REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J1089/2015

In the matter between:

FIELD FORCE MARKETING	**Applicant**
And	
DISTELL LIMITED	**First Respondent**
VMS GROUP (PTY) LIMITED T/A IMPERIAL RETAIL SOLUTIONS	**Second Respondent**
THE PERSONS WHOSE NAMES ARE LISTED IN ANNEXURE "A" TO THE NOTICE OF MOTION	**Third Respondent**

Heard: **25 June 2015**

Delivered: **17 July 2015**

Summary: Whether the termination of a service agreement and the subsequent conclusion of a contract for the provision of similar services by another entity constitutes a transfer of a business as a going concern as contemplated in section 197 of the LRA.

JUDGMENT

RALEHOKO AJ

Introduction

[1] This is an urgent application in which the applicant, Field Force Marketing ("FFM") seeks a declaratory order that section 197 of the Labour Relations Act No 66 of 1995 ("the LRA") applies to the termination of the Shelf Stacking Service Agreement between FFM and the first respondent, Distell Limited ("Distell") and the subsequent conclusion of a contract between the second respondent, VMS Group (Pty) Ltd t/a Imperial Retail Solutions ("Imperial") and Distell for the provision of comprehensive merchandising services beyond the services previously provided by FFM.

[2] The application is opposed by Imperial which also disputes the urgency of the application. Distell is not opposing the application and will abide the decision of the court. It has however filed an affidavit clarifying 'certain operational issues regarding the relationship between itself and FFM'.

[3] The issues for determination are therefore twofold, (a) whether the matter is urgent and (b) whether section 197 of the LRA applies to the facts of this case, in which case the contracts of employment of FFM employees will automatically transfer to Imperial.

The facts

[4] Distell is a brewer and distiller of alcohol products, which are then bottled and distributed to wholesale and retail liquor stores throughout South Africa.

[5] Since 2004, FFM has provided shelf stackers to Distell in terms of a verbal service agreement concluded between them, initially covering only Gauteng and the North West Province and was subsequently extended to cover all provinces throughout South Africa.

[6] The shelf stackers are designated to various retail stores which stock Distell products, *inter alia*, to pack these products on to dedicated shelves, ensuring that the prices of those products are correctly labelled, produce reports on sales of products and stock availability. The shelf stackers work

under the direct control and supervision of FFM personnel, who manage them.

[7] In 2006 FFM and Distell entered into another service agreement in terms of which FFM would also provide van assistants in the central region, being Johannesburg.

[8] These van assistants report directly to Distell and travel in Distell delivery vehicles to retail stores stocking Distell products where they would be involved in constructing advertising displays, stands and other marketing material for Distell products. Van assistants work under the control and supervision of Distell personnel.

[9] In other provinces other than Johannesburg, Distell made use of its own employees to assist merchandisers and referred to these employees as sales assistants. Sales assistants (according to Distell) and van assistants (according to FFM) perform the same duties.

[10] FFM would invoice Distell for the services provided by shelf stackers and van assistants supplied by it.

[11] Shelf stackers and van assistants comprise 90% and 10% respectively of FFM's workforce. FFM also employs a National Operations Manager, a Projects Manager, a National Operations Director and thirteen supervisors who are responsible for managing the shelf stackers.

[12] Distell never employed shelf stackers. Prior to 2004, Distell utilised shelf stackers provided by Profill, Workforce and Kelly who were taken over by FFM in 2004 when it concluded the service agreement with Distell.

[13] Distell was FFM's sole customer. The reason for this state of affairs is in dispute, with FFM contending that this is what was required by Distell, whereas Distell's version is that FFM was precluded from providing services to Distell's competitors but was free to provide its services to other businesses supplying the same clients that Distell supplied with its products.

[14] What is not in dispute is that in early 2014, Distell advised FFM to look for other customers. FFM contends that it tried securing alternative business but was unsuccessful. Without any evidence to the effect that the terms of

the service agreement were at any stage amended, in my view this suggests that FFM could have other customers, if it wished.

[15] On 17 July 2014 Distell informed FFM that it would invoke a tender process for the merchandising and shelf packing service and that FFM would have to compete with other service providers for the business.

[16] On or about 18 July Distell requested FFM and other interested parties to submit a proposal ("the RFP") "*to find alternative proposals to manage the off consumption merchandising environment and compare it to the current way of working*". In essence, Distell was looking to outsource its merchandising function and to get an expanded and comprehensive merchandising service, which includes shelf stacking which was being offered by FFM, from a service provider who would offer this service in more stores across the country. FFM had offered the service in 510 retail stores and Distell was looking to immediately increase coverage to 900 stores and ultimately to 30 000 stores. The stated objective was to improve efficiency.

[17] Distell invited interested parties to make submissions dealing with four scenarios. Two of the scenarios were (a) the taking over of existing service providers' staff and (b) not taking over the staff.

[18] FFM responded to the RFP, proposing re-inventing itself and partnering with a third party to provide the expanded merchandising service now required by Distell.

[19] In January 2015 the tender was awarded to Imperial and in terms of the new service agreement, Imperial took over 70 Distell personnel employed in merchandising, effective March 2015.

[20] In March 2015 FFM was informed that its submission was unsuccessful and was given verbal notice, followed by written notification, of termination of the service agreements effective 1 June 2015.

[21] FFM objected to the short notice of termination of the agreements which it argued did not afford it an opportunity to give adequate notice to its staff in

terms of s189A[1] of the LRA. FFM also raised the issue that the RFP made reference to the successful tenderer taking over the existing staff which was not mentioned in the notice of termination. As I have stated above, the RFP referred to four scenarios', one of which was the taking over of the current service providers' staff.

[22] Subsequent to engagement on FFM's concerns, on 21 April 2015 Distell issued a fresh termination notice, giving FFM 3 month's notice of termination of the service agreement, with the termination date being 21 July 2015.

[23] At a meeting held in April 2015, Imperial indicated that it was prepared to assist FFM with finding alternative employment for its employees by considering employing especially those employees who worked in remote areas. FFM's version to the contrary is not borne out by the facts.

[24] On 11 May 2015 FFM informed Distell and Imperial that it had taken legal advice to the effect that the termination of the agreement with FFM and the conclusion of the service agreement between Distell and Imperial triggers the provisions of section 197 of the LRA and therefore all FFM employees will automatically transfer to Imperial effective 21 July 2015. FFM sought an undertaking from both Distell and Imperial that FFM employees would automatically transfer to Imperial effective 21 July 2015.

[25] Both Distell and Imperial denied that section 197 applied and refused to furnish the undertakings sought.

[26] On 1 June 2015 Distell informed its trade partners that the merchandising function would transfer to Imperial, which would provide a full merchandising service across all consumption channels, including campaign executions, shelf packing and on shelf availability, cold space management, stock rotation and feedback on key drivers for Distell.

[27] In the meantime Distell, Imperial and FFM had agreed that from 1 June 2015 until 21 July 2015 when the service agreement with FFM will terminate, Imperial and FFM would render a parallel service to ensure a

[1] This section deals with the large-scale dismissal of employees for an employer's operational requirements.

smooth transition. This agreement was implemented and was in place at the time that the application was argued.

[28] It is not in dispute that since Distell started rendering service in terms of its service agreement with Distell on 1 June 2015, it has not utilised any aspect of the existing business of FFM.

[29] It is also not disputed that Imperial is a long standing merchandising service provider, which provides syndicated merchandising in terms of which a merchandiser can merchandise a basket of products in one retail store. It is also not disputed that Imperial has some 60 customers across the country, has a workforce, resources and infrastructure which it uses to provide merchandising services.

[30] At the time that the matter was heard, Imperial had not employed any FFM employees but as indicated above, had indicated an interest in employees employed in remote areas, who would be subjected to Imperial's recruitment processes.

[31] FFM challenged Distell and Imperial to produce a copy of their service agreement, a challenge which was rejected by both parties. However Imperial has produced a document setting out a summary of terms of that agreement. FFM has requested the court to draw an adverse inference from Imperial's failure to produce the service agreement with Distell.

[32] Before dealing with the main issue for determination, whether Distell's cancellation of the service agreements with FFM and the conclusion of the new service agreement with Imperial triggers section 197, I will deal with the issue of urgency which is in dispute.

Urgency

[33] FFM launched the present application on 8 June 2015 and the matter was argued on 25 June 2015.

[34] In its founding affidavit FFM submitted that the matter is urgent because "*Distell has cancelled the service level agreement with effect from 20 July 2015 and any declaratory order which may be granted subsequent to such cancellation of the service level agreement will unnecessarily prejudice the*

applicant and the individual respondents in that the individual respondents will no longer work as shelf packers and/or van assistants after that date nor will FFM be paid by Distell after that date."

[35] I have no hesitation in finding that this allegation does not establish urgency.

[36] The sequence of events is that FFM received a fresh notice of termination of the service agreement on 21 April 2015, effective 21 July 2015, without an offer to take over all the employees. It could have launched the application immediately thereafter. Instead it waited until 8 June 2015 and I find that it failed to act swiftly and delayed in bringing the application.

[37] The further submission that Distell and Imperial have not been forthcoming about their contractual arrangements and that it was only on 1 June 2015 when Distell issued a notice to trade partners that FFM had sufficient particulars to instruct legal representatives to prepare the application for a declaratory order on an urgent basis is not persuasive.

[38] FFM has not specified the information which it claims was contained in the notice to trade partners of 1 June 2015 which it was not privy to prior to that date.

[39] The facts show that FFM was notified in March 2015 that its proposal had been unsuccessful. In the same month and again in April 2015 FFM was informed that Imperial had been awarded the contract with effect from 1 June 2015. FFM was aware of the services that it would render to Distell had it been the successful bidder, that is an expanded merchandising service, inclusive of shelf packing. FFM was also aware that as the successful bidder, Imperial would render those services. As the nature of the services to be rendered by Imperial to Distell are well known to FFM, I do not deem it necessary to draw an adverse inference against Distell and Imperial for failing to disclose their service agreement. The summary provided by Imperial suffices and FFM has not disputed what is set out in that summary. For those reasons I find the applicant's reliance on the notice of 1 June 2015 to establish urgency as opportunistic and I reject it.

[40] If there was urgency, I find that it was self created.

[41] When FFM was informed of the termination of the service level agreement in March 2015, it indicated that it would seek legal advice. On 21 April 2015 FFM was given fresh notice of termination of the service agreement with effect from 21 July 2015, thereby giving it 3 months notice. On 11 May 2015 FFM's attorneys wrote to both Distell and Imperial demanding an undertaking, by 15 May 2015, that FFM employees would transfer to Imperial with effect from 1 June 2015 (or from 21 July). Therefore as early as 11 May 2015 FFM had received legal advice that section 197 applied to the transaction.

[42] When both Distell and Imperial did not meet the deadline of 15 May 2015, one would have thought FFM would launch the application immediately. It did not. Even when Imperial and Distell refused to give the undertakings on 18 and 27 May 2015 respectively, long after the deadline had passed, still FFM did not launch the application. It waited until 8 June. Its version that it did not have sufficient information to launch the application and only obtained this information on 1 June has already been rejected.

[43] I do not see the relevance of the further submission that Distell delayed finalising the tender process and I need not deal with it.

[44] The respondents might have been given sufficient time to file papers and had not argued any prejudice but again these facts do not assist FFM in establishing urgency.

[45] I would strike the matter from the roll for lack of urgency but in the interest of finality, I deal with the merits of the matter.

The parties' contentions on the merits

[46] FFM submits section 197 is triggered because there has been a transfer of a separate, distinguishable and discreet business, namely the exclusive rendering of a shelf packing and merchandising service by FFM for and on behalf of Distell. It advances the following reasons for its position:

46.1 the shelf packing and merchandising service formed part of Distell's business which was initially transferred as a going concern from

Distell to FFM and will now be transferred from FFM to Imperial with effect from 20 July 2015.

46.2 Imperial in fact took over part of the business on 1 June 2015 when it started rendering the service parallel to FFM.

46.3 There is no reason in law why Distell's merchandising service which has been taken over by Imperial triggers s197 but not the shelf packing service being rendered by FFM.

46.4 A snapshot of the service performed by FFM essentially includes the shelf packing and van assistant services to be rendered by Imperial.

46.5 Distell remains the owner of the liquor products throughout the shelf packing process.

46.6 The RFP contemplated the transfer of FFM employees to the new service provider.

[47] Mr Van As for FFM argued that the Labour Appeal Court has recently blurred the distinction between businesses that are largely employee reliant and businesses that are largely asset reliant. He relied on two decisions of the Labour Appeal Court in **TMS Group Industrial Services (Pty) Ltd t/a Vericon v Unitrans Supply Chain Solutions (Pty) Ltd and Others**[2] and **Communication Workers Union and Others v Mobile Telephone Networks (Pty) Ltd and Another**[3] and a decision of the Labour Court in **Harsco Metals SAP Ltd v Arcelormittal SA and Others**[4] and argued that the key question is "*whether in substance a discrete business operation had been transferred from Entity A to Entity B*."

[48] He argued that the business consisting of the provision of shelf packers and van assistants, which is largely employee reliant, which FFM rendered to Distell, is a discrete business operation clearly forming part of Distell's merchandising function and capable of being transferred in terms of section 197 of the LRA.

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[2] [2014] 10 BLLR 974 (LAC).

[3] [2015] JOL 33385 (LAC).

[4] (2012) 33 ILJ 901 (LC) at para 27.

[49] He further argued that the distinction between Distells' merchandising employees who have been transferred to Imperial in terms of section 197 of the LRA and employees of FFM is artificial because all these employees constituted a "*blend of insourced and outsourced merchandising teams that have executed Distell's brand visibility, product availability, pricing and promotional strategies*".

[50] Finally in oral argument, Mr Van As gave a hypothetical example of the University of Cape Town (UCT) deciding that it now requires a single service provider to provide a basket of all services currently being provided by various service providers (cleaning, gardening, security etc) and to take over all cashiers who have concluded employment contracts with UCT but can choose whether or not to take over the employees of the existing service providers whose service agreements will now be terminated. He argued that bearing in mind that the Constitutional Court has stated that section 197 is to be construed as a whole and in light of its primary purpose which is to save jobs, and bearing in mind the primary purpose of the LRA to promote economic development, social justice and labour peace, he argued that undoubtedly that scenario would trigger the provisions of s197 of the LRA and that the contracts of employment of all the employees of the service providers will have to transfer automatically to the new service provider.

[51] On the other hand Mr Snyman for Imperial argued that this case is about an outsourced service where there is simply a "change in service provider" from FFM to Imperial, without anything being transferred. He argued that something more is required for section 197 to apply and that on the facts of the case, 'something more' is absent and therefore section 197 does not apply.

The Law

[52] Section 197 provides as follows:

(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.

[53] Section 197 is therefore triggered when (a) there is a transfer, (b) of a business (or part of a business of a service) and (c) as a going concern.[5]

[54] The section changed the common law position that the acquisition and transfer of a business led to termination of contracts of employment and that the new employer would have to conclude new employment contracts with the affected employees if he wished to continue operating the business with the same workers. Section 197 now provides for the automatic transfer of the contracts of employment to the new employer, provided the requirements of section 197, as set out above, are met.

[55] The question whether there is a transfer of a business as a going concern is one to be determined with reference to the objective facts of each case.[6]

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[5] ***City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and Others*** (2015) 36 ILJ 1423 (CC) at para 35.

[56] In my view and as I will demonstrate below, most of the questions raised in this case can be answered with reference to the judgment of the Constitutional Court in ***Aviation Union of South Africa and another v South African Airways (Pty) Ltd and Others***[7]**,** which FFM did not refer to either in its written heads of argument or in oral argument. For purposes of this judgment though, I do not deem it necessary to summarise the facts of that case. I will simply refer to relevant portions of that judgment setting out the legal principles which ought to be applied in answering the vexed question of whether section 197 applies in the present case.

Evaluation

(a) <u>Transfer</u>

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

[58] In ***Aviation Union***,[8] *supra* the court stated as follows:

> [113] ...*We must ask these questions in the inquiry whether a transaction in issue contemplates a transfer of business by the old employer to the new employer. <u>Does the transaction concerned create rights and obligations that require one entity to transfer something in favour or for the benefit of another or to another</u>? <u>If so, does the obligation imposed within a transaction, fairly read, contemplate a transferor who has the obligation to effect a transfer or allow a transfer to happen, and a transferee who receives the transfer?</u> If the answer to both these questions is in the affirmative, then the transaction contemplates transfer by the transferor to the transferee. Provided that this transfer is that of a business as a going concern, for purposes of section 197, the transferee is*

[6] ***Transport and Allied Workers Union of SA v Transnet (Pty) Ltd and Others*** (2014) 35 ILJ 526 (LC) at para 16 and ***Swanepoel and Others v Leica Geosystems AG and Others*** (2014) 35 ILJ 2877 (LC) at para 25.

[7] (2011) 32 ILJ 2861 (CC)

[8] See also ***PE Rack 4100 CC v Sanders and Others*** (2013) 34 ILJ 1477 (LAC).

the new employer and the transferor the old. The transaction attracts the section and the workers will enjoy its protection. (my emphasis)

[59] On the facts of the present matter, in my view both questions which must be asked to determine whether there has been or whether there will be a transfer have to be answered in the negative.

[60] The cancellation of the service agreement between FFM and Distell and the conclusion of a service agreement between Distell and Imperial does not create rights and obligations that require FFM to transfer something in favour of or for the benefit of Imperial. FFM has no obligation to effect or to allow a transfer to happen and Imperial is not the recipient of anything being transferred from FFM.

[61] Imperial has started rendering the service in terms of the service agreement with Distell with effect from 1 June 2015, parallel to FFM. Nothing was transferred from FFM to Imperial prior to or on that date, to enable Imperial to render the service. Imperial has come on board with its own business and has rendered a service parallel to FFM without needing anything from FFM.

[62] Even on 21 July 2015 when the contract with FFM terminates, nothing will move from FFM to Imperial. FFM is not required to transfer anything for the benefit of Imperial and Imperial does not require anything from FFM. There will be no move of any assets, employees, infrastructure or anything associated with the business of FFM to Imperial. In other words, no components of the business of FFM will pass on to Imperial on 21 July 2015.

[63] It must be remembered that it is not in dispute that Imperial is a long standing merchandising service provider which has its own business and operations.

[64] In **Aviation Union**, supra the minority judgment stated as follows:

> *[46] …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 intact.*

> *[47] <u>For a transfer to be established there must be components of the original business which are passed on to the third party</u>. These may be in the form of assets or the taking over of workers who were assigned to provide the service.*

[65] As I have stated above, there are no components of the business of FFM which will be transferred to Imperial.

[66] Cancellation of the service agreements between FFM and Distell and the conclusion of a service agreement between Distell and Imperial simply means that FFM loses the right to provide the services it had provided in terms of the service agreements and, as the court found in ***Aviation Union***, there is no transfer of a business as a going concern but simple contracting out.

[67] FFM retains its business and remains free to offer that service to another service provider, using its current workforce. That FFM has retained its business is further evidenced by the fact that since 1 June 2015 it has rendered a service parallel to Imperial.

[68] Even if Imperial decides to employ FFM employees to work in remote areas as it has indicated, that is its choice. It has no obligation to employ any of these employees. In any event the facts are that Imperial has not employed any of FFM's employees.

[69] In ***Aviation Union,*** supra the court also stated as follows:

> *[52] Although the definition of business in section 197(1) includes a service, it must be emphasized that <u>what is capable of being transferred is the business that supplies the service and not the service itself</u>. 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*... (my emphasis)

[70] As I have found, no business was transferred to Imperial on 1 June 2015 and no business will be transferred to Imperial on 21 July 2015. FFM has retained its business. Rather this is a case of a change in service provider,

from FFM to Imperial. A change in service provider, without more, does not trigger section 197.

[71] In ***Swanepoel and Others v* Leica Geosystems AG & others**,[9] the court described a similar situation as simply the failure of the business of one competitor (in this case FFM) in an identifiable market, leaving the other (in this case Imperial) to take over the contract. This change in service provider without more does not trigger the provisions of section 197 of the LRA.[10]

[72] The other indication that there is no transfer is the fact that FFM itself is uncertain of the date of transfer, on which the rights and obligations between FFM and the employees will move to Imperial. This is a relevant question in the inquiry.[11]

[73] In its correspondences to Distell and Imperial prior to launching this application, it suggested that the date of transfer was 1 June 2015 when Imperial commenced rendering services in terms of its service agreement with Distell. But that cannot be because subsequent to 1 June 2015 FFM has been invoicing Distell for the services rendered by its employees to Distell and it will continue to do so until 20 July 2015.

[74] In this application, FFM contends that the transfer will take place on 21 July 2015, which is the termination date of its contract with Distell. But as I have indicated above, nothing will transfer on that date. On 21 July 2015 FFM simply loses the contractual right to render the service.

[75] I have considered the authorities[12] relied upon by FFM for its submission that the key question is "*whether in substance a discrete business operation had been transferred from Entity A to Entity B"* and found that on the facts, I accept that FFM has a discrete business operation, which is indeed capable of being transferred. However neither this discrete business nor its components have been transferred from FFM to Imperial.

[9] (2014) 35 ILJ 2877 (LC) at para 27.

[10] See also ***Crossroads Distribution (Pty) Ltd t/a Jowells Transport v Clover SA (Pty) Ltd and Others*** [2008] 6 BLLR 565 (LC) and ***Franmann Services (Pty) Ltd v Simba (Pty) Ltd and Another*** (2013) 34 ILJ 897 (LC).

[11] ***Swanepoel and Others v* Leica Geosystems AG & others,** supra para 24.

[12] Paragraph 47 above.

This is what distinguishes the authorities relied upon by FFM which I will now deal with.

[76] In ***Communication Workers Union,*** the fact that at the outset MTN offered the call centre service which it now sought to in source (and therefore a component of MTN's business) after cancelling the service agreement with Interaction Call Centre, the fact that MTN's assets and infrastructure were used by Interaction to provide the call centre service and would transfer back to MTN and the fact that a number of employees rendering the call centre service in question had been offered employment by MTN subsequent to the cancellation of the agreement with Interaction Call Centre, *inter alia,* pointed towards a transfer of a business as a going concern. In the present matter none of these factors are present.

[77] Similarly in ***TMS Group Industrial Services*** the court found that section 197 applied because the new service provider provided the warehousing service from the same premises previously used by the old service provider, using the outsourcer's computer systems and other equipment. Clearly something had been transferred from the old service provider to the new service provider and section 197 had been triggered. In the present case nothing has been transferred.

[78] Finally in **Harsco Metals SA**, the court found that section 197 applied because Harsco, the old service provider, was 'leaving behind both human and non-human assets that will be utilised by the new contractors'.[13] In the present matter FFM is not leaving behind anything that will be utilised by Imperial. FFM will in fact 'pack its bags and move on'. There is therefore no transfer of a business.

[79] FFM's initial stance in March 2015 to embark on retrenchments as contemplated in section 189 when it was informed of the cancellation of the service agreement was correct. This case fell outside of the scheme contemplated in section 197 of the LRA. That this was known to FFM is evidenced by the fact that FFM specifically demanded 3 month's notice of termination of the service level agreements to enable it to consult with the employees as contemplated in section 189. It is unfortunate that it

[13] At para 21.

abandoned that plan based on legal advice which it received, which in my judgment is incorrect.

[80] Even though the application must fail on account of having failed to satisfy the requirement of a transfer, I nevertheless proceed to deal with the requirements of a 'business' and 'going concern'.

(b) Business

[81] Section 197(1)(a) defines a business to include 'the whole or any part of any business, trade, undertaking or service'.

[82] That FFM has a business, in the form of an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective is not in dispute.

[83] What is also not in dispute is that the services which will now be rendered by Imperial, though they include a component of the services previously offered by FFM, they are much broader in scope than what FFM offered in terms of its service agreement with Distell.

[84] The point of departure is that FFM regards this business as forming part of Distell's merchandising function and therefore Distell's business. The argument is that it is Distell's business which has now been outsourced to Imperial, thereby triggering the provisions of section 197 of the LRA.

[85] Writing for the majority in ***Aviation Union***, Yacoob J held as follows:

> *106 'The final general observation is that, <u>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.</u> <u>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.</u> What happens here is simple contracting out of the service, nothing more, nothing less.(my emphasis)*
>
> *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.' (my emphasis)

[86] The facts simply do not establish what FFM contends, that the services rendered by FFM to Distell since 2004 form part of Distell's merchandising function. At no point did Distell have shelf stackers. There was never an initial insourcing of shelf stackers by Distell. On FFM's own version, Profill, Workforce and Kelly provided shelf stackers to Distell prior to 2004. Thereafter Distell contracted FFM to provide shelf stackers.

[87] If from the outset Distell did not offer the shelf stacking service, it cannot be said that shelf stacking is part of the business of Distell. What was outsourced was the provision of a shelf stacking service, which was not part of Distell's business.

[88] Whilst the fact that Distell did not at any point have shelf stackers is not decisive, it is a significant factor.[14]

[89] When FFM was awarded the contract in 2004 to provide a service, no business was transferred from Distell to FFM. FFM had to establish its own operations, infrastructure and personnel to be able to provide the service. It might have taken over some employees from Profill, Workforce and Kelly but the taking over of some employees on its own does not trigger the application of section 197. FFM chose to employ those employees. There was no obligation on it to employ them.

[90] I find that the business in question is that of FFM, an economic entity which is capable of being transferred. However in this case there are no facts to substantiate the allegation that this business has been transferred or will transfer to Imperial on any date. As I have found above, FFM retains its business which it can continue to operate after 21 July 2015 if it finds another customer.

[14] ***Harsco Metals SA*** supra at para 19 and 20

[91] The fact that Imperial will now also offer shelf stacking, a component of the business of FFM is irrelevant. It does so as a competitor of FFM, which is permissible and does not trigger section 197.

[92] What distinguishes Distell's merchandising employees who have been transferred to Imperial in terms of section 197 from FFM's shelf stackers is the fact that, unlike shelf stacking, merchandising formed part of Distell's business. That part of Distell's business was transferred to Imperial and hence section 197 was triggered.

[93] Furthermore, whilst this on its own is not determinative but certainly significant, the service agreement between Distell and Imperial required the transfer of Distell's merchandising employees to Imperial. There was no similar provision in respect of the employees of FFM.

[94] In conclusion on this aspect, I find that FFM has a separate, distinguishable and discrete business capable of being transferred. However on the facts of this case, that business has not been transferred to Imperial. FFM retains its business and can provide the same service of shelf stacking and van assistants to another customer after 21 July 2015.

(c) <u>Going concern</u>

[95] In ***National Education Health and Allied Workers Union v University of Cape Town and Others***[15] the court set out the test for determining whether a business has been transferred as a going concern as follows:

> *'In deciding whether a business has been transferred as a going concern, regard must be had to the substance and not the form of the transaction. 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 the list of factors is not exhaustive and that none of them is decisive individually.'*

[15] (2003) 24 ILJ 95 (CC) at para 56.

[96] In ***Aviation Union***, *supra* the court stated as follows:[16]

> *'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.*

[97] In ***FAWU v The Cold Chain (Pty) Ltd & Another***[17] the court held that what should be done in determining whether or not a transfer has taken place is to take a *"a snapshot of the entity before the transfer and assessing its components*" and comparing the picture with the one of the business after the transfer *"to establish whether it is substantially the same business but in different hands*".[18]

[98] In the present matter, after 21 July 2015 FFM retains its business of shelf stacking which it can offer to any customer that it finds. That business will not been transferred to Imperial. Imperial has its own business, of merchandising, which it has operated long before being awarded the tender by Distell. It is simply taking over a contract from FFM, which has lost the right to provide a service to Distell.

[99] It cannot be said that on 21 July 2015 FFM's business will be in Imperial's hands. The facts show that Imperial is in fact a different business which is in competition with FFM but utilises syndicated merchandising, which FFM does not subscribe to. Even the scope of services that will be offered by Imperial is much wider than the services previously offered by FFM. Imperial offers a merchandising service which includes shelf stacking, whilst FFM only offers a shelf stacking service and van assistants, which are components of merchandising. FFM conceded it would have to re-invent itself and partner with another entity to offer the services now required by Distell.

[100] After 21 July 2015, a new contractor with a different business will be on the scene. It is not a case of the same business in different hands. On this leg, FFM's application must also fail.

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[16] At para 71.

[17] [2010] 1 BLLR 49 (LC) at para 18.

[18] See also **Chemical Energy Paper Printing Wood and Allied Workers Union on behalf of Members v Hydro Colour (Pty) Ltd and Ano** (2011) 32 ILJ 1677 (LC) at para 13.

[101] Turning then to the hypothetical example of the UCT scenario that Mr Van As referred to in oral argument, the simple answer to the question is that '*the application of s197 depends upon a finely grained analysis of the facts of a particular case*.'[19] The three questions that ought to be asked are whether (a) there is a transfer (b) of a business (c) as a going concern. Section 197 will be triggered if these three requirements are met. It is simply impossible to answer these three questions using the hypothetical example of Mr Van As.

Other issues

[102] When the application was filed on 8 June 2015, the second respondent was cited as Imperial Retail Services (Pty) Ltd whereas the correct citation should have been VMS Group (Pty) Ltd t/a Imperial Retails Solutions. An application to correct the citation was brought and not opposed by any of the respondents. It is granted.

Costs

[103] Both parties submitted that costs must follow the result. I see no reason to depart from an agreed stance.

Order

[104] In the premises I make the following order.

104.1 The citation of the second respondent is amended to read VMS Group (Pty) Ltd t/a Imperial Retails Solutions.

104.2 the termination of the service contract between the applicant and the first respondent and the subsequent award of the service contract for expanded merchandising services to second respondent does not constitute a transfer of a business as a going concern as contemplated in section 197 of the LRA.

[19] **Communication Workers Union v Mobile Telephone Networks & Others** *Unreported DA10/2013 [2015] ZALAC 8 (21 April 2015).*

104.3 The contracts of employment of the applicant's employees will not automatically transfer to second respondent on 21 July 2015.

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

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Ralehoko AJ

<u>Appearances</u>

For the Applicant: Advocate M J Van As

Instructed by: Brian Bleazard Attorney

For the Second Respondent: Mr Sean Snyman of Snyman Attorneys