also nothing in s 197 which would preclude the new employer and the employee from agreeing to a variation or alteration of the employee's rights and obligations under his contract of employment with the old employer when the transfer takes place. The words "unless otherwise agreed" in s 197(2)(a) contemplate such an agreement. That does not mean, however, that the new employer and the employee may agree that, upon transfer of the contract of employment, the employee will forfeit his/her period of service with the old employer. That issue was dealt with in *Foodgro*. In that case Froneman DJP said, in para [25]:-

"Under s 197(2)(a) the relevant parties may alter the terms of the transferred contract, but they cannot escape the fact of its existence. Because an employee's continuity of employment is not a right or obligation, or a term of the employment contract, express provision was made in s 197(4) that the transfer of the employment contract would not interrupt that continuity. There is no provision in it, similar to s 197(2), which allows the parties to alter an employee's continuity of employment by agreement."

[29] In the same case Conradie JA said, in para [32]:-

"Section 197(2)(a) permits the employee and the new employer to modify the terms of the existing employment contract. They may, as I read the section, do this by renegotiating its terms regulating their future relationship and also by adjusting rights and obligations which had at the time of transfer already

accrued. Although the old contract may suffer so many modifications that it survives only in skeletal form, its survival is not unimportant. It provides the continuity of employment of which subsection (4) speaks. Some incidents of the old contract would be unalterable. One of them is the date of its commencement. That is a historical fact which cannot be altered by agreement. Any benefits which the law attaches to that commencement date could similarly not be changed. One of the benefits which the law attaches to the commencement of an employment contract is, of course, severance benefits upon retrenchment (s 196 of the Act)."

[30] Mr Snyman endeavoured to distinguish *Foodgro* on the facts. Firstly he argued that in *Foodgro* the employer sought to replace the existing employment contract of the employee at the exact time and as part of actually giving effect to the transfer of the undertaking, with a new employment contract. He said the simple choice offered to the employee was either to accept the new contract of employment or actually face dismissal. That was not the case in the matter before this Court. Mr Snyman's submission is incorrect as it appears from para [1] of the report in *Foodgro* that on 1 January 1997 the business was acquired as a going concern by the appellant and that only on 23 January 1997 did the employee sign a letter of appointment setting out the terms and conditions of her employment with the new employer. The second ground of distinction relied upon by Mr Snyman was that in the case of *Foodgro* there was a contemplated retrenchment at the time of the transfer of the undertaking. There is no indication in the report that there was a contemplation of retrenchment at the time of the transfer of the undertaking and it appears from the report that it was only on 30 May that Foodgro informed the employee that her services would be terminated on 30 June due to operational needs.

[31] I see no reason to distinguish *Foodgro* or to disagree with the Court's finding therein that the date of commencement of the contract of employment may not, upon a transfer in terms of s 197 of the Act, be altered by agreement. Accordingly, if the appellant sought to obtain the respondent's agreement to the forfeiture by him of his period of service

with Iscor within the context of the transfer of the respondent's contract of employment in terms of s 197 of the Act, an agreement resulting from that attempt would be unlawful and contrary to the express provisions of s 197(4) regarding continuity of employment.

- [32] In *van der Velde (supra)* the parties requested the Labour Court to make a preliminary ruling determining the effective date of the transfer of a business for the purposes of s 197 of the Act. The agreement in question provided for a transfer of contracts of employment on a date that preceded the signature of the agreement and provided for the fulfilment of certain suspensive conditions. There was no dispute that the transaction in question was one that was affected by s 197 of the Act as substituted by s 49 of Act No. 12 of 2002. That section, like its predecessor, deals with the transfer of contracts of employment pursuant to the transfer of a business by one employer to another employer as a going concern. The suspensive conditions in the agreement in question were fulfilled by 4 April 2003. The applicant was notified on 28 March that he had been retrenched. He contended that he was employed by the old employer until 4 April 2003 when the suspensive conditions were fulfilled whereas the respondents contended that the transfer of the applicant's contract of employment took place on 1 January 2003 which was the effective date of the agreement signed on 3 April 2003. The agreement provided in a clause dealing with employment related issues that from the effective date the new employer would take over the employment of all employees employed in their business as at the effective date, ie. 1 January 2003. The names of these employees were listed in an annexure to the agreement and included the applicant's name. The clause in question also provided that the employees listed in the schedule would be employed by the new employer during the interim period, in terms of s 197 of the Act, on the same terms and conditions

including remuneration and other benefits as those upon which they were employed by the seller immediately prior to the effective date. The employees listed in the schedule were not parties to the sale agreement and their consent to the transfer of their employment contracts was not sought. Van Niekerk AJ commented that regrettably the Act provides no guidance as to when a transfer can be said to have taken place nor did the issue seem to have been considered previously by the Labour Court. Van Niekerk AJ held at 1231 para [20]:-

“For the reasons that follow, and having regard to the purpose of s 197, it is my view that in the present instance the date on which a transfer for the purposes of the s 197 took place was the date on which the sale of the business became unconditional and NGN assumed full control of the business bundle that is the subject of the transfer. In other words, the date of transfer for the purposes of s 197 cannot be a date earlier than what might be termed the date of closure, the date on which the transferee employer takes final and unconditional control and responsibility for the transferred business. This is not a date that can be made retrospective or postponed by the will of the transferor and transferee employers, and it is a date to be determined objectively, and in the absence of any variation agreement with the parties defined by s 197(6)(a), regardless of what has been agreed by the employer parties.”

Although I am not sure that I agree with the expression “final and unconditional control” I agree with the remainder of this passage.

- [33] Van Niekerk AJ proceeded to give three detailed reasons for his finding, with which I respectfully agree. Under the first reason he said at 1232 para [21]:-

“There is a sense of chronology in s 197 – the transfer of the business occurs, immediately followed by the substitution of the transferee employer in relation to all contracts of employment in force on that date. To permit employer parties to manipulate the provisions of s 197 by effectively ceding employment contracts with retrospective effect to a date preceding the date of the completion of the transaction and the assumption of physical control of the business is inconsistent with the logic and structure of the section.”

- [34] After analysing the facts, van Niekerk AJ concluded at 1233 para [25]:-
 “All of the factual circumstances therefore point to a consummated assumption of control of the business by NGN and closure of the transaction, after the sale of the business became unconditional on 4 April 2003.”

- [35] It is important to bear in mind that, in applying the provisions of s 197 of

the Act, a distinction is to be made between the transfer of the business as a going concern and the transfer of the employee's contract of employment.

[36] The agreement in the present case was signed on 31 July 1998 but the effective date was agreed to be the commencement of business on 1 July 1998. Although clause 19.1 of the agreement provides that the purchaser shall, as from the effective date, employ all employees who were employed by the ITI business before the effective date, and whose names are listed in appendix 10, it is clear that, practically, neither the respondent's contract of employment nor the ITI business could have been transferred retrospectively from the effective date of 1 July 1998. The appellant's insistence that the transfer of the ITI business and the commencement of the respondent's new employment with the appellant took place on 1 July 1998 is therefore incorrect.

[37] Moreover, in terms of clause 4, the agreement was subject to a number of conditions precedent which had to be filled by not later than 14 September 1998. There was a provision that if they were not, and fulfilment thereof was not waived or extended, the agreement would be of no further force and effect. Although the evidence did not reveal when the conditions precedent were fulfilled, it is clear from the nature of the conditions that some of them, at least, could not have been fulfilled as at the date of signature of the agreement. For example, clause 4.1.1.1 provided that 90% of the parties set out in appendix A should sign a service and restraint of trade and confidentiality agreement in terms of which they would be employed by the purchaser for a period of three years "from the delivery date".

[38] Furthermore, it is clear from the appellant's conduct in relation to the employees after the date of signature of the agreement that the appellant did not regard the contracts of employment as having been transferred retrospectively from 1 July 1998 or, indeed, from the date of signature of the agreement on 31 July 1998. The facts I refer to are the following:-

- (a) Whilst the letter of 21 August recorded that "the continued employment of all ITI staff has been secured, without any change of the current conditions of employment" it proceeded to explain that in order to give effect to this, the employee concerned would be required to exercise one of the options referred to earlier in this judgment. In this regard I am of the view that the finding of the Court *a quo* that "Acceptance of the conditions is part of giving effect to the transfer to the

respondent”, was correct.

(b) Other indications in the letter of 21 August 1998 that the appellant did not regard the employee concerned as having been employed by the appellant with effect from 1 July 1998 were the following:-

(i) The words “You will be required to exercise one of the following options” – the future tense implied that this had not yet happened.

(ii) The first option was to “Accept the transfer to AST”, which implied that transfer had not yet taken place.

(iii) The election to continue employment under the same conditions of employment as at Iscor “will result in your becoming an employee of AST”, showed that this had not yet happened.

(iv) The provision that the acceptance of the conditions of employment offered by AST “will result in your becoming a new employee (of AST)”, implied that this would only occur after acceptance of the conditions of employment.

(v) The giving of the option of declining the transfer to AST again showed that the appellant did not regard the transfer of employment as having taken place.

(vi) The employee was given “until 18 September 1998 to exercise your option to transfer to the AST group”, which again showed that this had not yet occurred.

(vii) Having exercised the option to transfer to the AST group the employee still had until 30 October 1998 to decide on the conditions of service that would be applicable to him/her, which again showed that this had not yet been finalised.

[39] Counsel for the respondent submitted that logic dictated that in the interim period between the date of signature of the sale agreement and acceptance by the employee of transfer to AST, the employee was an employee of Iscor. I agree. That follows from the giving of the option to decline the transfer to AST, resulting in the employee remaining in the employ of Iscor and risking the possibility of retrenchment.

Furthermore, that the appellant itself regarded the respondent as having been employed by Iscor until the day after he accepted the conditions of employment, namely 30 October 1998, appears from the fact that the retrenchment calculation sheet prepared by the appellant shows that his period of service with the appellant commenced on 1 November 1998, the day after he accepted the new conditions of employment.

[40] The fact that it was not contemplated by the appellant that the contract of employment of the former ITI employees would be transferred to the appellant unless and until they exercised the option to so transfer, is another factor indicating that the business was not transferred as a going concern as at the effective date. The employees were obviously an integral part of the business acquired by the appellant from Iscor and the evidence was that the majority of employees did accept the transfer to the appellant. This supports the finding of the Court *a quo* that “the negotiations relating to forfeiture of the continued years of service were done within the context of the transfer”.

[41] It does appear from the evidence that the respondent knew, when he accepted the AST conditions of service, that the appellant sought to conclude a new contract of employment with the Iscor employees and accepted transfer to AST on that basis. It is apparent, however, that the appellant’s management misconceived the legal position relating both to the transfer of the contracts of employment and to the forfeiture of the employees’ years of service with Iscor. That much is apparent from the memorandum signed by van Zyl dated 10 October 1998 which says that: “the selling of ITI as a going concern to AST resulted in the termination of employees’ years of service with ISCOR”.

[42] This misconception also emerges from the e-mail (referred to in the judgment in the Court *a quo*) sent by Miss Olivier, the Group Human Resources Manager, to the Human Resources Team, dated 4 June 2002, in which she said:-

“Hi all, Apparently there is an uncertainty in some areas. I would like to confirm the following. Employees previously employed by ISCOR, that

worked for ITI, and formed part of the AST/ITI merger did not transfer with their service years. If you plan to retrench any such individual, the transfer date to AST must be considered as date of employment and not the employment date within ISCOR.”

[43] The probabilities are that the respondent was misled into signing his acceptance of the transfer and of the new conditions of employment. Even if he did agree to the transfer of his contract of employment on the basis that he was entering into a new contract, he did so acting under the mistaken belief, induced by the representation of van Zyl in the memorandum of 10 October 1998, that his years of service had terminated as a result of the sale of ITI to the appellant. I accordingly agree with the submission by counsel for the respondent that, quite apart from the legal effect of s 197(4) of the Act, the respondent ought not to forfeit his years of service with Iscor on the basis that he agreed to do so, or that he waived his right to continuity of service in terms of s 197(4) of the Act.

[44] The conclusions to which I have come make it unnecessary to determine the issues relating to the BCEA. I will, however, express my views with regard thereto.

[45] The Basic Conditions of Employment Act in operation at the time when the respondent was retrenched with effect from 31 July 2002 and became entitled to severance pay was the Basic Conditions of Employment Act No. 75 of 1997.

[46] That Act provides, in s 1, that “basic condition of employment” means a provision of this Act or sectoral determination that stipulates a minimum term or condition of employment”.

[47] S 4 of the BCEA provides”-

“4. Inclusion of provisions in contracts of employment. –

A basic condition of employment constitutes a term of any contract of employment except to the extent that –

- (a) any other law provides a term that is more favourable to the employee;
- (b) a basic condition of employment has been replaced, varied or excluded in accordance with the provisions of this Act; or
- (c) a term of the contract of employment is more favourable to the employee than the basic condition of employment.”

S 5 provides:-

"5. This Act not affected by agreements. –

This Act or anything done under it takes precedence over any agreement, whether entered into before or after the commencement of this Act."

[48] S 41(2) of the BCEA provides:-

"(2) An employer must pay an employee who is dismissed for reasons based on the employer's operational requirements or whose contract of employment terminates or is terminated in terms of s 38 of the Insolvency Act, 1936 (Act No. 24 of 1936) severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer, calculated in accordance with s 35."

This provision, providing as it does for the minimum severance pay payable on dismissal for reasons based on the employer's operational requirements, is a basic condition of employment as defined in the Act and accordingly constitutes a term of every contract of employment in terms of s 4, unless one of the exceptions provided for in that section applies.

[49] The only exception which could apply in this case is that provided for in s 4(c) namely, if a term of employment is more favourable to the employee than the basic condition of employment. I agree with Mr Landman that the exception must, in this case, be interpreted to mean a term relating to the payment of severance pay which is more favourable than that contained in s 41(2).

[50] On the basis of *Foodgro* the date upon which the "continuous service with that employer" commenced is a historical fact that cannot be altered by agreement and s 197(4) of the Act has the result that where a business is transferred as a going concern, employment with the old employer is deemed to be employment by the new employer. Accordingly, for the purposes of s 41(2) of the BCEA, the respondent's "continuous service" commenced in December 1970 and not on 1 November 1998.

[51] I do not consider that s 84(1) of the BCEA assists in determining the

length of service in a case in which there is a transfer of a contract of employment from one employer to the other pursuant to a transfer of the business as a going concern. It deals with determining the length of an employee's employment with an employer where there is a break in the employment with the same employer of less than one year. It has nothing to do with the transfer of a contract of employment from one employer to another employer.

[52] The appeal must fail, having regard to my finding that the Court *a quo* was correct in determining that s 197(4) of the Act prohibits the parties from entering into an agreement which alters an employee's continuity of employment, and that the respondent's years of service with Iscor should have been taken into account when the respondent's severance pay was calculated.

[53] I can see no reason why the respondent, having successfully opposed the appeal, should not be entitled to his costs of appeal.

[54] The appeal is dismissed with costs.

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McCALL AJA

I agree :
ZONDO JP

I agree :
KRUGER AJA

Appeal heard on :	
Attorney for the appellant :	Mr A. Landman
Instructed by :	Hugo and Ngwenya Attorneys
Counsel for the respondent :	Mr S. Snyman of Snyman's Attorneys
Judgment handed down on :	4 May 2007