IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN) **REPORTABLE**

CASE NO: C264/2005

COSAWU
Applicant

and

ZIKHETHELE TRADE (PTY) LTD First

Respondent

FAIZEL BARDIEN N.O.
In his capacity as Trustee of **ZELPY 2178 (PTY) LTD**
formerly trading as **KHULISA TERMINAL SERVICES**
(In liquidation) Second
Respondent

JUDGMENT

MURPHY AJ,

1. This case is concerned with the consequences of a second generation contracting-out transaction involving a change in the provider of an outsourced service in the Cape Town harbour. The issue for determination is whether such constitutes a transfer of business within the meaning of section 197 of the Labour Relations Act

of 1995 (“the LRA”).

2. Section 197(1) of the LRA defines a transfer of business to mean the transfer of the whole or part of any business, trade, undertaking or service by one employer (“the old employer”) to another employer (“the new employer”) as a going concern. Significant consequences flow if a transaction is found to be a transfer of business. For the purposes of this case the most important are 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 and 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.

3. In *NEHAWU v University of Cape Town and Others* (2003) 24 *ILJ* 95 (CC), the Constitutional Court explained the rationale underlying section 197 as follows:

> 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 minimizing the tension and the resultant labour disputes that often arise from the sale of businesses and impact negatively on economic development and labour peace. In this sense, section 197 has a dual purpose, it facilitates the

commercial transactions while at the same time protecting the workers against unfair job losses.

4. From a commercial point of view, therefore, section 197 transfers of business have the twin advantages of preserving jobs and avoiding the immediate necessity of paying compulsory severance benefits.

5. The applicant in this matter, a registered trade union, has made an urgent application for a declaratory order that the first respondent ("Zikhethele") be declared to be the employer of the applicant's 147 members, identified in a list annexed to the notice of motion marked X, with effect from 1 April 2005, being the date on which the business of Khulisa Terminal Services ("Khulisa"), now in provisional liquidation and under the trusteeship of the second respondent, allegedly was transferred to Zikhethele in terms of section 197 of the LRA.

6. The first respondent, Zikhethele, opposes the application on the merits, but has in addition raised certain preliminary points and disputed the urgency of the matter. In order to appreciate the preliminary points fully it is perhaps best first to deal with the background and peculiar issues of the dispute.

7. The union represented 181 employees of Khulisa working in the Cape Town, Port Elizabeth and Durban harbours. Khulisa's principal business was to supply terminal and stevedoring services to a company known as Fresh Produce

Terminals ("FPT") at the three harbours. The services entailed the handling of fresh products delivered to the harbour by suppliers to be sorted and stored in different cooling rooms until loaded onto ships for export using cranes and other loading equipment.

8. Up and until 2000, the individual applicants had been employed directly by FPT, previously known as International Harbour Services. During this time FPT decided to outsource the terminal and stevedoring services to outside companies. As part of a black economic empowerment initiative, FPT was instrumental in the formation of Signal Hill Manpower Specialists (Pty) Ltd ("Signal Hill") to which some of its employees (particularly those based at the Cape Town harbour) were transferred in terms of section 197 of the LRA. This transfer involved a reduction in the employees' remuneration, which was intended to be off set by anticipated benefits accruing to the workers through a restructuring of ownership involving the formation of a trust for their benefit. The exact details of this arrangement are not apparent. But it is clear that disillusionment soon set in and the experiment has not proven to be an unmitigated success.

9. Signal Hill performed the terminal services and Evening Rainbow (Pty) Ltd ("Evening Rainbow") performed the stevedoring services at Cape Town harbour. In Durban both the terminal and stevedoring services were outsourced to Sizonke Logistics (Pty) Ltd. The current managing director of both Zikhethele and Khulisa,

Mr. Nathi Mfundisi, was also managing director of Evening Rainbow.

10. The contracts for the rendering of terminal services to FPT at the three harbours terminated on 31 December 2003 and 28 February 2004. FPT then proposed that Evening Rainbow, Signal Hill and Sizonke merge to form a single company, which would provide the total service solution in the three different harbours. This led to the formation of Khulisa. The managing director of Evening Rainbow, Mfundisi, become managing director of Khulisa at this point, and Mr. Johan Immelman became its Operations Director. The idea behind the merger was that a broad based black economic empowerment company be formed with the shareholding divided into a 65:35 ratio of managers to employees (the employees shares to be held in trust) while the profits were to be shared in a 80:20 ratio of employees to managers.

11. Khulisa then entered into an agreement with FPT. Heads of agreement were signed, with the idea that a final agreement would be drafted between the parties at a later stage. As it turned out, a final agreement was never signed because of an acrimonious dispute regarding the terms of the employee trust, the rights attached to the employee shares and allegations of impropriety. FPT accordingly decided to terminate the contract with Khulisa and invited the two factions within Khulisa, being the managing director, Mfundisi on the one hand, and a faction led by Immelman on the other, to tender for the services. FPT gave notice of

cancellation on 16 February 2005 with the intention that the contract with Khulisa would terminate on 31 March 2005 with the successful bidder taking over from 1 April 2005.

12. Two new companies, being Zikhethele and a shelf company headed by Immelman, Business Venture Investments No 829 (Pty) Ltd trading as Signal Hill Operation Services ("Signal Hill II") tendered for the contract. Most of the Cape Town employees pledged their support for Immelman's tender, while the Durban and Port Elizabeth employees did not express an allegiance either way. At a meeting held on 27 January 2005, 56 employees of Khulisa signed a declaration giving their support "to Mr. Immelman and his management team to take us forward into a better and prosperous future". The declaration concluded with the statement: "We wish to break all ties with Mr. Mfundisi and Khulisa Terminal Services".

13. On 14 March 2005 FPT formally awarded the contract to the first respondent, Mfundisi's company Zikhethele, to be the national service provider in respect of terminal and stevedoring services to FPT.

14. Shortly afterwards Signal Hill II, being the unsuccessful tendering party, made an urgent application to the High Court, Cape of Good Hope Provincial Division seeking to interdict the implementation of the contract, pending an application for

review of the tender process. FPT, Zikhethele and Khulisa opposed the application, simultaneously bringing an application in terms of rule 47 of the Uniform Rules of the High Court for security of costs. Such security has been set at a R100 000, which amount Signal Hill II, being an off the shelf company, has so far been unable to pay. In the result the High Court matter has effectively been stayed.

15. On 23 March 2005, Mr. Bernie Beukes, the General Secretary of the Union, wrote a letter to Mfundisi seeking clarity about whether Khulisa's employees were to be retrenched in terms of section 189 of the LRA or whether they would transfer automatically to Zikhethele and proposed a meeting on 29 March 2005 to discuss the matter. When he had not received a reply to his letter by 24 March 2005, he telephoned Mfundisi who, according to Beukes, undertook to send a letter to the union in which he would disclose all the relevant information requested and propose a date for the meeting. No response was received to the letter nor was any meeting held. In his opposing affidavit filed in these proceedings, Mfundisi contended that his reason for not replying was quite obvious. As he saw it, the employees were embarking on two contradictory strategies. On the one hand they were seeking to set aside the contract awarded to Zikhethele, on the other they were enquiring about the possibility of the transfer of their contracts to Zikhethele. While allowing for some sense of grievance on the part of Mfundisi, I cannot say that such justified ignoring the letter. In fairness to the employees he needed to explain whether he envisioned retrenchments or a transfer, in the event and on the

assumption that the contract between FPT and Zikhethele would stand as valid. Not too much turns on his silence for the purpose of determining whether a transfer of business has indeed taken place.

16. On 1 April 2005, the day on which Zikhethele stepped into the shoes of Khulisa as service provider, Mfundisi, acting in his capacity as managing director of Zikhethele, addressed a memorandum to all the employees of Khulisa in Cape Town advising them that they would be "seconded" to Zikhethele, for the period 1 April 2005 to 11 April 2005. This seems to have been done without prior consultation or their agreement. The memorandum reads:

> "As you aware, Zikhethele Trade 15 (Pty) Ltd t/a Zikhethele Terminal Services ("Zikhethele) has been nominated as the preferred service provider to Fresh Produce Terminals ("FPT') nationally, including Cape Town, effective today, 1 April 2005. Zikhethele has concluded a contract with FPT in this regard.
>
> Business Venture Investments No. 829 (Pty) Ltd t/a Signal Hill Operations Services (SHOS) launched an application out of the Cape High Court on Tuesday, 29 March 2005 in regard to the awarding of the service provider contract to Zikhethele. This matter is to be heard on 11 April 2005.
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> In terms of a court order granted on 31 March 2005, Zikhethele is to continue with providing the services to FPT nationally including Cape Town, until the matter is heard on 11 April 2005.

In the interests of total fairness Zikhethele has resolved that all employees of Khulisa Terminal Services (KTS) will be seconded to Zikhethele for the period 1 April 2005 to 11 April 2005, unless the matter is resolved sooner, in which event such secondment will persist until that earlier date only. This is being done merely to accommodate the provisions of the Court Order granted on 31 March 2005 and to ensure that the rights of all parties are properly protected. All employees will continue to be employed by KTS but will merely be seconded to Zikhethele.

Zikhethele is confident that the application brought by SHOS will be dismissed by the High Court by or before 11 April 2005. Zikhethele is accordingly still accepting applications for positions with it. Please be advised that interviews for positions with Zikhethele will be concluded as follows:

1. Managers - Friday, 1 April 2005
2. Drivers - Monday, 4 April 2005
3. Operational Clerks -Tuesday, 5 April 2005".

17. It is not clear whether the decision-making organs of Zikhethele and Khulisa authorized the secondment or, as I have said, if there was any prior consultation or agreement with the employees. In his opposing papers Mfundisi maintained that the secondment was designed to preserve the status quo pending the outcome of the urgent application to the High Court, and that he was acting in good faith in that regard.

18. The invitation in the memorandum to the Khulisa employees to apply for positions with Zikhethele intimates openly that Zikhethele did not foresee an automatic

transfer of employment in terms of section 197 of the LRA. The applicant claims that this was different from what transpired in relation to the employees of Khulisa in Durban and Port Elizabeth, who, it contended, were taken over automatically. Zikhethele partially disputes this in its opposing affidavit. Without denying that all of the employees of Khulisa were taken over automatically, it avers that the employees in Durban and Port Elizabeth were interviewed and appointed to positions on application. It further asserts that the applicant had no members among the employees at Durban and Port Elizabeth. Be that as it may, in my opinion, the crucial point remains that by whatever means all the employees of Khulisa in Durban and Port Elizabeth transferred to Zikhethele.

19. Despite the terms of the memorandum of 1 April 2005, the secondment continued until 29 April 2005, resulting in an understandable measure of uncertainty among Khulisa's Cape Town employees. On 26 April 2005, it would seem again without prior notice or consultation, Mfundisi addressed a second memorandum under the letterhead of Zikhethele to the Khulisa employees advising them that the secondment would end on 29 April 2005. This memorandum reads:

> "On or about 31 March 2005, Zikhethele advised all employees of Khulisa Terminal Services in Cape Town that they would be seconded to Zikhethele for the period 1 April 2005 to 11 April 2005. the urgent application brought by Business Venture Investments No 829 (Pty) Ltd trading as Signal Hill Operational Services (SHOS) was due to be heard on 11 April 2005.

> As it transpired, that application was not heard on 11 April 2005. Instead, an application in terms of which FPT and Zikhethele required SHOS to provide security was heard on that date. SHOS was directed by the Court to furnish security for FPT in sum of R100, 000.00 and for Zikhethele in the sum of R100,000.00 and to do so by or before the 22nd of April 2005.

> Despite the earlier notice limiting your secondment to the 1 April 2005 to 11 April 2005, Zikhethele permitted such secondment to continue past the date of 11 April 2005. It is no longer possible for Zikhethele to do so.

> Please be advised that all secondment of KTS employees will come to an end at the close of business on Friday 29 April 2005.

> Zikhethele will, from Saturday 30 April 2005, directly employ persons so that Zikhethele may provide the terminal services as provided for in the Court Order. Many of you have applied for positions with Zikhethele and have been interviewed. Zikhethele will decide which of you it wishes to employ from Saturday 30 April 2005. Those of you that Zikhethele decides to employ will be advised directly concerning such employment".

20. Once more what is noteworthy about this memorandum is the statement that Zikhethele intended to directly employ persons to provide terminal services and that it had entertained applications from Khulisa employees who it would advise on the success of their applications in due course.

21. On receiving this memorandum Beukes addressed two letters to Mfundisi, one in his capacity as managing director of Zikhethele and the other in his similar capacity at Khulisa. The letters essentially advised Mfundisi that the union members had applied for positions with Zikhethele without prejudice to their rights, as they believed such applications were unnecessary because their contracts of employment would transfer automatically to Zikhethele in consequence of the transfer of the business of Khulisa as a going concern. In the letter addressed to Mfundisi as managing director of Zikhethele, Beukes sought an undertaking from him that the Khulisa employees who had not applied for positions at Zikhethele would be considered to have been automatically transferred, failing which the union would seek an order from the Labour Court. Mfundisi failed to respond to both of these letters, and has subsequently taken the view that he did not need to on account of it being quite obvious, in his opinion, that as far as Zikhethele was concerned there was no transfer of business to it, and also because of the contradictory nature of the separate relief sought in the two different jurisdictions.

22. On 26 April 2005 application was made to the High Court to place Khulisa under provisional liquidation. A provisional liquidation order was granted on 5 May 2005, returnable on 9 June 2005. From this the applicants infer that through the use of the tender process and subsequent liquidation of Khulisa, the respondents will be able to minimize their obligations hoping to avoid the consequences of section 197

and the obligation for Khulisa to pay retrenchment packages under section 189 of the LRA. Mfundisi denies this, but fails to provide any information or to give an undertaking that Khulisa, without the benefit of the FPT contract, is sufficiently in funds to meet any obligation it may have to pay its employees severance pay and accumulated leave pay. On the contrary there is an admission on record that Khulisa is unable to pay its debts.

23. In rebuttal of the allegations against him, Mfundisi offers some explanation and justification of the approach he has followed. Firstly, of obvious importance he asserts that of the 147 employees in Annexure X, Zikhethele has employed 104. There is no evidence however that either the 104 Cape Town employees or the employees taken on in Durban and Port Elizabeth have been employed on terms and conditions that are on the whole not less favorable than those on which they were employed by Khulisa. And it is safe to presume, given the correspondence and memoranda, that there is no intention on the part of Zikhethele to assume the obligations of Khulisa, guaranteeing continuity of employment, as would normally be the case in a transfer of business in terms of section 197 of the LRA. Most importantly, the fact remains that Zikhethele has employed all of the employees of Khulisa in Cape Town, Durban and Port Elizabeth with the exception of 43 in Cape Town who, the apprehension legitimately exists, may or may not be those who most vociferously backed the Signal Hill II bid.

24. In fairness to Mfundisi, to his credit, he appears to have made a last ditch attempt to resolve the differences within Khulisa in Cape Town. Instead of putting aside their differences for the common good of Khulisa, a significant faction of the employees had in reality resolved to have nothing further to do with Mfundisi and then embarked upon a strategy, which has culminated in the litigation before the High Court. Mfundisi admits acting in his own legitimate interests, pointing out that in his view the demise of Khulisa came about as a direct result of the actions of the employees who eventually supported the Signal Hill II bid.

25. Finally, while Mfundisi admits that he was managing director of Zikhethele and Khulisa, he disputes, “that Zikhethele is operated and controlled” in the same way that Khulisa was, maintaining that the one company bears no comparison to the other. Whilst in broad brush the activities of Zikhethele are conceded to be similar to those of Khulisa, he denies that the economic entity originally situated in Khulisa was transferred to Zikhethele because, as he sees it, Zikhethele has a completely novel structure which cannot be compared to Khulisa. There is no evidence or explanation elaborating on the structure of either. Nor is it denied that Mfundisi was managing director and had a controlling stake in both companies. Furthermore, Mfundisi does not dispute that Zikhethele operates from the same premises as Khulisa in Cape Town, Durban and Port Elizabeth. Even though Zikhethele is apparently acquiring separate furniture, it still makes use of the same telephone number, fittings and other equipment previously used by Khulisa. Most importantly,

while claiming to be contracting with new clients, Zikhethele's main client and biggest asset is FPT, as was the case with Khulisa. As far as suppliers are concerned Zikhethele has made a bald denial that its suppliers are the same as Khulisa's, but has offered no substantiation of how they differ.

26. In the light of these arrangements, the applicants contend that the business in question has remained exactly the same except for the fact that it is in different hands and operating under a different name. Hence, it is submitted that the economic entity comprising the business in Khulisa has been transferred to Zikhethele as a going concern with the result that the contracts of employment with Khulisa have been automatically transferred in terms section 197 to Zikhethele.

27. As far as I have been able to ascertain this is the first instance in which the Labour Court has been called upon to pronounce on second generation contracting-out. Second generation contracting-out typically occurs in circumstances, such as the present, where a company has outsourced services to a contractor and when the initial contract comes to an end puts the opportunity to provide the service out to tender, whereupon the original contractor is unsuccessful in its bid to secure the contract for an additional term.

28. Although the matter was not pertinently argued before me, a compelling argument can be made, based on the express language in section 197 of the

LRA, that the requirement in section 197(1)(b) that a transfer of business be *by* one employer to another precludes its application to second generation contracting-out, because in such arrangements nothing is transferred by the old employer to the new employer. Hence, second generation contracting-out is effectively exempted from the application of section 197. (See M Wallis *Section 197 is the Medium. What is the Message?* (2000) 21 *ILJ* 1 @ 4). In the present case the submission would be that the business transferred to Zikhethele as a going concern was not at the instance of Khulisa but rather FPT, who was never the old employer of the applicant's members. On the other hand, this court has held on another occasion that the lack of a contractual link between the transferor and the transferee is not a necessary pre-condition for the application of section 197 - *Nokeng Tsa Taemane Local Municipality and Another v Metsweding District Municipality and Others* (2003) 24 *ILJ* 2179 (LC) @ 2183.

29. Likewise, I am persuaded that a less literal and more purposive approach is justified in the context of section 197. As stated earlier, the 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 section 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. As in this case, the danger exists that the employees might not only lose their continuity of employment but also their severance benefits, for the reason that the old employer having lost its business to the new employer lacks the means to pay its debts. Accordingly, I am in agreement with Todd et al, *Business Transfers and Employment Rights in South Africa* (Butterworths, 2004) @ 27, that section 197(1)(b) might be better interpreted to apply to transfers "*from"* one employer to another, as opposed to only those effected "*by"* the old employer. 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 section 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.

30. The European law and practice on the topic is especially instructive. In *Dines v Initial Services* [1994] *IRLR* 336, the UK Court of Appeal was seized with facts resembling those of the present case in many aspects. The applicants in that case were employees of Initial Services, which undertook cleaning work at a hospital pursuant to a fixed term outsourcing contract. As a result of competitive tendering, when the contract expired the new contract went to a new provider Pall Mall. Reversing the decision of the Employment Appeal Tribunal, the Court of Appeal held that there had been a transfer of an undertaking. The fact that another company takes over the provision of certain services as a result of competitive tendering does not mean that the

first business or undertaking necessarily comes to an end. The Court of Appeal accepted that the transfer of the undertaking had taken place in two phases: the first being the handing back of the cleaning services to the hospital authority and the second phase being the grant to Pall Mall of the cleaning services on the day after the original contract terminated, which were operated by essentially the same labour force.

31. The European Court on similar but by no means identical facts reached a different conclusion in *Ayse Suzen* [1997] *IRLR* 255. The applicant was a school cleaner whose employer's school cleaning contract came to an end. Other contractors were appointed and she was dismissed. She sought a declaration that her dismissal was ineffective on grounds that she had been automatically transferred in terms of EEC Directive 77/187. The Court held that whilst the lack of any contractual link between alleged transferor and alleged transferee may point to the absence of a transfer within the meaning of the Directive it is certainly not conclusive. The Court however held further:

"The mere fact that the service provided by the old and the new awardees of a contract is

> similar does not therefore support a conclusion that an economic entity has been transferred. An entity cannot be reduced to the activity entrusted to it. Its identity also emerges from other factors, such as its workforce, its management staff, the way in which its work is organized, its operating methods or indeed, where appropriate, the operational resources available to it.
>
> The mere loss of a sales contract to a competitor cannot therefore by itself indicate the existence of a transfer within the meaning of the Directive. In those circumstances the service undertaking previously entrusted with the contract does not, on losing a customer, thereby cease to exist, and a business or part of a business belonging to it cannot be considered to have been transferred to the new awardee of the contract".

32. The European Court then concluded that there would be no transfer of business "if there is no concomitant transfer from one undertaking to the other of significant tangible or intangible assets or taking over by the new employer of a major port of the workforce, in terms of their numbers and skills, assigned by his predecessor to the performance of the contract".

33. The UK Court of Appeal considered and applied *Ayse Suzen* in *Bitts v Brintel Helicopters* Ltd [1997] *IRLR* 361 (CA) also finding that there had been no transfer of an undertaking where what was in fact transferred was of a limited nature. In that case Brintel Helicopters provided helicopter services to and from oil rigs in the North Sea for Shell (UK).

This was done through three separate contracts, covering different sectors. When the contracts expired they were put out to tender. KLM successfully tendered for the contract run out of Beccles in Norfolk. None of Brintel's employees based at Beccles were taken on by KLM, nor did it take over any equipment and ultimately conducted its operation out of Norwich Airport rather than from the base previously used in Beccles. The only assets transferred to KLM consisted of the right to land on oil rigs and the use of oil rig facilities. A transfer of such a limited part of the undertaking could not lead to the conclusion, the Court felt, that the Brintel Beccles undertaking was transferred so that it retained its identity in the hands of KLM. This distinguished it from the situation in *Dines* which involved a labour-intensive undertaking in which the staff combined to engage in a particular activity which continued or resumed with substantially the same staff after the transfer, so that the undertaking transferred retained its identity in the hands of the transferee.

34. In short, the European courts tell us this in relation to second generation contracting-out. The absence of a contractual link between the old and the

new employer is not decisive, hence a two phased transaction can indeed constitute a transfer. Secondly, the decisive criterion for determining whether there has been a transfer of an undertaking (read "business") is whether, after the alleged transfer, the undertaking has retained its identity, so that employment in the undertaking is continued or resumed in the different hands of the transferee. In order to determine whether there has been a retention of identity it is necessary to examine all the facts relating both to the identity of the undertaking and the relevant transaction and assess their cumulative effect, looking at the substance, not at the form, of the arrangements. The mode or method of transfer is immaterial. The emphasis is on a comparison between the actual activities of and actual employment situation in an undertaking before and after the alleged transfer. *Kelman v Care Contract Services* [1995] *ICR* 260. What seems to be critical is the transfer of responsibility for the operation of the undertaking. Mummery J's conclusion in *Kelman* offers a salutary guideline. He said:

> "The theme running through all the recent cases is the necessity of viewing the situation from an employment perspective, not from a perspective conditioned by principles of property, company or insolvency law. The crucial question is whether, taking a realistic view of the activities in which the employees are employed, there exists an economic

> entity which, despite changes, remains identifiable, though not necessarily identical, after the alleged transfer".

35. Our own law, I believe, is not much different. For the reasons already explained, I accept that the two phase transaction intrinsic to second generation contracting out does indeed constitute a "*transfer"* as contemplated by section 197 of the LRA. As in European law, the mode or method of transfer is less important. The crux of the determination is whether what is transferred is "a business in operation so that the business remains the same but in different hands" - *NEHAWU v University of Cape Town* @ 119E. The Constitutional Court held that whether such has occurred is a matter of fact to be determined objectively in the light of the circumstances of each transaction. Also in line with European law, in deciding whether a business has been transferred as a going concern, courts must have regard to the substance and not the form of the transaction. In this respect the Constitutional Court observed (@ 119G-120B):

> "A number of factors will be relevant to the question whether a transfer of 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".

36. Returning to the facts and circumstances of the case at hand, I am persuaded that there are significant features present that indicate there has been a transfer of business as a going concern from Khulisa to Zikhethele. My conclusion is informed in part by the history of outsourcing that has taken place since 2000, the unhappy events leading to the failure of the black economic empowerment initiative in the Cape Town harbour and the unsuccessful bid by a faction of the Cape Town employees. The incorporeal service provider contract originating in FPT has found its way through various corporate arrangements until it reached Zikhethele in almost identical form. The rights and duties involved have undergone metamorphosis to a degree, but contractually the same job needs to be done by the same employees at the same locale using the same operational methods. Viewing the situation first and foremost from an employment perspective, it is of utmost importance that by far the majority of employees of Khulisa have been taken over by Zikhethele in the three harbours. Limiting consideration of this factor to what has happened in Cape Town, the majority of employees there now work for Zikhethele. Added to that, Mfundisi has a controlling stake and is the managing director of both the new and the old employer. The premises, fittings and

equipment employed by Khulisa are now at the disposal of Zikhethele. At least some of the suppliers of the two companies appear to be the same and there is no doubt at all that FPT is the main client with the terminal and stevedoring services contract being the substantial incorporeal asset. The reality is that without that asset Khulisa can no longer pay its debts and has been forced into liquidation. That Zikhethele is in pursuit of new clients is of little significance, especially in view of the fact that such clients were in any event most likely in Mfundisi's sights as managing director of Khulisa.

37. Accordingly, on a narrow comparison between the actual activities and actual employment situation in the two companies before and after FPT's award of the tender to Zikhethele, the business as a going concern has retained its identity to a sufficient degree as to constitute a transfer of business. To the extent that the respondent has denied the allegation that the shareholding is substantially the same without disclosing the actual nature of the shareholding, I do not consider such denial as presenting a dispute of fact sufficiently material to justify a referral to oral evidence. The papers disclose that Mfundisi is the controlling shareholder and managing director in both companies. That, viewed from the employment law perspective, is enough to find that the business in question has retained its identity.

38. Taking a broader view, although strictly speaking perhaps not necessary on the facts of this case, it is acceptable to attach weight to the policy argument that a

finding adverse to the applicants would leave them not only without continuity of employment but with no severance pay because Khulisa cannot pay its debts. That would be so despite the fact that the principal players continue to operate a profitable stevedoring business in the Cape Town harbour, carrying on in more or less exactly the same way as has been done for many years, but only under the rubric of different contractual and corporate arrangements; making the admonition to apply a perspective not conditioned by the principles of property, company or insolvency law all the more salutary.

39. Finally, and perhaps also in the realm of policy considerations, counsel for the respondent has made much of the strong preference expressed by the Cape Town workers not to work for Mfundisi. Can the automatic consequences of a transfer of business be countenanced in the circumstances? In the hurly burly of business and life in the docks, I can see no reason why not. Clearly some of the applicants' members would have preferred to have seen Signal Hill II win the bid. The reality is that it lost. No fair labour policy can allow termination of employment to be visited on the employees simply for playing the wrong hand in a competitive tender process. All of the Cape Town employees have tendered their services to Zikhethele. Should they breach their duty of good faith to Zikhethele through subsequent acts of disloyalty or insubordination, they can be appropriately disciplined. At the time of the bid they owed no duty to Zikhethele. Moreover, during the period of "secondment" (itself an indicator of the blurred corporate

identities) the Cape Town employees performed loyally without demur.

40. In the premises I am satisfied on the facts and in the circumstances of this case that a transfer of a business took place in two phases when FPT cancelled the contract with Khulisa with effect from 31 March 2005 and then granted the contract to Zikhethele with effect from 1 April 2005. As a consequence, Zikhethele was automatically substituted in the place of Khulisa in respect of all contracts of employment in existence on 31 March 2005 and all the rights and obligations between Khulisa and its employees continue in force as if they had been rights and obligations between Zikhethele and the employees. Accordingly, the applicant is entitled to the declaratory order it seeks.

41. The matter, however, does not end there. As mentioned at the outset, the respondent has raised four points *in limine*. I have left them to last because in the final analysis they are without merit.

42. The first point is that the application should be dismissed because the applicant neglected to join both individuals appointed as the liquidators of Khulisa, having elected to join only Mr. Faizel Bardien and not the second Mr. Jurgen Steenkamp. The applicant has subsequently applied to join Mr. Steenkamp which application has not been opposed, and should therefore be granted. Given that one of the joint

liquidators was indeed joined I consider the non-joinder to be immaterial. In any event no relief is sought against the liquidators and they are joined merely because they are likely to have some interest in the outcome.

43. The second point is that there has been a non-joinder of FPT. I agree with counsel for the applicant that FPT has no direct or substantial interest in the outcome of this application. Any interest it may have, albeit potentially of financial import, is of an indirect nature. Although the employees of Zikhethele will work on its premises, the outsourcing arrangements do not grant it any say in who may or may not be employed by Zikhethele.

44. The third point *in limine* is that the application should be stayed pending the outcome of the review proceedings brought by Signal Hill II in the High Court. Even though the separate applications envisage relief which is potentially contradictory, until set aside the contract between FPT and Zikhethele should be presumed to be valid. Viewed from an employment perspective that valid contract is part and parcel of a transfer of business. Should it be declared invalid it may be necessary to effect another transfer of business to the eventual successful bidder. Such speculative scenarios ought not operate to

deny the applicant's members the security to which they are entitled in employment law under section 197 of the LRA.

45. The fourth preliminary point submits that the matter is not urgent or that the urgency that exists is of the applicant's own making. FPT awarded the contract to Zikhethele on 14 March 2005, but the applicant only launched these proceedings on 11 May 2005. I am satisfied that the matter only became urgent on 3 May 2005 when Zikhethele barred the employees entrance to the premises a few days after the secondment had ended. They brought the application within the week thereafter. Urgency is justified because the declarator needs to be made sooner rather than later in order to avoid any disruption or threat to industrial peace which may be caused by the employment by Zikhethele of substitute labour. Hence, I am persuaded that the matter is one of urgency.

46. Although the applicant has been put to perhaps avoidable expense, the complicated history attending this transfer and the ongoing relationship between the parties militate against an award of costs.

47. Accordingly, I make the following orders:

    a. The first respondent is declared to be the employer of the applicant's

members in Cape Town, identified in the list marked X annexed to the Notice of Motion, with effect from 1 April 2005.

b. It is further declared that, within the meaning of section 197(2) of the LRA, all the rights and obligations between Khulisa and the abovementioned members of the applicant at 31 March 2005 continue in force as if they had been rights and obligations between the first respondent and the abovementioned members of the applicant.

c. There is no order as to costs.

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Murphy AJ,

Date of hearing: 23 May 2005

Date of judgment: 31 May 2005

Applicants' Representative: Adv C Hinds instructed by Hofmeyr Herbstein & Gihwala Attorneys

Respondents' Representative: Adv G O van Niekerk SC instructed by Craig

Mundell Inc