REPORTABLE
IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT PORT ELIZABETH)
CASE NO: P 260/10
In the matter between:
ADAM SANDERS Applicant
and
CELL C PROVIDER COMPANY (PTY) LIMITED First Respondent
JOHANNES SMITH / P E RACK 4100C Second Respondent
ADVANCE WORX 119 (PTY) LIMITED Third Respondent
G-WORX 12 (PTY) LIMITED Fourth Respondent
JUDGMENT
DE SWARDT, A J:
The applicant applied to this Court as a matter of urgency on 23 April 2010, inter alia,
for an Order:
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'*directing that the takeover of the businesses of the third and fourth respondents by the first or second respondent will amount to a transfer of businesses as going concerns as contemplated in section 197 of the Labour Relations Act, No 66 of 1995 ('the Act');*
directing that whichever of the first or second respondents take over the businesses of the third and fourth respondents, take the applicant into its employ with effect 1 May 2010 on the same terms and conditions as he is currently employed;'
The application came before Cele J on 23 April 2010 and after hearing argument on
urgency and, to some extent, the merits of the application, the application was postponed for hearing on 7 May 2010.
The applicant filed a Notice of Abandonment of Relief in Respect of the first respondent on 6 May 2010, stating that he no longer sought relief as against the first
respondent, save for costs in the event that it continued to oppose the relief sought
against the second respondent. In the event, the first respondent did not pursue the
matter.
When the application was launched on 23 April 2010, the second respondent was cited as Johannes Smith ('Smith'). On the morning on 7 May 2010 the parties agreed
that P E RACK 4100C ('P E Rack') would be substituted for the second respondent
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and that all allegations made against, or in respect of, the second respondent, would

be deemed to be allegations made against, or in respect of, P E Rack. It was further agreed, inter alia, that the application would proceed on the basis that the papers which had been filed on behalf of the first respondent, would stand as a defence to the applicant's claims against P E Rack in its capacity as second respondent, as though these had been filed on behalf of the second respondent. It is not clear to me whether P E Rack is merely a trade name adopted by Smith, or whether it is a partnership, company or close corporation.

When the application was heard on 7 May 2010, the applicant was represented by his attorney of record, Mr M C Kirchmann of Kirchmanns Inc. The second respondent was represented by Mr M S M Brassey S C, assisted by Mr M J van As, on instructions of Deneys Reitz Attorneys.

Whereas the urgency of the matter had previously been in dispute, the second respondent indicated that it abandoned its opposition in this regard. Objection was, however, made to a supplementary affidavit filed by the applicant and an affidavit deposed to by the applicant's attorney, inasmuch as the Rules do not provide for the filing of such further affidavits and the leave of the Court had not been sought in this regard. An affidavit was also filed on behalf of first respondent. Such affidavit was filed well after the time stipulated in the Order of Cele J. Mr Kirchmann did not object to the filing of such affidavit.

The Court has a discretion to allow the filing of additional affidavits which are not provided for in the Rules. The supplementary affidavit deposed to by the applicant served to place facts before this Court in regard to developments since the granting of the Order by Cele J on 23 April 2010. The affidavit deposed to by Mr Kirchmann dealt largely with the events during the proceedings on 23 April 2010. To the extent that it is necessary to do so, the applicant is granted leave to file both of these affidavits.

The first respondent ('Cell C'), is a cell phone operator which, inter alia, sells air time
contracts, mobile phone accessories, pre-paid hand sets and renewals to members
of the public. In order to do so, it enters into franchise agreements on a country wide basis. Until 30 April 2010 the third and fourth respondents were franchisees of Cell C and conducted business under the name and style of Cell C Queenstown
and Cell C King Williamstown, respectively. Applicant was in the employ of these franchisees as a General Manager, a position he had held since 2002.
In terms of the franchise agreements, the leases in respect of the premises where
third and fourth respondents conducted business as aforesaid, were held by Cell C
and sub-leases were entered into between it and the third and fourth respondents.
Cell C also owned the furniture and fittings in the shops. Third and fourth respondents, as the franchisees, processed air time contracts on behalf of Cell C and
were paid 10% of the air time fee payable by contracted customers to Cell C. The
franchisees were paid a once-off connection fee whenever a new contract was

activated and a fee was paid in respect of 'pay-as-you-go' air time which was sold on
behalf of Cell C. The franchisees were required to maintain a stock of cell phones which were handed out to customers when new contracts were entered into. In the
ordinary course of their business, the franchisees dealt with queries and complaints
received from customers of Cell C, inclusive of repairs to cell phones, sim card swops
and account enquiries, irrespective of whether the customer had concluded his/her
contract with that particular franchise operation or not.
The written franchise agreements between Cell C and the third and fourth respondents expired on 24 January 2005 and 30 September 2008, respectively. The
franchises, however, continued on exactly the same terms and conditions on a month-to-month basis until April 2010. Earlier in the year, approximately R800,000.00 was spent in upgrading the premises where third and fourth respondents conducted business.
During March 2010 Mr Brett Barlow ('Barlow'), the managing director of the third and

fourth respondents, received notice of termination of the franchises from Cell C in
terms whereof the franchise agreements would terminate on 30 April 2010. The franchisees were advised by Cell C to terminate the services of their employees by
way of retrenchment, to remove their personal belongings from the premises on 30
April 2010 and to transfer the Telkom landlines at the premises into the name of Cell
C. The third and fourth respondents were obliged to continue the normal running of the businesses up to 30 April 2010 and to assist in the handing over and transition

process of these businesses to the new franchisee. The leases in respect of the premises where business was conducted, remain in place. All in all it was Barlow's
impression that the businesses which had previously been conducted by third and
fourth respondents, would continue to operate as they had previously, but under different ownership.
Barlow advised the applicant of the termination of the third and fourth respondents'
franchise agreements on 11 March 2010. Barlow further informed the applicant that
it would be necessary to enter into consultations with him (the applicant) and other
staff members around their retrenchment. Applicant thereupon consulted his attorney of record who, inter alia, called upon Cell C to acknowledge that section 197
of the Act would find application and that the employment contracts of all of the employees would be automatically transferred to the new franchisee(s). Cell C responded by denying that section 197 was applicable inasmuch as it was not buying
back the franchise undertakings from the applicant's employers, but had merely terminated the franchises as it was in law entitled to do.
Second respondent's defence to the applicant's claim remained that section 197 was
not applicable inasmuch as Cell C had simply terminated the franchise agreements
previously held by third and fourth respondents, whereupon a new franchise agreement was to be entered into between Cell C and second respondent. It was alleged that '*the business of the third and fourth respondents, namely the procuring*

of new customers and facilitation of the conclusion of airtime contracts between the

first respondent and the new customers and the earning of ongoing airtime commission on such contracts, ended when the applicant (sic) terminated its franchise agreements with the third and fourth respondent.' It was argued that '*the mere fact that the second respondent will run a business from the same premises where the third and fourth respondents ran certain of their businesses does not mean that there has been a transfer of a business as a going concern from the third and fourth respondents to the second respondent.'* It was pointed out that the third and fourth respondents had removed all of their possessions and stock from the premises and that there has been no transfer of goodwill.

Subsequent to 1 May 2010 when second respondent commenced doing business new contracts of employment were entered into with one Barnard and one Nholaka who had previously been in the employ of the third and fourth respondents.

Section 197(1)(a) of the Act defines 'business' as including '*the whole or a part of any business, trade, undertaking or service'*. 'Transfer' is defined to mean '*the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern'.* Section 197(2) of the Act provides, inter alia, that if a transfer of a business takes place the new employer is automatically substituted for the old employer in respect of all contracts of employment in existence immediately before the date of transfer.

In *National Education Health and Allied Workers Union v University of Cape Town*

and Others (2003) 24 ILJ 95 (CC) at 115 - 118 ('NEHAWU v UCT') the Constitutional Court made it clear that the purpose of section 197 of the Act was two-fold; it was aimed at protecting workers against the loss of employment in the event of the transfer of a business and to facilitate the sale of businesses as going concerns by enabling the new employer to take over the workers as well as other assets in certain circumstances. It facilitates commercial transactions while protecting the workers against unfair job losses.

Against this background, the Constitutional Court gave content to the phrase 'going concern' which is used in section 197 and held that what is transferred '*must be a business in operation "so that the business remains the same but in different hands".*
Whether or not that has occurred, is a question of fact which must be determined objectively in the light of the circumstances prevailing in each case. Regard must, however, be had to the substance and not to the form of the transaction. Matters such as the transfer of tangible and intangible assets, whether or not employees are taken over, whether customers are transferred and whether or not the same business is being carried on by the new employer, are all relevant, but none of these factors are individually decisive. Moreover, the fact that there is no agreement to transfer the workforce as part of the transaction, does not preclude the transaction from constituting a transfer of the business as a going concern within the meaning of section 197 (*NEHAWU v UCT, supra, at 119 - 120 para [56] to [57]*).
The Constitutional Court made it clear that the proper approach to the interpretation

of section 197 is to construe the section as a whole in the light of its purpose and the context of the Act as a whole. Regard must also be had to the declared purpose of the Act to promote economic development, social justice and labour peace (*NEHAWU v UCT, supra, at 121 para [62]*). In addition, the section must be interpreted against the background of section 23 of the Constitution, which provides that everybody has the right to fair labour practices and the requirement contained in section 39(2) of the Constitution that in '*interpreting legislation, and when developing the common law ... every court ... must promote the spirit, purport and objects of the Bill of Rights'* (*Aviation Union of SA on behalf of Barnes & Others v S A Airways (Pty) Ltd & Others (2009) 30 ILJ 2849 (LAC) at 2857 para [14]*).

Over time, the Labour Appeal Court and this Court has elaborated on the basic principles enunciated by the Constitutional Court in relation to the import and ambit
of section 197. In *S A Municipal Workers Union & Others v Rand Airport Management Company (Pty) Ltd & Others (2005) 26 ILJ 67 (LAC)* ('SAMWU v Rand
Airport') the Labour Appeal Court referred with approval to the minority judgment of
Zondo JP in the case of NEHAWU v UCT (2002) 23 ILJ 306 (LAC) where reference
was made to whether there was '*an economic entity'* that had changed hands with
the same economic or similar activities being conducted. In *FAWU v The Cold Chain
(Pty) Ltd & Another [1020] 1 BLLR 49 (LC)*, Francis J described the process around
the determination as to whether or not a transfer has taken place as '*taking a snapshot of the entity before the transfer and assessing its components'* and comparing the picture with the one of the business after the transfer '*to establish*

whether it is substantially the same business but in different hands'.
In the *Aviation Union-case,* supra, which concerned second generation outsourcing,
Zondo JP stated that the purposes of section 197, as these have been referred to by
the Constitutional Court, are not served or achieved by an interpretation '*that entails
job losses or the termination of the continuation of the employment of the employees
who moved with the work …'*. One of the reasons why the Labour Appeal Court found that section 197 found application in cases of second generation outsourcing
was that the contrary view was destructive of the purposes of section 197, '*because
an employer who wants to get rid of its employees in a certain part of its business or who wants to sell its business without the workers would be able to transfer its business by way of outsourcing to an outsourcee, in which case the contracts of employment of the employees would be automatically transferred to another employer. This would be for a certain period, eg six months or a year or more. At the end of that period the outsourcer would have its business transferred back to itself without the re-transfer back to itself of the contracts of employment of its former employees - on the basis of the argument that such transfer is not effected
"by" the old employer and, therefore, s 197 would not apply'* (at 2861 para [25]).
In these circumstances, the Labour Appeal Court construed section 197 as

encompassing the situation where a business was transferred from one employer to another, rather than to confine it literally to the word 'by' as used in the section. It did so on the basis that a purposive interpretation of statutes, which is the

interpretation that must be adopted in respect of the Act, permits a departure from the literal meaning of words or provisions where the literal or ordinary meaning would clearly defeat or undermine the clear purpose of the statutory provision concerned (at 2862H-I). One ought not to adopt a construction of section 197 that is '*at war with the very purpose of the section'* (at 2864 para [30]).

In the instant case, if one were to take a snapshot of the businesses conducted by the third and fourth respondents before 30 April 2010, one would find an outlet selling cell phone contracts, and pay-as-you-go airtime, where customers could bring in their cell phones for repairs or could enquire about a variety of problems which they experienced around their use of Cell C's products. A snapshot taken of the businesses on 1 May 2010 or on any day thereafter, would reveal a similar picture.

The businesses remained located in exactly the same place, the telephone numbers remained the same, the nature of the business remained the same. The only visible difference would ostensibly have been that there were some new faces behind the counter. Indeed, as Mr Kirchmann pointed out in argument, customers who had brought their cell phones in for repair prior to 1 May 2010, would collect these after 1 May 2010 once these had been repaired. Potential customers who came into either of the shops prior to 1 May 2010 to enquire about cell phone contracts, could come back on, or after, 1 May 2010 to conclude the contract.

Whether one adopts the aforesaid 'snapshot' test as formulated by Francis J, or the concept of an economic entity that changed hands, there clearly has been a transfer

of the businesses from one person/entity to another. The fact that the stock or

goodwill did not find its way to the new owner, does not in my view detract from the
fact that the businesses changed hands as going concerns, nor does the fact that all
of the employees' employment contracts have not been transferred. Employment
contracts were clearly not transferred, because the second respondent (and Cell C
for that matter) laboured under the mistaken impression that third and fourth
respondents had to retrench the employees. On an overall conspectus of the
prevailing facts and circumstances, there appears to have been a seamless change
of proprietor in respect of the Cell C outlets concerned.
It is clear that on a literal interpretation of section 197 there has not been any
transfer of a business from the third or fourth respondents to the second
respondent.
The franchise agreements pertaining to the third and fourth respondents were simply
terminated and a new franchise agreement was concluded, or is in the process of
being concluded, with the second respondent.
It is equally clear that if a literal interpretation were to be adopted, the purpose of
section 197, to the extent that it is aimed at safeguarding the jobs of employees,
would be defeated. The employees who had been employed by third and fourth
respondents would fall to be retrenched. Moreover, not only would the second
respondent be able to avoid the provisions of section 197, but any franchisee would
be able to jettison troublesome workers with impunity, or would be able to place a
successor in title in a position to 'cherry pick' employees. To borrow a phrase from

Zondo JP, a franchise arrangement would provide the perfect '*vehicle on which to
load the workers and a place where to dump them'* if an employer wished to sell his
business as a going concern to someone else (see *Aviation Union of SA obo Barnes,
supra, at 2892D*). Such an interpretation would neither give effect to the right to fair
labour practices which has been enshrined in the Constitution nor would it accord
with the aims and objects of the Act.
In the instant case, Cell C has effectively outsourced its business in the sense that

it has appointed franchisees to conduct business on its behalf. It has now decided
to change the person or entity to whom that business has been outsourced and it is
certainly free to do so. The freedom which Cell C has to conduct its business affairs
in the manner that suits it best, however, cannot detract from the rights of the employees who are affected by the decisions which Cell C elects to make. These employees are entitled to the protection afforded to them by section 23 of the Constitution and the Act.

The following Order is accordingly made:

1. The takeover of the businesses of the third and fourth respondents by the second respondent is declared to constitute the transfer of businesses as going concerns, as is contemplated in section 197 of the Labour Relations Act, No 66 of 1995, as amended.

2. The second respondent is declared to have automatically taken the applicant into his/its employ, with effect from 1 May 2010, on the same terms and conditions as those which applied to his employment with third and fourth respondents immediately prior to 1 May 2010, as is contemplated in section 197 aforesaid.
3. Second respondent is ordered to pay the applicant's costs on the High Court scale as between party and party.

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A M DE SWARDT, A J
10 May 2010

APPEARANCE:
For the Applicant: Mr MC Kirchmann
Instructed by Kirchmanns Inc

For the Respondent: Mr M van As, Counsel
Instructed by Deneys Reitz Attorneys