



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: 2025-002629

In the matter between:

**SCHNELLECKE LOGISTICS PARTS
AND ACCESSORIES (PTY) LTD**

Applicant

and

SCHENKER SOUTH AFRICA (PTY) LTD

First Respondent

MERCEDES-BENZ SOUTH AFRICA LTD

Second Respondent

**ADCORP BLU, A DIVISION OF ADCORP
WORKFORCE SOLUTIONS (PTY) LTD**

Third Respondent

**NATIONAL UNION OF METALWORKERS
OF SOUTH AFRICA (NUMSA)**

Fourth Respondent

NUMSA MEMBERS LISTED IN ANNEXURE

“A” TO NOTICE OF MOTION

Fifth to Sixtieth Respondents

**NON-UNIONISED EMPLOYEES LISTED IN
ANNEXURE “B” TO NOTICE OF MOTION Sixty First and Further Respondents**

Heard: 11 February 2025

Delivered: 21 February 2025

JUDGMENT

MAKHURA, J

Introduction

[1] The applicant is Schenellecke Logistics Parts and Accessories (Pty) Ltd (the applicant). It provides warehousing and operations management services to Mercedes-Benz South Africa Ltd (MBSA) at MBSA’s Parts Logistics Centre (PLC). The applicant was first contracted by MBSA to provide these services with effect from 1 January 2017, in terms of a three-year agreement. This contract was subsequently extended over time until the last contract which is due to expire on 28 February 2025.

[2] It is common cause that with effect from 1 March 2025, the first respondent, Schenker South Africa (Pty) Ltd (Schenker), will provide the warehousing and operations management service to MBSA. The applicant contends that the service that Schenker will start providing from 1 March 2025 is the same or substantially the same service it provided, that the PLC business of MBSA will transfer to Schenker on 1 March 2025 in terms of section 197 of the Labour Relations Act¹ (LRA). Schenker contends that there will be no transfer of business and that what will happen on 1 March 2025 is a change of service from the applicant to Schenker.

¹ Act 66 of 1995, as amended.

[3] The applicant has now brought these proceedings, seeking an order in the following terms:

‘Declaring that the process in terms of which the Applicant will cease rendering services to the Second Respondent at the Second Respondent’s Parts Logistics Centre and the First Respondent will commence rendering those services as from 1 March 2025 constitutes a transfer of a business, alternatively part of a business, as a going concern for purposes of section 197 of the Labour Relations Act, 66 of 1995 (“LRA”);

Directing the First Respondent to give effect to its obligations in terms of section 197 of the LRA, inclusive of receiving the Fifth to Sixtieth Respondents and Sixty First and Further Respondents into its service in compliance with section 197 of the LRA and concluding an agreement with the Applicant in terms of section 197(7) of the LRA within 2 (two) weeks of the above Honourable Court’s order.’

[4] The application is opposed by Schenker. MBSA has filed a notice to abide. The National Union of Metalworkers of South Africa, its members employed by the applicant and the non-unionised employees did not participate in the proceedings.

Material facts

[5] The applicant alleged, by way of a historical background that at least prior to 2011 MBSA had performed the outsourced services. In 2011, these services were outsourced to Caterpillar Logistics Services South Africa (Caterpillar), which was subsequently acquired by Neovea (Pty) Ltd (Neovea). The contract periods between MBSA and Neovea were from 2011 to 2013 and 2014 to 2016. The applicant submits that it follows from the above that prior to 2011, the services that Caterpillar or Neovea were contracted for were performed by MBSA. The applicant had invited the respondents to provide evidence to prove its inference wrong.

[6] MBSA did not oppose the application and did not file any affidavit. Further, it has not provided any instruction to Schenker to provide a contrary picture to the applicant’s

inferential conclusion. Schenker was dismissive in response to the allegations. It said that these allegations are irrelevant and speculative.

[7] The appointment of the applicant followed its response to MBSA's request for quotation (RFQ) to provide these services. The RFQ, which sets out the scope of work to be provided by the service provider, was issued in 2016. This 2016 RFQ provides the definition of the PLC business that the MBSA sought to outsource as follows:

'The distribution of parts in South Africa is done through the Parts Logistics Centre (PLC) in Isando Gauteng. This facility is outsourced and the outsourced partner is responsible for the day to day operation.

Parts are received from overseas and local suppliers on a daily basis. Most of our parts arrive in containers delivered from the harbour in Port Elizabeth. Local suppliers deliver to the PLC daily. Urgent orders arrive by airfreight and after being customs cleared at ORT are delivered to the PLC.

All of the parts are unpacked, checked and then prepared for shipment to the MBSA dealer via a cross-dock process at the PLC.

Stock parts are transported from the PLC to all dealers daily using an economy service. Emergency parts are also distributed on a regular basis using an appropriate transport service depending on the dealer's location and urgency of order...

The MBSA parts network at the MBSA is based on the principles of "Distribution National Inventory" (DNI) where MBSA owns the stock until such time that the stock is either consumed in a dealer's workshop or sold to an end customer.

The parts stocked at the MBSA dealers is on consignment and available to any customer via the computer systems run by MBSA...' [Emphasis added]

[8] Clause 4 of the 2016 RFQ deals with the service requirements and provides that:

'The scope of Parts Logistic Centre is defined below in this document. Out of scope and remaining under the responsibility of MBSA are inventory planning and management, inbound logistics, customs clearing and IT Systems specified.

The following description in combination with business figures, process

workflows, cut-off times as well as KPI's are included to provide the potential Service Provider with enough information to understand the dynamics of the operation.' [Emphasis added]

[9] Clause 8 of the 2016 RFQ provided that the PLC staff complement at the time in 2016 was made up of 90 hourly paid and 8 monthly paid employees. MBSA provided at least 8 systems, including the DNI, SAP DNI Planning which covers the demand management, forecasting, placing of orders on MBSA's suppliers and all aspects, SAP PLC which controls all the activities within the PLC and DNA DMS which is a transport management system used to manage the deliveries to dealers and to dealer customers. The service provider was only required to provide the Transport Management System (TMS) to manage parcels on the primary leg of the journey from the PLC to the MBSA dealers in Southern Africa.

[10] In terms of clause 9.9, the service provider was required to take over certain assets listed in Appendix C. These assets include 16 forklifts, reach truck, pallet jack, forklift battery, 8 battery chargers, forklift batteries, 7 forklift batteries, 4 digit smart strapping machines and 20 part trolleys.

[11] A three months' handover period was anticipated prior to the expiry of the contract. In this regard, as the three-year contract from 1 January 2017 was to lapse on 31 December 2019, it was anticipated that this three months' handover period would start on 1 October 2019.

[12] The successful service provider was expected to provide a list of the warehouse equipment required to operate the PLC. Under general information, the RFQ stated that MBSA would provide a canteen and locker facilities which would be managed by the service provider and MBSA would also provide the security service provider.

[13] In addition to the provision of the IT systems and the working space which included the canteen and office space, MBSA was to provide the following assets or

services – pallet jacks, packaging on site for parts repacking and distribution, packaging control and management of issue sheets, payment of rent, rates, taxes, water and electricity relating to PLC, checking, consolidating and making ready the orders for export dealers in Africa, preparation of export documentation for dealers in Africa and reverse logistics. With regard to the central stores, MBSA was to provide racking, shelving and stores management.

[14] Appendix D to the 2016 RFQ required the service provider to provide an estimate of implementation costs, which should include personnel. Clause 11.7 of the RFQ provides that the employment costs “*shall be based upon current rates of pay (March 2016) and the time of next review is to be specified*”. Further, clause 11.7 requested the service provider to:

‘Please indicate your willingness to migrate current operational staff into your future operational team. If willing please describe the process you would typically follow to achieve this.’

[15] The applicant was successful. In terms of the terms and conditions for the rendering of these services, the 2016 RFQ formed part of the agreement between the applicant and MBSA for this 2017 – 2019 agreement.

[16] The applicant and Neovea concluded an agreement in terms of section 197 of the LRA, resulting in transfer of the employees from Neovea to the applicant.

[17] Clause 3.1 of the terms and conditions for rendering the services provides that the service provider “*warrants and represents to MBSA that it shall in all respects comply with the MBSA’s requirements and conditions, at MBSA’s sole discretion, in respect of the services to be rendered / good to be delivered as specified in these terms and conditions...*”. In terms of clause 9.3, upon termination of the contract, all records and documents in possession of the applicant should be handed over to MBSA or be destroyed at MBSA’s written request and the MBSA retained any intellectual property

that may have been developed pursuant to the contract between MBSA and the applicant.

[18] In 2019, in anticipation of the expiry of the contract with the applicant at the end of December 2019, MBSA commenced another process to appoint a service provider for another three years, from January 2020 to December 2022. The applicant tendered by submitting a proposal document titled *“Logistics Concept and Proposal for Mercedes-Benz Part Logistics Centre Operations, Isando”* (the Proposal). This contract was awarded to another service provider, Kuehne & Nagel. The applicant was advised by MBSA that the contract was awarded to Kuehne & Nagel and that *“employees would need to transfer to Kuehne & Nagel in terms of section 197 of the LRA”*. The applicant thereafter discussed the terms of the transfer with a view to concluding an agreement with Kuehne & Nagel.

[19] Before the applicant and Kuehne & Nagel could conclude a section 197 agreement, Kuehne & Nagel allegedly reneged on the main contract with MBSA, which led to the MBSA and the applicant agreeing to extend the three-year contract by 14 months from January 2020 to February 2021. The extension incorporated the applicant’s Proposal.

[20] MBSA further extended the contract by a period of 22 months, from March 2021 to December 2022. An addendum to the contract was concluded between the parties. Section B of this addendum lists the Proposal as one of the documents that collectively with other documents form part of the agreement. The Proposal, which now formed part of the extended agreement between MBSA and the applicant, provided that:

‘Should [the applicant] be unsuccessful in retaining the PLC contract, all staff (blue and white collar) currently employed by [the applicant] will form part of s 197 Transfer Agreement.’

[21] In 2022, MBSA started another process to appoint a new service provider and released the new RFQ and/or scope of work, for the period January 2023 to February

2025. The material terms of the 2022 RFQ were similar to the 2016 RFQ which formed part of the 2017 – 2019 contract. The potential service providers were requested to indicate their willingness to take over the “*current operational staff*” into their operational team. The applicant was awarded the contract. The applicant and MBSA signed an addendum, titled “*second addendum to the purchase contract for the rendering of services and/or delivery of goods*”. This addendum extended the contract period, which was originally from 1 March 2021 to 31 December 2022, to 28 February 2025. The addendum further introduced new pricing structures. Clause 5.1 of the new addendum records that:

‘This Second Addendum, together with the Purchase Contract and the First Addendum, constitutes the whole agreement between the Parties relating to the subject matter hereof and no representation or indulgence by any Party not recorded therein shall be binding on the Parties.’

[22] As already addressed earlier, in terms of the first addendum, the applicant and MBSA agreed that the Proposal formed part of the agreement for the period commencing 1 March 2021 and the Proposal contained a provision that in the event that the applicant’s bid is unsuccessful or the applicant is not appointed, “*all staff (blue and white collar) currently employed will form part of a s 197 Transfer Agreement*”. This clause was therefore carried into the second addendum as it was not specifically excluded.

[23] During the contract between 2023 and 2025, the applicant had to provide additional racking and 150 trolleys specifically designed and manufactured to fit into the MBSA lean lift.

[24] In 2024, MBSA issued another RFQ or a scope of work to potential service providers. The standard terms and conditions for MBSA for rendering of services and delivery of goods were retained.

[25] Clause 3.4 of the 2024 RFQ required the service provider to provide, *inter alia* the following:

‘The proposed management structure model together with names and positions of all management contacts...

A proposal on how to best take on a workforce either existing or new and how to increase efficiency in the facility.’

[26] The service provider would be contracted to *inter alia* manage the operations consistent with MBSA “*standards, policies and expectations*”. MBSA would be responsible for the following - allocating facility management (for example, land, building or warehouse, sprinklers etc.), security, warehouse equipment, office furniture such as desks and office chairs), office hardware (personal computers, copy machines, fax, scanners, telephones etc.) including their maintenance and repair, office consumables (for example, stationery), payment of rent and utilities (water, electricity, heating, fuel, energy costs etc.), space management and location planning, office cleaning contract, waste and recycling management and providing planning and scheduling (overall forecast) and the IT systems. Insofar as the provision of IT by MBSA is concerned, the 2024 RFQ stated the following:

‘MBSA IT will provide the hardware and software... that it believes to be required to fulfil the service. LSP [Logistics Service Provider] will not be allowed to install its own software on hardware delivered by IT MBSA and is not allowed to use any non IT MBSA services like mail, cloud, etc. for purposes other than related to perform operations.

MBSA IT will provide all IT services like network, connection, office automations, patching, and antivirus, installation of software and service desk. Required number of employees as mutually agreed in writing between client and LSP will get standard MBSA mail.

Hardware purchased by LSP cannot be connected to MBSA network, LSP need to connect via own internet connection.

LSP employees [have] to follow all MBSA rules and policies, especially MBSA IT security guidelines and policies... which shall be deemed to be incorporated

herein by reference (and shall be made available to the contractor by the client upon receipt by the client of a written request therefor by the contractor).’

[27] The inbound and outbound activities remained the same in all material respects. In fact, the 2024 RFQ or scope of work did not differ in any material respect with the 2016 RFQ awarded to the applicant with effect from 2017 and extended until February 2025. The service provided by the service provider is subject to MBSA’s approval.

[28] The applicant contends that it has 111 blue-collar and 17 white-collar employees. Schenker was a successful bidder and was appointed by MBSA for the period from March 2025 to February 2028. As part of the terms and conditions, the applicant had to prepare a handover process. This process started on or about 25 November 2024. The parties discussed a possible transfer but failed, which has led to this application. The applicant submits that the MBSA’s PLC business has been transferred with effect from 1 March 2025 from its hands to that of Schenker.

[29] The high watermark of Schenker’s case is that the applicant has focused on establishing that the same or similar service will be provided by Schenker to MBSA. Schenker contends that whether the applicant established that the same or similar service is provided is irrelevant because the issue is whether a discreet business has been transferred. Schenker contends that the applicant failed to prove that the business or part thereof has been transferred.

[30] It was further contended that the applicant concedes that PLC is an integral component of MBSA’s business but downplays the fact that it is only providing services to MBSA. Schenker submits that, the PLC business will remain with MBSA after the change of hands from the applicant to Schenker and that Schenker will simply be providing *“the service of receiving and/or distributing parts which has been done by various service providers in the past and will, with effect 01 March 2025, be performed by Schenker.”* In other words, what will happen on 1 March 2025 is a service provision change and not a transfer of a business. In addition, it is contended that Schenker has

very limited knowledge of the specifics of the services rendered by the applicant to MBSA and that this points to the fact that Schenker would not take over what the applicant describes as a business if the specifics thereof are unknown to Schenker.

[31] Schenker contends that it “*will use its own methods, management systems, labour management systems, operating systems, IT programmes and intellectual capital to perform the services for MBSA*”. Further, that it has only 67 workforce that will be rendering the services to MBSA, compared to the 128 employees the applicant currently has, which in Schenker’s view, is due to its operating systems and efficiency.

[32] Lastly, Schenker contends that:

‘It is also highly significant that apart from an intention to render the services at the premises provided by MBSA and that Schenker will also operate MBSA's IT system, no other assets or employees of either the applicant and/or MBSA are required for Schenker to render the services to MBSA. If need be, Schenker will render the services on the basis of equipment and assets that it supplies and employees that it places at the PLC. The only exception being in respect of specialized equipment necessary to move lithium batteries. Specialized equipment is required for the handling of lithium batteries. As reflected in clause 7.25.1.2 of Annexure AB18, MBSA will supply that equipment. It stands to be emphasized that movement of lithium batteries constitutes a small fraction of the services to be rendered to MBSA. There is no need for the applicant's employees to render the services.’ [Emphasis added]

Evaluation

[33] More than two decades ago, the Constitutional Court, per Ngcobo J, in the *National Education Health and Allied Workers Union v University of Cape Town and others*² (NEHAWU) made it clear that the dual purpose of section 197 of the LRA is the

² (2003) 24 ILJ 95 (CC); 2003 (3) SA 1 (CC).

protection of the employees against job losses on the one hand and the facilitation of the commercial transaction on the other.³

[34] So, what triggers the application of section 197? There are three jurisdictional requirements that must be satisfied for section 197 to apply to a transaction. These requirements are discerned from section 197(1) and are that: (1) there must be a *transfer* (2) of a business, in whole or in part, from one employer to another (3) as a *going concern*.⁴ Therefore, if what is being transferred is a business, not just a service, and the transfer is as a going concern, then section 197 applies.

[35] The question in this case is whether there is a change of hands or a transfer of the services. If so, whether that which changed or will change hands is a discrete business or part thereof and if yes, whether this business or part thereof is or will be transferred as is, a going concern. These questions must be answered in the positive for section 197 to apply to the transaction.

Is there a transfer?

[36] “*Transfer*” is defined as a “*transfer of a business by one employer (‘the old employer’) to another employer (‘the new employer’) as a going concern*”.⁵ The question is whether the services rendered by the applicant currently will transfer to Schenker.

[37] Jafta J in *Aviation Union of South Africa and another v South Africa Airways (Pty) Ltd and others*⁶ (*Aviation Union*) dealt with the issue of a transfer as follows:

‘But whether a transfer as contemplated in s 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

³ *NEHAWU* at para 53.

⁴ See also: *Dimension Data (Pty) Ltd and others v GWB Technologies CC t/a GWB Technologies and others* [2022] ZALCJHB 97; (2022) 43 ILJ 1824 (LC).

⁵ Section 197(1) of the LRA.

⁶ 2012 (1) SA 321 (CC); [2012] 3 BLLR 211 (CC).

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.

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 were 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 it 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.⁷ [Emphasis added]

[38] It is not in dispute between the parties that there were be a transfer – that is, something will be transferred on 1 March 2025. The issue in dispute is the nature or identity of that which will be transferred. The applicant says it is the PLC business, Schenker contends it is a service provision.

What will transfer - a business or a service?

[39] Section 197(1) defines “business” to include “*the whole or a part of any business, trade, undertaking or service*”. In *Road Traffic Management Corporation v Tasima (Pty) Ltd; Tasima (Pty) Ltd v Road Traffic Management Corporation*⁸ (*Tasima*), Theron J, writing for the majority, looked at the definitions of the other words within the definition of “business”. She said:

‘... The word ‘trade’ is defined as ‘any regular occupation, profession, or business, especially when undertaken as a means of making one’s living or

⁷ Ibid at paras 47 – 48.

⁸ (2020) 41 ILJ 2349 (CC); [2020] 12 BLLR 1173 (CC).

earning money' and 'undertaking' is defined as '[a]n action, work, etc., undertaken or attempted; an enterprise'.

The associated words 'undertaking' and 'service' both indicate that s 197 is applicable to structures that fall outside of income-generating entities. To this end, this court held in *Aviation Union* that s 197 applies to 'any business provided that the other requirements are met. The aim is to cast the net as wide as possible'.

Courts have established what a business is by having regard to the constituent parts of the business and determining which parts are to be divested of by the transferor. A business can consist of a variety of components, including both tangible and intangible assets, goodwill, a management staff, a general workforce, premises, a name, contracts with particular clients, the activities it performs, and its operating methods. These components were explored in *Schutte*, where the Labour Court concluded that they did not constitute a closed list, but must be sufficiently connected to one another so as to form an 'economic entity' that is capable of being transferred. This approach influenced the Labour Court in *Harsco Metals*, where Van Niekerk J said:

"The definition [of a business] 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... 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".⁹

[40] In *Aviation Union*, the Constitutional Court, per Jacobo J made the following observation:

'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

⁹ Ibid at paras 58 – 60.

business of the transferor. What happens here is simple contracting out of the service, nothing more, nothing less.

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.

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.¹⁰

[Emphasis added]

[41] The applicant, by way of inference, contends that the MBSA rendered these warehousing and operations management services before it transferred them to Caterpillar or Neovea in 2011 and to the applicant in 2017. The applicant specifically invited the respondents to show otherwise. MBSA did not respond. Schenker dismissed these allegations, submissions and conclusions as irrelevant and speculative. The conclusion drawn by the applicant that MBSA provided these services is the most reasonable and probable conclusion. I therefore accept that MBSA rendered these services before it outsourced them to Neovea. What was transferred from Neovea to the

¹⁰ *Aviation Union* at paras 106 – 108.

applicant in 2017 was a business of warehousing and operations management services, which the applicant and Neovea concluded as section 197 transfer agreement. That business continues to date and there is no suggestion that it changed its identity since it was taken over by the applicant until now.

[42] Schenker contends that the PLC business is with MBSA and will remain with MBSA after the change of hands on 1 March 2025. It contends that it will be rendering the service of receiving and/or distributing. In other words, there will only be a change in the provision of service from the applicant to Schenker, not a transfer as envisaged in section 197. Schenker also contends that another important distinguishing factor that proves that it will only be a change of service is the fact that it has very limited knowledge of the specifics of the services rendered by the applicant to MBSA.

[43] The Labour Appeal Court in *TMS Group Industrial Services (Pty) Ltd t/a Vericon v Unitrans Supply Chain Solutions (Pty) Ltd and others*¹¹ (*Unitrans*) was confronted with the same argument, in the circumstances substantially similar to this matter in that the matter also involved the outsourcing of the warehousing service. The matter involved the termination of the contract by effluxion of time between the outsourcer and the outsourcee, and the subsequent award of the contract to the new outsourcee to render the same or similar services. Davis JA observed:

‘In this case, the service which was provided was that of warehousing. It was initially provided to third respondent by first respondent. As in the case of *Sodhexo*, the warehouse operation services constituted a discrete business. At the date of the inception of its agreement with third respondent, appellant assumed the right to use third respondent's assets and infrastructure in order to continue to provide the same service to third respondent as it had previously been provided by first respondent. As Mr van Esch said in his answering affidavit, the warehouse services, which were presently performed by the appellant can only be performed at the production facility of third respondent. Thus, the services are "performed at the very same site and fixed premises as the services

¹¹ (2015) 36 ILJ 197 (LAC); [2014] 10 BLLR 974 (LAC).

that were performed by Unitrans in terms of the warehousing agreement". Appellant was required to make use of the same equipment and IT systems that were previously employed by first respondent including forklifts, computers, printers, a computer system as well as other assets such as furniture.¹²

[44] This observation is apposite to this matter. As part of the contract between the applicant and MBSA, MBSA provided the warehouse and its equipment, payment of rent, water and electricity, security, office space and furniture such as desks and chairs, computers, copy machines, fax, scanners and telephones, office cleaning contract and waste and recycling management and the IT systems.

[45] The contention that Schenker will only be providing a service is not borne out of the facts and evidence presented before this Court. Schenker has not taken the Court into its confidence that despite what is set out in the 2024 RFQ, the agreement concluded with MBSA is different in material respects to what MBSA required in terms of its scope of work. It has not made that agreement available for the Court to scrutinise. On the facts before me, the warehousing and operations management currently performed by the applicant, which constitute the applicant's business, will be performed by Schenker with effect from 1 March 2025. This business, based on 2016 and 2014 RFQs, will not change its economic entity identity on or from 1 March 2025 when it changes hands.

[46] Therefore, the services currently performed by the applicant on MBSA's premises using MBSA's property and equipment and other assets as set out above, together with the employees is an economic entity and therefore a business as defined in section 197 of the LRA.

Is the business being transferred as a going concern?

¹² Ibid at para 30.

[47] Section 197 does not define what “*going concern*” means. However, Ngcobo J in *NEHAWU* said that the phrase must be given its ordinary meaning and held that:

‘... What is transferred must be a business in operation ‘so that the business remains the same but in different hands’. Whether that has occurred is a matter of fact which must be determined objectively in the light of the circumstances of each transaction. 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 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 therefore should not be considered in isolation.’¹³ [Own emphasis]

[48] It matters not that the outsourcer and the outsourcee have agreed on the transfer of the workforce because whether or not they agree does not qualify or disqualify the transaction from being a transfer within the meaning of section 197.¹⁴ *Tasima* tells us that the transfer of the workforce alone without the assets may not necessarily give rise to the transfer of a business as a going concern and that a distinction of often drawn between labour intensive and asset-reliant businesses.¹⁵

[49] The services rendered in this matter, which I have found to constitute a business or part of it, as apparent from the material facts above, are asset-reliant or asset-heavy. The question whether a business has been transferred as a going concern was answered by Theron J in *Tasima* with reference to the Constitutional Court’s earlier

¹³ Ibid at para 56.

¹⁴ *NEHAWU* at para 58

¹⁵ *Tasima* at para 95.

judgments in *Aviation Union* and *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and others*¹⁶ as follows:

‘Where services are involved, this court has held that what must be transferred is the business that supplies services - not the service itself. That being so, the mere termination of a service contract would not, without more, constitute a transfer within the contemplation of s 197. There must be ‘other indicators’, such as whether assets and customers were transferred to the new owner and whether employees were taken over by the new owner. In *Aviation Union*, this court was confronted with the question of whether a clause in an outsourcing contract contemplated the transfer of a business or simply the outsourcing of a service. This court considered the fact that both the premises from which the business was conducted and the assets with which it was conducted were transferred as being indicative that there had been a transfer of a business which supplied services as a going concern, rather than a mere outsourcing of a service. On this basis, it concluded that s 197 applied in that matter.

In *City Power*, City Power had taken over operation of the electricity services previously rendered by Grinpal in terms of a tender contract. It was agreed that there would be a ‘full handover of the entire infrastructure, software and databases’ relating to the prepaid electricity project from Grinpal to City Power. However, City Power refused to take transfer of Grinpal’s employees. The question was whether Grinpal’s business was transferred to City Power as a going concern. This court found that there had been a transfer of a business as a going concern, as Grinpal’s business had continued, albeit in the hands of another entity (City Power). This court stressed that where there has been a transfer of a business ‘as is’, with all of the complex network infrastructure, assets, know-how, and technology required to operate the business and continue rendering services, a transfer of a business as a going concern has taken place for the purposes of s 197.¹⁷ [Emphasis added]

¹⁶ (2015) 36 ILJ 1423 (CC); [2015] 8 BLLR 757 (CC).

¹⁷ *Tasima* at paras 96 – 97.

[50] The scope of work, contrary to Schenker's contention, in comparison from the current and that which Schenker will provide, is the same or substantially the same. In addition, the "Schenker-way" of performing the services differently with its own employees is not supported by any evidence. There is nothing before this Court to show that the agreement between Schenker and MBSA differs in material respects with the scope of work set out in the 2024 RFQ. Therefore, there is nothing to prove that Schenker will be apply its own methods, operating systems and IT programmes, which significantly differ with what the applicant currently provides.

[51] The applicant and MBSA have agreed that if the applicant is not successful in its bid, all its blue- and white-collar employees will form part of a section 197 transfer agreement. This, whilst not decisive, cannot just be dismissed as irrelevant. It shows in my view that the applicant and MBSA agree, having considered the services, at least at the time when this agreement was reached, that it was contemplated that the services rendered by the applicant constituted a business which may be transferred to another service provider if the applicant's bid is not successful. Whilst this agreement does not automatically lead to a conclusion that the services transferred constitute a business as a going concern, equally, the absence of the agreement between Schenker and MBSA does not disqualify the transaction from being a transfer as a going concern within the meaning of section 197.

[52] Schenker will operate from the same warehouse where the applicant is currently operating. It will use the same warehouse equipment, IT systems, office space, furniture and computers, used by the applicant. The fact that Schenker elects not to take the few items such as the 150 trolleys does not detract from the fact that the PLC business is transferred as is, a going concern. Therefore, the PLC business or part of it will transfer from the applicant as the old employer to Schenker as the new employer, as a going concern in terms section 197 of the LRA, with effect from 1 March 2025. Consequently, the rights and obligations of the applicant's employees at the PLC business will transfer to Schenker in terms of section 197(2) of the LRA.

Costs

[53] Finally, both parties were *ad idem* that the costs should follow the result. There is no reason to deprive the applicant, as a successful litigant, a costs order.

[54] In the premises, the following order is made:

Order

1. It is declared that the process in terms of which the applicant will cease rendering services to the second respondent at the second respondent's Parts Logistics Centre and the first respondent will commence rendering those services as from 1 March 2025 constitutes a transfer of a business, alternatively part of a business, as a going concern for purposes of section 197 of the Labour Relations Act, 66 of 1995 (LRA).
2. The first respondent is ordered to give effect to its obligations in terms of section 197 of the LRA, inclusive of receiving the fifth to sixtieth respondents and sixty first and further respondents into its service in compliance with section 197 of the LRA.
3. The first respondent is ordered to pay the costs of this application.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr F. Le Roux
Instructed by: Ivings McFarlane Attorneys
For the First Respondent: Mr C. Kirchmann of Kirchmanns Inc.