THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JA01/24

In the matter between:

ZEDA CAR LEASING (PTY) LTD T/A AVIS FLEET	**First Appellant**
BARLOWORLD LTD	**Second Appellant**
DEALERSBID (PTY) LTD (T/A DEALERSONLINE)	**Third Appellant**
DEALERSONLINE (PTY) LTD (INTERVENING PARTY)	**Fourth Appellant**

and

BELINDA PERLEE AND NINE OTHERS	**Respondents**

Heard: **7 November 2024**
Delivered: **10 February 2025**
Coram: **Savage ADJP, Van Niekerk *et* Nkutha-Nkontwana JJA**

JUDGMENT

NKUTHA-NKONTWANA, JA

Introduction

[1] This is an appeal, with the leave of the Labour Court, against the judgment and order it delivered on 3 November 2023 which found the dismissal of the respondents automatically unfair in terms of section 187(1)(g) of the Labour Relations Act[1] (LRA). The dispute between the parties pertained to the question of whether the dismissal of the respondents ensued from the first respondent's (Avis Fleet) operational requirements or a transfer of business by Avis Fleet to the third respondent (Dealersbid) in terms of section 197 of LRA.

[2] The Labour Court held that there had been a transfer and ordered Dealersbid to reinstate the respondents with full backpay. The respondents are cross-appealing this order. They seek an order to the effect that Barloworld and Dealersbid are jointly and severally liable to reinstate them with no loss of benefits.

[3] I propose to deal first with the corporate structure of the appellants and the citation of Dealersbid as a party in this litigation, a controversial tangled web that became apparent during the first hearing of the matter on 15 August 2024. As a result, the matter was postponed at Dealersbid's instance. Dealersbid was granted leave to take necessary steps to prosecute the appeal on its own behalf.

Appellants' corporate structure

[4] The second appellant (Barloworld) is a 100% shareholder of Barloworld South Africa (Pty) Ltd (Barloworld SA), which in turn, wholly owned Avis Fleet. Barloworld SA owned a 51% stake in Crownmill Trading (Pty) Ltd (Crownmill) trading as DealersOnline. The other shareholders of Crownmill were Dealersbid and Rokewood Technology (Pty) Ltd (Rokewood). With Barloworld having a majority stake, Crownmill was part of its conglomerate. Barloworld had three distinct operating

[1] Act 66 of 1995, as amended.

segments (Barloworld Logistics, Barloworld Equipment, and Barloworld Automotive). Barloworld Automotive was constituted of (i) Avis Fleet; (ii) Avis Budget Rent-a-Car; (iii) Barloworld Motor Retail; and (iv) Digital Disposal Solutions (DDS). Crownmill was part of DDS.

[5] The respondents were employed by Avis Fleet and held various positions under the unit called Car Mall or Trade and Auction Centre (Car Mall) which was responsible for the termination and disposal of vehicles at the end of the lease terms. Avis Fleet was also licenced to utilise Crownmill's online Auction Portal to terminate and dispose of its fleet. The controversy in this matter was brought about by the decision by Barloworld to close Car Mall and to contract Crownmill to take over the services rendered by the respondents under Avis Fleet's Car Mall. I will return to this issue later in the judgment, suffice it to say that the closure of Car Mall led to the retrenchment of the respondents.

[6] Barloworld undertook major structural changes after the respondents' retrenchment. Through an unbundling exercise, Barloworld disposed of Avis Fleet. Furthermore, in April 2023, Dealersbid and Rokewood bought Barloworld's stake in Crownmill and changed its name to DealersOnline (Pty) Ltd (DealersOnline).

[7] Dealersbid, therefore, contends that it was mistakenly cited as a party in this litigation as it was a shareholder of Crownmill. That being the case and as a result, it is not in a position to comply with the order of the Labour Court to reinstate the respondents. It further contends that it was kept in the dark about this litigation hence it could not object to its citation during the Labour Court proceedings. It refutes that it authorised Avis Fleet or Barloworld to represent its interests in this litigation, particularly in this Court.

[8] On the other hand, Crownhill's successor in title, DealersOnline, seeks leave to be joined as a party in this appeal even though it was not cited in the proceedings before the Labour Court. Likewise, DealersOnline contends that it was not aware of this litigation hence it could not have intervened in the proceedings before the Labour Court. Furthermore, it seeks leave to lead new evidence that was not before the Labour Court which pertains to the nature of the business transaction it had with

Avis Fleet, including the copies of the relevant service level agreements it concluded with DDS and Avis Fleet.

[9] Both these applications are not opposed, prudently so. It is apparent that DealersOnline has a direct and substantial interest in this litigation and is a necessary party as Dealersbid is just a shareholder and not a trading company capable of effecting the impugned order of the Labour Court or the order this Court might make.[2] In addition, I am satisfied that the further evidence at stake is weighty and material to a determination of the pertinent issue in this appeal.[3]

[10] Accordingly, both applications are granted. DealersOnline, the intervening party, shall be cited as the fourth appellant.

Factual background

[11] Car Mall had two core functions, which entailed collecting and disposing of vehicles at the end of the lease terms. To do so, it utilised an online platform called TradersOnline, which was open only to Avis Fleet. Even so, Avis Fleet also utilised the online Auction Portal owned by DealersOnline to dispose of its vehicles. DealersOnline services were open to other service users, including the banks.

[12] In 2020, Barloworld undertook a rationalisation process which was triggered by, *inter alia*, the adverse effects of the COVID-19 pandemic. On 3 July 2020, the Avis Fleet's Board of Directors resolved to embark on a restructuring process and to commence with a section 189A[4] consultation process. The employees were duly

[2] See: *Absa Bank Limited v Naude N.O and Others* [2015] ZASCA 97; 2016 (6) SA 540 (SCA) at para 9; *Gordon v Department of Health, KwaZulu-Natal* [2008] ZASCA 99; 2008 (6) SA 522; para 9.

[3] See: *De Aguiar v Real People Housing (Pty) Ltd* [2010] ZASCA 67; 2011 (1) SA 16 (SCA) at para 11; *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality and Another* [2017] ZASCA 23; 2017 (6) SA 360 (SCA) at para 23.

[4] A section 189A process is triggered when dismissals based on operational requirements by employers with more than 50 employees

served with a section 189(3)[5] notice to commence the consultation process. Three consultation sessions were held in June 2020 and were facilitated by the CCMA. All Avis Fleet departments, including Car Mall, were respectively represented by nominated employees during the CCMA facilitation sessions.

[13] It was the evidence of Avis Fleets that Barloworld decided to close Car Mall because two of its subsidiaries, Avis Fleet through Car Mall and DealersOnline, were dealing with vehicle disposal. The business model of DealersOnline was found to be more cost-effective as it was based on a variable cost structure. Unlike the fixed cost structure associated with Car Mall, a variable cost structure meant that there would be no fixed costs but that Avis Fleet would pay a rand value per unit if terminated. However, if there was no termination, there would be no payment due and payable. DealersOnline was already set up to do terminations and was providing this service to other service users in the market. Avis Fleet and DealersOnline concluded a service level agreement.

[14] The service that had been rendered by Car Mall was taken over by DealersOnline. As a result, all the Car Mall staff members, including the respondents, were retrenched on 31 July 2020 and 31 August 2020, respectively. It is not in dispute that the decision to close Car Mall was a subject matter during the section 189A consultation sessions. The respondents only took issue with the fact that the closure of Car Mall was only introduced during the last session of the section 189A consultation process.

The Labour Court proceedings

[5] Section 189(3) provides: "*The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to… the reasons for the proposed dismissals… the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives… the number of employees likely to be affected and the job categories in which they are employed… the proposed method for selecting which employees to dismiss…*".

[15] Displeased with their retrenchment, the respondents instituted the action that served before the Labour Court. The nub of their case was that the closure of Car Mall and transfer of its activities by DealersOnline triggered a section 197 transfer which, in turn, rendered their dismissal automatically unfair in terms of section 187(1)(g).

[16] To support their claim that there was a transfer, it was the respondents' evidence that DealersOnline took over the functions that had been rendered by Car Mall; took possession of Avis Fleet's vehicles; was granted access to the AS400 system, a leasing management tool that records the entire life of a vehicle; and employed six out of 53 retrenched employees.

[17] The appellants refuted the respondents' assertion that there was a transfer as contemplated in section 197. They were adamant that the respondents were retrenched consequent to a section 189A process. They further disavowed any transfer of assets to DealersOnline as a result of the closure of Car Mall. They asserted that the furniture and laptops were distributed throughout Avis Fleet. DealersOnline was only granted access AS400 software system; Avis Fleet remained the title holder and owner of the vehicles in possession of DealersOnline; the site that was occupied by Car Mall closedown.

[18] The Labour Court found, *inter alia*, that:

> '[63] In my view, there was such a discrete, identifiable economic entity within Avis Fleet, in the form of Car Mall. Car Mall performed the collection, inspection, termination, and vehicle disposal functions for Avis Fleet. That Car Mall was an economic entity is apparent from the reasons given by Barloworld for the decision to close down Car Mall, which is that there was a duplication of functions within the Barloworld Group of companies, by Car Mall and by DOL.
>
> [64] The definition of 'business' includes a part of a business. Car Mall was definitely a part of Avis Fleet and constituted an organised grouping of 53 persons and assets facilitating the exercise of the terminations and disposal of economic activity. It was an identifiable and discrete part of the Avis Fleet business. As Strydom testified, Car Mall was an integral part of the Avis Fleet

and Avis Budget Rent business, as car leasing and fleet management could not be conducted without the terminations and disposal business. This version was not seriously disputed, other than to say that terminations and disposals were now being performed elsewhere. That may be so because Avis Fleet chose to pay a fee to DOL for a function that still forms an integral part of its leasing and fleet management business. That function constituted an economic activity capable of being transferred.

…

[66] Car Mall did not own any assets but had possession of and managed Avis Fleet assets. Therefore, the fact that no assets were transferred from Avis Fleet to DOL is of no consequence as those assets were never the assets of Car Mall to begin with. Car Mall had possession and benefit of Avis Fleet property, and this was transferred to DOL. In my view that is sufficient to satisfy the transfer requirement, bearing in mind that ownership is not a prerequisite for this court to find that there has been a transfer of a business. We know from Aviation Union that transfer of the benefit (and not necessarily ownership) is sufficient to trigger the application of section 197.'

In this Court

[19] The appellants contend that the Labour Court erred in finding that Car Mall was a district economic activity capable of being transferred. Mr Boda SC, counsel for Avis Fleet and Barloworld, submitted that the DealersOnline and Car Mall were conducting the same functions before the closure of Car Mall. The differences were that DealersOnline used a variable cost structure and its platform was open to all dealers; while Car Mall used a fixed cost structure and its online platform was not open to the market. Consequent to the closure of Car Mall, the fixed cost structure was done away with and the disposal of the vehicles via the online platform was open to any car dealer to bid on and purchase.

[20] While Mr Stelzner SC, counsel for Dealersbid and DearlersOnline, submitted that what was transferred was a service and not a business that supplied services. While it is true that before the retrenchment of the respondents, DearlersOnline provided Avis Fleet with a limited service, it was already providing wide-ranging

service to other clients, such as banks, who, for a variety of reasons, require vehicles to be sold and are charged a fee per vehicle on a transactional basis.

[21] Mr Stelzner SC further submitted that, when Avis Fleet decided to rationalise its operations, DearlersOnline was appointed to provide the same type of services it was providing its other clients to Avis Fleet. As such, the *causa* was the service level agreement DealersOnline and Avis Fleet concluded. At no stage did DealersOnline acquire the business of Avis or any part thereof, let alone do so as a going concern. Avis Fleet vehicles were made available to DearlersOnline as its agent to sell the vehicles on behalf of Avis. Once sold, DearlersOnline would account to Avis for the proceeds of the sale.

[22] On the other hand, Mr Carratu, appearing for the respondents, submitted that Barloworld's decision to move the services that were provided by Car Mall from a fixed cost structure to a variable cost structure was the *causa* for the transfer and not a restructuring process due to economic constraints. That is so because the decision to implement a variable costing structure was intended to outsource an insourced business function to a third party and accordingly triggered the application of section 197, even if no transfer of assets took place, so he further submitted.

Discussion

Section 197

[23] Section 197(1) of the LRA provides:

> 'In this section and in section 197A —
>
> (a) "business" includes the whole or 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.'

[24] Where there is a transfer of a business as a going concern, the consequences listed in section 197(2) automatically follow by operation of law which provides, *inter alia*, that "*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…".

What was the causa?

[25] The Constitutional Court has, on several occasions, underscored the importance of a *causa* or legal cause in determining whether the jurisdictional facts for the application of section 197 are present.[6] This notion was niftily expounded in *Rural Maintenance (Pty) Ltd v Maluti-A-Phofung Local Municipality*[7] *(Rural Maintenance)*, per Froneman J, as follows:

> 'This provides a useful illustration of what role the *causa*, or legal cause, of any transfer of a business may play in the application of section 197 of the LRA. It is settled that the enquiry to determine whether the business is transferred as a going concern is a factual one. But the parameters of the factual enquiry are determined by the legal cause from which the transfer stems from. The legal cause may be the invalidity of the underlying contract.'

[26] In this case, it is not in dispute that Avis Fleet embarked on a restructuring process due to economic constraints as a result of the COVID-19 pandemic. The decision to migrate to a variable cost structure and sourcing the services of DealersOnline was implemented within the context of the restructuring process that was undertaken in terms of section 189A. To my mind, that was the *causa* which marked the confines within which the factual enquiry on the applications of section 197 had to be undertaken. The respondents' attempt to divorce the restructuring process, which was undertaken in terms of section 189A, from Barloworld's decision to adopt a variable business structure is accordingly untenable.

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[6] See: *Road Traffic Management Corporation v Tasima (Pty) Limited; Tasima (Pty) Limited v Road Traffic Management Corporation* [2020] ZACC 21; (2020) 41 ILJ 2349 (CC) *(Tasima)* at paras 34-49*; Rural Maintenance (Pty) Ltd and Another v Maluti-A-Phofung Local Municipality* [2016] ZACC 37; (2017) 38 ILJ 295 (CC) *(Rural Maintenance)* at para 39; *Aviation Union of SA and Another v SA Airways (Pty) Ltd and Others* [2011] ZACC 31; (2011) 32 ILJ 2861 (CC) (*Aviation Union*) at para 113.

[7] *Rural Maintenance supra* fn 7 at para 39.

Transfer of a business as a going concern

[27] In *Mobile Telephone Networks (Pty) Ltd & others v CCI SA (Umhlanga) (Pty) Ltd and Others*[8], this Court, per Sutherland JA, tersely expounded the test applicable in section 197 enquiry as follows:

> '[13] …Notable is the fact that, unlike the procedural regulatory mechanics for unfair dismissal for alleged misconduct in ss 185 to 188 and for unfair operational dismissals in ss 189 to 189A, the job protection element in s 197 is qualitatively different. The protection against the risk of job loss is rooted, not in a procedural straitjacket imposed on the employer, but rather, is located in the objective existence of a commercial reality, ie, a business as a going concern having been transferred. This means, in concrete terms:
>
> 13.1 a discrete business unit in the hands of the former owner (ie a business which performs a service, not the service itself, the unit being discernible by a grouping of workers set about a common objective);
>
> 13.2 which business is, as a fact, transferred from one owner to another;
>
> 13.3 and which business is a going concern at the time of transfer (ie it has intrinsic productive capacity);
>
> 13.4 which is recognisable as that going concern in the hands of the subsequent owner (ie it retains the character of the initial business unit).
>
> [14] What this means is that the judicial investigation into the entrails of such circumstances alleged to result in s 197 being properly triggered, is an endeavour to determine whether or not that commercial phenomenon exists. This exercise is not the imposition of a moral construct on the circumstances. The job protection objective hangs wholly by the thread of the banal concrete elements of s 197 being proven to exist.'

[28] Whether a business has been transferred as a going concern is an enquiry undertaken based on the test provided by the Constitutional Court in *National Education Health and Allied Workers Union v University of Cape Town and Others*[9] where it was said:

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[8] [2023] ZALAC 10; (2023) 44 ILJ 1906 (LAC) *(MTN*) at para 13.

[9] [2002] ZACC 27; (2003) 24 ILJ 95 (CC) at para 56.

> 'The phrase "going concern" is not defined in the LRA. It must therefore be given its ordinary meaning unless the context indicates otherwise. 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.'[10]

[29] It is therefore not enough to consider the fact that the execution of the same services would continue, albeit under different hands alone. Something more is required.[11] Whether a transfer of business as a going concern occurred must be determined within the whole context of what transpired.

[30] An immediate point to make in this regard pertains to the dictum in *Food and Allied Workers Union v Cold Chain (Pty) Ltd and Another*[12], copiously referred to by the Labour Court, where the outsourcing of a warehouse was found to constitute a section 197 transfer. I do not think the court intended to create an inflexible principle that every outsourcing transaction would automatically trigger the application of section 197 despite the prevailing factual circumstances that could militate against such a conclusion.

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[10] Id.

[11] See: *Aviation Union supra* fn 6 at para 75, an observation by the minority judgment.

[12] [2009] ZALC 109; (2009) 30 ILJ 2919 (LC) (*Cold Chain*).

[31] What transpired in this case is simply that a function that was performed by Car Mall to dispose of Avis Fleet vehicles at the end of the applicable lease period was contracted out to Dealers Online. No assets were transferred to DearlersOnline. DearlersOnline used its own online Auction Portal to dispose of Avis Fleet vehicles, a system used to service other clients such as banks. The AS400 software was never transferred to DearlersOnline. It was not seriously disputed that DearlersOnline had its infrastructure and manpower, hence there was no transfer of tangible or intangible assets like operating systems, employees, furniture, laptops and premises.

[32] Mr Currata was invited to direct us to the evidence of what was precisely transferred from Avis Fleet to DearlersOnline. In response, other than a sweeping submission that it was the service that was rendered by Car Mall, he could only refer to the six Car Mall employees that were recruited by DearlersOnline. This evidence alone cannot justify a conclusion that there was a section 197 if regard is had to all the circumstances.

[33] The fact that there were no assets transferred from Avis Fleet to DearlersOnline was obviously acknowledged by the Labour Court but took a view that it was inconsequential as "*those assets were never the assets of Car Mall to begin with"*. This finding is untenable as Car Mall was a mere unit comprised of the employees of Avis Fleet. Thus, the Labour Court erred in treating Car Mall as a business entity independent from Avis Fleet.

[34] I accordingly accept the respondents' submission that Avis Fleet continued as an economic entity leasing and selling fleet cars at the end of the lease period. What transferred to DealersOnline is an activity or service. To find otherwise, would essentially relegate Avis Fleet to its activity.[13] This case is distinguishable from *Aviation Union*[14] *and Tasima*[15] where the transfer of tangible and intangible assets was found to have occurred and accordingly, the business transferred was a going

[13] *See: Kruger and Others v Aciel Geomatics (Pty) Ltd* [2016] ZALAC 92; (2016) 37 ILJ 2567 (LAC) at paras 42 - 43.

[14] *Aviation Union supra* fn 6 at paras 53 and 120.

[15] *Tasima supra* fn 6 at para 75.

concern. As well, the dictum in *Cold Chain*[16] is distinguishable as the overall factual matrix in this case evinces a transfer of a service and nothing more.

[35] In sum, it is my view that what transpired, viewed holistically and in the context of restructuring, was not a transfer of the business as contemplated in section 197.

The main, dominant and proximate cause of the dismissal

[36] Even if the Labour Court was correct in its finding that there was a transfer, it still had to embark on enquiry to determine the main, dominant and proximate cause of the dismissal, a well-accepted test.[17] Sadly, that enquiry was not undertaken. For completeness sake, I will make a few observations as I have already found that the *causa* for the transfer was the decision by Barloworld to restructure its business due to the COVID-19 pandemic. This decision was implemented by Avis Fleet.

[37] The proposed business structure and the rationale for closing the Car Mall were explained during the section 189A consultation process. The need to restructure Barloworld and, in turn, the Avis Fleet, was not seriously challenged. It was further shown that the restructuring process affected about 2000 employees within the Barloworld group.

[38] It follows that the dominant cause of the dismissal of the respondents was Avis Fleet's operational requirements. As such, section 187(1)(g) finds no application. That being that case, it does not mean respondents are hung out to dry as "*the protection of workers is not solely governed by section 197 in these kinds of situations. Employees are also protected by the retrenchment provisions in*

[16] *Cold Chain supra* fn 12 at para 28.

[17] See: *SA Chemical Workers Union and Others v Afrox Ltd* [1999] ZALAC 8; (1999) 20 ILJ 1718 (LAC) at paras 46 - 49, referred to with approval in *National Union of Metalworkers of SA and Others v Aveng Trident Steel (A Division of Aveng Africa (Pty) Ltd) and Another* [2020] ZACC 23*;* (2021) 42 ILJ 67 (CC) at paras 75 - 76. *Long v Prism Holdings Ltd and Another* [2012] ZALAC 5; (2012) 33 ILJ 1402 (LAC) at paras 34 - 37.

section 189. The choice here is which employer should be responsible for the workers affected by the change in circumstance".[18]

[39] Nonetheless, the respondents nailed their colours on the mast of section 187(1)(g). With no alternative claim in terms of section 189, the finding that there was no transfer is dispositive of this matter.

Conclusion

[40] In all the circumstances, the labour Court erred in finding that there was a transfer of a business as contemplated in section 197 which triggered the application section 187(1)(g). Because of this finding, the respondents' cross-appeal has become superfluous.

Costs

[41] The is no reason to depart from the general rule that costs do not follow the result in labour matters; save for the costs occasioned by the postponement of the matter on 15 August 2024. Given the fact that the postponement was caused by the appellants' internal strife, they should pay the respondents' wasted costs, jointly and severally, the one paying the other to be absolved.

[42] In the result, the following order is made:

Order

1. The application brought by DearlersOnline for leave to intervene as a party and to lead further evidence is granted.
2. The appeal is upheld and the order of the Labour Court is substituted as follows:

"The applicants' claim is dismissed with no order as to costs."

[18] See: *Rural Maintenance supra* fn 7 at para 36; see also *Aviation Union supra* fn 6 at para 189.

3. The appellants shall pay the respondents' wasted costs occasioned by the postponement of the matter on 15 August 2024, jointly and severally the one paying the other to be absolved.

Nkutha-Nkontwana JA

Savage ADJP *et* Van Niekerk JA concur.

Appearances:

For the first and second appellant's:	Adv Feroze Boda SC
Instructed by	Cliffe Dekker Hofmeyr Inc
For the third and fourth appellant's:	R G L Stelzner SC
Instructed by	Bernadt Vukic Potash & Getz Attorneys
For the respondent:	Adv Roberto Carratu