

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 1586/19

In the matter between:

LOGWOOD VILLAGE NPC

Applicant

And

LECSO MANUFACTURING PROPRIETARY LIMITED

First Respondent

THE INDIVIDUALS LISTED IN ANNEXURE "A"

TO THE NOTICE OF MOTION

Second to Further Respondents

Heard: 8 August 2019

Delivered: 3 October 2019

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] In this opposed application, applicant ('Logwood') seeks an order declaring that the employment contracts of the Second to Further Respondents have transferred from it to the First Respondent ('Lesco') in terms of section 197 of

the Labour Relations Act (The LRA),¹ and that pursuant to the transfer of the employment contracts, Lesco is directed to comply with its obligations under the provisions of section 197 of the LRA.

The background:

[2] The factual background, to the extent that it is undisputed may be summarised as follows;

2.1 Logwood is a non-profit organisation registered in terms of the laws of the Republic. It is also a residential facility catering for about 150 intellectually disabled individuals. It provides these individuals with living, therapeutic and recreational facilities, and meaningful work opportunities for which they are remunerated.

2.2 Logwood also has an outreach programme registered with the National Department of Social Development in terms of which it employed about 60 members of the local community residing near Nooitgedacht, to assist in its income producing workshop.

2.3 Lecso is a producer and supplier of electrical components such as switches, wall sockets, extension cords and multiplugs. Since 1998, Logwood and Lesco have had in place, a verbal commercial agreement (Assembly Agreement) in terms of which Lecso effectively outsourced the full assembly and packaging process relating to about 80% of its total product requirements to Logwood.

2.4 The services in question were provided at Logwood's workshop in Muldersdrift. Lecso supplied the workshop which was made available by Logwood with equipment for its operational requirements, including conveyor belts, spot welders, tools, machines, shelving, tables printers, consumables, raw material, containers and other associated assets.

2.5 The Logwood workshop was exclusively used to assemble Lesco's products. Logwood in turn utilised three categories of its employees for Lesco's operations, *viz*;

¹ Act 66 of 1995 (as amended)

- a) Members of the local community (Outreach employees), who were paid a daily minimum wage. Logwood contends that despite these employees having been employed in terms of contracts which required of them to perform work as and when they were directed to perform, the *de facto* position was that they had devoted all of their time to Lesco's operations.
- b) Residential employees, who were paid a fee per unit assembled and,
- c) Three supervisors, who were paid a fixed monthly salary and also provided with accommodation on site.

2.6 The Second to Further Respondents are either outreach employees or supervisors. In terms of the Assembly Agreement, Lecso had also made a donation of R20 000.00 per month in addition to paying Logwood a fixed amount per unit assembled in the workshop. The Agreement endured over 22 years with its terms being amended over time to provide for Lecso to attend to the delivery and supply of the raw material and components parts to the workshop for assembly, as well as the removal of the assembled components to its own workshop and warehouse.

2.7 Logwood had also over time effected improvements and upgrades to the workshop utilised for Lesco's operations, some of which were done at the latter's request.

2.8 Various meetings were held between Logwood and Lecso from early 2019 in relation to the changes in the latter's pricing model to be applied in the assembling of its products.

2.9 In a letter addressed to Lesco on 7 February 2019², Logwood raised concerns and the sustainability of the parties' business model and indicated that an alternative pricing strategy needed to be developed to

² Annexure 'JW5' to the Founding Affidavit

address the concerns it had raised. These engagements could not yield an agreement between the parties.

2.10 In a meeting held on 2 May 2019 between the parties, Lecso informed Logwood that the longstanding Assembly Agreement between the parties was to be terminated on the basis that changes were to be made to its business strategy, to insource the assembly of its products from its own workshop.

2.11 Lecso on 6 May 2019 issued a written notice of termination of the agreement to Logwood³. The notice read:

'Dear Logwood.

Lesco hereby gives 30 Days Notice is hereby given to the Board of Trustees of Logwood Ranch. (Sic)

Notice to terminate the use of the facility and provision of labour.

We thank you most sincerely for the past 20 years of service

Kind regards,

David Shapiro

Director'

2.12 On 9 May 2019, Logwood sent a written termination proposal to Lesco which addressed a variety of issues including staffing; the terms and timing of the vacating of the premises; the proposed financial settlement of *inter alia* trading debts; and the retrenchment costs related to the three categories of employees. The proposed financial settlement of all these issues was in the amount of R718 580.92.

2.13 Lesco in response to Logwood's proposals made a once off final offer of a payment of a donation of R60 000.00, and an undertaking to pay 8 consecutive donations of R30 000.00 from 30 June 2019 in return for

³ Annexure 'JW6' to the Founding Affidavit. The letter reads:

unhindered access to the workshop for the purposes of removal of its stock and equipment.

- 2.14 When an agreement could not be reached on the termination proposals, Logwood then issued notices to its outreach employees informing them of the termination of the commercial agreement with Lecso.

The legal framework:

- [3] Central to the dispute between the parties is whether the termination of the Assembly Agreement by Lesco, taken together with other factors pointed out on behalf of Logwood, such as the alleged employment of one of its employees and the intention to take on others, constituted a transfer of a business as a going concern for the purposes of section 197 of the LRA.⁴
- [4] The purpose of section 197 of the LRA is to protect the rights of employees to continued employment flowing from a sale or transfer of a business. In *Aviation Union of South Africa & another v South African Airways (Pty) Ltd & others*⁵, the Court stated that purpose of these provisions was to alter the employment related consequences of the transfer of a business as a going

⁴ Which provides:

'197 Transfer of contract of employment

- (1) In this section and section 197 A-
- (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.'

⁵ 2012 (1) SA 321 (CC); 2012 (2) BCLR 117 (CC); [2012] 3 BLLR 211 (CC); (2011) 32 ILJ 2861 (CC) at paras 37 - 38

concern at common law, consistent with the constitutional right to fair labour practices, with a view to safeguard employees' security of employment, and to facilitate the smooth transfer of the business by guaranteeing the employer a workforce to continue the business.⁶

- [5] The test for determining whether a business is transferred as a going concern, is as laid out in *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town and Others*⁷ as follows;

⁶ See also *Harsco Metals South Africa (Pty) Ltd and Another v Arcelormittal South Africa Ltd and Others* [2012] 4 BLLR 385 (LC); (2012) 33 ILJ 901 (LC) at para 12; *Rural Maintenance (Pty) Limited and Another v Maluti-A-Phofung Local Municipality* 2017 (1) BCLR 64 (CC); (2017) 38 ILJ 295 (CC); [2017] 3 BLLR 258 (CC) at para [140], where it was held;

"In the interpretation and application of section 197, it is important that the primary purpose of the section be borne in mind at all times. The primary purpose of section 197 is the protection or safeguarding of the rights of employees whenever there is a transfer of business as a going concern from one employer to another. The principle upon which section 197 is based is that, whenever a business in which workers are employed is transferred as a going concern from one employer to another, the workers go with the business. This avoids the loss of jobs that used to result from transfers of businesses prior to the current LRA. The transferor ceases to be the employees' employer and the transferee becomes their employer, with full recognition of their years of service, benefits and other terms and conditions of employment unless there has been an agreement in writing as envisaged in section 197(2) read with subsection (6)."

See also *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town and Others* (2003) 24 ILJ 95 (CC) at para 53, where it was held;

"Section 197 relieves the employers and the workers of some of the consequences that the common law visited on them. Its purpose is to protect the employment of the workers 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. The section aims at minimising the tension and the result labour disputes that often arise from the sales of businesses and impact negatively on economic development and labour peace. In this sense, s 197 has a dual purpose, it facilitates the commercial transactions while at the same time protecting workers against job losses.

⁷ At para 56. See also *Rural Maintenance (Pty) Limited and Another v Maluti-A-Phofung Local Municipality* 2017 (1) BCLR 64 (CC); (2017) 38 ILJ 295 (CC); [2017] 3 BLLR 258 (CC) at paragraphs 28 -29; *Imvula Quality Protection (Pty) Ltd and Others v University of South Africa* [2018] 12 BLLR 1151 (LAC); (2019) 40 ILJ 104 (LAC) at para 16; See also *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and Others* [2014] 10 BLLR 945 (LAC); (2014) 35 ILJ 2757 (LAC) at para [23], where it was held that;

'All of these factors indicate that a court is required to examine the substance of the agreement to terminate the outsourcing, in this case between appellant and first respondent. In essence, the approach adopted in *Nehawu*, *supra* follows that of the European Court of Justice in the application of the Business Transfers Directive (2001/23/EC) which is applicable in the European Union, and dictates that a transfer must relate to an autonomous economic entity (defined to mean an organized group of persons and assets facilitating the pursuit of an economic activity that promotes a specific objective).

In turn this involves a determination whether that entity retains its identity after the transfers; that is, the transferor must carry on the same or similar activities with the personnel and/or the business assets without substantial interruption. See in this connection *Spijkers v Gebroeders Benedik Abbatoir CV* (1986) CMLR 296 and the instructive judgment of Van Niekerk J in *Unitrans Supply Chains Solutions (Pty) and others v Nampak Glass (Pty) Ltd and others* [2014] ZALCJHB 61 at para 15.'

‘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 the workers are taken over by the new employer, whether customers are 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.’

[6] Whether there was a transfer of a business as a going concern by the old employer to the new employer is a question of fact to be determined objectively, taking into account;

- i. Whether there was a transfer by the old to the new employer;
- ii. Whether what was transferred was the whole or part of the business, trade, undertaking or a service; and,
- iii. Whether the whole or part of the business was transferred as a going concern⁸.

[7] As to what constitutes a ‘transfer’ was explained in *Rural Maintenance*⁹ in the following terms;

“With regard to “transfer”, *Aviation Union* tells us that:

“For the section to apply the business must have changed hands, whether through a sale or other transaction that places the business in question in different hands. Thus the business must have moved from one person to the other. The breadth of the

⁸ *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and Others* (CCT133/14) [2015] ZACC 8; 2015 (6) BCLR 660 (CC); [2015] 8 BLLR 757 (CC); (2015) 36 ILJ 1423 (CC) at para 35; *Invula Quality Protection (Pty) Ltd and Others v University of South Africa* [2018] 12 BLLR 1151 (LAC); (2019) 40 ILJ 104 (LAC) at para 13; *Invula Quality Protection and Others v University of South Africa* [2017] 11 BLLR 1139 (LC); (2017) 38 ILJ 2763 (LC) at para 6

⁹ At para 100 (The Minority judgment of Jafta J (Mogoeng CJ and Madlanga J concurring))

transfer contemplated in the section is consistent with the wide scope it is intended to cover. Therefore, confining transfers to those affected by the old employer is at odds with the clear scheme of the section.

But whether a transfer as contemplated in section 197 has occurred or will occur is a factual question. It must be determined with reference to the objective facts of each case. Speaking generally, a termination of a service contract and a subsequent award of it to a third party does not, in itself, constitute a transfer as envisaged in the section. In those circumstances, the service provider whose contract has been terminated loses the contract but retains its business. The service provider would be free to offer the same service to other clients with its workforce still intact.

For a transfer to be established there must be components of the original business which are passed on to the third party. These may be in the form of assets or the taking over of workers who were assigned to provide the service. The taking over of workers may be occasioned by the fact that the transferred workers possess particular skills and expertise necessary for providing the service or the new owner may require the workers simply because it did not have the workforce to do the work. Without the protection afforded by section 197, the new owner with no workers may be exposed to catastrophic consequences, in the event of the workers declining its offer of employment.”

- [8] As further observed in *Imvula*¹⁰, for a transfer of a business as a going concern to occur, not all the assets of the business have to be transferred, nor is it a requirement that all the relevant employees should be transferred, as that depends on the nature of the business. Equally so, what must be transferred are those assets and personnel that are essential to the business as it was operated by the transferor, as without the transfer of the means to do the work, there could be no transfer of the business as a going concern.

¹⁰ *Supra* at Fn (7)

The transfer allows the actual business or a clearly demarcated portion thereof to operate seamlessly after the transfer¹¹.

- [9] Whether in a particular case it can be said that a transfer of business as a going concern has occurred was further explained in *NEHAWU*¹² as follows;

“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.”¹³ (footnotes omitted)

The submissions:

- [10] Logwood, in consideration of the above and other authorities and principles set out therein contends that;

10.1 The termination of the Assembly Agreement and the subsequent performance of the same assembly services previously rendered by its workshop employees to Lesco, but now performed by the latter’s employees working at its site (in-sourcing), and the continued use of the same infrastructure by Lesco employees, triggered the application of section 197 of the LRA.

¹¹ at para 21

¹² *Supra* at Fn (6)

¹³ *NEHAWU* at para 56; See also *Rural*, at para 148

- 10.2 The services performed by its employees on behalf of Lesco at the workshop as a result of the outsourcing, comprised an 'organised grouping of resources constituting an economic entity'.
- 10.3 The assembly operation had as its sphere of activity, the assembly of units for Lesco, meaning that it operated from a discrete premise, using Logwood employees who were supervised by Logwood staff to produce units to the requirements of Lesco.
- 10.4 The workshop as operated by Logwood constituted an organised grouping of persons and assets facilitating the exercise of an economic activity which was the assembly and packaging of Lesco's products.¹⁴ This further comprised a defined set of activities which represents an identifiable and discrete business undertaking.
- 10.5 The units previously assembled at the Logwood premises were now assembled at Lesco's premises, using exactly the same equipment for assembly by employees who operated in substantially the same

¹⁴ With reference to *Harsco Metals South Africa (Pty) Ltd and Another v Arcelormittal South Africa Ltd and Others* [2012] 4 BLLR 385 (LC); (2012) 33 ILJ 901 (LC) where it was held;

[25] Section 197 (1) defines a 'business' to include 'the whole or any part of a business, trade or undertaking, or service. The definition is broad, but it requires the court to subject the entity that is the subject of a transfer to scrutiny. In doing so, the courts have drawn on the jurisprudence developed by the European Court of Justice in applying EU Directives on the Transfer of Undertakings, and adopted the concept of an 'economic entity', defined as an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective'. This formulation suggests that there may be a distinction, especially in the case of a labour-intensive business, between an 'economic entity' and an 'activity'; the latter comprising only the provision of services under a specific contract.

[26] The 'economic entity' test is more easily applied where a substantial business, with its assets and employees, is the subject of the transfer. At the other end of the spectrum is the business that comprises only the provision of services. In those instances, the ECJ has recognised the requirement laid down in *Spijkers* to have regard to the transfer of the business's tangible assets may be unrealistic. Businesses engaged in this type of activity may in fact have no assets, or have only assets whose importance is negligible in relation to the overall conduct of their activities. Hence the caution in *Suzen* that an entity cannot be reduced to the activity entrusted to it. In the United Kingdom, this problem has been largely resolved by the incorporation of Regulation 3 (1) – (2) of TUPE 2006, and the addition of a 'service provision change' within the broader definition of a relevant transfer. In effect, this provides that if immediately before the service provision change, there is an organised grouping of employees which has as its principal purpose the carrying out of activities on behalf of the client and where the client intends that the activities will, following the service provision change, be carried out by the transferee."

manner, and thus the economic entity retained its identity after the transfer.

10.6 Consequently, there was a transfer of a full business, with Lesco having removed all of the essential infrastructure and placed it at its premises for the continuation of the same activities, in pursuance of the same objectives.

[11] Lesco denied that the provisions of section 197 of the LRA were triggered on the grounds that;

11.1 The termination of the contractual relationship between the parties only meant that Logwood lost its contract. Logwood however retained its business, and was free to offer those services to other clients.

11.2 The termination of the contractual relationship between the parties was due to unreasonable demands by Logwood for an amendment in the commercial terms of the contract;

11.3 The employment contracts of the outreach employees contained provisions affording Logwood the flexibility to require them to perform work other than that performed for Lesco.

11.4 The parties were in dispute about a financial settlement pursued by Logwood.

11.5 The business moved from Logwood's premises to Lesco's premises some 55 km away.

Evaluation:

[12] At the core of this dispute in determining whether the provisions of section 197 of the LRA were triggered is that it can be accepted that;

12.1 Lesco outsourced the full assembly and packaging process relating to about 80% of its total product requirements to Logwood. Logwood in turn made available its workshop to Lesco for the purposes of assembly and packaging of the products. It further utilised the services

of the three categories of employees, who were paid as per their own contractual arrangements with Logwood. Those contractual arrangements were such that other than performing work on the Lecso's operations, Logwood was at liberty to utilise the employees' services in other areas unrelated to Lecso's operations.

12.2 Lecso had equipped the workshop to its own specifications, with Logwood being required to incur expenses in maintaining and ensuring that the workshop remained at Lecso's standards and expectations.

12.3 When the Assembly Agreement came to an end Lecso took away all its own movable assets and equipment associated with its assembly and packaging operations, and continued with the same operations utilising the services of its own employees at its own premises. In a nutshell, the business, once continued with at Lecso, retained its identity.

[13] In addressing the principal question, the starting point in relation to the other grounds raised by Lecso is that a determination of whether or not there was a transfer of business as a going concern from the Logwood to Lecso cannot be dependent on the specific grounds of the termination of the Assembly agreement, or what the demands of the one party were for the sustainability of that agreement.

[14] Equally so, that determination does not also depend on the new location of the operations of Lecso. The fact that if it were to be found that section 197 of the LRA was triggered, this would imply that the employees transferred would have to travel long distances to the new premises is clearly a non-issue. The question remains whether on the objective facts, what took place constituted a transfer of business as a going concern as contemplated in section 197 of the LRA.

[15] The dispute surrounding the nature of employment contractual arrangements between Logwood and some of the outreach employees can be resolved by an acceptance from the pleadings that the three categories of employees were primarily engaged in the servicing of the contractual arrangements

between Lecso and Logwood. Thus, they had primarily devoted to performing work on the Lesco contract.

[16] It is indeed equally correct that there were incidents where some of these employees had to perform other unrelated tasks, *i.e.* work for other customers as per their own contracts of employment dictated. Be that as it may, it can be accepted that that the outreach employees, were not solely employed for the purposes of servicing the Lesco operations, as it is further common cause that as a condition for receipt of donations from the National Department of Social Development, Logwood was in any event obliged to employ a certain number of employees from local communities to assist in its income producing workshop. The facts and circumstances of this case are distinguishable from those in *Rural*, where employees had to be specifically employed to service the agreement between Rural and the Municipality. In this case, the residential employees were always available as the facility was designed primarily with their needs in mind, whilst the outreach employees were employed by Logwood as part of the donation deal with the Department of Social Development.

[17] It is also correct as pointed out on behalf of Lesco, that central to any dispute regarding an alleged transfer in accordance with the provisions of section 197 of the LRA is whether there is any business (including a service) capable of being transferred as a going concern. Such a business must constitute an 'economic entity' as equally pointed out by Logwood, which when transferred, must retain its identity.

[18] Lesco further correctly pointed out that only once an assessment of Logwood's business was made could it be possible to determine whether that business was capable of being transferred. In this regard, reference was made to a Facebook post dated 25 June 2019 (After the termination of the Assembly Agreement), in which the nature of Logwood's business was characterised as;

18.1 Being a non-profit organisation which strives to provide meaningful work opportunities for its residents within the safety of a protective environment.

- 18.2 Being committed to the development of adults with intellectual impairments towards self-actualisation and leading a meaningful life.
- 18.3 The provision of labour to execute any form of work which is labour intensive and repetitive in nature.
- 18.4 The use of its facilities at its premises to provide services; to execute contracts to individual specifications, and the provision of flexible contracts of employment that allowed for the deployment of employees to provide any particular service as and when required.
- [19] The Facebook post was also in a form of an appeal to businesses for work in its income producing workshop, subsequent to the termination of agreement with Lesco.
- [20] Taking into account what is at the core of this dispute, the nature of Assembly Agreement, and the nature of the parties' businesses, and further to the extent that it is accepted that for a transfer to have occurred there must be components of the original business which are passed on to the third party, and that what is capable of being transferred is the business that supplies the service and not the service itself, the following invariable conclusions ought to be reached;
- 20.1 There can be no doubt that throughout the tenure of the Assembly Agreement, Lesco for all intents and purposes retained ownership of the assets associated with the operations other than the workshop. It is therefore correct as pointed out on behalf of Lesco that these assets could not have been transferred from Logwood to Lesco, as they always remained its property in any event.
- 20.2 In the light of the nature of Logwood's business as can be gleaned from its Facebook post, and further in the light of the evidence in regards to the ownership of the assets necessary to continue with the business, it is my view that the mere provision of labour or the type of service in this case on its own cannot constitute a business or an 'economic entity' as submitted on behalf of Logwood. In this regard, Lecso, and correctly so, took issue with Logwood's reliance on the

concept of ‘economic entity’ and correctly pointed out the caution sounded in *Tasima (Pty) Ltd v Road Traffic Management Corporation and Others*¹⁵, and also in *Rural Maintenance*.¹⁶ Accordingly, it cannot

¹⁵ (2017) 38 ILJ 2385 (LC), where it was held;

[25] Mr Redding pointed out that this approach has also been adopted by this Court in *Harsco*:

“Section 197 (1) defines a ‘business’ to include ‘the whole or any part of a business, trade or undertaking, or service. The definition is broad, but it requires the court to subject the entity that is the subject of a transfer to scrutiny. In doing so, the courts have drawn on the jurisprudence developed by the European Court of Justice in applying EU Directives on the Transfer of Undertakings, and adopted the concept of an ‘economic entity’, defined as an organised grouping of persons and assets the exercise of an economic activity which pursues a specific objective’.”

[26] But Van Niekerk J didn’t stop there in *Harsco*. He continued:

“Useful as these authorities are, in South Africa, in relation to the definition of a ‘business’ for the purposes of s 197, the judgment of the Labour Appeal Court in *SAMWU v Rand Airport Management Co Ltd* remains the authority by which I am bound. In that case, the court concluded that the outsourcing of gardening and security functions at an airport management by the employer were businesses capable of being transferred in terms of s 197, despite that fact that it did not appear that any assets, goodwill, operational resources or workforce were to be transferred. No distinction was drawn between a business that is largely employee-reliant, as opposed to an asset-reliant business. Nor was it suggested that in the former, greater weight ought to be attached to the number of employees transferring as opposed to the latter instance, in which the number of assets transferring might attract greater weight. If, as in that case, a grouping of relatively unskilled employees and the work they perform, with no assets appearing to be the subject of any transfer, comprises a ‘business’ for the purposes of s 197, then it is difficult to conceive, in the context of an outsourcing transaction, of an economic entity that would not be capable of transfer in terms of the section.”

[27] Mr Redding’s reliance on the English and European jurisprudence must be evaluated in the light of those remarks of Van Niekerk J. Like him, I am bound by *Rand Airport* and, more recently, by the Constitutional Court in *Rural Maintenance*. And in that case, Froneman J once again cautioned against “the wholesale and uncritical adoption of jurisprudence under the Acquired Rights Directive adopted by the European Commission or the British TUPE Regulations.”

¹⁶ At paragraphs 23 – 25, where it was held;

“The term “service provision change” was introduced into the British Transfer of Undertakings (Protection of Employment) Regulations (TUPE Regulations) in 2006. It is not a term used in section 197 of the LRA. Section 197(1)(a) defines “business” as including “the whole or part of any business, trade, undertaking or service”.

The use of terms or concepts not found in the wording of section 197 to determine whether a transaction falls under the terms of section 197(1) and (2) may be misleading and has the potential to bring about an incorrect result. As Yacoob J remarked in *Aviation Union*, the evaluation of whether there has been a transfer of business as a going concern under section 197 “is complex enough without it being burdened with questions about the ‘generation’ of outsourcing”. The same can be said about service provision changes.

In *NEHAWU* support was found for the Court’s reasoning on the purpose of section 197 in “comparable foreign instruments and foreign case law construing these instruments.” But this was done with acknowledgment of possible differences in language and context. This Court has on many occasions warned that the use of comparative law should be treated

be accepted as suggested by Logwood, that the mere organised grouping of persons by Logwood (The employees) and assets (which in any event belonged to Lesco), would ordinarily constitute an economic activity for the purposes of section 197 of the LRA.

20.3 It can further be accepted on the facts that none of the employees were taken over as a consequence of the termination of the Assembly Agreement. In the founding affidavit, it was averred on behalf of Logwood that one of its key employees (Ms Magwede), was employed at the Lesco's workshop. Lesco's response however was that this employee has been in its employ since December 2017 and long before the current dispute. The replying affidavit on the other hand contained a bare denial, and on the *Plascon Evans*¹⁷ principles, it can be accepted that indeed no employees were taken over by Lecso flowing from the termination of the Assembly Agreement. Whether Lesco has any intention to take some of those employees at some point in the future does not take Logwood's case any further.

[21] In the end, the only transfer that took place in this case is in respect of tangible assets that in any event belonged to Lecso. None of Logwood's employees were transferred to Lecso, and I did not understand from Logwood's case that any of its customers (if any) were transferred or that any of its goodwill was equally transferred. Thus, on the whole, the termination Assembly Agreement and the subsequent insourcing by Lecso did not in itself, constitute a transfer as envisaged in section 197 of the LRA. Logwood, which merely supplied the facilities and labour, only lost a contract with Lecso, but retained its own business, which it is described in its own Facebook post. The businesses operated by Logwood and Lecso are not in any shape or form similar, and it is inconceivable as to how it can be said that there was a transfer of Logwood's business as a going concern, when Logwood retained the essentials of its business after the termination of the Agreement. Ultimately, Logwood as it has sought to do *via* its Facebook post, is still in a

with due regard to different contexts and language. *NEHAWU* is no authority for the wholesale and uncritical adoption of jurisprudence under the Acquired Rights Directive adopted by the European Commission or the British TUPE Regulations.

¹⁷ *Plascon-Evan Paints Ltd v Van Riebeeck (Pty) Ltd* 1984 (3) SA 632 (A)

position, and at liberty to offer similar services at its workshop to other clients, with its workforce still intact.

[22] In the light of the above, it follows that Logwood's case must fail. I have further had regard to the requirements of law and fairness, and in the light of the circumstances of this case, it is my view that a costs order is not warranted.

[23] Accordingly, the following order is made:

Order:

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

E. Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: A Redding SC and R Itzkin, instructed by
Wilken INC

For the First Respondent: J Berger, instructed by Smit Sewgoolam
Incorporated