**IN THE LABOUR COURT OF SOUTH AFRICA**
**HELD AT PORT ELIZABETH**

Case No: P100/06
Date Delivered: 16/11/07

In the matter between

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| **CROSSROADS DISTRIBUTION (PTY) LTD t/a JOWELLS TRANSPORT** | Applicant |
| and | |
| **CLOVER S.A. (PTY) LTD** | First Respondent |
| **M G MOKO AND 16 OTHERS** | Second to Eighteenth Respondents |

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**JUDGMENT**

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**REVELAS J**

[1] The applicant, ("Crossroads") seeks a declaratory to the effect that section 197 of the Labour Relations Act, 66 of 1995, as amended (or "the LRA"), is not applicable in circumstances where it has become the new transport and logistics supplier to a company called Woodlands Dairy (Proprietary) Limited (or "Woodlands"). Previously the first respondent (or "Clover") provided Woodlands with the services mentioned.

[2] Clover, in its opposing papers, also seeks a declaratory order, but to the effect that section 197 of LRA does apply to the circumstances described in the applicant's notice of motion. It seeks a further order that the contracts of employment of the 2nd to 18th respondents (or "individual respondents" or "employees") be declared to have been automatically transferred by operation of law with effect from 1 December 2005, or 1 January 2006 "as the case may be", as contemplated in section 197 of the LRA.

[3] When on 1 March 2005, Clover notified Woodlands of its intention to terminate of the contract between them, Clover had been supplying Woodlands with transport and logistical services since 1 September 2003. The individual respondents were amongst those employed by Clover to fulfil its obligation as service provider to Woodlands. The notice given by Clover of its intention to terminate the contract with Woodlands, resulted in the latter requiring another transport and service provider and it subsequently approached Crossroads to tender in relation to the transportation of the raw milk used in its business. The subsequent transportation agreement entered into between Crossroads and Woodlands on 18 Augustus 2005, provided that Crossroads as transport carrier, would collect raw milk in bulk from suppliers designated by Woodlands and deliver the milk in accordance with a certain schedule. The commencement date of the agreement is 1 January 2006. The provision of the relevant service by Crossroads was phased in as from 1 December 2005. Crossroads invested in fourteen new tanker vehicles at the cost of R23 million to service its contract with Woodlands and as a result of its contemplated business expansion, the applicant employed additional staff, such a qualified drivers for the vehicles, some of them being former employees of Clover.

[4] To avoid disruption in the business of Woodlands, as far as possible (which was of concern to Woodlands), there were communications and meetings between Crossroads, Clover and Woodlands about the latter's transportation and logistics supply requirements. The practical arrangements in existence between Clover and Woodlands were firstly, that the business ran as a full time (24 hour) operation and secondly that Clover's Humansdorp premises would be the principal base of that operation, with the collection vehicles following a planned route. The other arrangements involved raw milk samples being collected and taken to the Humansdorp base for analysis and then, at a point next to the factory, the raw milk will be pumped out of the tanks on the vehicles and into factory storage facilities.

[5] Clover employed one manager four supervisors and thirty one drivers while it rendered the services in question to Woodlands. On 29 June 2005 Clover advised Crossroads that it intended retaining the services of the manager, three supervisors and eleven drivers. Crossroads offered employment to any drivers who had lost their

employment on similar terms of employment to those applicable to when they were employed by Clover. Subsequently sixteen former Clover employees were employed by Crossroads as drivers, some from 1 December 2005 and others from 1 January 2006. Hence mention of the two dates in the second declarator sought by Clover in its opposing papers.

[6] Clover also sold office furniture and one appliance at the Humansdorp premises to Crossroads, who also paid an amount towards a wash bay structure and certain equipment installed by Clover at the same site. These transactions were separate transactions which were not incorporated in the agreement between Woodlands and Crossroads. Whereas Shell provided fuel for Clover's tankers, Crossroads had an arrangement with Caltex. In order to deliver the relevant services, Crossroads had only the Humansdorp premises in common with Clover as a base from which it operates.

[7] The answer to the question whether section 197 of the LRA applies or not, will impact on the rights, obligations and liabilities of the parties which may differ materially. If section 197 does apply to the situation in question, then the employees employed by Clover were indeed automatically transferred to Crossroads, and their current employment arises from contracts they have concluded with Clover. The benefits derived from their lengths of service for instance, will be materially affected, and the question of their entitlement to severance pay.

[8] Section 197 of the LRA provides for the continued employment of an employee where his or her employment is transferred from one employer ("the old employer") to another employer ("the new employer") in circumstances where there has been a transfer of business, and there is no agreement to the contrary. The section envisages a transfer of a business, trade, undertaking, or service (an addition to the definition made in 2002) as a going concern, at the instance of one employer to another.

[9] Crossroads argued that even though "business" is defined as including a business trade, undertaking, or service (or part thereof) the later insertion of "service" in the definition, does not extend to a contract for the provision of service. In this

regard I was referred to the judgment in *Municipal Workers Union & Others v Rand Airport Management Co (Pty) Ltd & Others (2002) 231W 2304 (LC)* where **Landman J** commented that the addition of "service" in the definition, does not amount to a significant change to the definition in that *"it merely clarifies the position that a business, to use a general term, may consist mainly, or only of the rendering of services to another or persons for profit or otherwise"*. Although the judgment was overturned on appeal the aforesaid observation remains apt. It was also submitted by Crossroads that with the insertion of "service" in the definition, the legislature intended to remove doubt about non-commercial service-providing entities such as universities, being included in the definition.

[10] The meaning of "business" and "going concern" are important in determining this issue. A business implies a certain infrastructure premises and staff. A "going concern" is something similar – an entity with assets, customers and employees. According to the Constitutional Court in *NEHAWU v University of Cape Town and Others (2003) 24 ILJ 95 (CC) at paragraph 56* a "going concern" must be given its ordinary meaning, which is a business in operation. Whether there is such a business can only be determined by relying on the facts of each case.

[11] In the present matter, Clover relies on the later contract concluded between Woodlands and Crossroads, which was preceded by its own very similar contract with Woodlands (which came to an end), to argue that there was a transfer of a business as a going concern envisaged by the Act.

[12] In *SAMWU & Others v Rand Airport Management Co (Pty) & others (2005 26 ILJ 67 LAC* gardening and security functions were outsourced to several service providers. It was accepted in that matter that the obligations to be fulfilled by the providers fell within the definition of "service" as contemplated in the section in question and was capable of being transferred in the manner envisaged by section 197 of the LRA. The question whether they were so transferred, depended on whether they were transferred as a "going concern" (at 78 paragraphs [18] and [19]). An entity which provides such services is indeed capable of being transferred within the meaning of section 197(1)(b). However the same reasoning does not apply to the

contract which governs the terms and conditions upon which such services are rendered. That is not capable of being transferred, in my view.

[13] The concept of Second Generation contracting must also be examined in this case. "Second Generation" contracting out takes place where there is a change in the provider of the outsourced service. In *COSAWU v Zikhethele Trade (Pty) Ltd and Another (2005) 26 ILJ 1056(LC)* it was held that "second generation" contracting out could constitute a transfer for the purposes of section 197, in the absence of an agreement between the two providers. In paragraph [2] of that judgment **Murphy AJ** concluded that:

> **"A mechanical application of the literal meaning of the word "by" in section 197 (1) (a) 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 protection. The possibility for abuse and circumvention of the statutory protections by unscrupulous employers is easy to imagine..... I am in agreement with Todd et al Business Transfer and Employment Rights in South Africa ..... that S 197 (1) (b) might be better interpreted to apply to transfer "from" one employment to another, as opposed to only those effected "by" the old employer".**

[14] **Basson J** in *Aviation Union of South Africa and Others v SAA Pty Ltd LGM Engineers (Pty) Ltd and Others (V 2206/07 – Labour Court: 1 October 2007)* held that there was no need to read into the express and unambiguous section 197 of the Act, words that do not appear there. She held that the section only envisaged a transfer from an old to a new employer. She agreed with **Murphy AJ** that workers affected by a second generation transfer may well equally be in need of protection, but she was of the view that it should be left to the legislature to extend the ambit of section 197(1) (b) so as to apply to the so-called second generation transfers as well. In her view the *Zikhithele* decision is only authority for the proposition that, where the second business is so closely aligned to the first business that it is in fact identical, section 197 maybe applicable. She compared this to a situation of piercing the corporate veil. I respectfully agree with the views of **Basson J** and associate myself with her views in this matter.

[15] 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 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.

[16] The fact that some employees employed by Clover commenced working for Crossroads does not mean they were automatically transferred. They accepted offers of employment, and concluded their own separate contracts. There was no statutory obligation on the part of Crossroads to employ them. It was also not a situation where all employees of Clover were obliged to commence working for Crossroads. Clover is still in business although it no longer carries on the business of providing transportation and logistics to Woodlands. Crossroads now carries on that business. Woodlands was never the employer of any of the employees in question. Therefore there was no "old employer" – "new employer" relationship between them which would invoke the operation of section 197 of the LRA. Nothing tantamount to a going concern has been transferred by Clover or Woodlands to Crossroads. The purchase of certain items and installation of structures at the Humansdorp premises and the taking over one office there, were all separate transactions. Key assets, such as tankers were not transferred, but used by Clover in other business operations.

[17] In my view, the argument that section 197 is applicable to the situation *in casu* is not sustainable, because there has been no "transfer of business" as contemplated by section 197 of the Act. The meaning given by Clover to "transfer of a business"

strains the language of section 197 of the LRA to include situations which perhaps should have been contemplated by the legislature, but were not.

[18] In the circumstances, I make the following order:

1. Section 197 of the LRA does not find application to the circumstances of this matter and the applicant is entitled to the relief sought in paragraph 1 of its notice of motion.
2. The first respondent is to pay the costs of this application

E REVELAS
Acting Judge of the Labour Court