

The outsourcing debate rages on

The Labour Relations Act seeks to protect employees from being retrenched in the event of a business, or a part of a business, being transferred as a going concern. A critical area of dispute is whether outsourcing falls within the scope of section 197 of the Act. The **Labour Bulletin** reports on the findings of a recent Labour Appeal Court decision in the case of the Samwu and Rand Airport.

Section 197 gives workers certain protections where a business (or part of a business) is transferred as a 'going concern'. Whether a business (or part of a business) has been transferred as a 'going concern' can be answered by asking whether 'it is the same business but in different hands'. However, in practice, this is not as easy.

The unions have battled for a progressive interpretation of section 197. In *UCT v Nehawu* the Labour Court held that section 197 did not apply to outsourcing because, among other things, it was a temporary transfer. The Labour Appeal Court went one step further and adopted an even narrower interpretation of section 197. The LAC found that section 197 only applied when the old and the new employer agreed to the transfer of workers from the old to the new employer. The Constitutional Court overruled the LAC and held that no

agreement (between the old and new employers) to transfer workers was required to activate section 197. The CC held that the courts should look at the circumstances of each transaction and have regard to substance and not form (i.e. it is irrelevant whether it is outsourcing or a sale). The CC stated that all the relevant factors should be considered, i.e. whether the assets (tangible or intangible) were transferred, whether customers were transferred and whether the same business will be conducted. The CC stated that none of these factors would be individually decisive. The CC did not, however, resolve the question of whether a typical outsourcing transaction could fall within the scope of section 197.

Following the *UCT v Nehawu* cases, there were certain amendments to the Act in 2002. The legislature tried to address the difficulties encountered in *UCT v Nehawu*

by an amendment to section 197. The amended section defined a 'business' by including the concept of a 'service'. *Rand Airport* is the first case following the amendments where the union expressly argued that outsourcing falls within the scope of section 197.

RAND AIRPORT SAGA

Rand Airport informed the South African Municipal Workers Union in April 2002 that it was facing financial difficulties and one of the options being considered was outsourcing of its non-core functions such as security and gardening services. During various meetings, the company indicated that workers would not be retrenched if the union agreed to outsourcing. Security personnel were informed in July that their functions were being outsourced to Capital Air from 1 August in terms of section 197 of the Act. This created the impression that the company was characterising the outsourcing as a transfer of business in line with the Act. The union's attorneys wrote to *Rand Airport* on 31 July stating that because the outsourcing would occur in terms of section 197, the workers' terms and conditions of employment would remain the same with the new employer. The next day, all employees were informed that they were being retrenched (as from 31 August) and that they could apply for their positions with the companies, which were taking over the garden and security services. This was conveyed to the union's attorneys who were informed that the outsourcing did not fall within the scope of section 197.

The union brought an urgent application in the Labour Court for an order declaring that the outsourcing of gardening to Turnkey Facility Management and security to Capital Air Security Operations

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constituted a transfer of parts of Rand Airport's business in terms of section 197 of the Act. If the outsourcing were transfers, under section 197, the union asked for an order declaring that the workers' employment contracts were transferred from Rand Airport to the two companies on the same terms and conditions of employment.

In the Labour Court, the unions' representatives argued that Rand Airport had itself characterised the outsourcing as a transfer under section 197. It was only when the union pointed out that the transfer meant that working conditions would remain unchanged that Rand Airport announced that workers would be retrenched and that section 197 was inapplicable. The Labour Court found that the introduction of the word 'service' into the 2002 amendments did not alter the reach of section 197. The court dismissed the application and found that the outsourcing of gardening and security did not constitute a transfer of part of a business as a going concern. In addition, the court thought it significant that, although Rand Airport had awarded a tender to a security company, there was no signed written contract.

The union appealed against this decision to the Labour Appeal Court, which handed down its judgment in December 2004. The LAC concurred with the union's representatives that outsourcing of gardening and security fell within the definition of the word 'service' in terms of section 197. However, the LAC found that merely because an outsourcing agreement was in place, this did not mean that any transfer had in fact taken place. The court found there was no evidence to suggest that the agreement to outsource gardening had been implemented. The LAC found that

there was insufficient evidence to find that an outsourcing agreement between Rand Airport and the security company existed when the union launched its application in the Labour Court. The LAC stated that if the outsourcing of gardening and security had been implemented those transactions would have fallen within the scope of section 197.

Rand Airport has appealed against the LAC decision to the Supreme Court of Appeal on the basis that outsourcing did not constitute a transfer of a part of a business as envisaged in section 197. The union has cross-appealed on the basis that the LAC should have given the workers relief.



Provisions of section 197 (including amended section which came into effect on 1 August 2002):
Section 197 is designed to protect workers facing retrenchment in the event that his/her employer sells or transfers the business or a part of the business (as a going concern) to another employer.

- '(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.'