

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN CAPE TOWN**

Case no.: C399\99

In the matter between:

NATIONAL EDUCATION HEALTH AND ALLIED
WORKERS UNION

Applicant

and

UNIVERSITY OF CAPE TOWN
(UCT)

First Respondent

SUPERCARE CLEANING (PTY) LTD

Second respondent

METRO CLEANING SERVICES CC

Third Respondent

TURFMECH CC

Fourth Respondent

ECO ENVIRONMENT (PTY) LTD

Fifth Respondent

JUDGMENT

MLAMBO J.

1. The interpretation and meaning of section 197 of the Labour Relations Act no 66 of 1995 ("the Act") is the issue in this matter. The applicant contends that on a proper interpretation of the section it is entitled to a declarator:

11. that the outsourcing of gardening , sports ground maintenance, cleaning and related non-core activities ("the outsourced services") by the First Respondent ("the University") to the Second to Fifth Respondents is a transfer of a part of the University's business, trade or undertaking as a going concern in terms of section 197 (1) (a) of the act;

1.2. that the employment contracts in existence between the University and those of its employees who received notices of termination of employment pursuant to the resolution of the Council of the University of 26 August 1999 are transferred automatically to either the 2nd, 3rd, 4th or 5th Respondents in terms of section 197(2)(a) of the act;

1.3. that the notices of termination referred to in 1.2 above contravene section 197 (2)(a) of the act;

1.4. and an order interdicting and restraining the University from contracting with the 2nd, 3rd, 4th, or 5th Respondents unless such contracts provide that all the rights and obligations between the University and each employee employed in the outsourced services and whose services were terminated pursuant to the resolution of the Council of the University of 26 August 1999 continue in force as if these were rights and obligations between each such employee and the 2nd, 3rd, 4th, or 5th Respondents.

2. The applicant also seeks, in the alternative,

- (a) a declarator that the dismissal of the applicant's members pursuant to the resolution of the Council of the University of 26 August 1999 is procedurally and substantively unfair,
- (b) an order interdicting and restraining the University from dismissing applicants' members pursuant to the termination notices of 26 August 1999 pending final determination in terms of section 188(1) of the act; and
- (c) an order that the University must consult with Applicant as required by Section 189 of the act on appropriate measures to avoid dismissals and to minimize the number of dismissals.

3. It is prudent at this stage to set out the background facts and circumstances of this matter in some detail. The First Respondent is a University and as such an institution of higher learning. By virtue of the University of

Cape Town (Private) Act 8 of 1999, which Act came into effect in September 1999, it enjoys juristic personality. This Act replaced and re-enacted the University of Cape Town Act, 1959, which had in turn replaced the University's founding acts, namely the 1911 South African Act and the 1916 University of Cape Town Act. First Respondent has its administrative offices in Lovers Walk, Rondebosch, Western Cape. In terms of section 8 of the Private Act, the University is governed by its Council, which administers all property of the University and makes all appointments and has general control of the University, its affairs and its functions.

4. The Second Respondent is Supercare Cleaning (Pty) Ltd; a company registered in terms of the company laws of South Africa, situated in Amblehill Court, Inhlabati Street, Oostersee, Parow. The Third Respondent is Metro Cleaning Services CC, a close corporation registered in terms of the close corporation laws of South Africa, situated at 2 Shell Court, Main Road, Mowbray. The Fourth Respondent is Turfmech CC, also a close corporation registered in terms of the close corporation laws of South Africa, situated at 406 Lansdowne Road, Lansdowne. The Fifth Respondent is Eco Environment Services (Pty) Ltd, a company registered in terms of the company laws of South Africa, situated at Vredenburg Farm, Winery Road, Somerset West and trading as Eco Maintenance.
5. In December 1997, the Council of the University approved and adopted a Strategic Planning Framework, which had been developed by a committee established by the University for that purpose. This document is known as the "SPF" and I shall refer to it by that acronym.
 - 5.1. The SPF, inter alia,
 - 5.1.1. states that the University is an institution of learning;
 - 5.1.2. states that the core business of the University is that of learning, which covers the conventional division of university activity into the three categories of teaching, research and extension;

- 5.1.3. records that the University is expected to contribute to society by the integration and dissemination of knowledge, by sending able graduates out into the world, by making available the expertise of its staff, and by the publication and application of its research findings;
 - 5.1.4. recognizes and warns that change at the University is unavoidable, and desirable to allow it to implement its mission and vision of being a world class African university;
 - 5.1.5. states that the University needs to consider its role, its shape and its size;
 - 5.1.6. identifies the University's need to allocate its limited resources strategically in a process where it is obliged to set priorities and make choices.
6. On 16 April 1999 the University called a meeting attended by representatives of the Applicant and representatives of the Staff Association. At the meeting a proposal on outsourcing gardening, maintenance, cleaning, and duties associated with cleaning was presented. This proposal emphasized that (a) outsourcing would allow the University to give greater focus to its core business and (b) that savings would be effected. The Applicant's response to this proposal was that there was no need and basis for the University to outsource. Nevertheless an Evaluation Committee was set up by the University to consider which activities and posts were to be outsourced.
 7. There were no further consultation meetings between the Applicant and the University until 21 June 1999. At this meeting a more detailed document proposing the disestablishment of 323 posts was handed to the Applicant. A copy was sent to all employees potentially affected by the proposal. This proposal emanated from recommendations of the Evaluation Committee. The Applicant requested a copy of the evaluation committee report but the University refused this request. A Council meeting was held on 30 June 1999. In terms of the agenda of that meeting, the Council was asked to endorse management's proposal for: *"The disestablishment of 323 posts as identified by the Evaluation*

Committee and the outsourcing of all tasks previously covered by these posts to a contractor/s meeting the criteria of the University.

Delegate the authority to terminate the services of certain staff members on operational grounds to the deans and heads of support departments or their nominees”.

8. The Council declined to take the decision on outsourcing. It also declined to accept, as it was asked to do, that “a convincing case had been made out that outsourcing was the only route to follow in order to focus on its activities”, but resolved as follows :

to focus the university’s work on core activities and to agree in principle to use outsourcing as a technique to achieve this; and to mandate management to arrange a tightly-timetabled round of further consultations with trade unions and the SRC, in compliance with the relevant legislation, and bring proposals, with the responses of interested parties, to the next meeting of Council, all relevant information to be made available to the parties concerned.

It was only after this meeting of the Council that the Applicant was given the report of the Evaluation Committee.

9. The matter came before the Council again on 26 August 1999. The agenda for that meeting was circulated to all members of the Council in advance. On that date and after proper consideration of the matter the Council resolved as follows :

- 9.1. The outsourcing of all tasks associated with cleaning, gardening, sports ground maintenance and non-core activities usually combined with cleaning tasks in the faculties, such as photocopying, messenger services and tea making;
- 9.2. The dis-establishment of posts affected by the outsourcing;
- 9.3. The termination of employment of employees affected by the outsourcing;
- 9.4. The delegation of authority to the Vice Chancellor and/ or a Deputy Vice Chancellor nominated by her, deans or activity deans and heads of support departments or acting heads of support departments individually, to do

all things necessary to give effect to 9.1 - 9.3 above, including authority to terminate individual contracts of employment;

9.5. The delegation of authority to the Vice Chancellor, and to any officer nominated by her, to contract with third parties for the supply of the services covering all tasks associated with cleaning, gardening, sports ground maintenance and non-core activities, such as photocopying, messenger services and tea making.

On that date this decision was taken by a majority of 12 votes in favour to 5 votes against, with 3 members abstaining.

10. Pursuant to the Council Resolution of 26 August 1999 and on the 31 August 1999 about two hundred and sixty seven (267) employees were handed notices of the termination of their services. This notice states:, inter alia,
"You are hereby given notice that your employment with the University of Cape Town will be terminated on 30 September 1999 due to operational requirements. The month of September will constitute your contractual notice period. Your services are being terminated on a no fault basis".

The notices of termination of services also notified the affected employees that they had until 07 September 1999 to apply for a limited number of vacancies within the University and until 30 September to apply for employment with the second to fifth Respondents.

11. The stance adopted by the applicant from the beginning, i.e. when the University first mooted outsourcing was to dispute that outsourcing was the only route but mainly that should outsourcing go ahead there should be a labour retention clause requiring successful contractors to first offer jobs to former University staff. The Applicant also lamented the insufficient time it had been afforded to consult with its members and further that the University's approach to the consultation process with it, was not in keeping with the requirements of section 189 of the Act. The case argued by the Applicant in these proceedings is that the outsourcing of the affected services was a transfer of part of the University's business to the 2nd to 5th Respondents. The interpretation contended for by the applicant is simply that outsourcing in this case of the University's gardening, sports ground maintenance and cleaning, in particular is a transfer of a part of the university's business, trade or undertaking as a going concern in terms of Section 197(1)(a). On the other hand the

University has argued that the outsourcing engaged by it do not amount to a transfer within the contemplation of section 197. The University's argument is further that in relation to the alternative relief sought, it complied with all the requirements of the law in relation to the termination of services of the affected employees. The Second Respondent also opposed the application. Its opposition can be summarized on two bases as follows: (a) in terms of section 197 when the whole or any part of a business, trade or undertaking is transferred as a going concern the contracts of employment of the employees engaged in that business, or part thereof and the rights and obligations arising from those contracts are transferred only if the transferor and transferee agree that the transfer of the business will involve a transfer of employees. In this case, the submission is that the University and the 2nd respondent have not agreed to the transfer of employees. The second basis of opposition by 2nd Respondent is that even if section 197 does provide for an "automatic" transfer of employees' contracts the present case does not fall within the ambit of section 197 (1)(a) because the work outsourced to the 2nd Respondent is not a business, trade or undertaking and it has not been transferred as a going concern.

In interpreting Section 197 the court should adopt a purposive approach consistent with the purpose of the Act and the Constitution of South Africa Act no 108 of 1996; the court must also examine the substance of the transaction and not the form. The court should also adopt a multi-factorial approach to the analysis of the transaction i.e. not attach more emphasis or importance to one factor over others. In *Foodgro (a division of Leisurenet Ltd) v Keil* (1999) 9 BLLR 857 (LAC) Froneman DJP said at p.878 paragraph 11: *"The pursuit of economic development by means of a particular interpretation and application of the act is, however, qualified by the injunction that it must be done in conjunction with other goals, namely those of social justice, labour peace and democratization of the workplace. This is to be done by fulfilling the primary objects of the act; giving effect to fundamental rights and International Labour organisation obligations;*

providing a proper framework for collective bargaining and in workplace decision-making and effective resolution of labour disputes (Section 1 and 3 of the act)”.

13. Section 197 reads as follows:

“197 Transfer of contract of employment. (1) A contract of employment may not be transferred from one employer (referred to as ‘the old employer’) to another employer (referred to as ‘the new employer’) without the employee’s consent, unless (a) the whole or part of a business, trade or undertaking is transferred by the old employer as a going concern; or (b) the whole or a part of a business, trade or undertaking is transferred as a going concern-

(i) if the old employer is insolvent and being wound up or is being sequestrated; or

(ii) because a scheme of arrangement or compromise is being entered into to avoid winding-up or sequestration for reasons of insolvency.

(2) (a) If a business, trade or undertaking is transferred in the circumstances referred to in subsection (1)(a), unless otherwise agreed, all the rights and obligations between the old employer and each employee at the time of the transfer continue in force if they were rights and obligations between the new employer and each employee and, anything done before transfer by or in relation to the old employer will be considered to have been done by or in relation to the new employer.

(b) if a business is transferred in the circumstances envisaged by subsection (1)(b), unless otherwise agreed, the contracts of all employees that were in existence immediately before the old employer’s winding-up or sequestration transfer automatically to the new employer, but all the rights and obligations between the old employer and each employee and anything done before the transfer by the old employer in respect of each

employee will be considered to have been done by the old employer.

- (3) An agreement contemplated in subsection (2) must be concluded with the appropriate person or body referred to in subsection 189 (1).
- (4) A transfer referred to in subsection (1) does not interrupt the employee's continuity of employment. That employment continues with the new the employer as if with the old employer.
- (5) The provisions of this section do not transfer or otherwise affect the liability of any person to be prosecuted for, convicted of, and sentenced for, any offence".

Interpretation of Section 197.

- 14. In *Schutte and Others v Powerplus Performance (Pty) Ltd and Another* (1999) 20 ILJ 655 (LC) Seady AJ was asked to consider the provisions of section 197. The facts in that matter were briefly, that the second respondent had decided to restructure its vehicle rental business by closing down its workshops and contracting with the first respondent to service and repair its vehicles. The employees who worked in the workshops were offered jobs with the first respondent but on less favourable terms than those they had with the second respondent. The employees refused to accept the new terms. The second respondent then told them that they would be retrenched. They applied to court for relief on the grounds that the transaction between the first and second respondents amounted to a sale of the business as a going concern and accordingly that their contracts with the second respondent were automatically transferred to the first respondent on the same terms and conditions by virtue of Section 197. After considering the decisions of the English courts and the Court of Justice of the European Communities ("the ECJ") on the subject Seady AJ concluded that Section 197

was an employee protection provision. She then proceeded to consider factors that suggested that a transfer had taken place and concluded that a transfer as contemplated by section 197 had indeed taken place. She concluded that the sale of the workshops to the first respondent was a transfer within the contemplation of Section 197 and that the employees' employment contracts were automatically transferred to the first respondent. Seady AJ found that Section 197 provides protection to employees whose jobs are affected by the transfer of the business or part thereof as a going concern.

15. In the *Foodgro v Keil* (supra) matter the issue was not whether the transferred contract of employment could be varied but the effect of the transfer itself on employment contracts in general. Foreman DJP confirmed the views of Seady AJ that Section 197 was an employee protection provision. He motivates this view as follows: *"if the purpose was to make it as easy as possible for purchasers to acquire a business from another without incurring obligations to existing employees, the introduction of section 197 would have been unnecessary. The common law would have created adequately for that situation; the provisions relating to automatic transfers of contracts of employment in section 197(1) and (2) and the non-interruption of an employee's "continuity of employment" (section 197(4)) secures advantages not previously enjoyed by employees; even after automatic transfer of contracts of employment under section 197 employees may still, unilaterally, resign from employment, without attracting additional sanction under the act."*(paragraph 13 of the judgement).
16. The proper approach in my view is to analyse section 197 properly. The subject matter of section 197 is the transfer of a contract of employment as opposed to the transfer of a business or part thereof. The first part of Section 197 is in keeping with the common law, that a contract of employment may not be transferred without the employee's consent. From there Section 197 then makes a break from the common law by providing that a contract of employment may be transferred without the employee's

consent if the business (of the transferring employer) or part thereof is transferred as a going concern. Seady AJ in the Schutte v Powerplus matter (supra) took the view that where a business or part thereof is transferred as a going concern then the employment contracts (affected by such transfer) are automatically transferred. In paragraph 30 of the judgment she states: *“The primary purpose of section 197 is to protect the rights of employees during certain process of business restructuring. Their continuity of employment is ensured if there is a change of employer.”*

17. I do not agree that section 197 provides blanket protection of jobs when businesses are transferred. This section prohibits the transfer of employment contracts without the consent of the employees concerned. The section however provides that an employer may transfer employment contracts without the consent of the employees concerned where he transfers his business or part thereof as a going concern. In other words the provisions of section 197 become relevant where the transfer of the employment contracts without consent is contemplated. The employee protection alluded to by Seady AJ and Froneman DJP is only relevant where employment contracts are transferred without the employee's consent. Surely it follows that the Legislature would protect the interests of employees whose contracts are transferred to another employer without their consent. The Legislature has done this in Section 197(2)(a) and the logical reason for this protection is that the employees concerned have had no say in the transfer of their contracts of employment,
18. Section 197(2)(a) preserves the terms and conditions that applied to the employees whilst employed by the old employer. In terms of section 197(2)(a) the old terms and conditions are preserved unless agreed otherwise. The agreement envisaged here must in terms of Section 197 (3) be concluded in the case of employees, with the union that represents the affected employees. It is clear from Section 197(2)(a) that parties are at liberty to agree on whatever terms and conditions they may choose. This means that

where a transfer of a contract of employment, as envisaged in Section 197 (1)(a), occurs parties are not compelled to maintain the old terms and conditions if they agree on other terms and conditions. The compulsion to maintain these terms and conditions applies where there is no agreement between the parties and importantly where the contracts of employment are transferred without the consent of the affected employees. Section 197(4) guarantees continuity of employment where contracts of employment are transferred from employer to employer.

19. It follows that in my view section 197 does not compel the automatic transfer of contracts of employment in cases of transfers of a business or a part thereof. What the section does is to permit the transfer of a contract of employment without the consent of the employees concerned. In this sense I agree with Seady AJ's comments in paragraph 29 where she states: *"In the absence of statutory provisions like Section 197 an employer could face onerous procedural obligations, compensation orders and costly severance payments in situations where it seeks to transfer a business, including the services of its employees. A mere cession of employment contracts would not suffice. A combined cession and delegation is required. The common-law requires that contracts of employment be terminated and fresh contracts be entered into with the new employer. The consent of the old employer, new employer and employee is required. Failing this the old employer would have to terminate the contracts of employment and in so doing act lawfully and fairly. Section 197 shortcircuits this, although its relationship to the unfair dismissal provisions of the act is not clearly articulated."*

These comments confirm my view that an employer is permitted to transfer a contract of employment without the consent of the employees concerned and, in turn, the new employer is compelled to maintain the same terms and conditions applicable to those employees where such transfer occurs. If the legislature meant to compel employers to transfer contracts of employment in all transfers of

businesses, the provisions of the act would and should have specified this such as is the case in section 197(2)(b). The plain meaning is that an employer is permitted to transfer an employment contract without the consent of the employees concerned only if the business is transferred as a going concern.

20. On the other hand section 197(2)(a) appears, at first glance, to provide that indeed if a business or part thereof is transferred as a going concern (in terms of section 1(a)) then all employment contracts at the time of the transfer are also automatically transferred. The key to the interpretation of this sub-section is found in its link with Section 197(1)(a). To me section 197(2)(a) means no more than that when a contract of employment is transferred with a business or part thereof (which is transferred as a going concern) then all rights and obligations in existence at the time of the transfer are preserved. In other words section 197(2)(a) deals with the consequences of a transfer of a contract of employment without the employees consent which is the subject matter of section 197(1)(a). In a nutshell section 197(1)(a) and 197(2)(a) do not (and cannot) provide for the same thing i.e. the transfer of a contract of employment. If this were so the two subsections would be contradictory in that Section 197(1)(a) would provide for permissible transfers and Section 197(2)(a) would provide for automatic (compulsory) transfers of employment contracts. In my view employment contracts are automatically transferred in the case of section 197(2)(b). A careful reading of sections 197(2)(a) and 197(2)(b) reveals that they provide for different scenarios. Section 197(2)(a) provides for the preservation of rights and obligations during the transfer of a business as a going concern. Section 197(2)(b) provides for the automatic transfer of contracts of employment in instances where a business or part thereof is transferred as a going concern due to insolvency.

21. Thus an employer in the process of transferring his business or part thereof has the choice whether to also transfer the contracts of employment attached to that business

or not. If he decides to transfer those contracts, section 197 kicks in. He may decide to redeploy the affected employees. In such cases the transferring employer must, in my view, treat the employees affected by the transfer in a fair manner. It is not open to that employer to simply dismiss those employees simply because there has been a transfer of a business or part thereof. In this regard it is worthwhile to remind ourselves that the Constitution guarantees fair labour practices. The Act also guarantees fair labour practices and also offers protection against unfair dismissals.

22. It might be argued that the views expressed in this judgement would allow employers to do as they pleased in circumstances where they transfer their businesses. In my view the vast majority of cases where transfers or outsourcing of businesses takes place restructuring is the always the basis. Employers engage in restructuring exercises to improve productivity, viability and generally to streamline their businesses. This is no different to what trade unions do in their pursuit of improved terms and conditions for their members. They engage employers in negotiations and sometimes call strikes to achieve these objectives. Thus restructuring and improved terms and conditions are issues of mutual interest to both business and labour. It must be mentioned that the ability of labour to counter spurious restructuring processes and sham retrenchments could be viewed as ineffectual as it is dependent on section 189. This situation would look much better had the right to strike been open even against restructuring processes that inevitably lead to job losses. In my view the same should be open to employees whose employer transfers his business and elects to retrench rather than redeploy or transfer their contracts of employment. I see no reason why the employees concerned should not prevail on their employer to do what in their opinion is in their best interest and where no agreement is achieved to be allowed to strike to force the employer's hand.

23. It follows therefore that I do not agree with Seady AJ in the Schutte decision that section

197(1)(a) provides for the automatic transfer of employment contracts where a business or part thereof is transferred as a going concern. However the Foodgro v Keil decision is a different kettle of fish. It is a decision of the Labour Appeal Court which is decision of a court superior to this Court and is therefore binding on this Court. In the view I express in this judgment I am respectfully, not persuaded that the interpretation of section 197(1)(a) and (2)(a) found in the Foodgro decision, is correct, though I am bound by it and must follow it.

24. I now turn to consider if outsourcing is a transfer of a business, or part thereof as a going concern within the contemplation of section 197. It is perhaps prudent to also consider views from the ECJ, which has had occasion to entertain kindred disputes for the past twenty years or so. A comprehensive treatise of English and ECJ cases and authorities was done by Seady AJ in the Schutte v Powerplus case (supra). I do not intend to traverse the same path save to refer to two cases, which were referred to in these proceedings and which I think are of some relevance. In **Schmidt v Spar-und Leihkasse der fruheren amter Bordesholm, Kiel and Croshagen (case 392/92) (1994) IRLR 302** the ECJ was petitioned to consider whether the outsourcing of services even though affecting a single employee could amount to transfer of a business within the contemplation of the Acquired Rights Directive 77/187/EEC. The ECJ opined that indeed such a transaction was a transfer as contemplated by the Acquired Rights Directive even though a single employee stood to be affected. The reasoning of the court is as follows: *“Thus, when an undertaking entrusts by contract the responsibility for operating one of its services, such as cleaning, to another undertaking which thereby assumes the obligations of an employer towards employees assigned to those duties, that operation may come within the scope of the directive. As the court held at paragraph 17 of its judgment in Watson Rask and Christensen, cited above, the fact that in such a case the activity transferred is for the transferor merely an ancillary activity not necessarily connected with its objects cannot have the effect of excluding that*

operation from the directive. Nor is the fact that the activity in question was performed, prior to the transfer, by a single employee sufficient to preclude the application of the directive since its application does not depend on the number of employees assigned to the part of the undertaking which is the subject of the transfer. It should be noted that one of the objectives of the directive, as clearly stated in the second recital in the preamble thereto, is to protect employees in the event of a change of employer, in particular to ensure that their rights are safeguarded. That protection extends to all staff and must therefore be guaranteed even when only one employee is affected by the transfer”.

The other case is that of **Suzen v Zehnacker Gebaudereinigung Gmbh Krankenhaus**

service (1997) IRLR 255 ECJ. In this case certain services were outsourced to institutional and at the expiry of the contract period institution 1 lost the contract to institution 2. An employee of institution 1 sought a declarator that the loss of the contract to institution 2 was a transfer of a business and that her contract was also transferred to institution 2. The ECJ answered the question in the negative ruling that no transfer had taken place. The court reasoned the matter as follows: *“The term entity refers to an organized grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective. In order to determine whether the conditions for the transfer of an entity are met, it is necessary to consider all the facts characterizing the transaction in question, including in particular the type of undertaking or business, whether or not its tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred, and the period, if any, for which those activities were suspended. However, all those circumstances are single factors in the overall assessment, which must be made and cannot therefore be considered in isolation (see*

in particular, SPIJKERS and REMOND STICHTING). As observed by most of the parties who commented on this point, the mere fact that the service provided by the old and the new awardees of a contract is similar does not therefore support the conclusion that an economic entity has been transferred. An entity cannot be reduced to the activity entrusted to it. Its identity also emerges from other factors, such as its workforce, its management staff, the way in which its work is organized, its operating methods or indeed, where appropriate, the operational resources available to it. The mere loss of a service contract to a competitor cannot therefore by itself indicate the existence of a transfer within the meaning of the directive. In those circumstances, the service undertaking previously entrusted with the contract does not, on losing a customer, thereby cease fully to exist, and a business or part of a business belonging to it cannot be considered to have been transferred to the new awardee of the contract.”

26. Decisions of the ECJ must be considered against the backdrop of the Acquired Rights Directive 77/187/EEC. The provisions of the directive and those of section 197 are not couched in similar terms. The directive provides that:

of an undertaking, business or part of a business to another employer as a result of a transfer or merger.

Article 3(1).The transferor’s rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee. Member states may provide that, after the date of transfer within the meaning of Article 1(1) and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship.

Article 3(2). Following the transfer within the meaning of Article 1(1), the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement. Member States may not limit the period for observing such terms and conditions, with the proviso that it shall not be less than one year."

The test adopted by the ECJ in determining whether a transfer of a part of a business has occurred was also considered in *Spijkers v Gebroeders Benedik Abbattoir CV* (1986) (2) CMLR 296 where the following was said *"Consequently it cannot be said there is a transfer of an enterprise, business or part of a business on the sole ground that its assets have been sold. On the contrary, in the case like the present, it is necessary to determine whether what has been sold is an economic entity which is still in existence, and this will be apparent from the fact that its operation is actually being continued or has been taken over by the new employer, with the same economic or similar activities. To decide whether these conditions are fulfilled it is necessary to take account of all the factual circumstances of the transaction in question, including the type of undertaking or business in question, the transfer or otherwise of tangible assets such as building and stocks, the value of intangible assets at the date of transfer, whether the majority of the staff are taken over by the new employer, the transfer or otherwise of the circle of customers and the degree of similarity between activities before and after the transfer and the duration of any interruption in those activities. It should be made clear, however, that each of these factors is only a part of the overall assessment which is required and therefore they cannot be examined independently of each other."*

28. It is clear from these decisions that the acceptable approach is to examine the substance of the transaction and not the form thereof and to weigh all the factors pointing in either direction and make an overall assessment without treating any individual fact as decisive. S Andeman in: *Labour Law: Management Decisions and Workers' Rights* (3ed) (Butterworths, 1988) at 200 summarizes the ECJs' case law on the

subject as follows: *“The directive is meant to apply to a wide variety of transfers including those between non-commercial ventures and those involving the initial contracting out of services or part of an operation from one employer (public or private) to another, as long as the business has retained its identity and the operation is continued.. It does not matter that the transferor retains ownership of the assets used, or that the service is performed exclusively for the transferor, that the service is performed for a fixed fee and hence the contractor’s risk of loss is nil as long as a stable economic operation continues”.*

29. In considering the ECJs’ decisions I have found that a uniform approach has proved to be elusive. The approach in the Suzen case of a concomitant transfer of tangible or intangible assets in particular seems to be somewhat at odds with the decision in Schmidt, which did not consider the assets test. The assets test found in the Suzen case was adopted by the UK court of Appeal in *Betts v Brintel Helicopters* (1997) IRLR 361 case where it was held that the transfer of helicopter services to ferry workers and goods to and from oil rigs in the North Sea was not a transfer within the meaning of the Directive. The court considered that the incoming contractor took over no assets and did not employ anyone who had previously worked for the outgoing contractor.
30. In my view the sale of a business, legal transfer thereof to another employer or merger is markedly different to outsourcing. Outsourcing involves the putting out to tender of certain services for a fee. The contractor performs the outsourced services and in return is paid a fee for its troubles by the employer. Where outsourcing occurs the employer pays the contractor a fee to render the services outsourced as opposed to paying salaries or wages to a group of employees to render the outsourced service. An outsourcing transaction is usually for a fixed period of time at the end of which it again goes to tender and the existing contractor could lose the contract to another contractor.

31. The sale of a business or part thereof leads to consequence different to those arising from outsourcing. It gives me a fundamental problem to equate outsourcing to a legal transfer or sale. In the case of a sale or legal transfer the business or part thereof changes hands permanently and the transferring or selling entity receives a consideration for the business that is transferred. The situation is different when it comes to outsourcing. The outsourcing party retains some control over the outsourced services, for example, the standard of performance or service delivery must meet certain criteria set by the outsourcing party. At the end of the contract period the outsourcing party could decide to perform the services itself and not invite further tenders.
32. It appears therefore that the fact that in a legal transfer or sale the fact that there is a permanent transfer of a business or part thereof must mean that in an outsourcing what is transferred is nothing more than the opportunity to perform the so-called outsourced services. In my view it remains the prerogative of the outsourcing party to decide who gets the contract to perform the outsourced services. If outsourcing is a transfer of a business in terms of Section 197 I do not see how the contractor who loses the contract can transfer its employees to the successful contractor as it has no say in who gets the contract. That say remains vested in the outsourcing party. Conversely I do not see how the outsourcing party can force the successful contractor to take over the employees of the outgoing contractor. This scenario illustrates the difficulties presented by regarding outsourcing as a transfer of a business.
33. In this regard it is possible that some outsourcing exercises could be of a permanent nature, and this type could amount to a transfer of business. each case must be considered on its own merits. An outsourcing exercise of a permanent nature that also involves the transfer of assets is more akin to a transfer of business than one that is not. it also seems proper that an outsourcing transaction where the outsourcing party

relinquishes the control and relinquishes the power to dictate standards over the outsourced services is more akin to a transfer of a business or part thereof. In casu the University did not simply outsource all cleaning functions for instance. Some cleaning functions and other related functions such as photocopying and messenger services were retained while others were outsourced. Furthermore managerial and senior supervisory responsibility in the cleaning section, in particular, was retained by the University. The university has therefore retained a measure of control of the outsourced services. It is correct too that the University has not outsourced all functions related to any of the services that were outsourced. As stated the University has retained some cleaning responsibilities whilst outsourcing others. Therefore what we have here is not the outsourcing of each service as a whole but some parts of each. This leads to the result that a number of activities performed and managed on differing bases and performed by persons employed on different bases were curtailed by the University. In the end the outsourced services whilst capable of being identified as identifiable economic entities they share that identity with the services not outsourced by the University. This fact coupled with the fact that the outsourcing is not permanent and the fact that the university has retained some control over the outsourced services militates against a conclusion that a transfer has taken place as contemplated by section 197(1)(a). In the circumstances of this case therefore it cannot be found that the outsourcing done by the University amounts to a transfer of a part of a business as contemplated in section 197(1)(a). Even if one were to consider the phrase "going concern" as part of the scenario. This phrase means nothing more than "continue in actual operation". See in this regard **General Motors Sa (Pty) Ltd v Besta Auto Component Manufacturing (Pty) Ltd & Another 1982 (2) SA 653(SE)** where Kannemeyer J quoted with approval the following passage from an Australian judgment:

"The words 'as a going concern' are merely intended to mean that the shop is being kept open instead of being closed up, and that the customers are being kept together, so that if the purchaser wishes to keep on the business he can do so;

that ... the vendors only propose to sell the stock and fixtures, and they leave it to the person who buys to decide whether he will carry on the business or not, and that meanwhile, lest the purchaser should care to carry on the business, they keep it open till he takes his choice. In some cases they shut up the shop prior to the sale; in other cases they keep it 'going' so that the trade may not be broken and dispersed."
 (per Madden CJ in *Ferne v Wilson* (1900) 26 VLR 422 at 437)

In this case the fact that the University retains control over the outsourced services and that the transaction is over a fixed period cannot make the transaction a transfer as contemplated by section 197(1)(a).

Alternative declarator

34. The applicant seeks in the alternative, an interdict against the University to dismiss its members pending the final determination of the dismissal dispute. The basis for this claim is that the dismissals were not effected for a fair reason or in accordance with a fair procedure. The University has set out a comprehensive case showing how it has, allegedly, complied with section 189 of the Act. This is set out in the affidavits filed in opposition to this application. On the other hand the Applicant has set out a comprehensive case showing that the retrenchment of its members was not justified. This Court has said in other cases that the relief sought by the Applicant in these proceedings will be sparingly granted. This is in view of the fact that the legislature has specifically empowered this Court to adjudicate such disputes. The Court has stated that exceptional facts and circumstances must be brought to the fore to justify intervention by the Court in urgent applications. In this case the applicant has not addressed the attention of the Court to exceptional circumstances that would entitle it to the relief it seeks. What the Applicant has done is to set out a comprehensive treatise of the law to show that the dismissal of its members was unfair and not justified. This is

the type of case that should be made at the adjudication stage of the matter. At this stage of the proceedings and in view of the case made out by the Applicants it seems justified to conclude that no relief can be granted at this stage. The matter must be prosecuted in the normal cause.

In the final analysis the court makes the following order:

1. The application is dismissed.
2. There is no order as to costs.

MLAMBO, J

Date of Judgement: 29 March 2000

For the applicant: Mr Benjamin of Cheadle, Thompson and Haysom

For the first Respondent Mr. Duminy, SC with Mr. Stelzener

Instructed by Jan S Devilliers and Son

For the second Respondent Mr. Breytenbach

Instructed by Bowman Gilfillan Inc.