THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 123/2010

In the matter between:

SOUTH AFRICAN AIRWAYS (PTY) LIMITED **Appellant**

and

AVIATION UNION OF SOUTH AFRICA **First Respondent**

BARNES, M R AND 62 OTHERS **2nd to 64th Respondents**

SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS UNION **65th Respondent**

LGM SOUTH AFRICA FACILITY MANAGERS AND ENGINEERS (PTY) LIMITED **66th Respondent**

ALLAN AND 204 OTHERS **67th to Further Respondents**

Neutral citation: *SAA v Aviation Union of SA* (123/10) [2011] ZASCA 1 (11 January 2011)

Coram: MPATI P, LEWIS, MHLANTLA and SHONGWE JJA and EBRAHIM AJA

Heard: **8 November 2010**
Delivered: **11 January 2011**

Summary: Labour Law – s 197 of the Labour Relations Act 66 of 1995 – interpretation – termination of outsourcing agreements and 'second generation' transfers.

ORDER

On appeal from: Labour Appeal Court (Johannesburg) (Zondo JP and Davis and Leeuw JJA sitting as court of appeal).

1 The appeal is upheld with costs including those consequent upon the employment of two counsel.
2 The order of the Labour Appeal Court is set aside and replaced with:
'The appeal is dismissed with costs.'

JUDGMENT

LEWIS JA and EBRAHIM AJA (Mpati P, Mhlantla JA concurring)

[1] This appeal concerns the interpretation of s 197 of the Labour Relations Act 66 of 1995. The section regulates, among other things, the employment rights of employees of a business, or part of a business, that is sold as a going concern. It has been the subject of much judicial interpretation, this case being one where what is termed 'second-generation outsourcing' is in issue.

[2] Before turning to the facts it is useful to deal with some terminology. Outsourcing itself refers to the transfer of certain work by an enterprise to a contractor. It generally occurs where the managers of a business prefer to concentrate on the core work of the business and to enter into a contract with another entity to perform services that are peripheral: typical examples include catering and cleaning.[1]

[1] A useful discussion of outsourcing by Malcolm Wallis is to be found in 'Is Outsourcing In? An Ongoing Concern' (2006) 27 *ILJ* 1.

[3] In *National Education Health and Allied Workers Union v University of Cape Town*[2] the Constitutional Court affirmed that where an entity such as a university enters into contracts with service providers to perform work previously done by it, such as catering or cleaning, s 197 applies since the entity is transferring a part of its business. The section reads:

'197 Transfer of contract of employment

(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.'

[4] At issue in this appeal is whether there has been a second or further transfer of a business as a going concern by an old employer to a new employer where there has been one transfer of a business as a going concern (from A to B) and possibly subsequent transfers: by B back to A, or by B to C or by A to C, but none of the transactions post the first transfer from A to B has been proved to have occurred. Transfers of workers' employment contracts from A to B have, as we have said, been termed 'first generation outsourcing'. Subsequent transfers by B (back to A or to C, or from A to C) have in the legal literature generally, and in several cases, been

[2] 2003 (3) SA 1 (CC).

referred to as 'second-generation outsourcing'. As Malcolm Wallis[3] points out, the transfer from A to C, or from B to C, is nothing of the sort. Either the contract with the first service provider is terminated and A resumes performing the services in issue, or A enters into a second (or third and so on) contract with a different service provider. In the latter case there will be a transfer from A to C – a 'first generation outsourcing'. As we shall show, there was no evidence in this matter that in fact B had transferred the business back to A or to a third party, C, or that A had transferred the business as a going concern to C, and the appeal requires a consideration of this as well as the interpretation of s 197.

[5] The appellant, South African Airways (Pty) Ltd (SAA), is the former employer of a large number of employees whose contracts of service were transferred to the 66th respondent, LGM South Africa Facility Manager and Engineering (Pty) Ltd (LGM), when SAA entered into an outsourcing agreement with LGM in terms of which its infrastructure and support service department were transferred to LGM.

[6] The material terms of the outsourcing agreement were the following. The agreement took effect on 1 April 2000 and would expire at midnight on 31 March 2010; SAA retained an option to renew the agreement for a further five years after the initial expiry of the agreement; assets and inventory of SAA pertaining to the transferred services were sold to LGM and, on termination of the outsourcing agreement, SAA would be entitled to repurchase the assets and inventory of LGM dedicated to providing the services under the agreement; LGM and SAA agreed that transferred employees were deemed to have been employed by LGM in terms of s 197(1)(b) and s 197(2)(a) of the LRA;[4] LGM was afforded the access which was reasonably required to render the services, to use the office space, workshops, the airport apron, computers and the network of SAA at all designated airports; LGM was entitled to an annual fee for rendering the outsourced services to SAA; the agreement was administered by a Joint Executive Committee comprising

[3] Op cit p 2.
[4] The section itself now provides expressly that the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer. The provision was inserted in 2002: previously there had been some doubt – settled in *Nehawu* above – whether there was an automatic transfer of rights of employment to the new employer.

representatives of SAA and LGM and of importance to the present dispute was a provision in the agreement (clause 27) that SAA retained the right to transfer certain services and all functions to itself or to a third party and to obtain transfer or assignment of LGM to SAA of all third party contracts.

[7] In June 2007, due to a change in ownership of LGM, SAA gave LGM notice of termination of the outsourcing agreement with effect from 30 September 2007, as it was entitled to do in terms of clause 26.12 of the agreement. In August 2007, SAA advertised for tenders for the various services then performed by LGM in terms of the outsourcing agreement. On 17 August, SAA called on LGM to implement the handover plan in terms of the outsourcing agreement and indicated that it had no obligation towards the staff of LGM who had been engaged in the services provided pursuant to the agreement.

[8] LGM in turn gave notice to the affected employees of its intention to dismiss them on the basis of reduced operational requirements. The 64 individual respondents were originally employees of SAA whose employment contracts were transferred to LGM in terms of the outsourcing agreement or were subsequently employed by LGM. All were engaged in the services provided by LGM in terms of the agreement.

[9] On 14 September, partly in an effort to obtain certainty about the employment status of these respondents as from 1 October, and partly to obtain a commitment from SAA to assume responsibility for the transfer of the contract of the individual respondents, the Aviation Union of South Africa (AUSA), the union representing them, and which is the first respondent in this appeal, wrote to SAA requesting confirmation that the employees would be transferred back to SAA on 1 October and that they should report for duty on that date.

[10] SAA responded that it was not prepared to give such an undertaking. This deadlock culminated in the launching by AUSA and others (including the 65th respondent, the South African Transport and Allied Workers' Union (SATAWU) of an application for interim declaratory relief in the Labour Court. In essence the respondents claimed an order that the termination of the outsourcing agreement, or

SAA's resumption of part or all of the undertaking or services previously conducted by LGM, gave rise to a transfer to SAA in terms of s 197 of the Act. In the alternative, an order was sought that if SAA granted specific tenders to third parties, the award of such tenders would amount to a transfer to the new contractors under s 197. Only AUSA and SATAWU have participated in this appeal. We shall refer to these respondents for convenience as 'the trade unions'.

[11] The question to be determined, in the view of Basson J in the Labour Court, was 'whether there can be a section 197 transfer between the unsuccessful outgoing contractor and the successful incoming contractor? Put differently, the question which arises is whether this "second outsourcing" constitutes a transfer as contemplated by section 197 of the LRA'.

[12] The Labour Court found that it could not, on the facts, conclude that there would be a transfer of employees from LGM to SAA. It also found that s 197 contemplated only 'first generation outsourcing' and that, accordingly, s 197 was not applicable to this matter. Basson J said that the intention of the legislature was clear: only a transfer of a business *by* an old employer was governed by s 197. There had not, in this case, been any transfer by SAA of a business as a going concern to any entity other than the first transfer to LGM. The prerequisite for the application of s 197 was thus not met. She dismissed the application with costs.

[13] Basson J recognized, however, that s 197 should be interpreted so as to protect the work security of employees affected by a business transfer. This was made clear in *Nehawu*[5] where Ngcobo J said:

'But the purpose of the Legislature involves protecting the interests of both the employers and the workers. Employers are at risk as far as severance pay is concerned. Workers are at risk in relation to their jobs. Properly construed s 197 is for the benefit of both employers and workers. It facilitates the transfer of businesses while at the same time protecting the workers against unfair job losses. That is a balance consistent with fair labour practices.'

[14] However, Basson J concluded that the wording of the section could not be rewritten so as to make it apply when there was a transfer 'from' an entity – the

[5] Above, para 70.

argument of the trade unions being that there had been a transfer in 2007 from SAA once LGM ceased to be the employer. In any event, given that there was no evidence of a transfer to SAA of any business, nor of a transfer to the service providers who took over the work on 1 October 2007, s 197 was inapplicable.

[15] It should be noted that Basson J considered the judgment of Murphy AJ in *Cosawu v Zikhethele Trade (Pty) Ltd*[6] where it was held that if a business is transferred as a going concern in a second generation outsourcing agreement, such a transfer would fall within the ambit of s 197. She distinguished *Cosawu* on the basis that there the second business was so closely aligned to the first business that s 197 was applicable: in effect she considered that they were the same business.

[16] The trade unions and the other respondents appealed against the decision of the Labour Court to the Labour Appeal Court which found that the Labour Court had erred in its approach to s 197. Davis JA (Leeuw JA concurring) adopted the approach in *Cosawu*, as did Zondo JP in a concurring judgment. They held that if a business is transferred as a going concern in a second generation outsourcing agreement, such a transfer (in this case *from* SAA) would fall within the ambit of s 197.

[17] In *Cosawu* Murphy AJ, after referring to *Nokeng Tsa Taemane Local Municipality v Metsweding District Municipality*,[7] said:[8]

'Likewise, I am persuaded that a less literal and more purposive approach is justified in the context of s 197. . . . [T]he section is intended to protect employees whose security of employment and rights are in jeopardy as a result of business transfers. A mechanical application of the literal meaning of the word 'by' in s 197(1)(b) would lead to the anomaly that workers transferred as part of first generation contracting-out would be protected whereas those in a second generation scheme would not be, when both are equally needful and deserving of the protection. The possibility for abuse and circumvention of the statutory protections by unscrupulous employers is easy to imagine. . . .'

---

[6] [2005] 9 BLLR 924 (LC).
[7] (2003) 24 *ILJ* 2179 (LC) at 2183.
[8] Para 29.

[18] Murphy AJ considered that in the circumstances it would be pragmatic to read 'by' as 'from'. He said:[9]

'A pragmatic interpretation of this kind allows a finding that a business in actual fact can be transferred by the old employer in such circumstances, but that the transfer occurs in two phases: in the first the business is handed back to the outsourcer and in the second it is awarded to the new employer. Importantly this interpretation will be in conformity with the prescriptions of s 39(2) of the Constitution obliging courts when interpreting legislation to promote the spirit, purport and objectives of the Bill of Rights. By affording the same protection to employees affected by first and second generation contracting out arrangements, courts will promote the spirit and advance the purport of equal treatment and fair labour practices.'

As Wallis[10] observed of this reasoning, interpreting 'by' to mean 'from' changes the meaning of the definition, and there was no justification for the court's changing the words that the legislature had used after consideration and debate.

[19] Nonetheless, this was the reasoning of the Labour Appeal Court in this matter too. But, as we shall demonstrate, this approach to interpreting legislation, and to the invocation of s 39(2), is not consonant with the approach of the Constitutional Court and this court, and the disregard of the words used by the legislature on the basis of a general 'fairness' principle leads not only to uncertainty but also to a failure to observe the doctrine of separation of powers.

[20] SAA appealed against the Labour Appeal Court's decision, with the special leave of this court, on two bases: first, that the court below erred in its interpretation of s 197 which is at odds with its ordinary meaning; and second, that it erred in finding on the facts that there was a transfer of a business *as a going concern*.

[21] The trade unions argued, on the other hand, that the 'purposive' interpretation given to s 197 by the Labour Appeal Court is correct and should be adopted. Secondly, it contended that the continuation of the services by SAA amounted to the transfer of a business as a going concern, as contemplated in s 197(1)(b).

---

[9] Para 29.
[10] Op cit p 11.

[22] As we have said, to invoke the protection of s 197 the transfer must comprise two elements: there must be a transfer of a business as a going concern; and that transfer must be by the old employer to the new employer. But the court below reasoned that an examination of the multiple meanings of the word 'by' indicated that the literal interpretation of the section, which would preclude any possible extension to second generation transfers, was not justified linguistically. This was so because the wording of the section does not necessarily mean that the transferor has to play an immediate positive role in bringing about the transfer. Relying on the judgment of Murphy AJ in *Cosawu*, it approved the view that a literal meaning of the word 'by' would lead to the anomaly that workers transferred as part of first generation contracting out would be protected, but not those of the second generation scheme, despite both being equally deserving of the protection afforded by s 197.

[23] Moreover, a literal interpretation, the Labour Appeal Court found, again relying on *Cosawu*, was susceptible to abuse by unscrupulous employers: employees might not only lose their continuity of employment but also their severance benefits because the old employer, having lost its business to the new employer, would lack the means to pay its debts and in addition owed no more obligation to any of those employees. Thus the court below held that a literal interpretation of the word 'by' in s 197 was subversive of the very purpose of the section and found that a purposive construction of the section was warranted.

[24] The trade unions argued that this is a permissible form of interpretation when one is attempting to give effect to the right to fair labour practices, guaranteed by s 23(1) of the Constitution, and the right to equality enshrined in s 9 of the Bill of Rights. These rights, they submitted, inform the proper meaning of s 197, which would reinforce the primary object of the Act – to promote economic development, social justice, labour peace, and the protection of employees against loss of employment. On the facts of the present matter, the 'transaction' would be covered by the wording of s 197 – a transfer from SAA.

[25] SAA, on the other hand, urged us to consider the plain and unambiguous choice of language in s 197 as indicative of the legislature's intention that s 197 should apply to a situation only where there are two elements to a transaction: the

transfer of a business as a going concern, made *by* an old employer to a new employer. It argued further that it was now trite that s 39(2) of the Constitution, which compels an interpretation of legislative provisions in light of the values embedded in the Bill of Rights, applies only where the language of the statute is not unduly strained. The Constitutional Court, in *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others*; *In Re Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others*,[11] stated:

'. . . [J]udicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section.

Limits must, however, be placed on the application of this principle. On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read "in conformity with the Constitution". Such an interpretation should not, however, be unduly strained.'

[26] Harms DP in *Minister of Safety and Security v Sekhoto*[12] most recently summarized these principles, in so far as relevant here, as follows:

'. . . There is a distinction between interpreting legislation in a way which "promote[s] the spirit, purport and objects of the Bill of Rights" and the process of reading words into or severing them from a statutory provision under s 172(1)(b), following upon a declaration of constitutional invalidity under s 172(1)(a).

. . . The first process, being an interpretative one, is limited to what the text is reasonably capable of meaning. The second can only take place after the statutory provision, notwithstanding the application of all legitimate interpretative aids, is found to be constitutionally invalid.'

[27] And of course in *S v Zuma*[13] the Constitutional Court cautioned against using the Constitution to interpret the language of legislation to mean whatever a court

[11] 2001 (1) SA 545 (CC) paras 23-24.
[12] (131/10) [2010] ZASCA 141 (19 November 2010).

wants it to mean. It would appear that in *Cosawu* and this case the courts considered that a particular outcome promoted the objects of the Act and the section in particular, and disregarded the intention of the legislature as manifested in the clear language of the section.

[28] There was no challenge to the constitutionality of s 197 in this matter. A collateral challenge in the guise of reading a word to mean something different is simply not legitimate. See in this regard *The Law Society of the Northern Provinces v Mahon.*[14] It would be tantamount to usurping the role of the legislature.

[29] In *Standard Bank Investment Corporation Ltd v Competition Commission & others*; *Liberty Life Association of Africa Ltd v Competition Commission & others*[15] this court dealt with the interpretation of the Competition Act 89 of 1998, the issue in the appeal being whether the Competition Commission is one of the regulatory authorities whose approval of a bank merger and an insurance merger is required. Various arguments against a literal interpretation of the section were raised in favour of a purposive construction. Whilst recognizing the need to give effect to the object or purpose of legislation, the court stressed that it is not the function of a court to do violence to the language of a statute and impose its view of what the policy or object of a measure should be. It quoted the the dictum of Innes CJ in *Dadoo Ltd & others v Krugersdorp Municipal Council*:[16]

'Speaking generally, every statute embodies some policy or is designed to carry out some object. When the language employed admits of doubt, it falls to be interpreted by the Court according to recognized rules of construction, paying regard, in the first place, to the ordinary meaning of the words used, but departing from such meaning under certain circumstances, if satisfied that such departure would give effect to the policy and object contemplated. I do not pause to discuss the question of the extent to which a departure from the ordinary meaning of the language is justified, because the construction of the statutory clauses before us is not in controversy. They are plain and unambiguous. But there must, of course, be a limit to such departure. A Judge has authority to interpret, but not to legislate, and he cannot do violence to the language of the lawgiver by placing upon it a meaning of which it is not

---

[13] 1995 (2) SA 642 (CC) paras 17-18.
[14] (86/2010) [2010] ZASCA 175 (2 December 2010).

[15] 2000 (2) SA 797 (SCA).
[16] 1920 AD 530 at 543.

reasonably capable, in order to give effect to what he may think to be the policy or object of the particular measure.'

Thus the court stressed the limits of judicial interpretation and held that to do otherwise would be to fail to respect the separation of powers and to usurp the function of the legislator. In our view, the advent of the Constitution has not changed this fundamental principle.[17]

[30] In *South African Police Service v Public Servants Association*[18] the Constitutional Court dealt with the interpretation of the Police Service Regulations in a purposive and contextual sense, where the regulations in question were designed to serve diverse purposes in a complex context. The court emphasised that a purposive approach to interpretation does not give a court licence, through an interpretative exercise, to distort the ordinary meaning of words beyond that which those words are reasonably capable of bearing. Sachs J said:

'Interpreting statutes within the context of the Constitution will not require the distortion of language so as to extract meaning beyond that which the words can reasonably bear. It does, however, require that the language used be interpreted as far as possible, and without undue strain, so as to favour compliance with the Constitution. This in turn will often necessitate close attention to the socio-economic and institutional context in which a provision under examination functions. In addition it will be important to pay attention to the specific factual context that triggers the problem requiring solution.'

[31] SAA contended that the interpretation favoured by the Labour Appeal Court represents a radical departure from the fundamental rule of statutory construction: that when the language chosen by the legislature is clear, words have to be given their ordinary grammatical meaning in the context in which they appear in the statute. The choice of language in s 197 is plain and unambiguous. By the deliberate use of the word 'by', the legislature showed that it intended s 197 to apply to a situation where there are at least two positive actors in the process. The ordinary meaning of the word 'by' requires positive action from the old employer who transfers the business to the new employer. Broken down to its essential components s 197(1)(b), in the context of the section as a whole, has the following unambiguous

[17] See also Wallis op cit p 11.
[18] 2007 (3) SA 521 (CC) para 20.

meaning: the word 'by' identifies the old employer as the means or instrumentality for effecting the transfer of the business; the definition of 'transfer' identifies the entity to which the business is transferred, namely the new employer; and the section then identifies the consequences of the transfer for the new employer, the old employer and the affected employees. To interpret the word 'by' to mean 'from', as the court below did, argued SAA, not only strains the meaning of the word but also fundamentally changes the meaning of the section as a whole since it no longer requires any action on the part of the old employer. This is not consonant with the intention of the legislature as evinced by the ordinary meaning of the word 'by'.

[32] The 'purposive' interpretation adopted by the Labour Appeal Court was aimed, it said, at preventing abuse. This concern on the part of the court is misconceived because there is, as SAA argued, no suggestion of any abuse in the present case. And even if we accepted that such abuse is possible, that is no reason to distort the plain meaning of the section. We accordingly conclude that the Labour Appeal Court erred in adopting an approach to the interpretation of s 197 which is at odds with the ordinary meaning of the words chosen by the legislature. By interpreting the word 'by' to mean 'from' the court impermissibly distorted the meaning of the word.

[33] The second ground on which the LAC erred, argued SAA, is that the evidence did not establish that there was a transfer of a business activity as a going concern. What is meant by 'going concern' is 'a business in operation' and whether transfer has occurred is a factual matter, to be determined objectively by reference to all relevant factors considered cumulatively, the list not being exhaustive and none of the factors being individually decisive: *Nehawu*.[19]

[34] The Labour Court, in concluding that there was no transfer of a going concern, had regard to the lack of an agreement regulating the re-transfer of employees back to SAA from LGM, and the lack of any indication that the services would revert to SAA. The Labour Appeal Court, on the other hand, did not delve into the factual question whether there was a transfer as a going concern: instead it held

[19] Above, para 56.

that s 197 covers the situation 'whereby, after SAA cancelled the mutual outsourcing agreement, it invoked clause 27 of the outsourcing agreement to compel LGM to implement the handover plan'. That court did not consider what this handover plan entailed and whether the issues dealt with in it permitted the conclusion that there was a transfer of a business as a going concern. On the evidence, argued SAA, the only document referring to the 'hand over plan' was a letter from SAA, annexed to the second and third respondent's answering affidavit. In the letter SAA pointed out that a plan must, without delay, be developed for a hand-over process as envisaged in the outsourcing agreement and be implemented. There is no evidence whatsoever that such a hand-over process was actually implemented, what it entailed and when the process was completed. Thus no facts existed, when the application was brought, to sustain a finding that a transfer as a going concern did take place.

[35] In this respect the approach of the Labour Appeal Court, in finding that an evidential basis did exist for finding that any transfer of a business as a going concern occurred, was clearly wrong. Where parties wish to enter into an outsourcing agreement, and then for the business to revert to the outsourcer, or to be transferred to another provider, there must be a clear re-transfer, demonstrated through written contracts or conduct, of all assets and obligations of the business, including the transfer of workforce rights and obligations so that no difficulty arises in invoking the protection afforded by s 197 to affected employees who have been involved in carrying out the services provided for in the initial outsourcing agreement. As was held in *Crossroads Distribution (Pty) Ltd t/a Jowells Transport v Clover SA (Pty) Ltd*:[20]

'The entity which provided the service in this case was not transferred at any stage. There was no transfer of any kind, only the conclusion of separate transactions starting with the termination of one contract and ending in a new contract. A transferring party ("old employer") and a transferee ("new employer") as envisaged by section 197 are also not identifiable in this case. Here is a situation where an institution — if I may borrow a term from counsel for Crossroads — on termination of a contract which it has concluded as principal for the provision of services, contracts with another provider for the same service. Section 197 as it stands does not apply to such a situation. This can be demonstrated with an example in the heads of argument filed by Crossroads. A municipality has a contract with a certain car

[20] [2008] 6 BLLR 565 (LC) para 15.

hire company ("company A") to meet the travel needs of its employees. If it then terminates that contract and concludes a contract with "company B", must all the employees of company A now be employed by company B? Surely not.'

[36] The trade unions argued, however, that on termination of the outsourcing agreement between LGM and SAA, the only probable inference to be drawn was that there was a 'double transfer', that is a transfer by LGM to SAA at midnight on 30 September 2007, and a transfer by SAA thereafter to the entity that commenced providing the services in question. Counsel argued that it is an absolute precondition that every time there is an outsourcing agreement, on its termination there is automatically a transfer back to the original owner, provided the latter remains the owner of the assets which had been transferred in terms of the initial agreement.

[37] The trade unions argued also that it was clear on the facts before us that the respondents had established that a transfer of business activities as a going concern would take place at midnight on 30 September despite there being a lacuna in the evidence placed before the Labour Court by way of affidavits from which such a conclusion could be reached. It referred to its founding papers in which it was alleged that from 1 October 2007, SAA would either have had to provide the services itself or it would have had to engage one or more service providers. SAA's response was that after completion of the tender process, the successful bidder would commence rendering services, without being specific as to who would provide these services from 1 October 2007 until the tender process had been completed. It emphasized the fact that SAA had at no stage indicated that the services would not continue after midnight 30 September.

[38] As authority for the proposition that a transfer contemplated by s 197 was possible in the circumstances, and does in fact occur in such cases, the trade unions referred to an English case, *Dines & others v Initial Health Care Services Ltd and Pall Mall Services Group Ltd.*[21] Here the appellants were employed as cleaners at a hospital by the first respondent who held a contract for cleaning services for the Health Authority. On expiration of the contract on 30 April 1991, and after a

[21] [1994] IRLR 336 (CA).

competitive tendering process, the contract was awarded to the second respondent as from 1 May. The appellants were dismissed by the first respondent on the grounds of redundancy and given redundancy payments. On 1 May they commenced employment with the second respondent and continued to carry out the cleaning service at the hospital. In these circumstances the Court of Appeal held that the Industrial Tribunal before which the appellants had instituted proceedings against the first respondent for unfair dismissal, had misdirected itself by finding that there was no transfer of an undertaking when the second respondent took over the hospital cleaning contract from the first respondent. It held that as the cleaning services were to be carried out by essentially the same labour force on the same premises and for the same health authority, there was a transfer of an undertaking which took place in two phases: the handing back by the first respondent to the health authority of the cleaning services at the hospital; and the handing over by the health authority of the cleaning services to the second respondent on the following day.

[39] Counsel for the trade unions stressed that what is significant in deciding whether there had been a transfer in circumstances where SAA had played the role of facilitator, as in a transfer of the business by LGM to SAA, and then yet another transfer to the third contracting party, are the tangible and intangible assets which are in fact transferred to ensure continuation of the business activity. But there was no evidence that any such assets would be transferred, given that the relief was sought before the date of termination of the contract between SAA and LGM.

[40] In motion proceedings, as these were, courts are bound to decide matters of fact on the papers before them. It is not permissible to make findings of fact only on a weighing up of the probabilities: *Administrator, Transvaal & others v Theletsane & others.*[22] Botha JA said that 'in motion proceedings, as a general rule, decisions of fact cannot properly be founded on a consideration of the probabilities, unless the Court is satisfied that there is no real and genuine dispute on the facts in question . . .'. He continued to say that 'the room for deciding matters of fact on the basis of what is contained in a respondent's affidavits, where such affidavits deal equivocally

[22] 1991 (2) SA 192 (A) at 196I-197D.

with facts that are not put forward directly in answer to the factual grounds for relief on which the applicant relies, if it exists at all, must be very narrow indeed'.

[41] In the absence of a factual basis for the Labour Court to have concluded that there was a transfer of a business as a going concern by LGM either to SAA or to another entity, its decision to dismiss the application was correct. Accordingly the Labour Appeal Court erred in upholding the appeal to it.

[42] 1 The appeal is upheld with costs including those consequent upon the employment of two counsel.
2 The order of the Labour Appeal Court is set aside and replaced with:
'The appeal is dismissed with costs.'

_____

C H Lewis
Judge of Appeal

_____

S Ebrahim
Acting Judge of Appeal

SHONGWE JA (dissenting)

[43] I have read the judgment of Lewis JA and Ebrahim AJA, and regrettably, I do not agree with the order proposed by them. It will not be necessary for me to deal with the facts of the appeal as they appear in detail in the main judgment.

[44] My point of departure is that when one looks at the nature of the transaction and the purpose of section 197, it becomes clear that by operation of law there must

have been a continuation of the services provided by LGM to SAA or any third party resulting from the termination of the outsourcing agreement.

[45] The purpose of section 197 is to protect the interest of both the worker and the employer. Also to give consideration to the interests of the third party who would take over the services – see *National Education, Health and Allied Workers' Union v University of Cape Town* 2003 (3) SA 1 (CC) at 29 para 62 (See also *Chirwa v Transnet Ltd & Others* 2008 (4) SA 367 (CC) para 110).

[46] The majority judgment makes the point that there is a paucity of evidence regarding what was actually transferred. Even counsel for SAA argued that there is a lack of evidence and that the Unions bear the onus. It is further argued that the Unions could have approached the court with a request to lead further evidence on or after the termination of the outsourcing agreement.

[47] In my opinion there is no need to embark on an exercise to define or analyse whether the word 'by' in the definition of transfer means that the old employer must be the one taking a positive and active role in the proposed transfer. In the present case clause 27 of the Outsourcing Agreement makes provision for LGM to positively assist SAA in the manner described in the clause to effect the transfer. Therefore upon termination of the Outsourcing Agreement the transfer would be effected by LGM to SAA who will now become the new employer. It is unimaginable how SAA would conduct the tender process if it did not receive transfer from LGM. Even the benefits that LGM was enjoying under the outsourcing agreement came to an end. This clearly demonstrates the understanding by the parties of the concept of outsourcing.

[48] The transaction is structured in such a manner that upon termination of the outsourcing agreement, LGM must transfer, as a going concern of course, back to SAA whatever LGM received from the initial outsourcing agreement.

[49] The factual evidence exists in the form of circumstantial evidence and in the form of the understanding that exists between the contracting parties dealing with second generation outsourcing. The purposive interpretation method takes care of

avoiding the potential of abuse by employers of the outsourcing concept of doing business especially in protecting the employee. I, with respect, embrace the reasoning and conclusion of counsel for the respondent as explained in para 24 of the main judgment.

[50] Courts must avoid becoming too legalistic in approaching matters of interpretation. Lord Greene M R in *Bidie v General Accident Fire and Life Assurance Corporation Limited* [1949] 1 Ch 121 at 129 said the following:

'The first thing to be done, I think, in construing particular words in a section of an Act of Parliament is not to take those words in vacuo, so to speak, and attribute to them what is sometimes called their natural or ordinary meaning. Few words in the English language have a natural or ordinary meaning in the sense their meaning is entirely independent of their context. The method of construing statutes that I myself prefer is not to take out particular words and attribute to them a sort of prima *facie* meaning which as a whole and ask myself the question: "In this statute, in this context, relating to this subject-matter, what is the true meaning of that word?" In the present case, if I might respectfully make a criticism of the learned judge's method of approach, I think he attributed too much force to the abstract or unconditioned meaning of the word "representation'" No doubt in certain contexts the word "representation" would b e sufficient to cover not merely probate, not merely letters of administration with the will annexed, but administration simpliciter. The real question that we have to decide is, what does the word mean in the context in which we here find it, both in the immediate context of the sub-section in which the word occurs and in the general context of the Act, having regard to the declared intention of the Act and the obvious evil that it is designed to remedy.'

[51] SAA failed to volunteer information after receiving the application initially, as to what was going to happen upon termination of the outsourcing agreement. There is no doubt that a second generation outsourcing was on the cards and SAA knew very well in advance what it was going to do. It would be unfair and unjust to expect the workers not to have approached the court immediately after hearing that new tenders had been advertised. It could have been prejudicial to them if they waited after the termination. For them to stay protected by the law, they deemed it prudent to approach the court on an urgent basis before termination lest they were estopped from exercising their right.

[52] Section 39(2) of the Constitution 108 of 1996 provides that ‘when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.’ It is trite that courts should strive to promote the establishment of a society based on democratic values, social justice and fundamental human rights. To construe the provisions of section 197 otherwise than to give effect to its purpose, would encourage the abuse of employees by employers.

[53] I associate myself with the findings and conclusion of the LAC, and would propose the following order:
‘The appeal is to be dismissed with no order as to costs.’

_____

J SHONGWE
Judge of Appeal

APPEARANCES

APPELLANT:	GJ Marcus SC (with him Ms K Pillay & Ms N Mji) Instructed by Cliffe Dekker Hofmeyr Inc, Sandown Naudes, Bloemfontein
FIRST TO 64TH RESPONDENTS:	JG van der Riet SC (with him Ms I de Vos) Instructed by Ruth Edmonds Attorneys, Johannesburg McIntyre & Van der Post, Bloemfontein
65th RESPONDENT:	Webbers, Bloemfontein Instructed by Cheadle Thompson & Haysom, Johannesburg