REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 435/17

In the matter between:

IMVULA QUALITY PROTECTION	**First Applicant**
PERSONS LISTED IN ANNEX A	**Second to further Applicants**
RED ALERT TSS (PTY) LTD	**First Intervening Applicant**
PERSONS LISTED IN ANNEX B	**Second to further Intervening Applicants**

and

UNIVERSITY OF SOUTH AFRICA	**Respondent**

Heard: 1 August 2017

Delivered: 31 August 2017

Summary: Application of s 197 to insourcing of security services. Insourcing limited to the making of offers of employment to certain of the outgoing contractors' employees. In terms of a 'shared services' model, client's role after termination limited to employment, client not taking transfer of any business infrastructure. Third party to be appointed to provide management and infrastructure for security services. Held that there is no 'business' that is the subject of any transfer and that s 197 thus not applicable.

JUDGMENT

VAN NIEKERK J

Introduction

[1] The respondent, the University of South Africa (UNISA), is one of the largest universities in South Africa and one of the largest distance education institutions in the world. During 2015 and 2016, UNISA (and other South African universities) were the subject of protests and sustained pressure by student formations and trade unions. What is known as the 'Fees must Fall' campaign articulated a number of demands, one of which was that UNISA 'insource' functions that had previously been outsourced to private service providers. In response to this demand, UNISA concluded an agreement with the representatives of various interest groups in terms of which it agreed to partially insource the security function. The agreement provided, in broad terms, that 70% of the budget spend on security would be allocated to wages, and that 30% would be allocated to the appointment of a service provider. As a consequence, agreements with the first applicant and first intervening applicant (two of the three service providers contracted to provide security services to UNISA) were terminated.[1] For convenience, I shall refer to the first applicant as 'iMvula' and the first intervening applicant as 'Red Alert'.

[2] iMvula and Red Alert contend that the termination of the agreements and UNISA's offers of employment made to their security staff constitutes a transfer of a business as a going concern for the purposes of s 197 of the Labour Relations Act (LRA). The order they seek is that all of their employees assigned in terms of their contracts with UNISA be declared employees of UNISA from the termination date, on the same terms, and without loss of service. While UNISA does not dispute making offers to some members of the applicants' employees, it contends that given the

[1] On 8 June 2017, the court granted an order permitting one of the other security services contracted by UNISA, Red Alert TSS (Pty) Ltd and those of its employees engaged to provide those services, leave to intervene in these proceedings.

nature of the transaction, s 197 does not apply since there is no transfer of a business as a going concern.

Relevant legal principles

[3] 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.'

[4] Section 197 has a dual purpose; it does more than protect workers against job losses. Although the avoidance of job losses consequent on the transfer of a business as a going concern is an important principle on which the protections contained in s 197 are founded, it is not the only one. Job losses in themselves do not trigger the application of s 197.[2] In *National Health and Allied Workers Union v University of Cape Town & others* (2003) 24 *ILJ* 95 (CC) (to which I shall refer as '*NEHAWU*'), the Constitutional Court said the following:

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[2] Where there is no s 197 transfer, employees whose work security is prejudiced by the relevant transaction will inevitably be protected by the provisions of s 189 and 189A.

> [52] What lies at the heart of disputes on transfers of businesses is a clash between, on the one hand, the employer's interest in the profitability efficiency or survival of the business, or if need be its effect is of disposal of it, and the workers interest in job security and the right to freely choose an employer on the other hand…
>
> [53] Section 197 …. relieves the employers and the workers of some of the consequences that the common law visited on them. Its purpose is to protect the employment of the workers and to facilitate the sale of businesses as going concerns by enabling the new employer to take over the workers as well as other assets in certain circumstances. The section aims at minimising the tension and the result labour disputes that often arise from the sales of businesses and impact negatively on economic development and labour peace. In this sense, s 197 has a dual purpose, it facilitates the commercial transactions while at the same time protecting workers against job losses.[3]

[5] The Constitutional Court has considered the provisions of s 197 on at least four occasions.[4] While the judgments have not always been unanimous, the principles to be applied are well-established. First, it is clear that for s 197 to be triggered, three discrete requirements must simultaneously be met. These are a transfer, of the whole or part of a business (defined to include a 'service'), as a going concern. A transfer is defined to mean 'the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern. A 'business' is defined in s 197(1) (a) to include a 'service'. This does not mean that the latter should be viewed as a discrete entity; on the contrary, what is capable of being transferred is the business that supplies the service and not the service itself.[5] Whether there is a transfer as a going concern remains to be determined by the approach formulated in *NEHAWU* where Ngcobo J said the following:

[3] At paragraph 56.

[4] *NEHAWU* (supra), *Aviation Union of SA v SA Airways (Pty) Ltd & others* [2012] 3 BLLR 211 (CC); *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and others* 2015 (6) BCLR 660 (CC), and *Rural Maintenance and others v Maluti-a-Phofung Local Municipality* [2017] 3 BLLR 258 (CC).

[5] See *Aviation Union* at para 52, and *Rural Maintenance* at para 30.

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

[6] The label attached to a transaction is irrelevant. Whether a transaction is described as 'outsourcing' or 'insourcing', and whether the in-or outsourcing is an initial transaction or one extending to any number of 'generations', is of no consequence. More specifically, the use of terms such as insourcing and outsourcing are not in themselves indicative of a transfer as a going concern. 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 as I have indicated, 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 concern.

[7] In relation specifically to a change in service provider, the termination of a service contract or the appointment of a new service provider does not in itself trigger the application of s 197. The application of the section remains regulated by the above principles. Further, cases decided under the European Acquired Rights Directive or the TUPE Regulations and similar regulatory measures may be instructive and provide guidance (as do any comparable foreign instruments and case law), but they are not to be uncritically applied.[6] The court must remain guided by the principles established by our domestic courts, having regard to the wording and the purpose of s 197.

Factual background

[6] *Rural Maintenance* at para 26.

[8] The material facts are not in dispute. On 5 May 2015, the applicant concluded an agreement with UNISA for the provision of security services at certain of UNISA's campuses in Gauteng. The services to be rendered were defined in clause 1 of annexure 'A" to the agreement to include the following:

> The Services will include, but not be limited to the following:
>
> 1.1 The Service Provider shall provide the University with high level access control, security and patrol services in order to protect a and secure the University's staff, students, visitors, property and reputation.
>
> 1.2 The Service Provider shall provide a sufficient number of on-site properly pre-trained, efficient and competent employees and supervisors/managers (herein collectively referred to as its 'personnel') in order to provide the required Services. The number and qualifications of personnel as well as the time and premises with the services must be rendered or set out in Annexure "B" attached hereto.

[9] From 1 June 2015, iMvula provided UNISA with security services in terms of the agreement. Pursuant to the agreement, iMvula placed some 200 security officers on a daily basis at various sites throughout Gauteng, in return for which it is paid a monthly contract fee. The terms of the agreement provide that the agreement would subsist for a period of five years, subject in terms of clause 9.2 of the agreement, to UNISA's right to terminate the agreement 'out of convenience' after 12 months by giving one calendar month's written notice. The contract between UNISA and Red Alert is cast in virtually identical terms.

[10] During February 2016, being some eight months into the five year agreement, UNISA advised iMvula and other security service providers, including Red Alert that it was contemplating insourcing the security functions.

[11] During October 2016, UNISA had signed an agreement with what were described as stakeholders represented in a multi-stakeholder task team on insourcing. The key elements of the agreement were that 910 of a total of 1413 outsourced staff members would be insourced as part of

UNISA's permanent staff complement and that the current contracts of all service providers would be terminated as soon as practically possible. The business model referred to is one of 'shared services'. In terms of this model, UNISA will not incur any costs greater than those already applied to outsourcing. The shared services model contemplates that while the majority of staff engaged in the rendering of security services will be employed by UNISA, security services would continue to be provided by outsourced service providers, as far as possible using staff employed directly by UNISA.

[12] On 18 November 2016, UNISA addressed a letter to iMvula in which it stated the following:

> 1. This serves to inform you that in terms of clause 9.2 of the above-mentioned agreement Unisa care with gives notice of termination of the agreement to be effective from 31 March 2007 teen.
> 2. The aforementioned decision has been taken in light of issues encountered by a number of universities concerning the outsourcing of services.

[13] During the course of December 2016 and January 2017, there was a flurry of correspondence between the first applicant and UNISA. The first applicant had received information that its employees were being approached directly and offered employment by UNISA. UNISA does not dispute that it handed application forms to iMvula and Red Alert employees or that it implemented a vetting process in terms of which UNISA would determine which security officers they wished to employ. Pursuant to the agreement on insourcing, UNISA intends to create 544 positions for security staff. At the time the papers in this application were filed, there was uncertainty as to precisely how many of iMvula and Red Alert's employees UNISA would employ. The answering affidavit indicates that the figure may be in the region of two-thirds of the security officers currently deployed to various sites throughout Gauteng in terms of the service agreements. It is clear that some of the applicant's staff engaged in the provision of services to UNISA will not be offered employment directly by UNISA. The papers do not disclose precisely how many iMvula and Red Alert employees were successfully recruited

by UNISA, but it is not in dispute that UNISA intends to employ the majority of them.

[14] Much of the correspondence concerned averments to the effect that UNISA was in breach of the agreement, that it was acting in bad faith and that it was abusing confidential information pertaining to iMvula's employees. Whether UNISA acted in breach of its contract when it gave notice to terminate the contract with the effect from 31 March 2017 (a matter that remains in dispute) and whether UNISA has deliberately devised a scheme in an attempt to avoid the consequences of section 197 (which is denied) is not relevant to the present application. If the insourcing of security services in the manner in which it has occurred in the present instance triggers s 197, these are consequences in law. The automatic substitution of one employer for another then applies, regardless of the motives, intentions or preferences of the employer parties and any affected employees.

[15] It is not disputed that on termination of the contract with iMvula and Red Alert at the end of March 2017, UNISA did not take transfer of any assets or other business infrastructure necessary to perform security services, nor are any of iMvula or Red Alert's operating methods to be transferred to UNISA.

[16] The essential differences between the existing and the shared services model are also not disputed. In terms of the 2015 agreements, iMvula and Red Alert provide high level access control, security and patrol services, pre-trained employees and supervisors and managers to provide the services, high level monitoring systems, risk analysis relating to all aspects of the services, recommendations on any technological developments that might reduce UNISA's risk, job descriptions and post instructions for all staff, the training management and supervision of its staff, the provision of security vehicles, mobile phones, radios and raincoats to the staff.

[17] In contrast, the new service provider to be in engaged in terms of the shared services model will provide equipment and infrastructure, and in particular, torches, radios, guard tracking and monitoring equipment,

registers, vehicles and staff uniforms. UNISA will manage the human resources required for the service. Of some significance is the fact that none of the equipment that will be supplied by the new service provider either belongs to or is currently owned by iMvula and Red Alert. The new service provider will also provide UNISA with managers and supervisors, employed by the service provider, to manage the security service. To the extent that the human resources allocated by UNISA are insufficient to provide effective security, the service provider will be required to provide any risk mitigation measures to make the service effective.

Analysis

[18] In essence, the court is required to determine whether UNISA's termination of its contracts with iMvula and Red Alert and its decision to employ the majority of their employees engaged on the contract, constitutes the transfer of a business as a going concern for the purposes of s 197.

[19] It is common cause that the insourcing exercise does not extend to UNISA taking over or otherwise assuming any responsibility for the full business bundle, including infrastructure, assets, know-how, technology and the like. Stripped to its essentials, the case presented by iMvula and Red Alert is that the provision of security guards is a service and thus a business (if not in whole then at least in part), and that the result of the insourcing will be the continuation of that service.

[20] The Constitutional Court has identified two situations within the realm of outsourcing and insourcing with a clear distinction between the two. In the first, where s 197 does not apply, the outgoing service provider forfeits the right to provide services, whether by way of the cancellation of a contract or otherwise, but does not transfer its business. In this instance, the right to provide the outsourced service may transfer, but no business is transferred as a going concern. In Aviation *Union,*[7] the court said the following:

> Although the definition of business in this section 197 (1) includes a service, it must be emphasised that what is capable of being transferred

[7] *Supra*

> 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 with in the contemplation of this section. That is not what this section was designed to achieve is apparent from its scheme, historical context and purpose.

[21] The second situation arises when on the termination of a service contract, when the service is either insourced or a different service provider is appointed, the business that supplies the service, including its business infrastructure, is transferred from the outgoing service provider either back to its erstwhile client or to the new service provider, as a going concern. In these circumstances, a transfer occurs as contemplated by s 197.

[22] The distinction is one that has its roots in the definition of a 'business' in s 197(1). While that definition includes a service, it should be emphasised that it is the business that supplies the service that is capable of being transferred, not the business itself.[8]

[22] In the present instance, even if I accept that the requirement of a transfer has been satisfied, I am not persuaded that iMvula and Red Alert have established that there has been any transfer of a business. In other words, the termination of the contract between UNISA on the one hand and iMvula and Red Alert on the other hand, falls into the first category referred to above.

[23] At best for iMvula and Red Alert, UNISA will become the employer of the majority of the employees previously engaged by them to work at the same site, performing the same work. However, as the principles reflected above indicate, it does not necessarily follow that iMvula or Red Alert have transferred a business to UNISA. Although it is not impossible for a transfer only of employees to constitute the transfer of a business for the purposes of s 197, the requirement of the existence of a business must be met. It makes no difference that the nature of the business is the

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[8] *Rural Maintenance* at paragraph [30].

provision of a service, the business that supplies the service must be transferred.

[24] The present case is to be distinguished on the facts from *Aviation Union*. In that instance (also a dispute about insourcing in which the application of s 197 was upheld), it was common cause that on termination of the outsourcing agreement the fixed assets, inventory and the like would transfer from the service provider to the client on insourcing, or to a new service provider in terms of any new outsourcing agreement. This is not the case here – there is no transfer of assets, corporeal or incorporeal, nor is UNISA taking over any existing infrastructure consequent on the termination of the service agreements and the offers of employment that it has made.

[25] Counsel for the applicant also relied on *SAMWU & others v Rand Airport Management Co (Pty) Ltd (*2005) 26 *ILJ* 67 (LAC) in support of the submission that the taking over of employees was in itself sufficient to trigger s 197. In *Harsco Metals SA (Pty) Ltd v Arcelormittal SA Ltd & others* (2012) 33 *ILJ* 901 (CC), in relation to the requirement that there be a transfer of a business, the court said the following:

> … In relation to the definition of a 'business 'for the purposes of s 197, the judgment of the Labour Appeal Court in *SAMWU & others v Rand Airport Management Co (Pty) Ltd* 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 managed by the employer will business is capable of being transferred in terms of s 197, despite the fact that it did not appear that any assets, goodwill, operational resources or workforce were to be transferred. A 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 or to be attached to the number of employees transferring as opposed to the net instance in which the number of assets transferring might attract lighter 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 not be capable of transfer in terms of the section.[9]

[25] That statement was made prior to the decisions by the Constitutional Court in *Aviation Union* and *Rural Maintenance*. To the extent that the Labour Appeal Court in *Rand Airport* relied primarily on the inclusion of the word 'service' in the definition of 'business' to conclude that because they were services, the gardening and security functions comprised a business capable of being transferred, it is now clear that s 197 requires a determination of the existence of a business that supplies the service – the existence of the service cannot in itself trigger the application of s 197. The Constitutional Court's judgments require this court to avoid confusing form and substance – the relevant enquiry is into the existence or otherwise of a discrete economic entity in the form of the variety of components that go to make up a business, including assets, goodwill, workforce, management staff and the manner in which the business is organised and performed, the operational resources available to the business, and the like. In other words, the single component of the statutory definition of business (i.e. a service) ought not to elevate what was intended to be illustrative to a determinative level.

[26] The economic entities that comprise iMvula and Red Alert comprise business infrastructures, management, assets and operational resources, know-how, and the staff deployed at UNISA and elsewhere. It is only some of those staff deployed at UNISA who are the subject of any transfer. iMvula and Red Alert retain all of the other components that go to make up their respective businesses. They will be free to offer their services to other clients, and to deploy those employees not engaged by UNISA on other sites, should posts be available. The true position therefore is that the contracts for the provision of services concluded between UNISA and iMvula and Red Alert respectively have come to an end, and that no part of the infrastructure for the conducting of the business of providing a security service is to be transferred to UNISA. In those circumstances, UNISA's decision to insource in terms of the

[9] At paragraph 27.

shared services model and the offers of employment consequently made to some of iMvula and Red Alert's staff does not trigger s 197. The application falls to be dismissed.

[27] Finally, neither party disputed that costs ought properly to follow the result.

I make the following order:

1. The application is dismissed, with costs.

André van Niekerk
Judge

APPEARANCES

First Applicant: Adv. Boda SC, with him Adv. R Itzkin instructed by Stein Scop Inc.

Intervening Applicants: Adv. HM Viljoen, instructed by Ramsay Webber Inc.

First Respondent: Mr C Todd, Bowman Gilfillan Inc.