

SOUTH AFRICA / JUDGMENT

Associated Computer Solutions (PTY) Ltd and Others v Man Truck and Bus (SA) (PTY) Ltd and Another (1 August 2022) (J 808/22) [2022] ZALCJHB 203 (1 August 2022)

[2022] ZALCJHB 203

COURT

Labour Court Johannesburg

BEFORE

Prinsloo

CASE / FILE NUMBER

J 808/22

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

CASE

NO: J 808/22

In

the matter between:

ASSOCIATED
COMPUTER SOLUTIONS (PTY) LTD
First Applicant
SEPHESIHLE
VILIKAZI
Second Applicant
ANNA-MARIE
GEORGINA OPPERMAN
Third Applicant
KATHLEAN
ESCHNER
Fourth Applicant
and
MAN
TRUCK AND BUS (SA) (PTY) LTD
First Respondent
MAN
AUTOMOTIVE (SA) (PTY) LTD
Second Respondent

Heard: 27 July 2022

Delivered: 01 August 2022
(In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be on 01 August 2022).

JUDGMENT

PRINSLOO, J

Introduction

[1] The Applicants approached this Court on an urgent basis for relief in terms of the provisions of section 197 of the Labour Relations Act[1] (LRA). They seek final declaratory relief, aimed at securing the transfer of employment of the Second to Fourth Applicants (the affected employees) to the Second Respondent.

[2] The Respondent took issue with urgency and in my view, the issues so raised by the Respondent are not entirely without merit. However, the nature of this application renders it inherently urgent, and this Court will deal with the application on an urgent basis.

The dramatis personae

[3] Before dealing with the merits of the case and the relief sought, I have to set out who the dramatis personae are.

[4] It is not disputed between the parties that most large companies and organisations use some kind of enterprise resource planning (ERP) information technology or software system to assist them to manage day-to-day business activities such as accounting, sales and order management, procurement and supply chain operations.

[5] The Applicant (ACS) is in the business of IT software. It inter alia sells, implements and supports a software package known as “Embrace” and provides various services related thereto. In fact, it is common cause that the primary business of ACS consists of providing clients with access to and use of its Embrace ERP IT system, according to the client’s particular needs and provides ongoing support to the clients who use the Embrace system.

[6] The First Respondent’s business was transferred to the Second Respondent on 1 May 2017 as a going concern and the First Respondent

is in the process of being wound up in terms of the Companies Act[2]. The Second Respondent (MAN) stepped into the shoes of the First Respondent.

- [7] MAN is part of a global group of companies and is the South African subsidiary of the global company, MAN Truck & Bus SE (MAN SE), which is based in Germany. MAN is a leading manufacturer of heavy and extra-heavy trucks, commuter buses and luxury coaches. MAN's business comprises inter alia, an assembly plant located in Pinetown, a bus and coach manufacturing facility in Olifantsfontein, a central parts depot located in Isando, a used commercial vehicle operation in Centurion and a widespread national sales, service and parts dealer network in South Africa and other Southern African countries.

Background

facts

- [8] The business of ACS is to provide clients such as MAN, licences to access its Embrace ERP suite of software solutions and support services, in exchange for licence fees, support fees and ad hoc fees. Clients of ACS use this software to support their respective businesses. ACS also operates a service desk to provide comprehensive

support to its clients, and this includes helpdesk services where required, where staff who are trained on Embrace software are at hand to assist clients with queries and problems.

- [9] For the past thirty years, MAN has made use of ACS's Embrace ERP software to run its business. In South Africa, around 700 users throughout MAN and its dealer network used the Embrace software for inter alia inventory management, sales management, support, parts and finance. MAN paid licence fees for these users to Embrace.

- [10] MAN previously had a complete internal IT department, which included inter alia an in-house team to Embrace support staff who would handle queries from users in the various MAN branches and dealer networks, as well as routine IT functions. During 2016, MAN outsourced these support functions to ACS and the parties entered into an "Outsourced

Embrace Service Agreement" (agreement). It was agreed that MAN was outsourcing its Embrace service desk to ACS as a going concern, which constituted a transfer in terms of section 197 of the LRA. The agreement was continually renewed.

- [11] Prior to the conclusion of the aforesaid agreement, MAN performed the IT helpdesk functions in-house and the affected employees were employed by MAN, they were wholly or primarily dedicated to perform the IT helpdesk functions. The affected employees transferred to ACS upon the effective date of the agreement and they continued to render similar IT helpdesk functions, which MAN no longer provided in-house. ACS would inter alia support the Embrace ERP system on behalf of MAN, who would use the system as a fully functional dealer management and financial system and provide support to all of MAN's Embrace users.

- [12] MAN is the only entity within the global group of companies which utilised Embrace as an ERP system. The German parent company and other MAN entities around the world all use a SAP-driven ERP system, known as the 'Enterprise Services Architecture system' (ESA). SAP is a German provider of ERP software.
- [13] MAN's case is that the SAP ESA system connects MAN SE with its subsidiaries and it allows the interfacing of systems and the sharing of critical information amongst the group entities that make use of ESA. As the ESA system utilises a number of security systems and firewalls to protect the integrity of the system and the information stored therein, it treats other non-SAP ERP systems as non-trusted systems, which in turn prevents or restricts interfacing between the two systems. Embrace and ESA cannot work together and consequently, MAN could not interface seamlessly with MAN SE and other entities within the group. As a result of this, MAN found that it was losing ground to its competitors. Furthermore, the MAN group has diagnostic technology, which enables experts situated around the world, to diagnose and repair faults in vehicles located in South Africa but due to the lack of a seamless interface between the Embrace system and ESA, MAN cannot access this functionality and is disadvantaged as a result. ESA offers an e-commerce function, which is essential to optimise inter alia sales and marketing, more accurate sales forecasting and automated sales reports, which is imperative to MAN's business. Such function is not part of ACS's offering.
- [14] MAN further submitted that the MAN group's approach is to engage with key service providers on a centralised basis on behalf of all group entities, which will allow the group to secure better pricing based on the concept of economies of scale. The same applies in respect of the ESA system, in terms of which MAN SE has global licensing and service level agreements in place.
- [15] MAN has been considering moving to the ESA system in order to engage seamlessly with the MAN group for several years and advised ACS as early as 2018 that it was investigating the implementation of an ERP system with more functionality and greater interface with the MAN group than that of the Embrace system. In 2019, MAN took the decision to begin the process of moving to the ESA system.
- [16] On 29 April 2022, MAN gave 90-days' notice of termination of the agreement, which would be terminated with effect from 31 July 2022. MAN indicated that after the end of July 2022, it would still require 30 licences from ACS, until the end of December 2022.

The Applicant's case

- [17] The Applicant's case is that MAN transferred a part of its business to ACS in terms of the agreement and that the work that was originally done by MAN, was now done by ACS. Having cancelled the agreement, MAN will retain 30 Embrace licences until the end of December 2022 and all the support work on the product which was performed by ACS in terms of the agreement will have to be performed by MAN. The import of this is that it has insourced its Embrace ERP Service Desk together with all the duties that were assigned to

ACS in terms of the agreement.

- [18] The Applicant understands that MAN's stance is that it will move away from the Embrace system to the SAP system but insists that even if that is the case, MAN will continue to use 30 Embrace licences post the termination date of 31 July 2022. ACS submitted that it matters not what the licences will be used for, as the licences will need to continue to be supported, thus there is an insourcing of the Embrace ERP Service Desk.
- [19] ACS's case is further that it matters not which system is to be used by MAN, be it Embrace or SAP, the work which is done by the affected employees will continue to be done, albeit on a SAP system.
- [20] The Applicant *inter alia* seeks a declaratory order that the termination of services constitutes a transfer as a going concern, as envisaged by section 197 of the LRA and that with effect from 31 July 2022, the employment agreements between ACS and the affected employees are transferred automatically to MAN, on conditions not less favourable than those existing immediately prior to the date of the transfer.

The Respondent's case

- [21] MAN disputes that the change in provider of ERP software and support triggered section 197 of the LRA.
- [22] In respect of the retention of the 30 Embrace licences, MAN explained that the licences are secured in terms of a separate agreement with ACS and that the rationale for the retention of the licences is to enable MAN to access its historical data, transactional history and other information stored on the Embrace system. MAN has incurred the cost of retaining the licences in order to comply with its statutory records retention obligation and in preparation for any statutory audit. The aforesaid licences and the relevant licensing agreement are unrelated to the termination agreement.
- [23] MAN explained that the licences are not retained for the purpose of enabling MAN to transact on the Embrace system or utilising Embrace for any other purpose, other than accessing historical data. It is undisputed that MAN would not make use of support services and if technical support is required in accessing the historical data, it will be requested and billed for on an ad hoc basis. The day-to-day IT telephone helpdesk support services provided by ACS and which the affected employees were engaged in, will no longer be required by MAN.
- [24] The efficiency of the ESA system has the result that a number of functions which ACS had performed under the agreement, will no longer be required, including the support to Embrace users.
- [25] In short, the Respondent's case is that ACS is losing a client, but still retains its entire business, including its customer support functions. No technology, infrastructure or assets will transfer back to MAN as a result of terminating the agreement with ACS.

The relevant legal principles

[26] Section 197 (1) and (2) of the LRA provide that:

'(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.'

[27] The Constitutional Court in *Aviation Union of SA and another v SA Airways (Pty) Ltd and others*[3] (Aviation Union) held that the purpose of section 197 is to preserve all contracts of employment between the workers and the owner of the business which is transferred as a going concern. In this way, on the one hand, the workers' employment is safeguarded and on the other, a new owner is guaranteed a workforce to continue with the operation of the business and the dual purpose of section 197 is served. Section 197 must be interpreted against this background.

[28] The question of whether there has been a transfer of a business as a going concern entails an enquiry into (1) the existence of a business (is there an economic entity capable of being transferred?); (2) whether there was a transfer of a business; and (3) whether the business is transferred as a going concern[4]. For section 197 to be triggered, the three discrete requirements must be met and if the transfer meets these requirements, the transferee is substituted automatically and by operation of law for the transferor as the employer of those of the transferor's employees engaged in the business on the date of the transfer. The transfer occurs by operation of law, irrespective of the wishes or intentions of the parties and the label attached to a transaction is irrelevant.

[29] Whether there has been a section 197 transfer is a matter of fact to be determined objectively, applying the approach as formulated in *National Education Health and Allied Workers Union v University of Cape Town and others*[5] (NEHAWU):

‘In deciding whether a business has been transferred as a going concern, regard must be had to the substance and not the form of the transaction. A number of factors will be relevant to the question whether a transfer of a business as a going concern has occurred,

such as the transfer or otherwise of assets both tangible and intangible, whether or not workers are taken over by the new employer, whether customers are transferred and whether or not the same business is being carried on by the new employer. What must be stressed is that this list of factors is not exhaustive and that none of them is decisive individually...’

[30] In casu, the 2016 agreement contemplated that the MAN in-house Embrace helpdesk was being outsourced to ACS as a going concern, and that the affected employees were transferring in terms of section 197. The Applicants placed much reliance on this and submitted that MAN and ACS concluded a transfer in terms of section 197 and MAN cannot contract out of the agreement but is bound thereto. Mr Lennox for the Applicants submitted that once the agreement is cancelled, the transferred business must revert to MAN. In my view, the submission so made is too simplistic and loses sight of the requirements to be met in a section 197 transfer and the enquiry to be conducted by this Court. It is trite that the labels attached to a transaction by the parties are not determinative of the matter.

[31] In *Aviation Union*[6], the Constitutional Court noted that:

‘... whether contracting out amounts to the transfer of a business as a going concern, the substance of the initial transaction, more specifically whether what is outsourced is a business as a going concern rather than the provision of an outsourced service remains significant during subsequent transfers. If the outsourcing institution from the outset did not offer the service, that service cannot be said to be part of the business of the transferor. What happens here is simple contracting out of the service, nothing more, nothing less.’

[32] In *Invula Quality Protection and others v University of South Africa (UNISA)*,[7] the Court held that:

‘The label attached to a transaction is irrelevant. Whether a transaction is described as ‘outsourcing’ or ‘insourcing’,

and whether the in- or outsourcing is an initial transaction or one extending to any number of ‘generations’, is of no consequence. More specifically, the use of terms such as insourcing and outsourcing are not in themselves indicative of a transfer as a going concern. Whether there has been a transfer of a business as a going concern by the old employer to the new employer is a matter of fact, to be determined objectively, and which as I have indicated, necessarily entails an enquiry into (1) the existence of a transfer,

(2) whether there was a transfer of a business, and (3) whether the business is transferred as a going concern.’

[33] It is within this legal framework that the requirements of section 197 are to be considered and the question of whether section 197 was triggered in casu is to be answered.

The existence of a business

[34] The first enquiry is whether there is a ‘business’ as defined in section 197(1)(a).

[35] In relation to the requirement that a business be transferred as a going concern, in *Aviation Union*[8], the Court emphasised that what matters during the factual enquiry is substance rather than form:

‘Although the definition of business in section 197(1) includes a service, it must be emphasised that what is capable of being transferred is the business that supplies the service and not the service itself. Were it to be otherwise, a termination of a service contract by one party and its subsequent appointment of another service provider would constitute a transfer within the contemplation of the section. That this is not what the section was designed to achieve is apparent from its scheme, historical context and its purpose. The context referred to here is the alteration of the common law consequences on employment contracts, when the ownership of a business changes hands.’

[36] When section 197 is sought to be applied to a change in service providers, what must be transferred, is the business that supplies the service.

[37] The Applicants’ case is that MAN outsourced its Embrace Service Desk to ACS, as a going concern and that the Embrace Service Desk was and still exists as a clearly identifiable business unit. This is the ‘business’ that will transfer to MAN after the cancellation of the agreement.

[38] Mr Lennox referred to the clauses of the 2016 agreement that provided for the transfer in terms of section 197 of the LRA. Clause 7 of the agreement provided for the provision of services and recorded specifically that ACS will take over the staff and responsibilities

of MAN’s internal ERP service desk, incorporating them into the supplier’s support centre structure and will continue providing the ongoing Embrace support services to all Embrace users.

[39] Mr Fourie on behalf of MAN submitted that the affected employees were not required to only service MAN after the transfer. The agreement in fact envisaged that the affected employees would provide services to other ACS clients. They became part of the ACS support team and they provided Embrace helpdesk support services to all Embrace users. The job titles of the affected employees indicate that they are employed as an Embrace Administrator, an Embrace Support Specialist and an Embrace ERP Manager respectively.

- [40] It is undisputed that ACS is the owner and developer of the Embrace ERP software suite and is the sole provider of Embrace software and related services, such as technical support on Embrace software.
- [41] ACS has clients across a broad, diverse spectrum of industries which include the financial, pharmaceutical, automotive, service, supply chain, rental, electronics and trading sectors. ACS promotes itself as catering for the needs of corporations with complex structures, such as multiple companies, branches, manufacturing plants and warehouses through the development, implementation and support of Embrace, a comprehensive end-to-end ERP business software solution. The solutions provided by ACS are all backed-up by a comprehensive in-house support and client service team.
- [42] In my view, what used to be MAN's internal Embrace ERP service desk became part of ACS's service desk, providing support services to ACS's clients who use the Embrace ERP system. The affected employees formed part of the ACS service desk and they have offered their services to other clients of ACS. After the termination of the agreement with MAN, the affected employees will still be able to render services to ACS's clients who use the Embrace system. It is hard to imagine a situation where the Embrace helpdesk can retain an identity as a discrete economic entity where there is no user of the Embrace ERP system. Put differently: the Embrace helpdesk cannot provide support where there is not an Embrace ERP system user. ASC remains the license holder and service provider for Embrace ERP, the helpdesk provides the support to users of the Embrace system.
- [43] The service desk does not have any separate, discrete economic identity and does not per se constitute a service for purposes of section 197(1).

Transfer as a going concern

- [44] The next question is whether the Applicant's business was transferred as a going concern and this question must be considered in view of the facts placed before this Court.
- [45] The question of whether a business, including the whole or part of any business, trade undertaking or service, has been transferred 'by one employer

to another employer as a going concern' was answered by the Constitutional Court in NEHAWU[9] in the following terms:

'The phrase "going concern" is not defined in the LRA. It must therefore be given its ordinary meaning unless the context indicates otherwise. What is transferred must be a business in operation "so that the business remains the same but in different hands". Whether that has occurred is a matter of fact which must be determined objectively in the light of the circumstances of each transaction. In deciding whether the business has been transferred as a going concern, regard must be had to the substance and not the form of the transaction.' (Footnotes omitted.)

[46] In *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and others*[10] (Grinpal), the Labour Appeal Court held that:

‘In essence, the approach adopted in *NEHAWU* follows that of the European Court of Justice in the application of the Business Transfers Directive (2001/23/EC) which is applicable in the European Union, and dictates that a transfer must relate to an autonomous economic entity (defined to mean an organized group of persons and assets facilitating the pursuit of an economic activity that promotes a specific objective). In turn this involves a determination whether that entity retains its identity after the transfer; that is, the transferor must carry on the same or similar activities with the personnel and/or the business assets without substantial interruption.’

[47] In *Grinpal*, the Court further held that:

‘The question is whether the activities conducted by a party, such as first respondent, constitute a defined set of activities which

represents an identifiable business undertaking so that when a termination of an agreement between first respondent and appellant

takes place, it can be said that this set of activities, which constitutes a discrete business undertaking, has now been taken over by another party.’[11]

[48] In *Aviation Union* it was held that:

‘For a transfer to be established there must be components of the original business which are passed on to the third party. These may be in the form of assets or the taking over of workers who were assigned to provide the service. The taking over of workers may be occasioned by the fact that the transferred workers possess particular skills and expertise necessary for providing the service or the new owner may require the workers simply because it did not have the workforce to do the work. Without the protection afforded by s 197, the new owner with no workers may be exposed to catastrophic consequences, in the event of the workers declining its offer of employment.’[12]

[49] From the facts placed before this Court, it appears that the Applicants’ case is after the termination of the agreement, 30 Embrace licences would remain operative and as such the licences will need to be supported, there is an insourcing of the Embrace ERP service Desk and thus a transfer as a going concern.

[50] The argument that as MAN retains 30 of the 800 licences it previously held, it would require helpdesk support services, is not supported by the evidence placed before this Court. MAN’s explanation that it would only require a few licences for purposes of accessing

historical information and that it would not transact on Embrace or require any support services, was not disputed.

- [51] In SVA Security (Pty) Ltd v Makro (Pty) Ltd - a division of Massmart and others (Makro),[13] the Court held that the objective facts showed that there was no transfer of any equipment, intellectual property or any tangible or intangible assets, but there was merely a cancellation of a contract of service and by taking over the contract of service, Fidelity would utilise its own equipment, assets and resources to service the contract. Only a contract of service was taken over and not the business as the applicant was at liberty to continue with its business by providing similar services to other clients.
- [52] In UNISA,[14] the Court held that there was no transfer of any assets, corporeal or incorporeal or takeover of any existing infrastructure consequent on the termination of the service agreement. Invula and Red Alert retained all other components of the business, and they were free to offer their services to other clients and the true position was that the contract for the provision of services came to an end and no part of the infrastructure for conducting the business of providing a security service was transferred.
- [53] There is no evidence before me to show that any assets, skills, technology or any element of ACS's business will transfer to MAN on termination of the agreement. The reality is that MAN will use SAP and the support services will be rendered from Germany or Southeast Asia. The affected employees are not trained or authorised to work on SAP and even if they were to transfer to MAN, they would not be able to render the same helpdesk services to MAN, as they have been doing on the Embrace system.
- [54] MAN will no longer be using the Embrace system, but that is not the end of ASC's business in providing clients with access to and use of its Embrace ERP system and in rendering support services for the use of the Embrace system.
- [55] In casu, ASC has lost a client in MAN when it terminated the agreement and decided to utilise a different ERP system. ACS at best lost the right to provide the service to MAN, but it retained its business of providing the service, in this case helpdesk support for Embrace users. ACS is at liberty to continue with its business by providing similar services to other existing and potential clients.
- [56] Section 197 does not apply where the outgoing service provider merely loses the right to provide the service but does not transfer its business.
- [57] In the circumstances and on a proper assessment of the facts and the law, the termination of the agreement between ACS and MAN did not trigger the application of section 197.

Costs

- [58] In the notice of motion, the Applicants sought costs against the Respondent in the event of opposition. In argument, Mr Lennox submitted that both parties are seeking a cost order against the other and that the issue of cost is ultimately an issue that falls within the Court's discretion.

[59] Mr Fourie submitted that this is a dispute between two commercial entities and either of them should pay the costs. He submitted that the costs should follow the result.

[60] It is evident that the parties are effectively seeking an order that costs should follow the result. I can see no reason to disagree or to deviate from the general rule that the cost should follow the result, more so where no submissions were made to justify any deviation and where the normal considerations as to why costs should not be awarded, do not apply in casu.

[61] In the premises, I make the following order:

Order

1. The application is dismissed;
2. The First Applicant is to pay the Second Respondent's costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For The Applicants:

M A Lennox

Instructed by:

Hinrichsen Attorneys

For the Second Respondent:

G Fourie SC

Instructed by:

Werksmans Attorneys

[1] Act 66 of 1995, as amended.

[2] Act 71 of 2008.

[3]

(2011) 32 ILJ 2861 (CC).

[4] See: *Franmann Services (Pty) Ltd v Simba (Pty) Ltd and another*

(2013) 34 ILJ 897 (LC).

[5] (2003) 24 ILJ 95 (CC) at para 56.

[6] *Aviation Union supra* at para 106.

[7](2017) 38 ILJ 2763 (LC) at para 6. This judgment was upheld on appeal. See *Invula Quality Protection (Pty) Ltd and others v University of South Africa*

(2019) 40 ILJ 104 (LAC).

[8] *Aviation Union supra* at para 52.

[9] *NEHAWU supra* at para

[10]

(2014) 35 ILJ 2757 (LAC) at para 23.

[11] *Ibid* at para 24.

[12] *Aviation Union supra* at para 48.

[13] *UNISA supra*.

[14] [2017] 11 BLLR 1139 (LC), (2017) 38 ILJ 2736 (LC) (UNISA). This judgment was upheld on appeal: (2019) 40 ILJ 104 (LAC).

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