REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 1978/12

In the matter between:

FRANMANN SERVICES (PTY) LTD **Applicant**

and

SIMBA (PTY) LTD **1st Respondent**

CAPITAL OUTSOURCING GROUP (PTY) LTD **2nd Respondent**

Heard: 29 August 2012

Delivered: 30 August 2012

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an urgent application in which the applicant seeks an order declaring that on the termination of an agreement between the applicant and the first respondent, the employment contracts of those of the applicant's employees currently engaged in providing services to the first respondent are transferred in terms of s 197 of the Labour Relations Act (LRA) to the respondent, alternatively any new service provider appointed by the first respondent.

[2] On 10 August 2012, the applicant amended its notice of motion by seeking leave to join the second respondent in the application. A subsequent application for joinder sought to join the South African Catering, Commercial and Allied Workers' Union, the Progressive General Employees Association of South Africa and the Wood Electrical and Printing Union, all trade unions. The remaining respondents in the joinder application, some 636 employees, are all currently employed by the applicant pursuant to the contract between the applicant and the first respondent. There was no opposition to the joinder application, nor is it disputed that the unions and employees sought to be joined favour the granting of an order in the terms sought by the applicant. While they have not sought to be represented in these proceedings in their own right, on the basis that they all have an obvious and material interest in the outcome of these proceedings, the respondents concerned are joined to the application.

[3] The applicant is a temporary employment service, or labour broker. Since 2000, the applicant has supplied labour to the first respondent. The contract between the applicant and the first respondent is to terminate on 31 August 2012. The first respondent has appointed the second respondent to provide it with temporary employment services. As at the date of the hearing of this application, the second respondent had only issued a letter of intent; there is

no written agreement between the first and second respondents recording the terms on which the second respondent is to provide services.

[4] Most of the papers filed in these proceedings (some 500 pages) are not directed at the issue in dispute. The issue to be decided is crisp - is s 197 triggered only by the cancellation of an agreement between a client and a service provider and the subsequent appointment of a new service provider to perform the same activities? Of course, the factual background is an essential component of the enquiry, since each case must be assessed on its merits, in relation to the legal test that applies.

[5] Given the fact that the agreement between the applicant and the first respondent is to terminate on 31 August 2012 and that the respective parties desire a degree of certainty on their respective positions prior to that date, I have had to prepare this judgment overnight. My reasons for the order that is reflected below are necessarily brief.

<u>Applicable legal principles</u>

[6] 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.'

[7] It is now well-established that whether there has been a transfer of a business as a going concern for the purposes of s 197 is a matter of fact, to be determined objectively. This necessarily entails an enquiry into (1) the existence of a transfer by one employer to another, (2) whether there was a transfer of a business (is there an economic entity capable of being transferred?) and (3) whether the business is transferred as a going concern (does the economic entity that is transferred retain its identity after the transfer?) (see *Aviation Union of South Africa & another v South African Airways (Pty) Ltd & others* [2012] 3 BLLR 211 (CC)). If the transfer meets these criteria, 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 transfer occurs by operation of law, and irrespective of the wishes or intentions of the parties.

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

[9] The *SAA* judgment concerned the termination of a contract in terms of which certain services previously conducted by SAA were outsourced to a service provider, and where the terms of the contract regulated the reversion of services to SAA or an alternative service provider. In paragraphs [47] and [48] of the judgment, in discussing what is contemplated by 'transfer', Jafta J said

the following:[1]

> [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*** (own emphasis).The service provider would be free to offer the same service to other clients with its workforce still intact.
>
> [48] For a transfer to be established there must be components of the original business which are passed on to the third party. These may be in the form of assets or the taking over of workers who are assigned to provide the service…'

[10] in relation to the requirement that a business be transferred as a going concern, Japhta J referred to the multi-factoral test established in *National Education Health & Allied Workers Union v University of Cape Town & others* (2003) 24 *ILJ* 95 (CC) and emphasised that what matters during the factual enquiry is its substance rather than its form (see paragraph [51] of the judgment). At paragraph [52] of the judgment, Japhta J said the following:

> 'Although the definition of business in section 197(1) includes a service, it must be emphasised that what is capable of being transferred is the business that supplies the service and not the service itself. Were it to be otherwise, a termination of a service contract by one party and its subsequent appointment of another service provider would constitute a transfer within the contemplation of the section. That this is not what the section was designed to achieve is apparent from its scheme, historical context and its purpose. The context referred to here is the alteration of the common law consequences on employment contracts, when the ownership of a business

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1 Although this is a reference to the judgment of the minority, the court was split only in respect of the remedy to be granted. On the meaning of s 197, the majority and minority judgments come to similar conclusions.

changes hands.'

[11] This point is reinforced in paragraph [75] of the judgment in relation to the 'going concern' requirement:

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

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

provide a service that requires the use of the first respondent's infrastructure, at least not in the sense that it is afforded control over that infrastructure for the purpose of providing the contracted service.

Analysis

[13] Unlike *SAA,* in the present instance, there is no formal agreement between the first and second respondents relating to the consequences of the termination of the agreement between the applicant and the first respondent, or the appointment of any alternative service provider. The first respondent has issued a letter of intent to the second respondent in terms of which the second respondent will be appointed to provide temporary employment to the first respondent. The terms on which the second respondent will provide the services and any similarity between those terms and the service provided by the applicant remain unclear at this stage.

[14] Adv. Pretorius SC, who with Adv. Fourie appeared for the applicant, urged me to accept that that the applicant's business is in itself an economic entity capable of being transferred in terms of s 197. In the alternative, it was submitted that regardless of the nature of the applicant's business, the added factors of access to the tools of production, the fact that the services were to be provided to the same client and the like, had the consequence that s 197 will be triggered. In the further alternative, the applicant submits that on balance, it is more probable that a significant part of the workforce will be taken over by the second respondent and that the application of s 197 will be triggered on that basis.

[15] The first argument (i.e. that the nature of the applicant's business is such that it is *per se* an economic entity capable of transfer) is met by the Constitutional Court's interpretation of s 197. That conclusion, as I have indicated, is that generally speaking, the termination of a contract between a client and service provider is not in itself a transfer of a business as a going concern. What is of particular importance in the present case is the fact that the applicant is to discontinue business and that it is for this reason that the contract between the applicant and the first respondent is to terminate. It is not disputed that the

sole director of the applicant wishes to discontinue business as a temporary employment service, that this was the primary reason for the termination of the contract between the applicant and the first respondent, and that the applicant did not submit a tender for the contract that was ultimately awarded to the second respondent. In other words, to the extent that the *SAA* judgment draws a distinction between a business and the service provided by that business, in this instance, the applicant's business will terminate and will thus not be capable of being continued. The fact that the service provided to the first respondent will as of 1 September be provided by the second applicant is in itself of no consequence.

[16] The second argument (i.e. that there is a sufficiently significant business bundle that is the subject of a transfer) is similarly not persuasive. The fact that any of the second respondent's employees may be engaged on the same production line to performing the same tasks does not in itself trigger s 197. On the papers before me, it is not disputed that the second respondent has no intention of acquiring or taking of any of the corporeal and warning incorporeal assets of the applicant, and that it has no intention to utilise any processes instituted by the applicant or of acquiring any of the applicant's rights or obligations as against the first respondent. On that basis, in the light particularly of there being no assets, tangible or intangible, goodwill and the like that is to be transferred, and in the absence of any specific evidence relating to the use of any of the first respondent's assets or infrastructure, there is no transfer as a going concern.

[16] In so far as any intention by the second respondent to employ any of the applicant's employees is concerned, I am unable to find, on the evidence before me, that it is more probable than not that either the first or the second respondents, or both, will make offers of employment to the applicant's employees after 31 August. Although the second respondent in particular has been equivocal as to its future intentions regarding the employment of any of the applicant's employees, that is not sufficient in itself to warrant a finding that it intends to do so. This is an issue best dealt with in terms of an express

statement (which I record in paragraph [18] below) to the effect that in the event of any material change in the circumstances that currently pertain, this judgment will not preclude any of the parties from exercising any right that may be acquired by virtue of those changed circumstances.

[17] In short: In my view, there will be no transfer of a business as a going concern for the purposes of s 197 only on account of the termination of the contract between the applicant and the first respondent on 31 August, and the appointment of the second respondent to provide the same or a similar service. This is a case where, in the words of Yacoob J, an outsourcee is contracted to provide a service, and becomes obliged to do so in circumstances where it is the outsourcee's responsibility to make appropriate business infrastructure arrangements, and in particular, the securing of staff. In relation to the applicant, cancellation of the contract between it and the first respondent entails only that the applicant's contractual right to provide the service terminates will be forfeited in circumstances in which the whole infrastructure for conducting the business of providing temporary labour will ordinarily remain the applicant's property. (see the *SAA* judgment at paragraph [107].

[18] I wish to emphasise that my decision is predicated on the facts as determined on the papers before me. Subsequent events, either in the form of the terms of any contract ultimately concluded between the first and second respondents, or any offer of employment to those the applicant's employees currently employed at the first respondent's plant, may well have the consequence of a different result. This judgment does not close the door to any later proceedings initiated on this or some other appropriate basis.

[19] Finally, in relation to costs, there is no reason why costs should not follow the result. In so far as the costs of the postponements on 16 August and 23 August are concerned, a reasonable request was made for an adjournment to of the application to 23 August 2012. This was refused by the applicant. The first respondent then brought a formal application for a postponement, which was unsuccessfully opposed. In these circumstances, and in the exercise of

the discretion conferred on me by s 162 of the Act, the applicant ought to be liable for the costs of the postponement on 16 August 2012. In relation to 23 August 2012, since the postponement was occasioned by the prospect of a settlement, there ought to be no order as to costs.

[20] The first respondent submits that the costs of two counsel are warranted. I agree; the matter was sufficient complex to justify an order to that effect.

For the above reasons, I make the following order:

1. The application is dismissed.

2. The applicant is to pay the costs of these proceedings, including the wasted costs of the postponement on 16 August 2012, but excluding the costs of the postponement on 23 August 2012, such costs to include the costs of two counsel.

André van Niekerk

Judge of the Labour Court

Representation

For the applicant: Adv. P Pretorius SC, with Adv. G Fourie, instructed by Blake Bester

For the first respondent: Adv. E van Graan SC, with Adv. H Mkhawane, instructed by Cowan Harper

For the second respondent: Adv. I. Pillay, instructed by McGregor Erasmus.