IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case no: JA 12/2023

In the matter between:

MOBILE TELEPHONE NETWORKS (PTY) LTD	**FIRST APPELLANT**
IBRIDGE CONTRACT SOLUTIONS (PTY) LTD	**SECOND APPELLANT**
ISON XPERIENCES SOUTH AFRICA (PTY) LTD	**THIRD APPELLANT**

and

CCI SA (UMHLANGA) (PTY) LTD	**FIRST RESPONDENT**
EMPLOYEES LISTED IN ANNEX A	**SECOND TO 252ND RESPONDENT**

Heard: **2 May 2023**

Delivered: **15 June 2023**

Coram: **Waglay JP, Sutherland JA, Gqamana AJA**

JUDGMENT

SUTHERLAND JA

Introduction

[1] This appeal is about whether or not section 197 of the Labour Relations Act[1] (LRA) is applicable to the consequences of the elapsing, by effluxion of time, of the contract between the first appellant, MTN, and the first respondent, CCI, who had in terms thereof, supplied Call Centre services to MTN.[2] The call centre services provided by CCI were thereafter provided by the second and third appellants, Ibridge Contract Solutions (Ibridge) and Ison Xperience South Africa (Ison). In an urgent application brought before the Labour Court, it was held that section 197 does apply and an order was made that the business unit of CCI that had performed services for MTN, had been transferred as a going concern to MTN, Ibridge and Ison and that all three appellants were therefore obliged to take over the MTN component of the workforce of CCI, seemingly on a joint and several basis. The appeal lies against that order and the ancillary orders dependant on that primary order.

[2] The controversy is not rooted in the relevant legal principles nor to any material degree derived from a dispute of fact. Rather, the locus of the controversy is about the significance of several pertinent facts in determining whether or not the test for the existence of a transfer of a business as a going concern has been proven.

---

[1] Act 66 of 1995, as amended.

[2] Section 197 reads as follows:

'(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...'

The critical facts

[3] MTN is a premier telecommunications service provider with millions of customers. An aspect of its business is continual interaction with its customers. The subject matter of such interaction ranges across the full gamut of customer queries from changing a SIM card to technical assistance with the operations of voice and data devices. To cope with such enquiries, it is necessary that many persons be mustered who have the necessary product knowledge and communication skills, to respond when the 'help line' is called by customers. At an early stage of the delivering this service to customers, the task was carried out internally by staff employed by MTN. By about 2006, the policy of outsourcing of the customer 'call centre' work to others was initiated by MTN.

[4] CCI was already in the business of providing call centre services, when, in 2018 it was contracted to perform a call centre service for MTN.[3] The contract was for a fixed period of five years ending on 31 December 2022. For the first year, CCI was to be the exclusive provider of call centre services, save a discreet portion which MTN reserved to perform itself. Thereafter, MTN was entitled to contract other service providers to provide the same call centre service as CCI. Axiomatically, this meant two things: first, the other call centre service providers would be direct competitors of CCI, and second, the 'work pie' comprising the customer calls would have to shared, thereby reducing CCI's 100% share to something less. This is exactly what happened. Ibridge was contracted in 2021. Ison was contracted in 2022. The pot was shared as MTN saw fit.

[5] The contractual terms of the agreement between MTN and CCI are elaborate and delineate the character of the business operations required by MTN to be performed by CCI. Aspects which are significant for this case are listed. CCI was obliged to establish within its organisation a discrete unit to deal with the MTN work. The staff to be deployed by CCI had to be physically segregated from other staff whose duties might have given rise to conflicts of interest between the MTN work and that of another client of CCI. Operationally, a 'Chinese wall' had to be established, a common label in commerce to mean

[3] CCI provides, from South Africa, services to customers in South Africa and abroad. It has 9000 employees.

that staff in different sectors of a business were to keep strictly confidential any information within their sector about the client whom they serviced and divulge nothing whatever to other staff in other sectors of the business. If an employee in the MTN sector was to be redeployed to another sector of CCI's business, a 6-month sanitisation period was required. The locale of the MTN unit was prescribed: only the Umhlanga office and the Sandton office of CCI could be used even though CCI had other offices too. CCI undertook to have in its employ sufficient individuals, as consultants, to meet the demand of the calls volume expected. The call volume fluctuated, owing to several reasons and the two parties were, in terms of the contract, in a state of constant liaison: MTN would monitor the call flow and issue forecasts over forthcoming months to which CCI had to make such staffing accommodations as were required. This involved increasing the complement or reducing the complement of staff deployed on the MTN work. When decreasing the complement, it was open to CCI to redeploy those persons to other sectors of CCI's business dealing with other customers, whether those customers were local or abroad, or to retrench the surplus staff. Lastly, the staff deployed on any particular client would axiomatically need to be briefed or trained on the particular product knowledge necessary to engage meaningfully with a customer. CCI was contractually obligated to provide such training for MTN business unit staff. This training was over and above generic call centre techniques and skills training.

[6] CCI states that it complied fully with these terms and established the necessary structure of consultants to field the calls together with layers of supervisory management. Over time, the MTN business unit complement fluctuated between 900 and 250 staff. MTN challenges the figure of 250 which it says should be closer to 138 at the time of the contract ending, but this is immaterial to the controversy.

[7] There are peculiar aspects of the circumstances which cloaked the conclusion of the contract that are notable. Prior to engaging CCI, MTN had endeavoured to conclude a similar contract with Adcorp. MTN staff had been transferred to Adcorp pursuant to section 197. The relationship between MTN and Adcorp was severed for reasons immaterial to this controversy. Thereupon, CCI was

contracted and the MTN staff that had been transferred to Adcorp were again in terms of section 197 transferred to CCI. The contracts in both cases were drawn unequivocally to describe and regulate an outsourcing of services. This is manifestly plain in the provisions of clause 46 which, in some detail, set out a process that prescribes the duties of both parties upon the termination of the fixed-term contract. This involved a requirement for an exit plan to ensure no disruption of the service to which MTN was entitled when a transition to a 'replacement' service provider eventuated. These provisions loom large in the controversy and the question of what might trigger them is in dispute.

[8] These several attributes of the transaction between the parties show that CCI was, in respect of the MTN business unit, subordinated to MTN to a material degree. The operation of access by CCI consultants to the customers who called the helpline were intermediated by MTN. The customer would contact the MTN contact point, and thereupon, a computer sifting program forwarded the call to a particular consultant within CCI (or, later on, within one or another of the three service providers) to deal with. The redirection was random, and no one service provider had a fixed customer base. The customer who called several times would be unaware of the existence of the various call centre service providers. Access was given to the MTN computer system, Citrix, which held the substantive product information to enable the consultants to perform their allotted tasks. Remuneration was calculated on call volumes processed.

[9] When the CCI contract lapsed, the calls that would have been redirected to CCI were, axiomatically, redirected to the other two call centre service providers, who had already been receiving a measure of the calls. Neither Ibridge nor Ison required any transfer of equipment or other tangible or intangible assets to perform their contractual functions, which, obviously they had already been carrying out before the termination of the CCI contract. Indeed, the return by CCI to MTN of the system access devices or codes went no further than MTN's storeroom. A handover of historical call records by CCI to MTN was not a necessary component of current and future operational requirements and, also, was not made available to Ibridge or Ison.

[10] What is however plain is that both Ibridge and Ison had to increase their staff complements to cope with the additional call volumes. 45 CCI staff took pre-emptive steps and resigned in 2022 in order to join Ibridge, which was located in KwaZulu-Natal. Ison, which services MTN from its offices at the Cape did not have any CCI staff try to join it; it recruited an additional 270 staff at the Cape. No CCI staff tried to join MTN.[4]

The Test

[11] The law on the methodology of enquiry by a court into the question of whether or not a business has indeed been transferred as a going concern has been intensively and repeatedly analysed in the case law, not least by several cases in the Constitutional Court. The jurisprudence is to the effect that a court must conduct a fact-specific enquiry to find out what are the objectively discernible facts that have a bearing on the issue at hand.[5] No consideration that might have a bearing on the characterisation of an event which, upon a holistic appreciation, might trigger section 197 ought to be ignored, but the relative weight to be accorded each aspect and its material effect on the overall conspectus, obviously, could vary and needs to be assessed in context.[6] The essence of a section 197 status is that, as a fact, an actual transfer of operational capacity occurred.[7] Section 197 is neither pro-worker nor pro-employer. [8]

[12] Critical attributes to be looked for include these:

12.1 Can the business which is alleged to have been transferred be recognised as such because it has retained its identity post-transfer: ie,

[4] MTN has always provided call centre services to a select clientele. The proportion of this reserved service in relation to the total call centre volume is stated to be about 5%. This niche part of the business of MTN has never been outsourced.
[5] *Aviation Union of South Africa and another v South African Airways (Pty) Ltd and others* 2012 (1) SA 321 (CC) (*Aviation*) at paras 47 and 111
[6] *National Education Health and Allied Workers Union v University of Cape Town and others* 2003 (3) SA 1 (CC) *(NEHAWU)* at para 56; also, *Aviation* at para 51.
[7] *Aviation* at paras 41, 43, 44.
[8] *NEHAWU* at para 56.

is the business in the hands of the alleged 'new' owner the same business that was in the hands of the 'old' owner?[9]

12.2 What 'components' of the 'old' business are visible or discernible which are now in the hands of the alleged 'new' owner?[10] What is required is to locate the business that performs the service, not simply discern the performance of a similar service.[11]

12.3 In a labour-intensive business, has a critical mass of the workers moved over to the alleged new owner? [12]

12.4 What assets – of whatever kind – were possessed by the 'old' owner and are now in the hands of the alleged 'new' owner?

12.5 What influence does the agreement between the principal and initial 'outsourcee' have on colouring the circumstances of the alleged transfer?[13]

[13] Section 23(1) of the Constitution speaks to the guarantee of fair labour practises. The content of that right is fleshed out in the LRA. The purpose of section 197 includes a measure of job protection and, also, facilitates the 'new' business owner sustaining the business as a going concern upon transfer from the former owner.[14] The meaning and reach of section 197 must be understood

---

[9] *Aviation* at para 49 and at *NEHAWU* at para 56; also, *Süzen v Zehnacker Gebäuderrelnigung GmbH Krankenhausservice* [1997] IRLR 255 (ECJ) (*Süzen)*, an oft cited decision of the European Court of Justice. Construing a differently worded instrument, the case is authority for the proposition that significant transfer of some assets, tangible or intangible, is required to constitute a transfer as prescribed in that jurisdiction and that loss of contract to a rival is insufficient *per se* to trigger the EEC Transfers Directive. The notion of a 'going concern' is absent from the EEC directive.

[10] See: *Dimension Data (Pty) Ltd and others v GWB Technologies CC t/a GWB Technologies and others* (2022) ILJ 1824 (LC).

[11] *Aviation at para 52.*

[12] *Süzen supra.*

[13] *Aviation* at paras 108, 114, 121.

[14] *NEHAWU* at paras 52 - 53:

> '[52] What lies at the heart of disputes on transfers of businesses is a clash between, on the one hand, the employer's interest in the profitability, efficiency or survival of the business, or if need be its effective disposal of it, and the worker's interest in job security and the right freely to choose an employer on the other hand. The common law provided little protection to workers in these situations. Under common law the sale of a business, whether as a going concern or not, often resulted in the loss of employment. The new owner was under no obligation to employ the workers. The Industrial Court, acting under the unfair labour practice provisions of the [1956 LRA], did however attempt to remedy the situation. Van Dijkhorst AJA also recognised that under the common law 'the employees were the worst off'. They were confronted with a take-over and

as such. The fair labour practice remedies relevant to job security objectives as alluded to in the Constitution and set out in the scheme of the LRA are not *guarantees of job security*; rather, the LRA inhibits dismissals which are not for good cause and has created statutory procedural and substantive remedies for *unfair* dismissals. Notable is the fact that, unlike the procedural regulatory mechanics for unfair dismissal for alleged misconduct in sections 185 to 188 and for unfair operational dismissals in sections 189 to 189A, the job protection element in section 197 is *qualitatively* different. The protection against the risk of job loss is rooted, not in a procedural straitjacket imposed on the employer, but rather, is located in the objective existence of a *commercial reality*, ie, a business as a going concern having been transferred. This means, in concrete terms:

13.1 a *discrete business unit* in the hands of the former owner (i.e. a business which performs a service, not the service itself, the unit being discernible by a grouping of workers set about a common objective);[15]

13.2 which business is, *as a fact*, transferred from one owner to another;

13.3 and which business is a going concern *at the time of transfer*, (i.e. it has intrinsic productive capacity);

13.4 which is recognisable as that going concern in the hands of the subsequent owner. (i.e. it retains the character of the initial business unit).[16]

---

lost their employment'. Later the transferring employer incurred the statutory obligation to pay severance benefits. This obligation no doubt had an impact on the cost of the sale of businesses. In short, the situation led to the retrenchment of workers, the payment of severance benefits and escalated costs in a way that inhibited commercial transactions. On the whole, the situation had potential to impact negatively on economic development and the promotion of labour peace.

[53] Section 197 strikes at the heart of this tension and 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 resultant 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 the workers against unfair job losses.'

[15] *Harsco Metals SA (Pty) ltd and another v Arcelormittal SA Ltd and others* (2012) 33 ILJ 901 (LC) at para 25.

[16] *NEHAWU* at para 56.

[14] What this means is that the judicial investigation into the entrails of such circumstances alleged to result in section 197 being properly triggered, is an endeavour to determine whether or not that commercial phenomenon exists. This exercise is not the imposition of a moral construct on the circumstances. The job protection objective hangs wholly by the thread of the banal concrete elements of section 197 being proven to exist.

Analysis of the facts

[15] Was there a discrete 'MTN-business' in the hands of CCI?[17] The answer is yes. That is manifest from the terms of the contract, and more tellingly, from the organisational arrangements implemented by CCI described above. A finding that there was a discrete business is also dispositive of the question of whether or not there was, in existence, at an earlier time than the termination of the MTN/ CCI agreement, a business which was a going concern in the hands of CCI. It follows that such a 'business unit' existed which *could* have been transferred.[18]

[16] However, is it objectively shown that the discrete 'CCI MTN-business unit' was indeed transferred as a going concern?[19] The fact that there was discernibly a going concern in the hands of CCI does not *per se* prove that it transferred once the contract terminated and CCI ceased to have any use for it: still less it does it prove, *per se*, that there was anything left to actually transfer once the agreement lapsed.

[17] What was the jurisprudentially cognizable event that triggered the cessation of the business unit in the hands of CCI and its concomitant alleged transfer? The lapsing of the contract simply severed the contractual relationship between MTN and CCI. CCI and MTN negotiated a revised price for services and failed to reach agreement on an extension of the contract. The management of CCI risked the existence of the survival of the CCI-MTN business unit when the negotiations on an extension of the contract began to wobble. This fraught

---

[17] *Road Traffic Management Corporation v Tasima (Pty) Ltd; Tasima (Pty) Ltd v Road Traffic Management Corporation* (2020) 41 ILJ 2349 (CC) (*Tasima*) at para 58.
[18] *Tasima* at para 60.
[19] *Aviation* at para 53.

exercise took place with the full knowledge that there were two competitors performing the same service for the same body of clients.

[18] The potential trigger for section 197 is the take-up of the work by Ibridge and Ison, not the lapsing of the MTN/CCI contract. However, did a transfer really occur in its wake? The mere fact that the service CCI would have performed was now performed by others is not significant; what is needed is for the CCI/MTN business unit to have transferred.

[19] A practical definition of a business is that of an enterprise composed of opportunities and risks within which milieu a productive capacity is deployed to generate revenue. The major asset, or the *sine qua non* or the substratum of the CCI MTN-business unit - call it what you may - was the contractual entitlement of CCI to perform a call centre service in such volumes as prescribed by MTN.[20] The secondary assets comprised the physical tools of trade: offices, furniture, telephones, etc. CCI sacrificed its primary asset which did not transfer to Ibridge or Ison. The 'keys' to access the MTN database, when returned to MTN, went into storage as being surplus to current requirements. CCI's secondary assets did not, it is common cause, transfer. CCI had marshalled persons to exploit that contractual entitlement and that body of employees constituted a fluctuating number of persons. This body of persons might be construed as the third category of assets as behoves a labour-intensive productive capacity but was, throughout the duration of the contract, a generally amorphous collection of persons who came and went in variable numbers.

---

[20] *Tadjima* at para 60:

> 'Courts have established what a business is by having regard to the constituent parts of the business and determining which parts are to be divested of by the transferor. A business can consist of a variety of components, including both tangible and intangible assets, goodwill, a management staff, a general workforce, premises, a name, contracts with particular clients, the activities it performs, and its operating methods. These components were explored in *Schutte*, where the Labour Court concluded that they did not constitute a closed list, but must be sufficiently connected to one another so as to form an 'economic entity' that is capable of being transferred. This approach influenced the Labour Court in *Harsco Metals*, where Van Niekerk J said:
>
> > "The definition [of a business] 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... 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".'"

[20] What was there to observe or discern in the hands of any of the three appellants which constitutes the ex-MTN business unit of CCI as a going concern retaining its identity in one or more of their hands? The sum effect of the termination of CCI's MTN business was that Ibridge and Ison got a greater volume of work. They got it and performed it without any need to take transfer of anything. No 'components' of CCI's business are discernible in the hands of either of CCI's competitors.

[21] Hypothetically, had CCI been an exclusive supplier of call centre services to MTN, there would indeed have had to be a 'replacement' service provider or service providers engaged upon the termination of the contract, a need recognised expressly in the agreement. But on these facts, once the contract lapsed the 'MTN business unit' of CCI became redundant. No transition was necessary, still less was there a need to transition to a 'replacement' service provider. The contention that Ibridge and Ison are obviously 'replacements' is incorrect because it wrongly assumes that the contract means that the termination of the relationship, under any circumstances, axiomatically triggers clause 46. However, examined holistically and objectively, CCI's MTN business simply did not transfer. This proposition does not mean it could not have been transferred under any other circumstances, but rather, *on these facts*, it did not transfer.[21]

[22] In *Kruger and others v Aciel Geomatics (Pty) Ltd*[22], the contention that section 197 applied to circumstances where the contract with a non-exclusive distribution agent was cancelled and the agency business transferred to a successor, was dismissed. Among the perspectives canvassed in that case was the recognition that the circumstances evidenced the failure of a competitor for the business leaving the other competitor the *de facto* sole agent and that this result did not trigger section 197. The comparison cannot be drawn too tightly because that case was not about outsourcing. However, the factor of non-exclusivity remains a weighty consideration.

---

[21] *Aviation* at paras 70 – 75.
[22] (2016) 37 ILJ 2567 (LAC).

[23] Part of the thesis advanced on behalf of MTN is that the change from an exclusive service provider to a competing service provider makes a significant change to the circumstances and any emphasis on the initial contract, such as was made in *Aviation,* is an error in reasoning because once CCI was one among three, there could be no simplistic application of the exit provisions of the agreement. I agree. The key thesis advanced on behalf of CCI in support of the proposition that section 197 is triggered is that the initial contract coloured the developments to such an extent that section 197 was built into *any* termination of the contract. That is incorrect. The character and attributes of circumstances that governed *the particular termination* would determine whether or not section 197 was triggered and in turn, whether clause 46 of the agreement was triggered. The gear-change from an exclusive service provider to a competitor changed the trajectory upon which CCI relies. Moreover, that gear-change was within the contemplation of the parties from the outset and what was envisaged by them and indeed occurred: i.e., competitors came on board. There was not a ripple of protest from CCI as CCI's relationship of exclusivity with MTN evaporated and CCI's share of the total call volume diminished and its workforce shrunk. Notionally, if the CCI employees had in the absence of compulsion been 'transferred' to one or more of the appellants, the CCI MTN-business unit would, in any event, not have survived as a going concern in the hands of the appellants; the staff would have been swallowed by the business units in Ibridge and Ison.

[24] The implication of the CCI thesis is, that whenever a business outsources a discreet business unit, any termination of that relationship triggers section 197. This consequence means that whomsoever is employed in the business unit will, in perpetuity, be secured in their jobs. This outcome, presumably, remains the position even when the business becomes an unviable competitor in the marketplace. There is, in my view, a great difference between a rule or norm that forbids the loss of jobs when contractual bonds are severed and a rule or norm which guarantees job security if, and only if, a prescribed set of facts exist: i.e, the employer's business is a going concern and that business is acquired by another party. A finding of fact is not an equity - choice.

[25] The call centre business is labour-intensive. What considerations are peculiarly pertinent to determining a transfer of this type of business? The fact that neither Ibridge nor Ison wanted to take over the workforce is immaterial. The fact that Ison at the Cape could not, practically, take over people who worked for CCI in Umhlanga is material. The example serves to show that a *labour-intensive business has a domicile* and that a transfer is, in some circumstances, simply not feasible. In the example of Ibridge which does share proximity to CCI's offices in KwaZulu-Natal, only 45 of the workers sought to be employed there, a veritable dribble.

[26] The alleged traditional instability of the workforce and high turnover in the sector was canvassed on the papers. However, I am not satisfied that enough objective data is available to draw any certain inferences save that staff turnover was high. Axiomatically the core job-skills to be a consultant are easily acquired. The key soft skills which filter potential entrants to this sector are obviously an intelligible accent and a lucid speaking voice. Picking up product knowledge cannot be taxing and, in any event, it is axiomatic that such knowledge perpetually changes.

[27] The contention that MTN and the other respondents had colluded in order to contrive a series of transactions to circumvent the application of section 197 is not sustainable on these facts.[23] The end result cannot, by inference, prove an unethical or unlawful intent. The risk of close competition was latent from the moment the contract was signed in 2018. The dwindling workforce was accepted as a part and parcel of the dynamic of the relationship with MTN. Correspondence on record reflects that CCI was comfortable when its personnel numbers plummeted, regarding it as a mere vagary of the business risk.

[23] The correspondence from MTN sources that broached an exit plan does not materially contribute to answering the question whether objective evidence points towards the business being transferred as a going concern any more than CCI's communication that redeploying staff as call volumes plummeted was not a problem because they could be redeployed, this proves that section 197 does not apply.

Conclusions

[28] The upshot is that the court *a quo* erred in taking the view that section 197 was applicable to these facts. Several conclusions in that judgment assumed as given, the very questions of the alleged fact that had to be investigated to determine their existence.

[29] The evidence on record does not demonstrate that, in this case, there was, as a fact, a transfer of any vestiges of the CCI business unit devoted to MTN work.

[30] The appeal must therefore be upheld.

Costs

[31] There is no ongoing relationship among the parties. However, as the factual matrix presented a measure of novelty, it is appropriate that there be no costs order.

Order

1. The appeal is upheld.
2. The order of the court *a quo* is set aside in its entirety and substituted by the order:

'The application is dismissed with no order as to costs.'

SUTHERLAND JA

Waglay JP and Gqamana AJA concur.

APPEARANCES:

For the First Appellant:	Adv A Myburgh SC with him, Adv R Itzkin instructed by Edward Nathan Sonnenbergs
For the Second Appellant:	Adv M Van As instructed by Webber Wentzel
For the Third Appellant:	Adv G Fourie SC instructed by Blakes Maphanga
For the Respondents:	Adv A Franklin SC with him, Adv A Bishop Instructed by Cowan Harper Madikizela Inc.