REPUBLIC OF SOUTH AFRICA

Reportable

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

CASE NO: J2923/11

In the matter between:

HARSCO METALS SOUTH AFRICA (PTY) LTD	First Applicant
HARSCO METALS STEELSERV (PTY) LTD	Second Applicant

And

ARCELORMITTAL SOUTH AFRICA LIMITED	First Respondent
PHOENIX SERVICES INTERNATIONAL LLC	Second Respondent
TUBE CITY IMS SOUTH AFRICA (PTY) LTD	Third Respondent
NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA	Fourth Respondent
SOLIDARITY	Fifth Respondent
UASA – THE UNION	Sixth Respondent

SOUTH AFRICAN EQUITY WORKERS ASSOCIATION	Seventh Respondent
THE EMPLOYEES WHOSE NAMES ARE LISTED IN ANNEXURE "A" TO THE NOTICE OF MOTION	Eighth and Further Respondents

Heard on: 23 December 2011

Delivered on: 29 December 2011

Summary: Transfer of part of a business as a going concern for purposes of s 197 of LRA. Termination of service agreement between client and contractor; new contractors appointed after tender process. A transfer of a business as a going concern for the purposes of s 197 takes place where on the facts, the whole or part of a business is transferred, as a going concern, from the outgoing contractor to the new. In this instance, the transfer of assets to the new contractors and the employment by the new contractors of the majority of the outgoing contractor's employees tilt the balance in favour of the application of s 197.

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an urgent application in which the applicants seek a declaratory order to the effect that the transfer of their business to the second and third respondents on 1 January 2012 is a transfer of a business as a going concern for the purposes of s 197 of the Labour Relations Act, 66 of 1995 ('the LRA').

[2] The application is opposed by the first and third respondents. The fourth

respondent, the National Union of Metalworkers of South Africa (NUMSA), filed an affidavit in effect reserving its rights in relation to averments made regarding the conduct of the second and third respondents in relation to offers of employment made to individual respondents. This aspect of the application was not pursued at the hearing and NUMSA did not appear when the matter was argued.

[3] It is not disputed that the application is urgent (given that the date of any transfer for the purposes of s 197 is 1 January 2012), or that declaratory relief is appropriate should the applicants succeed.[1]

[4] The business that forms the subject of these proceedings comprises the services performed by the applicants to the first respondent (AMSA) in terms of six separate service contracts, two each in Vanderbijlpark and Newcastle, and one each at Vereeniging and Saladanha. The services, in broad terms, comprise slag management and processing services. The key question raised in these proceedings is whether on termination of the service agreements between the applicants and the AMSA and the appointment by AMSA of the second and third respondents (to which I shall refer as 'Phoenix' and 'Tube City' respectively) and the continuation of the services by them, triggers the application of s 197. The applicants contend that it does; AMSA, Phoenix and Tube City contend that it does not.

[5] The papers in this application exceed 1200 pages. The application was argued the day before Christmas Eve, and I undertook to make a ruling on the morning of 29 December 2011. What follows are the necessarily brief reasons for the conclusion to which I have come.

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1 In *Aviation Union of South Africa & another v South African Airways (Pty) Ltd & others* (case CCT 08/11, [2011] ZACC 31 24 November 2011), the Constitutional Court held that a dispute as to whether or not a specific transaction triggers the application of s 197 and whether as a consequence the new employer is substituted for the old as the employer of the affected employees is a justiciable dispute, and one that the parties are entitled to have determined, even if the agreements concerned have not yet been implemented (see paragraphs [115] and [116] of the judgment).

Factual background

[6] The applicants (to which I shall refer collectively as 'Harsco') conduct business at more than 160 locations world-wide (13 of these being in South Africa), in over 30 countries. Harsco provides services to AMSA in terms of the service agreements, and in doing so operates the four sites mentioned above at which it employs a total of 445 employees; 247 at Vanderbijlpark, 95 at Saldanha, 63 at Newcastle and 40 at Vereeniging. Each site is managed by a site manager.

[7] As mentioned above, Harsco provides AMSA with a variety of services relating to the management and processing of slag, a by-product from the smelting of ore. In essence, during the iron and steel-making process, impurities are generated (slag) from which any residual value is extracted before it is disposed of in an environmentally friendly way. The services rendered by Harsco include the processing of slag and waste, the separation and recovery of metallic content, the upgrading of the recovered metallics, crushing and screening of de-metallised slag and the sale of recycled slag to various manufacturers for the production of various products, including the production of filter media, fertilisers, road making construction materials, cement, abrasives and roofing granules. For this purpose, Harsco operates a number of metal recovery plants, and crushing and screening plants. These plants have been established by Harsco and are operated at Vanderbijlpark, Newcastle and Saldhana, but not at Vereeniging.

[8] Harsco has provided the above services for some 40 years. The current service agreements were due to expire on 31 March 2011, but they were extended to 31 December 2011. Shortly before the initial expiry of the applicable service agreements in March 2011, AMSA initiated a tender process in respect of all the operations mentioned above, but for Vanderbijlpark Slag where the service agreement with Harsco remains in force. Harsco, Phoenix and Tube City, all direct competitors in the South African market, were amongst those who submitted tenders. But for Vanderbijlpark Slag, Harsco was unsuccessful in its bid to renew its

agreements with AMSA. Phoenix was awarded the tender in respect of the operations in Vereeniging, Newcastle Slag and Newcastle; Tube City was awarded the tender in respect of the operations in Vanderbijlpark and Saldanha Bay. As a result, Harsco will cease to provide services to AMSA at the above plants, but for the arrangement in relation to the Vanderbijlpark metal recovery plant and the Newcastle aggregate plant, where Harsco has been retained to continue business operations until the end of January 2012 and April 2012 respectively, to ensure a seamless transition of those operations to Tube City and Phoenix at the end of the transitional period.

[9] In summary, and without doing justice to the myriad of factual material that is the subject of the affidavits before me, it seems to be common cause that the following will transpire further to the termination of the six contracts of service by AMSA with effect from 31 December 2011:

1. Tube City will commence with its contract of service at Newcastle and Vanderbijlpark, there being two contracts at each of these sites, and Phoenix will commence with contracts at Saladanha and Vereeniging.

2. Phoenix and Tube City will perform substantially similar services to those performed by Harsco, at the same locations.

3. In Vanderbijlpark and Newcastle, Harsco will provide retained services for a limited period, to ensure a smooth handover to the new contractors.

4. AMSA will purchase certain assets from Harsco, some of which it will on-sell to Phoenix and Tube City, while retaining the balance. The balance of the assets will be provided by the incoming service providers, who will make a total capital investment of some R500 million.

5. Harsco has not made available for purchase their metal recovery and crushing and screening plants at Newcastle, Vanderbijlpark and Saldanha, with the result that they will be decommissioned or otherwise

deployed by Harsco.

6. Phoenix and Tube City appear likely to employ some 300 of Harsco's 445 employees.

7. Harsco will retain its head office staff and two site managers, the latter because they are subject to a restraint of trade in favour of Harsco.

Further details as to the assets being transferred and the number of Harsco's employees engaged by Phoenix and Tube City appear below.

The interpretation of s 197

[10] Section 197 (1) provides:

'(1) In this section and in section 197A—

(a) 'business' includes the whole or a part of any business, trade, undertaking or service; and

(b) 'transfer' means the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern.

(2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6)—

(a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;

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

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

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

The judgment of the Constitutional Court in *Aviation Union of South Africa &*

another v South African Airways (Pty) Ltd & others [2] (to which I shall refer as the '*SAA* judgment') has to some extent clarified the meaning of s 197(1) and the circumstances in which it will apply. The interpretation of certain passages of the *SAA* judgment is central to the determination of the application or otherwise of s 197 in the present instance.

[11] An understanding of the factual matrix in the *SAA* judgment is of some importance. In that case, SAA terminated an agreement with a service provider (LGM) in terms of which LGM provided certain services to SAA. On termination of the agreement the services would be provided by a new contractor. LGM indicated to the unions concerned that it intended to retrench all the workers who would be rendered redundant by virtue of the termination of the services agreement by SAA. The unions approached this court for declaratory relief to the effect that the termination of the agreement and the subsequent provision of those services by a new contractor is a transfer in terms of section 197 of the LRA. If s 197 did apply, then the employment contracts would be secured and all the employees would continue to be employed on the same terms and conditions with the new contractor. If s 197 did not apply, the employees would be retrenched. This court held that s 197 did not apply as the section requires a transfer "by" the old employer, which it held, was SAA. As the services were not transferred "by" SAA but "from" LGM, the court held that the section did not apply. The Labour Appeal Court [3] overturned this decision and held that s 197, interpreted in light of the purpose of the LRA, did apply. The majority of the Supreme Court of Appeal,[4] however, agreed with the interpretation of this court and held that the section did not apply. The unions then appealed the case to the Constitutional Court. The Constitutional Court had to decide the reach of s 197 and whether the transaction at issue was subject to the section, and split six to five.[5] The majority and minority agreed on the first question (the legal interpretation inquiry) and disagreed on the second question (the factual

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2 CCT 08/11, [2011] ZACC 31 24 November 2011,

3 *Aviation Union of South Africa and Others v South African Airways (Pty) Ltd And Others 2010 (4) SA 604 (LAC)*

4 *South African Airways (Pty) Ltd v Aviation Union of South Africa and Others* 2011 (3) SA 148 (SCA)

5 *AUSA* (above) at para 79

inquiry).

[12] Both the majority and minority judgments record that the purpose of s 197 is to alter the employment–related consequences of the transfer of a business as a going concern at common law, consistent with the constitutional right to fair labour practices and in an effort to safeguard workers' security of employment and to facilitate the smooth transfer of the business by guaranteeing the employer a workforce to continue the business.[6] Both judgments further reject the contention that the reference in s 197 (1) (b) to the transfer of a business 'by one employer... to another employer...' necessarily excludes the application of the section to what have been termed 'second-generation outsourcing'. They also reject the contention that outsourcing ought to be treated as a discrete category for the purposes of s 197. On the contrary, the majority judgment says the following:

> '[105] A further general point must be made. An inquiry whether a transaction falls under the terms of section 197(1) and (2) would be misleading if it focuses solely or mainly on the generation of the transfer. It has the potential to bring about an incorrect result. It does not matter in principle what the generation of the outsourcing is, or even whether the transaction is concerned with contracting out at all. The true inquiry is whether there has been a transfer of a business as a going concern by the old employer to the new employer. That evaluation is complex enough without it being burdened with questions about the generation of outsourcing. A transfer of business may not be covered by section 197 even if it is a first generation contracting out. On the other hand, even a fifth generation outsourcing could be caught by the section if it is in reality the transfer of a business as a going concern.'

[13] The Constitutional Court further affirmed that whether there has been a transfer of a business as a going concern by the old employer to the new employer is a matter of fact, to be determined objectively, and which necessarily entails an enquiry into (1) the existence of a transfer, (2) whether there was a transfer of a business, and (3) whether the business is transferred as a going

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6 Paragraph [38] of the judgment.

concern.[7] In this regard, the approach adopted by the court in *NEHAWU v University of Cape Town*[8] was affirmed. This in turn requires that there should simultaneously be a transfer by one employer to another, an economic entity capable of being transferred, and that the economic entity retain its identity after the transfer.

[14] The Constitutional Court split only on the issue of whether on the facts, there had been a transfer as a going concern. The majority found on the basis of the relevant agreements that there had been a transfer; the minority preferred to remit the matter to this court to make a factual finding.

[15] To sum up: *SAA* resolves the debate on whether second (and further) generation outsourcing may in principle trigger the provisions of s 197. The court's unanimous answer is that they may. The judgment also affirms that whether an outsourcing attracts the application of s 197 is to be determined in the same way as any other transfer. Section 197 is triggered when on the facts there is a transfer by one employer to another, in circumstances where the transferred entity is the whole or part of a business, and where the business (or part of it) is transferred as a going concern. If the transfer meets these criteria (a matter for objective determination), the transferee is substituted automatically and by operation of law for the transferor as the employer of those of the transferor's employees engaged in the business on the date of the transfer.

The necessity for a prior transfer

[16] I deal first with the submission made on AMSA's behalf that properly construed, the judgment of the Constitutional Court necessarily requires the scrutiny of the initial transaction to determine whether there is simply a further contracting out of services, or the transfer of a business as a going concern. The basis for the submission lies in paragraphs [106] to [108] of the judgment, where the majority record the following:

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7 See paragraph [44]

8 [2003] 5 BLLR 409 (CC).

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

[107] There is no transfer of the business as a going concern. The outsourcee is contracted to provide the service, and becomes obliged to do so. And it is the outsourcee‘s responsibility to make appropriate business infrastructure arrangements. These may include securing staff, letting appropriate property for office or other work space, and acquiring fixed assets, machinery and implements, computers, computer networks and the like. Cancellation of the contract in these circumstances entails only that the outsourcee forfeits the contractual right to provide the service. The whole infrastructure for conducting the business of providing the outsourced service would ordinarily remain the property of the outsourcee. As we shall see, that is not what happened here, either when the initial outsourcing contract was concluded between SAA and LGM, or when SAA cancelled it.

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

[17] AMSA contends (and I accept this to be the factual position for the purposes of this application) that in 1956, a joint venture was established between Iscor (AMSA’s predecessor) and Heckett, and housed in a JV named Heckett (South Africa) (Pty) Ltd. The JV continued until 2000 (Heckett having in the interim changed its name to the second applicant) when Iscor sold its 49% shareholding. The Newcastle contract (concluded in August 1995) and the Vanderbijlpark contract (concluded in April 1997) came into existence while the

JV was in existence. On this basis, AMSA contends that there was never any transfer of a business as a going concern or otherwise) from AMSA to Harsco or its predecessors in relation to the services rendered at Newcastle and Vanderbijlpark. In effect, the initial transaction was the establishment of the JV in 1956. The JV did not extend to Saldanha and Vereeniging contracts, and in respect of the Newcastle slag dump contract and the Vanderbijlpark contracts (referred to as 'GBFS contracts'), none of these involved the transfer of a business as a going concern form AMSA to Harsco.

[18] On other words, the initial transaction comprised a contracting out by AMSA with Harsco in terms of which the latter would perform services, and that consistent with this, Harsco was required to itself to establish the necessary business infrastructure. Since the initial transaction did not involve the transfer of a business as a going concern from AMSA to Harsco, then the cancellation of the service contracts in the present instance is just that – it does not attract the application of s 197. In short: on the facts, in respect of each of the six contracts at issue in these proceedings, there was the simple contracting out of the services to Harsco. Harsco became contracted to provide the services and did so by making proper business infrastructure arrangements. The cancellation of the contracts in these circumstances entails no more than that Harsco forfeits the contractual right to provide services and that the whole infrastructure for providing the services remains the property of Harsco.

[19] Mr P Pretorius SC, for Harsco, submitted that this contention was factually and legally incorrect. At the level of principle, he argued that if AMSA's interpretation of the dictum is applied to all transactions involving the transfer of a business, a great deal of uncertainty would result, and the protective purpose of s 197 might well be undermined. The dictum must necessarily be appreciated in its context – Yacoob J was concerned with the cancellation of a particular outsourcing contract, and reasoned that the terms of the initial transaction were significant, but not determinative. The court was saying no more than that if SAA had not originally transferred its business to it would follow that the mere cancelation of the contract would involve no transfer; the contractor (in this case LMG) would simply pack its bags and move on. Indeed, on the facts, he found

that there had been a transfer in terms of s 197.

[20] What Yacoob J does not say, and could never be interpreted to say, is that unless there was a s 197 transfer from an outsourcing party to the first contractor there could never be a subsequent transfer from the first contractor to any second or subsequent contractor, regardless of the facts and the nature of the transaction. Such a general rule would be flawed, as can be seen from the example, inspired by the *Rand Airport* judgment. ACSA decides to build a new airport. It contracts with B to provide gardening services. B commences the provision of services in circumstances where ACSA has never regarded gardening as an integral component of its business operation. The contract with B terminates, and C is appointed to provide the services. It cannot be suggested, in principle, that there can never be a transfer from B to C only on account of the fact that there was no transfer from A to B. The correct approach, in my view, as recognised by the Labour Appeal Court in *Rand Airport* and the Constitutional Court in *NEHAWU*, is for the court to scrutinise the transaction in question and the factual circumstances surrounding it to determine whether on the applicable test the application of s 197 is triggered. This interpretation of the majority judgment in SAA is consistent with the purpose of s 197, which is to ensure both continuity of employment within an economic entity irrespective of any change in ownership, and to facilitate the smooth transfer of businesses as going concerns.

[21] In any event, the present circumstances can be distinguished from the factual circumstances posited by the example developed by Yacoob J. On termination of the service agreements, Harsco is not going to 'pack its bags and move on' in circumstances where the whole infrastructure for constructing the business of the outsourced service will remain its property. Whatever the origin and history of its provision of the services to AMSA, Harsco is leaving behind both human and non-human assets that will be utilised by the new contractors, Phoenix and Tube City. The significance of these assets is a matter that is relevant to the enquiry into whether there is a transfer of a business as a going concern, a matter dealt with below. For this reason alone, in my view, an assessment of whether the cancellation of the service agreements and the

appointment of Phoenix and Tube City to provide the services triggers s 197 is required.

Is there a transfer?

[22] Section 197 (1) defines a transfer to mean 'the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern'.

[23] In regard to the meaning of transfer, in paragraphs 47 and 48 of the judgment of the minority in *SAA*, in discussing what is contemplated by 'transfer', 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.
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> [48] For a transfer to be established there must be components of the original business which are passed on to the third party. These may be in the form of assets or the taking over of workers who are assigned to provide the service. The taking over of workers may be occasioned by the fact that the transferred workers possess particular skills and expertise necessary for providing the service or the new owner may require the workers simply because he did not have the workforce to do the work. Without the protection afforded by s 197, the new owner with no workers may be exposed to catastrophic consequences, in the event of the workers declining its offer of employment."

[24] In *COSAWU v Zikhethele Trade (Pty) Ltd*, [9] Murphy AJ, following the EAT in *Dines v Initial Services*,[10] held that the absence of a contractual link (as there is in the present instance) between the old and the new employers was not decisive. Further, in a situation where one contractor succeeds another, s 197 is not automatically applicable, but nor is it the case that its application is necessarily excluded. What is more significant than the mode of transfer is whether what is transferred is a business in operation that remains the same but in different hands.[11] In the present instance, none of the parties contends that the absence of any contractual nexus between Harsco on the one hand and Phoenix and Tube City on the other hand is decisive, or even significant. It is not disputed that there are components of Harsco's business that are to be passed on to Phoenix and Tube City. As I have mentioned, at least some of the Harsco's assets will transfer, as will the majority of Harsco's employees. There is therefore a 'transfer' for the purposes of s 197.

<u>Is there the transfer of a business?</u>

[25] Section 197 (1) defines a 'business' to include 'the whole or any part of a business, trade or undertaking, or service. The definition is broad, but it requires the court to subject the entity that is the subject of a transfer to scrutiny. In doing so, the courts have drawn on the jurisprudence developed by the European Court of Justice in applying EU Directives on the Transfer of Undertakings, and adopted the concept of an 'economic entity', defined as an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective'.[12] This formulation suggests that there may be a distinction, especially in the case of a labour-intensive business, between an 'economic entity' and an 'activity'; the latter comprising only the provision of services under a specific contract.

[26] The 'economic entity' test is more easily applied where a substantial

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9 [2005] 9 BLLR 924 (LC)

10 [1994] IRLR 336 (EAT)

11 At paragraphs [34] and [35] of the judgment.

12 *Suzen v Zehnacker Gebaudereinigung GmbH Krankenhausservice* [1997] IRLR 225.

business, with its assets and employees, is the subject of the transfer. At the other end of the spectrum is the business that comprises only the provision of services. In those instances, the ECJ has recognised the requirement laid down in *Spijkers*[13] to have regard to the transfer of the business's tangible assets may be unrealistic. Businesses engaged in this type of activity may in fact have no assets, or have only assets whose importance is negligible in relation to the overall conduct of their activities. Hence the caution in *Suzen* that an entity cannot be reduced to the activity entrusted to it. In the United Kingdom, this problem has been largely resolved by the incorporation of Regulation 3 (1) – (2) of TUPE 2006, and the addition of a 'service provision change' within the broader definition of a relevant transfer. In effect, this provides that if immediately before the service provision change, there is an organised grouping of employees which has as its principal purpose the carrying out of activities on behalf of the client and where the client intends that the activities will, following the service provision change, be carried out by the transferee.

[27] Useful as these authorities are, in South Africa, in relation to the definition of a 'business' for the purposes of s 197, the judgment of the Labour Appeal Court in *SAMWU v Rand Airport Management Co Ltd* [14] remains the authority by which I am bound. In that case, the court concluded that the outsourcing of gardening and security functions at an airport management by the employer were businesses capable of being transferred in terms of s 197, despite that fact that it did not appear that any assets, goodwill, operational resources or workforce were to be transferred. No distinction was drawn between a business that is largely employee-reliant, as opposed to an asset-reliant business. Nor was it suggested that in the former, greater weight ought to be attached to the number of employees transferring as opposed to the latter instance, in which the number of assets transferring might attract greater weight. If, as in that case, a grouping of relatively unskilled employees and the work they perform, with no assets appearing to be the subject of any transfer, comprises a 'business' for the purposes of s 197, then it is difficult to conceive, in the context of an outsourcing transaction, of an economic entity that would

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13 *Spijkers Gebroeders Bendik Abbatoir CVv Alfred Benedik en Zonen* [1986[2 CMLR 296

14 [2005] 3 BLLR 241 (LAC).

not be capable of transfer in terms of the section.

[28] For these reasons, I am satisfied that there is an economic entity capable of being transferred, in the form of Harsco's business operations conducted pursuant to the six service agreements concluded with AMSA.

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

[29] Section 197 does not define what is meant by a transfer of a business 'as a going concern'. The South African courts have drawn inspiration from the ECJ. In *NEHAWU v University of Cape Town*, [15] Ngcobo J stated:

> "A number of factors will be relevant to the question whether a transfer of a business as a going concern has occurred, such as the transfer or otherwise of assets both tangible and intangible, whether or not workers are taken over by the new employer, whether customers are transferred and whether or not the same business is being carried on by the new employer. What must be stressed is that this list of factors is not exhaustive and that none of them is decisive individually. They must all be considered in the overall assessment and should therefore not be considered in isolation."[16]

Both the majority and minority judgments in *SAA* affirm this approach. [17]

[30] In *NEHAWU*, the Constitutional Court decided whether as a matter of principle, s 197 applied to outsourcing. It held that it did, but declined to make a finding on the facts, referring the matter back to the LAC for decision. There is consequently no guidance on what weight must be attached to the factors identified by the court as relevant, or put another way, when the tipping point is reached that determines whether a business is transferred as a going concern.[18]

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15 [2003] 5 BLLR 409 (CC)

16 At para 56 of the *NEHAWU* judgment. This formulation is drawn almost word for word from *Spijkers Gebroeders Bendik Abbatoir CVv Alfred Benedik en Zonen* [1986[2 CMLR 296 and the later judgment of the ECJ in *Suzen v Zehnacker Gebaudereinigung GmbH Krankenhausservice* [1997] IRLR 225. See also *Cheeseman v R Brewer Contracts Ltd* [2001] IRLR

17 See paragraphs [50] and [111].

18 The idea of a 'tipping point' is Clive Thompson's – see Freund, Le Roux and

[31] In relation to weighting of the factors to be considered (which is really the essence of the present dispute), the only authority that I was able to locate is the judgment by Murphy J in *COSAWU v Zikhethele Trade (Pty) Ltd*. [19] Murphy J adopted a principled view on what comprised a transfer of a business as a going concern. and concluded after a review of the relevant European law, following the ECJ, that the decisive criterion for determining the existence of a business is whether, after the transfer, the undertaking has retained its identity. Murphy J went on to say:

> In order to determine whether there has been a retention of identity is necessary to examine all the facts relating both to the identity of the undertaking and the relevant transaction and assess their cumulative effect, looking at the substance, not at the form, of the arrangements. The mode or method of transfer is immaterial. The emphasis is on a comparison between the actual activities of and actual employment situation in an undertaking before and after the alleged transfer (*Kelman v Care Contract Services Ltd* [1995] ICR 260 (EAT). What seems to be critical is the transfer of responsibility for the operation of the undertaking. Mummery J's conclusion in *Kelman* offers a salutary guideline. He said:
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>> "The theme running through all the recent cases is the necessity of viewing the situation from an employment perspective, not from a perspective conditioned by the principles of property, company or insolvency law. The crucial question is whether, taking a realistic view of the activities in which the employees are employed, there exists an economic entity which, despite changes, remains identifiable, though not necessarily identical, after the alleged transfer." [20]

[32] I can think of no basis to depart from this approach, other than to say that a primary consideration, in my view, is the nature of the business. This will in most instances provide some useful indication of the weight to be attached particularly to the transfer of assets and whether any workers are taken over by the new employer, and if so, the number and significance of each. Thus, in

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Thompson *Current Labour Law 2010* at p 76.

19 Supra

20 At paragraphs [34] and [35].

Schmidt, the ECJ held that 'the absence of (tangible) assets (does not preclude) the existence of a transfer'. It went on to state, in its judgment in *Süzen* , that 'where in particular an economic entity is able, in certain sectors, to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction affecting it cannot, logically, depend on the transfer of such assets'. That does not mean that in every case involving a transfer of contracted-out services the assets become irrelevant, but they would be less relevant than a case where the services concerned were labour intensive. Conversely, where the activities carried on by the service provider require the use of substantial plant and equipment and cannot be regarded as essentially labour intensive, the absence of a transfer of those assets will lead to the conclusion that the entity transferred does not retain its identity. What is clear though, and relevant to the present case to the extent that certain assets will be sold to AMSA and ultimately made available to Phoenix and Tube City (see below) , the fact that any assets used in the activities of the business or undertaking concerned are made available by the contracting authority to the original service provider, and are subsequently made available by the contracting authority to the transferee as part of the arrangements for the transfer, need not prevent the transfer being a transfer in terms of s 197 (see *Abler & others v Sodhexho MM Catering GmbH*). [21]

[33] I begin the assessment with this matters that are common cause. As I have mentioned, it is not disputed that the majority of Harsco's workers engaged in the business are to be taken over by Phoenix and Tube City. The figures are set out above – some 300 of Harsco's 445 employees (roughly 70% will transfer. Mr Myburgh SC, who appeared for AMSA, urged me to adopt a qualitative approach and to consider that Harsco will retain key members of management, in particular the two site managers restrained from transferring to Phoenix. I am not persuaded that the functions of the site managers are such that the fact of the intention to retain them overrides the consideration of some 70% of Harsco's employees assuming employment with Phoenix and Harsco. This is not to deny the existence of any need for operational management, or its importance, but it seems to me that from the available figures that the operation of the physical infrastructure by skilled and semi-skilled employees is a

21 [2004] IRLR 168.

significant component of the business operation that cannot be ignored for the purposes of determining the existence of a transfer of a business as a going concern.

[34] In so far as any transfer of customers is concerned, it is common cause that the only recipient of services in terms of the service agreements is AMSA, and that post-transfer, AMSA will remain the sole recipient of services. It is also common cause that Phoenix and Tube City will perform substantially similar services to those preformed by Harsco, at the same locations at which Harsco performed the services. In my view, this is a strong indication of the continuation of a discrete economic entity in different hands.

[35] It is common cause that there are no intangible assets (in the form particularly of intellectual property) that is the subject of the transfer. Harsco will retain its goodwill, intellectual property and patents and its operational methodology. The factor that has generated more disputes (and paper) than any other in these proceedings is that of the tangible assets to be transferred. I accept for present purposes the averments made by AMSA. In essence these are that Harsco has not made available for purchase the recovery plants and the screening and processing plants that it has not made available for purchase. The total value of the plants is some R8.6 million. Although this is said to comprise only 3% of the value of assets at Vanderbijlpark, it comprises 18% of the value of assets at Saldanha and 49% of the value of assets at Newcastle. In answer to the contention that the failure to make these plants available is incompatible with Harsco's claim that there is a transfer of a business as a going concern, Harsco contends that, for various reasons, the plants will in any event be decommissioned. In the result, the new service providers are required to commission new plants.

[36] In relation to movable assets, there is a dispute of fact on the papers, and I accept for present purposes the figures and calculation thereon produced by AMSA. These reveal that Harsco has 283 assets (units) deployed at AMSA, their NBV being R133.6 million. Of these, AMSA has made 161 (57%) available for purchase. OF the units that Harsco will retain, AMSA regards 14.2% as critical to the operation of the services. (This figure includes the recovery plants, and the crushing and screening plants referred to above.) Of the 161 units

made available by Harsco, AMSA will purchase 92 (57%) of them at a NBV of R71.7 million. This equates to 32.5% of the assets deployed by Harsco at AMSA by number, and 54% of the total NBV of all Harsco's assets. Of the 92 assets that ASMSA will purchase, it will retain 30. Phoenix will acquire 16 and Tube City will acquire 46. In total, 62 of Harsco's assets out of an overall total of 283 (22% by number, and 33% of the total NBV of all Harsco's assets), will be taken over by the incoming service providers.

[37] The fact that Phoenix and Tube City will not take transfer of the plants is an important factor, but not in itself an overriding one. The assets that the new service providers will acquire from Harsco are not entirely insignificant. It seems to me, following *Spijkers*, *Dines* and *Cosawu*, that the factual circumstances particularly to be taken into account in determining whether the conditions for a transfer of whole or part of a business as a going concern for the purposes of s 197 are met are primarily the degree of similarity of the activity carried on before and after the transfer and the type of undertaking concerned, and the question whether or not the majority of the employees are to be taken over by the new employers. In the present case, the service contracts concluded between AMSA on the one hand and Phoenix and Tube City on the other hand require the new service providers to perform substantially similar services to those performed by Harsco, at the same locations, broadly using the same operational methods. Viewed from an employment perspective, the majority of Harsco's' employees will work for Phoenix or Tube City. It makes no difference, in my view, that offers of employment were made by Phoenix and Tube City and accepted by Harsco's employees, as opposed to agreement on any transfer of employment. What is relevant is whether any of Harsco's employees will be employed by Phoenix and Tube City after the termination date, and if so, the number of employees. I wish to emphasise that the similarity of the services to be provided to be provided by Phoenix and Tube City is not in itself determinative, nor is the fact that on the transfer date, they will employ the majority of Harsco's employees. Viewed cumulatively though, and taking into account that in the present instance, both of these criteria are met and that on the transfer date, substantially the same services will be provided from the same locations, and viewed through the lens of the actual activities of and the employment situation in the undertaking before and after the transfer, to use the words of Mummery J

in *Kelman*, there exists an economic entity which, despite changes, remains identifiable, though not necessarily identical, after the transfer.

[38] It remained open to Phoenix and Tube City to employ none of Harsco's employees, and to decline to take transfer of any or of Harsco's assets. In this event, my conclusion would have been different, and there would I think have been no more than the termination of one contract and the beginning of another. But that is not what is to occur.

[39] For the above reasons, I am persuaded that the entity that comprises Harsco's business operations performed in terms of the service agreements with AMSA will continue as a discrete economic entity in the hands of Phoenix and Tube City on termination of the service agreements between Harsco and AMS, and that for the purposes of s 197, there is a transfer of a business as a going concern.

Relief

[40] In so far as the relief sought by Harsco is concerned, prayer 2 of the notice of motion contemplates a declaratory order in terms of which the engagement of Phoenix and Tube City to conduct business operations for and on behalf of AMSA in place of Harsco is a transfer of a business as a going concern in terms of s 197. For the above reasons, I intend to grant an order on that basis, but making clear that it is the termination of the service agreements and te appointment of Phoenix and Tube City to provide the services that triggers the application of s 197. Prayer 3 of the notice of motion contemplates a declaratory order to the effect that the termination of the agreements between Harsco and AMSA obliges Harsco to transfer the relevant business as a going concern within the meaning of s 197 (1) and (2). I see no need for such an order. If s 197 is applicable in the present circumstances, it follows that Phoenix and Tube City are substituted, automatically and by operation of law, as the employers of all those persons engaged in the business that is the subject of the transfer. In other words, on the date of transfer, Tube City is substituted for Harsco as the employer of those employees engaged in terms of the service contracts in respect of Newcastle and Vanderbijlpark as at the date of the transfer, and Phoenix is substituted for Harsco as the employer of those

employees engaged in terms of the service contracts at Vereeniging and Saldanha as at the date of the transfer. [22]It follows from the provisions of s 197 (2) that all rights and obligation as between Harsco and the affected employees at the time of the transfer continue in force as if they had been rights and obligations as between the employees and Phoenix and Tube City respectively. Finally, there is no reason why costs should not follow the result, and why the costs of two counsel should not be included.

I make the following order:

1. It is declared that the cancellation of service agreements concluded between the Applicants and the First Respondent and engagement of the Second and Third Respondents by the First Respondent to conduct business operations for and on behalf of the First Respondent in the place and stead of the First and Second Applicants at the First Respondent's plants in Saldanha, Vanderbijlpark, Vereeniging and Newcastle, amounts to the transfer of a business as a going concern for the purposes of s 197 of the Labour Relations Act, 66 of 1995.
2. The First and Third Respondents are to pay the costs of these proceedings, jointly and severally, the one paying the pother to be absolved, such costs to include the costs of two counsel.

André van Niekerk

Judge

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22 The principle of assignment applies to determine to which of the new contractors who will assume the relevant activities Harsco's employees should transfer. See *Botzen v Rotterdamsche Drooggdok Maatschappij BV* [1985] ECR 519, applied in *Duncan Web Offset (Maidstone) Ltd v Cooper* [1985] IRLR 633 (EAT). In relation to employees subject to restraint, this is not a bar to the transferee employer, having assumed all employment-related rights and obligations, from becoming entitled to enforce the restraint against its competitors.

APPEARANCES

For the Applicants: Adv PJ Pretorius SC, with Adv I De Vos, instructed by Edward Nathan Sonnenbergs

For the First Respondent: Adv AT Myburgh SC, with Adv F Boda, instructed by DLA Cliffe Dekker Hofmeyr

For the Third Respondent: Adv GC Pretorius SC, with Adv HE Mkhawane, instructed by Bowman Gilfillan