

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. JS371/03

In the matter between:

E.C. VAN DER VELDE

Applicant

and

BUSINESS AND DESIGN SOFTWARE (PTY) LTD

First Respondent

NATIONAL GOLF NETWORK (PTY) LTD

Second Respondent

RULING ON POINT IN LIMINE

A VAN NIEKERK AJ

[1] The parties have requested the Court to determine, by way of a preliminary ruling, the effective date of the transfer of a business for the purposes of section 197 of the LRA in circumstances where their agreement provides for a transfer of contracts of employment on a date that precedes the signature of the agreement and the fulfilment of certain suspensive conditions.

[2] The parties requested the ruling at the commencement of a trial in which the Applicant contends that he was unfairly dismissed by the First Respondent ("B&DS") for a reason that is automatically unfair, being a transfer of a business in terms of section 197 of the Labour Relations Act or for a reason related to the transfer. In the alternative, the Applicant claims that

B&DS unfairly retrenched him. In both instances, relief is also sought against the Second Respondent (NGN) on the basis that it is a transferee (new) employer for the purposes of section 197 and that it has incurred liabilities to the Applicant on that basis.

[3] B&DS alleges that at the time of the Applicant's dismissal, there was no employment relationship between it and the Applicant, and that it should not be party to these proceedings but for a potential joint and several liability with NGN in terms of section 197(8). That liability is to pay severance pay to the Applicant should he be found to have been dismissed for operational requirements, and should his refusal to accept the alternative employment offered to him be found to be reasonable.

[4] The facts are largely common cause. On 3 April 2003, B&DS and NGN signed an agreement in terms of which NGN acquired all of the rights and obligations of AST National Golf Network, which provides the handicapping system and golf card used by the majority of golfers and golf clubs in South Africa. The transaction was described in a communiqué issued by NGN on 8 April 2003 as a 'friendly internal acquisition'. NGN, the purchaser, comprised a consortium made up of a number of the managers of B&DS that successfully tendered for the purchase of the business. The Applicant was a member of a competing consortium that was unsuccessful in its bid to buy the business.

[5] The agreement provided for the sale of the business as a going concern. There is no dispute that in these circumstances, the transaction is one that was affected by section 197.

[6] For reasons that are not apparent, the parties agreed that the effective date of the agreement, notwithstanding the date on which it was signed, was 1 January 2003. All risk and benefit attaching to the business was deemed to have passed to NGN on the effective date,

and ownership was deemed to have passed to NGN on that date provided that the cash portion of the purchase price had been paid by the delivery date, the business day after the last of the suspensive conditions had been fulfilled. The whole of the agreement was subject to certain suspensive conditions that were to be fulfilled by 4 April 2003. In the event of the suspensive conditions not being fulfilled, the agreement makes provision for a reversion to the status quo. There is no dispute that the suspensive conditions were timeously fulfilled.

[7] Employment related issues are regulated by clause 16 of the agreement of sale. B&DS and NGN agreed that from the effective date, NGN would take over the employment of all employees employed in the business as at the effective date, i.e. 1 January 2005. The names of these employees were listed in an annexure to the agreement. The Applicant's name appears on that list. Clause 16 provides that the employees listed in the schedule would be *'employed by the purchaser [NGN] during the interim period in terms of section 197 of the Labour Relation Act 66 of 1995 upon the same terms and conditions including remuneration and other benefits as those upon which they were employed by the seller [B&DS] immediately prior to the effective date.'*

[8] The interim period is defined in the agreement as the period between the effective date and the delivery date. What B&DS and NGN presumably intended was that once the purchase price had been paid and the suspensive conditions fulfilled, the affected employees would be deemed to have been employed by NGN with effect from 1 January 2003, on the terms and conditions that has existed as between them and B&DS. Presumably, if the suspensive conditions had not been fulfilled, the deeming provisions would not have applied and the continuity of the employees' employment by B&DS would not have been affected. The employees listed in the schedule were not parties to the sale agreement. Their consent was not sought for the transfer of their employment contracts from B&DS to NGN, nor does it appear that until at least the date on which the agreement was signed, that they

were aware of the deeming provision in relation to their employment.

- [9] On 28 March 2003, the Applicant was advised that he had been retrenched. The circumstances of his termination of employment are not relevant for present purposes, but the Respondents submit that the Applicant was fairly dismissed by NGN for reasons related to NGN's operational requirements, and that NGN was under no obligation to pay severance pay because the Applicant unreasonably refused an offer of alternative employment.

[10] Mr van As, who appeared for both Respondents, submitted that B&DS and NGN were entitled to determine the effective date of the transfer of employment contracts, and that in the absence of some ulterior motive, the Court should not interfere with that intention. On that basis, he submitted that the Applicant's contract of employment had transferred from B&DS to NGN on 1 January 2003, and that the restructuring that had resulted in Applicant's retrenchment had therefore occurred after the transfer of his employment to NGN. On 28 March 2003, the Applicant's employer was NGN, he was dismissed by NGN, and only NGN is liable for the consequences of any unfair dismissal that may have been effected.

- [11] Mr Bleazard, who appeared for the Applicant, submitted that for the purposes of section 197, the transfer of the business from B&DS to NGN occurred no earlier than the date on which the suspensive conditions in the sale agreement were fulfilled, i.e. 4 April 2003. But for his dismissal on 28 March 2003, the Applicant's contract of employment would have been transferred from B&DS to NGN, with the business, during the first week in April 2003.

- [12] In one sense, the issue that the parties have asked the Court to decide

is academic. An essential element of section 197 is the assumption of liability by the transferee (new) employer for anything done by the transferor (old) employer prior to the transfer, including any unfair dismissal, the commission of any unfair labour practice, or any act of discrimination. (See section 197(2)(c)). On this basis, whether the transfer of the business was effected in January 2003 or April 2003, NGN is the respondent that is ultimately liable if the Applicant is found to have been unfairly dismissed.

- [13] However, the date of the transfer for the purposes of section 197 appears to be of some significance to the Applicant and the Respondents. The effect of Mr Bleazard's submissions is that fixing the date of transfer determines the legal identity of the Applicant's employer on the date of his dismissal. To the extent that the Applicant claims to have been unfairly dismissed by reason of the transfer of the business or a reason related to it, the fact that the date of dismissal preceded the date of the transfer of the business, would further assist the Applicant in his cause. Having said this, I did not understand Mr Bleazard to suggest that the Applicant would necessarily be deprived of a claim for unfair dismissal if the dismissal took place after a transfer in terms of section 197. On the contrary, it seems clear to me that section 187(1)(g) (which lists the reason of a transfer or a reason related to a transfer in terms of section 197 as automatically unfair) contemplates a dismissal effected either pre-transfer or post-transfer, by the old employer or the new employer respectively. What is relevant to the enquiry is whether the proximate cause of the dismissal is one that the transfer itself or a reason related to the transfer, or for some other reason that is potentially fair. But that is not a determination that needs to be made at this point in the proceedings.

- [14] Section 197 reads as follows: -

"Transfer of contract of employment

197. (1) *In this section and in section 197A-*

- a) *'business' includes the whole or a part of any business, trade, undertaking or service; and*
- b) *'transfer' means the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern.*

2) *If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6)-*

- a) *the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;*
- b) *all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;*
- c) *anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new*

employer; and

- d) *the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer."*

[15] Despite any previous uncertainty, the unambiguous effect of section 197(2) is an automatic and obligatory transfer of contracts of employment from the transferor employer to the transferee employer when there is a transfer of the whole or part of a business as a going concern. This consequence is achieved by the mechanism of an automatic substitution of the transferee (new) employer in the place of the transferor (old) employer, and the requirement that, unless otherwise agreed in terms of section 197(3), all rights and obligations in terms of existing contracts continue in force between the new employer and the affected employee, and the new employer assumes the employment related liabilities referred to in subsection (2)(c).

[16] The transfer of the whole or part of a business as a going concern triggers the application of section 197. Section 197(2) provides that '*If a transfer of a business takes place...*' then the consequences described above follow. Regrettably, the LRA provides no guidance as to when a transfer of a business can be said to have taken place, nor does it seem that this issue has been considered previously by this Court.

[17] As I have noted above, Mr van As submitted that the Court should simply give effect to the contracting parties' intention, at least in the absence of any manifest fraudulent or otherwise devious intent. He submitted that a distinction might be drawn between the notion of a

'real' employer, and a 'deemed' or 'substituted' employer. In either case, NGN was the Applicant's employer, because in terms of the contract between NGN and B&DS, NGN had agreed to take over the employment contracts with effect from 1 January 2003, and on the application of section 197, NGN was substituted as the Applicant's employer on the same date, being the effective date of the sale. Mr Bleazard submitted that the 'effective date' established and defined by the contract of sale was nothing more than a fiction. The fiction was that there was an agreement between B&DS and NGN on 1 January 2003. On the date of the Applicant's dismissal, 28 March 2003, the agreement between B&DS and NGN remained conditional. On that basis, there been no transfer of employment contracts before 28 March 2003, and between 1 January 2003 and 28 March 2003, the Applicant had remained employed by B&DS. In response, Mr van As submitted that in accordance with the contractual rules regulating suspensive conditions, once the suspensive conditions were fulfilled, all of the consequences of the contract, including clause 16 (regulating the transfer of employment contracts) came into operation with effect from the agreed effective date of 1 January 2003.

- [18] There may be cogent commercial reasons for sellers and purchasers of businesses to make the operation of their agreements retrospective. As between them, there is nothing to preclude the assignment of employment-related responsibilities for defined periods, and their assuming any related liabilities. Section 197 recognises employees' interests by requiring disclosure to affected employees of the terms of the agreed apportionment of liability in respect of certain defined payments. However, in my view, it does not necessarily follow that the employer parties' agreement on an effective date for their transaction is binding on the affected employees, or that for the purposes of section 197, the employer parties to the underlying transaction can unilaterally

decide on the date on which the provisions of section 197 will be triggered.

[19] As a general rule, section 197 must be purposively applied, so as to give effect to the Constitution and in particular, to the right to fair labour practices. Consistent with the concept of fair labour practices, section 197 attempts to strike a balance between employer and employee interests. The section does so by protecting security of employment and employee rights when a business is transferred, and it facilitates transfers of business by permitting transfers of contracts of employment without employee consent. The section also avoids retrenchments and the obligation to pay severance pay in circumstances of business transfers. (*See National Education Health and Allied Workers Union v University of Cape Town & others* (2003) 24 ILJ 95 (CC), and Todd et al *Business Transfers and Employment Rights in South Africa* (Lexis Nexis Butterworths 2004) at 22).

[20] For the reasons that follow, and having regard to the purpose of section 197, it is my view that in the present instance the date on a transfer for the purposes of the section 197 took place was the date on which the sale of the business became unconditional and NGN assumed full control of the business bundle that is the subject of the transfer. In other words, the date of transfer for the purposes of section 197 cannot be a date earlier than what might be termed the date of closure, the date on which the transferor employer takes final and unconditional control and responsibility for the transferred business. This is not a date that can be made retrospective or postponed by the will of the transferor and transferee employers, and it is a date to be determined objectively, and in the absence of any variation agreement with the parties defined by section 197(6)(a), regardless of what has been agreed by the employer parties.

[21] First, section 197 is structured so as to require the substitution of the transferee employer for the transferor when a business is transferred from one to the other as a going concern. Whether or not there has been a transfer of a business as a going concern is a matter that must be objectively determined, having regard to all of the relevant factors. This assists a Court to determine how many components of a business have found their way to the transferee and whether it can accordingly be said that the business is the same or substantially the same after the transfer, but in different hands (see *Todd et al* at 56). The objective determination that must be made implies that there is some physical transfer or at least some assumption of control over the tangibles and intangibles that comprise the business and which are the subject of the transfer. There is a sense of chronology in section 197 - the transfer of the business occurs, immediately followed by the substitution of the transferee employer in relation to all contracts of employment in force on that date. To permit employer parties to manipulate the provisions of section 197 by effectively ceding employment contracts with retrospective effect to a date preceding the date of the completion of the transaction and the assumption of physical control of the business is inconsistent with the logic and structure of the section.

[22] Secondly, and in relation to the affected employees, section 197 is predicated on the notion that employees have a right to know the identity of their employer. This is a right recognised by the common law, which prohibits the transfer of a contract of employment from one employer to another without the employee's knowledge and consent. Section 197 creates a statutory exception to the common law rule, since when a business is transferred in circumstances where the section applies, it has the consequence of the substitution of one employer for another, by operation of law, irrespective of the consent of

the employee. But the section has a series of in-built protections for employees. Section 197(7) obliges the transferor and transferee employers to agree on defined employment-related liabilities for severance pay and certain accrued earnings, and to disclose the terms of their agreement to affected employees. In a transaction that complies with section 197, an employee would be aware therefore of the identity of the new employer and which of the employers had assumed the liabilities concerned. In the case of dismissal for transfer-related reasons (such as are alleged to exist in the present matter) the identity of the employer that effects any dismissal is of obvious significance to an employee. If the employer parties to a transfer were able to manipulate the transfer date by agreeing deemed dates on which the business transfers or on which section 197 is triggered, there is potential prejudice to an affected employee.

- [23] Thirdly, to allow the employer parties to fix the date of transfer of a business for the purposes of section 197 permits the prospect of abuse. Section 197(8) provides that in respect of the liabilities mentioned above, the old employer remains jointly and severally liable to an affected employee, with the new employer, for a period of 12 months after the date of the transfer. If the employer parties to an agreement effecting the transfer of a business were able to manipulate the transfer date, it may be possible, by fixing an effective date 12 months and one day prior to any physical transfer of the business to circumvent this protection, particularly when the transferee employer is a shell. This no doubt was one of the reasons for enacting section 197(8) - the prospect of unscrupulous employers using section 197 to transfer employees into a shell company and then putting those companies into liquidation to avoid payment of unpaid remuneration, severance pay, accrued leave, and the like. While I appreciate Mr van As's point that the Court is always entitled to intervene in the event of

fraud or the fixing of a date of transfer for some other ulterior motive, this is a matter best dealt with at the level of principle.

[24] Finally, on the facts, the Respondents did not conduct themselves consistently with the proposition advanced by Mr van As. The AST Group made the announcement of the sale of the business on 8 April 2003. The terms of the announcement make it clear that in AST's announcement of its interim results on 27 March 2003, it advised that in relation to businesses identified as non-core, it was '*in the process of closing or disposing of those businesses.*' The announcement of the transaction to third parties in the form of member clubs of the AST network was made on 8 April 2003. In this announcement, notice was given of certain management appointments and responsibilities in the business over which NGN had assumed control, all of which are cast in the future tense.

[25] All of the factual circumstances therefore point to a consummated assumption of control of the business by NGN and closure of the transaction, after the sale of the business became unconditional on 4 April 2003.

[26] In summary, for the purposes of section 197, the business of B&DS transferred to NGN on a date no earlier than 4 April 2003. The fulfilment of the suspensive conditions of the sale agreement may have had the effect that in contractual terms, the whole contract became enforceable and that it became enforceable retrospectively as if it had been unconditional from the outset. But for the purposes of the Labour Relations Act, a transferee employer is substituted for et transferee employer only once any contract underlying the transaction is complete, and the transferee has objectively assumed responsibility

and control of the business that it has acquired.

[27] It follows that B&DS dismissed the Applicant. I emphasise that this is the conclusion I reach on the basis of the application of section 197. If there are any contractual consequences following on any employment related warranties or other assumptions of liability flowing from the agreement of sale, those are matters to be determined by another Court as between the two Respondents. For the purpose of these proceedings, the determination of the factual issues giving rise to any unfair dismissal are to be determined as between the Applicant and B&DS, his employer on the date of dismissal. If the Applicant's dismissal is found to be unfair (either automatically unfair because the reason for dismissal is the transfer or a reason related to it or because B&DS fails to prove that any dismissal effected by reason of its operational requirements satisfies the requirements of substantive and procedural fairness) then any remedy granted by the Court would, in terms of section 197(2)(c), operate as against NGN. In addition, there is the matter of B&DS's potential joint and several liability for severance pay if any order in that regard is necessary.

[28] My ruling therefore is that both Respondents are properly before the Court in any proceedings to determine the merits of the Applicant's claim, and the matter will continue on that basis on the agreed dates of 8 and 9 December 2005.

ANDRE VAN NIEKERK,
Acting Judge of the Labour

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Date of hearing

11 November 2005

Date of judgment:

18 November 2005