IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

CASE NO: JA 66/97

IN THE MATTER BETWEEN:

MIRIAM KGETHE AND OTHERS **APPELLANTS**

AND

L.M.K. MANUFACTURING (PTY) LTD **FIRST RESPONDENT**
NATIONAL RUBBER PRODUCTS CC **SECOND RESPONDENT**

JUDGMENT

KROON JA:

[1] The appellants instituted application proceedings in the Labour Court against the present two respondents and two further persons who were, respectively, one Kriel, the director and one Fraser, the general manager of the first respondent. LANDMAN AJ (as he then was) dismissed the application with costs. He thereafter refused the appellants leave to appeal. A petition to this Court for such leave was, however, granted subject to the rider that the appeal would proceed as against the present two respondents only. The reason for the rider was that the other two persons referred to above had no legal interest in the proceedings and should not have been joined as respondents in the Court **a quo**.

[2] Wide ranging aspects were canvassed on behalf of the appellants in the papers filed in

the Court **a quo** and in the petition for leave to appeal. It is fortunately unnecessary to consider a large number of these aspects.

[3] The appellants are members of the National Entitled Workers' Union ("NEWU"), a registered trade union. Up until 30 June 1997 they were employees of the first respondent, some being permanent weekly paid employees and others casual employees in terms of fixed term contracts.

[4] The first respondent is a company which up until 30 June 1997 carried on business as a manufacturer of rubber products.

[5] The second respondent is a close corporation which, pursuant to an agreement concluded between it and the first respondent - an aspect dealt with below - commenced business with effect from 1 July 1997.

[6] During the first half of 1997 the first respondent experienced serious financial difficulties. Its liquidation was in the offing. To stave off the liquidation, so the management of the first respondent decided, there were three options open to it, viz., (a) the sale of the shares in the first respondent; (b) the sale of the business of the first respondent as a going concern; (c) the sale of all or part of the assets of the first respondent.

[7] In the result, so it was alleged by Fraser, only the third option materialised and on 26 May 1997 the first and second respondents concluded an agreement styled

"Agreement Sale of Assets", the implementation of which was made subject to the fulfilment of certain suspensive conditions. According to Fraser the subject of the sale was the "bulk" of the first respondent's assets and neither the business of the first respondent nor any part thereof was sold to the second respondent as a going concern.

[8] Subsequent to 26 May 1997 a number of meetings took place between Fraser and shop stewards at the workplace and/or one Nomvela, a representative of NEWU, and certain communications passed between the first respondent and Nomvela.

[9] On 13 June Fraser apprised the shop stewards of the financial difficulties facing the first respondent, the alleged reasons giving rise thereto and the options open to the first respondent, stated to be:

"(a) liquidation

(b) sale (take over of debts)."

He further advised them as follows:

> "Negotiations are underway for the sale of the business with final detail and conclusion to be reached on Tuesday 17 June 1997."

Fraser further stated that the first respondent was doing its best to secure employment for the employees and that it was hoped that the majority of workers would have "job security". It may be noted that at that stage Fraser did not disclose that any agreement had in fact been concluded between the two respondents, and his allegation that he informed the shop stewards "of the details of the sale" is not borne out by the minutes of the meeting, which he confirmed were correct.

[10] On 17 June Nomvela sent a telefax to Fraser in which the complaints were raised that

the first respondent had entered into negotiations with the prospective buyers of the business without prior consultation with NEWU, that details of the buyers and of the terms of the proposed agreement had not been disclosed and that the jobs of NEWU members had been placed at risk. Under pain of an urgent application to Court Nomvela demanded an undertaking from Fraser that the sale of the business would be suspended until the first respondent had complied fully with the provisions of section 189 of the Act (which imposes on an employer contemplating the dismissal of any employee on the grounds of operational requirements, to conduct certain consultations) and had furnished certain information relating to the buyers. A repeat of that demand on 18 June was coupled with the comment that the first respondent appeared to be in the process of selling its business. The communication of 17 June further requested Fraser to furnish the agenda for a meeting which Fraser had earlier proposed.

[11] The response of Fraser dated 18 June recorded that the agenda of the proposed meeting was

> "The Takeover of L.M.K. Manufacturing (Pty) Ltd."

The comment by Nomvela that the first respondent "appeared to be in the process of selling its business" was then not challenged by Fraser.

[12] At the proposed meeting, held on 19 June, Fraser advised Nomvela that the subject to be discussed was not a "takeover", but the sale of the first respondent's assets. He revealed, in confidence, the name of the purchaser, viz., the second respondent, and showed Nomvela the first page of a document styled "Agreement Sale of Assets",

which reflected the second respondent as the purchaser. He, however, refused, on the grounds of alleged confidentiality, to allow Nomvela sight of the remainder of the agreement, or to disclose the exact nature of the transaction embodied therein or any further particulars concerning the purchasers. In response to Nomvela's request that he confirm that employment for all of the existing employees had been secured with the second respondent, he handed Nomvela a letter from the second respondent dated 19 June 1997 and headed "TO WHOM IT MAY CONCERN" which read as follows:

> "This serves to confirm that the weekly paid permanent employees presently employed at LMK Manufacturing (Pty) Ltd will be re-employed subject to acceptance of new employment contracts and working conditions."

Fraser further advised Nomvela that the casual workers, whose names appeared on a list later furnished to NEWU, would not be re-employed by the second respondent.

[13] On 20 June NEWU received a telefax from a firm styled Massprac (apparently a labour consultancy acting on behalf of the first respondent). It recorded, **inter alia**, that:

(a) the meeting of 19 June had been held in order to discuss "the sale of the company";

(b) NEWU had been apprised of the reasons urgently necessitating "the sale of the assets of LMK", which reasons were repeated in the letter;

(c) NEWU had been advised that an application for the liquidation of the first respondent had been put on hold pending "the sale of LMK and payment of creditors by 30 June 1997";

(d) for liquidation to be avoided it was crucial that the sale "take place" on 30 June;

(e) NEWU had been informed that "the sale of the assets" had been agreed upon between the first respondent and another company, the agreement being that the new owners would acquire the assets of the first respondent and would in turn pay the creditors of the latter;

(f) in order to distance itself from the bad name of the first respondent in the market place the purchaser was starting a new company;

(g) a copy of the sale agreement with the heading "Sale of Assets" reflecting the name of the new company and the names and addresses of its directors had, in confidence, been handed to NEWU;

(h) NEWU had been advised that jobs had been secured for all permanent wage employees as from 1 July on the same conditions and at the same wages as then prevailed and that a letter to that effect had been handed to NEWU, and that different provisions - the details need not be set out - relating to the termination of the employment of the casual workers (who were divided into two categories) and their possible re-employment would operate;

(i) NEWU's request that severance pay be paid to the employees could not be acceded to because the first respondent did not have the funds therefor.

[14] As appears from [12] above the letter from Massprac did not accurately reflect what had occurred at the meeting of 19 June in that much of what had allegedly been conveyed to NEWU had in fact not been disclosed, the full contents of the alleged sale agreement had not been revealed, it had not been stated that the re-employment of the permanent workers would be on the same terms and conditions as then applied and, as regards the casual workers, it had simply been stated that they would not be

re-employed.

[15] On 21 June Fraser telefaxed to NEWU a further letter from the second respondent, also dated 19 June and headed "TO WHOM IT MAY CONCERN". The first paragraph coincided with the earlier letter. A further paragraph read as follows:

> "The remuneration will not be less than that presently paid by LMK. The hours of work and other benefits will be in line with the Basic Conditions of Employment Act. Any benefits presently enjoyed, which do not comply with the Basic Conditions Of Employment Act, will be brought in line with the requirements of this Act, whether this means reducing or improving such benefit."

[16] By letter dated 21 June NEWU requested Massprac to furnish it with, **inter alia**, certified copies of the first respondent's current bank statements and a list of its assets and debts; a copy of the agreement relating to the sale of the first respondent's assets - as this had in fact not previously been handed to NEWU; full particulars of the creditors of the first respondent and the amount owed to each; certified proof from the Registrar of Companies relating to the change of the company's name; details of the existing contracts relating to casual workers; proof that the agreement of sale stipulated that the purchasers undertook to retain all permanent wage employees on the same working conditions and at the same wages as then prevailed.

The letter further recorded that NEWU had not accepted the automatic termination of the employment of a group of the casual workers, as had been alleged by Massprac in its earlier letter.

In regard to severance pay it was contended that NEWU had simply pointed out that in terms of the Act retrenched employees were at least entitled to one week's severance pay.

There was no response to this letter.

[17] At a further meeting on 23 June Nomvela again voiced the demand that all employees be retained by the purchasers on terms not less favourable than those then prevailing. According to Nomvela Fraser refused to discuss this "repeated request". Fraser's version, as contained in the minutes of the meeting drawn up on behalf of the first respondent and confirmed by him as being correct, was that he stated that he could not bind the purchasers, but that he would speak to them about the demand and the further demand that the sale agreement contain a clause providing that the employment contracts be continuous so as to safeguard the employees' long service awards, and thereafter revert to NEWU.

The minutes do not bear out Fraser's further averment that he stated that the second respondent was not prepared to take over the appellants' employment contracts in that it was not purchasing the business as a running concern.

[18] Save as is set out in [20] and [21] below Fraser did not revert to NEWU in regard to the second respondent's attitude in respect of the continued employment of the employees, notwithstanding a further threat by NEWU, contained in a letter dated 23 June and headed "Sale or Take-Over of LMK Manufacturing (Pty) Ltd", that if the first demand referred to above was not met, the court would be approached for appropriate relief.

[19] A further dispute relating to the meeting of 23 June was the following. Fraser alleged that, as was recorded in the minutes of the meeting, he offered to let Nomvela have

sight of the agreement relating to the sale of the assets of the first respondent's business together with a list of its liabilities, subject to same remaining confidential, but that Nomvela declined the offer with the comment that he was a unionist, not an economist. Nomvela denied that such an offer was made and averred that the comment referred to was made in another context. He averred that Fraser had consistently refused to make the agreement available, claiming that it was confidential. The fact remains that on either version Nomvula did not peruse the document in question.

[20] On 23 June Fraser distributed a "Notice To All Staff Members" reading as follows:

> "Please be advised that LMK Manufacturing (Pty) Ltd has been sold and we hereby give you one week's notice.
>
> LMK Manufacturing (Pty) Ltd was faced with the option of either liquidating the company or selling the company. With the sale of the company we have been able to secure the employment of all permanent weekly paid staff. Should the company have been liquidated, everybody would have lost.
>
> Please be advised that the new owners will be taking over on the 1st July 1997.
>
> We thank you for your service and loyalty during the period that you were employed by LMK Manufacturing (Pty) Ltd and wish you the best for the future."

[21] On 25 June Fraser responded to NEWU's letter of 23 June as follows:

> "With reference to the above fax please take notice of the following points.
>
> We have sold the assets of LMK Manufacturing (Pty) Ltd. It is not a takeover.
>
> At the last meeting held at our offices on the 23/6/97, we gave you the opportunity to read the "Sale of Assets Agreement" and a schedule of the liabilities of the company. From this you would have seen for yourself that LMK cannot continue to trade and that there are not any funds available for severance packages.

> We have done everything in our power to ensure that as many [employees] as possible are given employment with the new buyers.
>
> All [employees] of LMK Manufacturing have been given a [week's] notice on the 23/6/97. They will be paid this week's notice/severance plus all leave pay outstanding. This is in terms of the Labour Relations Act No 66 of 1995 which you refer to in your fax of 21st June 1997.
>
> We sincerely hope that you do not find it necessary to take this matter to the Labour Court in view of the above information, but should you do so, we will defend the matter."

[22] The appellants thereupon, on 27 June, launched the proceedings in the Court **a quo**, on the basis of urgency, for relief in the form of a rule **nisi** together with an interim order. By agreement the matter was postponed to 1 July, presumably to allow certain answering and replying papers to be filed, which was duly done.

[23] At the time of the postponement, so Nomvela averred in his replying affidavit, "the respondents" gave an undertaking to do nothing and not to allow anything to take place which would prejudice the applicants' rights as envisaged in the notice of motion." The reference to "the respondents" did not include a reference to the present second respondent, which did not oppose the proceedings in the Court **a quo**.

[24] On 30 June the second respondent caused those employees whom it had "re-employed" to sign contracts of employment effective as from 1 July, an example of which was annexed to Nomvela's replying affidavit. The extent, if at all, to which the terms and conditions of employment provided for in these contracts differed from those which obtained prior to 1 July was not elucidated in the papers. Clause 1 of the

contracts did, however, specifically provide that the employee

> "understands and accepts that it is an express condition of this contract that no service with any previous employer, or any obligations of any previous employer are transferred to this employment relationship."

[25] Certain of the relief contained in the appellant's notice of motion was abandoned during the hearing in the Court **a quo**. What remained thereof, as paraphrased by me, was relief in the form of an order that:

(1) the first, second and third respondents (the latter two being Kriel and Fraser) forthwith make disclosure to the applicants of:

  (a) a copy of the notice of the first respondent's intention to alienate its business and/or the assets thereof published by the first respondent as envisaged in section 34 of the Insolvency Act, No. 24 of 1936;

  (b) details of:

    (I) all its assets before the alleged sale;

    (ii) all the assets allegedly sold to the fourth respondent (the present second respondent);

    (iii) all its liabilities and creditors at the time of the alleged sale;

(2) the fourth respondent forthwith make disclosure of the forenames or initials and surname of every member of the fourth respondent reflected on any business letter bearing that respondent's registered name;

(3) all the respondents forthwith make disclosure to the applicants of the original of the alleged agreement of sale and/or furnish the applicants with a certified copy thereof;

(4) the first, second and third respondents be interdicted from carrying out the sale of the business and the fourth respondent be interdicted from taking over the

first respondent's business and/or assets, alternatively, all the respondents be interdicted from carrying out the alleged agreement of sale, until such time as written proof of the validity of the agreement was produced to the Court and a certified copy thereof was furnished to the applicants, alternatively, until such time as a valid agreement of sale was concluded between the first, second, third and fourth respondents.

(5) all the respondents forthwith produce to the Court written proof (including but not limited to what is sought in (1) above) of any alleged valid sale agreement and to furnish certified copies thereof to the applicants, alternatively, in the event of no valid sale agreement having been concluded, that all the respondents renegotiate and conclude a valid sale agreement in compliance with the provisions of section 189 of the Act;

(6) the already implemented transfer of the contracts of employment and the already given offers of new employment to some of the applicants be declared invalid and/or null and void;

(7) all the respondents forthwith incorporate the statutory safeguards provided for in subsection (2)(a) of section 197 of the Act in the valid sale agreement and further incorporate therein the following provision:

> "The purchaser undertakes to retain all the employees of the seller on terms and conditions of employment not less favourable than those applicable before the sale."

(8) all the respondents forthwith incorporate in such valid sale agreement the organisational rights (but not limited to recognition rights) of the applicants' trade union;

(9) the costs of the application be borne by the first respondent provided that the

costs of any opposition thereto be paid by such respondents as oppose the application, jointly and severally.

[26] In addition the applicants gave notice, **via** the replying affidavit deposed to by Nomvela, that a further order would be sought declaring the contracts of employment dated 30 June 1997, concluded between the then fourth respondent and those employees who were "re-employed" by it, to be invalid and of no force and effect.

[27] It merits mention that notwithstanding that it was Fraser's contention that he had at one meeting offered to permit Nomvela to peruse the sale agreement allegedly concluded between the two respondents and a schedule of the first respondent's liabilities, and despite the fact that it was common cause that no such perusal was in fact undertaken, Fraser did not, on behalf of the first respondent, annex to his affidavit either of the said documents or any of the other documents disclosure of which was sought by the appellants, nor did he tender to produce same. Instead, relying essentially on the allegation that the agreement allegedly concluded between the two respondents embraced no more than a disposition of assets and did not constitute a disposition of the first respondent's business or any part thereof as a going concern, Fraser contested that the appellants were entitled to any of the relief sought.

[28] Similarly, the second respondent, which did not oppose the proceedings in the Court **a quo**, did not produce or tender any of the documentation disclosure of which was sought by the appellants.

[29] LANDMAN AJ's interpretation of the appellants' papers in the Court **a quo** was

that, as regards the disclosure of documentation, what was being sought was information which related, firstly, to the retrenchment or termination of the services of the appellants and, secondly, to an alleged duty to comply with section 197 of the Act insofar as there was a sale or transfer of the business of the first respondent.

[30] Section 197, insofar as is relevant, provides as follows:

> "(1) A contract of employment may not be transferred from one employer (referred to as "the old employer") to another employer (referred to as "the new employer") without the employee's consent unless-
>
> (a) the whole or any part of a business, trade or undertaking is transferred by the old employer as a going concern;
>
> ---
>
> (2) (a) If a business, trade or undertaking is transferred in the circumstances referred to in subsection (1)(a), unless otherwise agreed, all the rights and obligations between the old employer and each employee at the time of transfer continue in force as if they had been rights and obligations between the new employer and each employee, and everything done before the transfer by or in relation to the old employer will be considered to have been done by or in relation to the new employer.
>
> ---
>
> (4) A transfer referred to in subsection (1) does not interrupt the employee's continuity of employment. That employment continues with the new employer as if with the old employer.
>
> ---"

[31] The essential foundation of LANDMAN AJ's refusal to order the disclosure of the documentation in question was his finding that despite the use, at various stages during the discussions between Fraser and the shop stewards and/or NEWU, of loose language, such as the references to "the sale of the company" or the "takeover"

thereof, it was in fact clear that neither the business of the first respondent nor any portion thereof had been transferred to the second respondent as a going concern; what had occurred was the conclusion on 26 May 1997 of an agreement in terms of which portion of the assets of the first respondent was sold to the second respondent.

[32] Consequently, so it was held, section 197 was not of application and no entitlement to any information bearing on an alleged non-compliance with the provisions of the section aimed to the appellants.

[33] The further corollary of that finding, so LANDMAN AJ recorded, was that a contention on behalf of the first respondent that it was obliged to terminate the services of the appellants with effect from 30 June 1997, was correct. In respect of that termination (or retrenchment) it might well have been that the appellants were entitled, in terms of section 189, to the disclosure of certain documents, but a dispute regarding such disclosure would, in terms of section 189(4) read with section 16, have to be referred for conciliation by the Commission and, if there is no settlement, the Commission must arbitrate the dispute.

[34] With respect, I am unable to endorse the above approach. Without the alleged agreement between the respondents and certain of the other information sought by the appellants being placed before the Court **a quo**, it was not permissible for that Court to determine if and when an agreement was in fact concluded or what the effect of the agreement was. The evidence relating to these aspects that was placed before the Court **a quo** was secondary evidence and, in the absence of an acceptable explanation

for the non-production of the written agreement itself, was inadmissible as not being the best evidence. The matter should accordingly have proceeded on the basis that the true nature of the agreement had not been disclosed.

[35] It should also be pointed out that whatever may have been said on behalf of the appellants in the papers filed in the Court **a quo** concerning the purported retrenchments or dismissal of the employees by the first respondent, the appellants did not in fact seek the disclosure of any information in connection therewith. The question whether an order for the disclosure of such information should be made accordingly did not in fact arise.

[36] A number of reasons were present why the appellants legitimately apprehended that the agreement concluded between the first and second respondent might in fact have had the effect of a transfer of the business of the first respondent or a part thereof as a going concern. Despite the clear statement by Fraser at times that the effect of the agreement was not such a transfer, on a number of occasions various descriptions were applied to the agreement and its effect which were quite appropriate if in fact a transfer as a going concern had been effected. At one stage NEWU was advised that not only was the second respondent acquiring the assets of the first respondent but would also discharge its liabilities. The second respondent immediately commenced business at the same premises where the first respondent had conducted operations and utilised the same telephone number. Finally, although NEWU voiced concern regarding the appellants' interests in safeguarding their continuity of service, and registered the complaint that the agreement had not been made available for perusal,

the first respondent, through Fraser, remained throughout coy about disclosing the full terms of the agreement and information concerning its liabilities. Even it be accepted that Fraser did on one occasion in fact offer perusal of the agreement and the schedule of the first respondent's liabilities to Nomvela, the response of the latter in effect conveyed that he would not be able to make head or tail thereof, and on Fraser's own version he would not have allowed Nomvela to take copies of the documents away with him. Even after proceedings had been instituted and production of the agreement was demanded, neither of the respondents saw fit to comply such demand. One asks the question, why?

[37] If in fact a transfer as a going concern had been effected, the appellants would be entitled to the benefits accorded to them in terms of section 197, and they would be entitled to reject any other benefits which either of the respondents sought to accord them **in lieu** thereof. In the event of non-recognition by the respondents of the entitlement to the firstmentioned benefits and an insistence that the lastmentioned benefits be accepted the appellants could, in terms of section 158(1) (a) (iv), approach the Labour Court for an appropriate declarator.

[38] If on the other hand no transfer as a going concern was effected, but the effect of all that transpired was a transfer of the contracts of employment of the appellants without their consent - and on the evidence that possibility cannot be excluded - such transfer would have fallen foul of the provisions of section 197. Again, if need be, the appellants could approach the Labour Court for the appropriate declarator.

[39] As demonstrated above, there is good reason to apprehend that in fact a transfer as a

going concern was effected or, alternatively, that a transfer of employment contracts in contravention of section 197(1) had been effected, and that the rights of the appellants are being infringed. In such circumstances and in order to enable the effective exercise of its jurisdiction to issue the declarators referred to, the Labour Court has the power to order the disclosure of information bearing on the existence or otherwise of those rights. Such an approach not only promotes fairness, but is also practical in that its facilitates the determination of what rights exist and may have the effect of obviating unnecessary litigation. See, too, section 158(1)(j) of the Act which empowers the Labour Court to deal with all matters necessary or incidental to performing its functions in terms of the Act or any other law.

[40] Although at certain stages during the negotiations between NEWU and Fraser the latter adopted the stance that certain of the information demanded was confidential, neither of the respondents raised the defence of confidentiality in the Court **a quo** as a counter to the appellants' application. That the information in question is in fact not confidential is borne out by Fraser's alleged offer to Nomvela to disclose same and the second respondent's attempt informally to place portion of the alleged information before this Court (as to which see [41] - [44] **infra**). Indeed, at the hearing of the appeal. Mr COETSEE, on behalf of the first respondent, pertinently stated that he had no objection to the disclosure of the information in question.

[41] After the noting of the appeal, and in response to the notice of set down sent to the second respondent, that respondent (which, again, did not seek to oppose the appeal proceedings) addressed a letter to the Registrar of this Court reading as follows:

"We refer to your fax dated the 16 October 1997 in connection with the above case, and enclose the following for your consideration.

(1) The purchase and sale agreement between National Rubber Products cc and L.M.K. Manufacturing (Pty) Ltd, with particular reference to page 4 paragraph 1.15.4 and page 5 paragraph 6, and the fact that only the assets of the business were purchased.

(2) A copy of the contract of employment signed by all employees with particular reference to Page 1 paragraph 1."

[42] In a subsequent letter the second respondent confirmed that it was not seeking to oppose the appeal and stated that its intention in sending the documents to the Registrar was "purely to point out to the hearing the relevant paragraphs pertaining to the case our point of view."

[43] It need hardly be stated that documents informally placed before this Court in this manner cannot be taken into account. I would, however, **en passant**, mention the following: the heading of the sale agreement submitted does not correspond to that to which reference was made during the discussions set out earlier in this judgment; the close corporation reflected in the agreement as the purchaser is not the second respondent (although the registration number is the same as that reflected on the letterhead of the second respondent), and in this regard it may be noted that the evidence was that on a date well after 26 May, the date on which the agreement submitted by the second respondent was signed, a document was produced by Fraser which reflected the second respondent as the purchaser; contrary to what Massprac conveyed to NEWU, as recorded earlier in this judgment, the alleged agreement provided that the first respondent would discharge its liabilities to its creditors; neither the schedule setting out the assets purchased nor the schedule of liabilities referred to

in the agreement as annexures thereto, accompanied the document submitted by the second respondent.

[44] In the circumstances this Court is not called upon to consider what the effect of the alleged agreement as submitted by the second respondent,was, nor indeed would it be proper for it to do so.

[45] I turn now to consider the relief sought by the appellants in the Court **a quo**.

[46] As already indicated earlier in this judgment Kriel and Fraser had no legal interest in the proceedings, no relief was claimable against them and they should not have been joined as parties. The remarks that follow are subject to this comment.

[47] For the purposes referred to earlier I consider that the following information should have been disclosed by the first and/or the second respondent as the case may be:

(1) a copy of the notice of intention to alienate its business and/or assets published by the first respondent in terms of section 34 of the Insolvency Act, No. 24 of 1936 (if in fact there was such a publication);

(2) details of all the first respondent's assets and liabilities immediately prior to the alleged sale concluded between the two respondents;

(3) the original or a copy of the alleged agreement concluded between the two respondents together with all annexures thereto (which would have disclosed details of the assets sold, information which the appellants sought separately).

[48] I am not persuaded that there was any reason why the appellants should have been favoured with information as to the forenames or initials and surnames of the members of the second respondent or with "written proof of any alleged valid sale agreement" (whatever that may mean).

[49] The appellants were not entitled to an order interdicting the respondents from carrying out any agreement concluded between them or the second respondent from taking over the business or assets of the first respondent, whether on the basis contended by the appellants as set out in [25 (4)] above or on any other basis. The rights of the appellants will be governed by what, in the result, it transpires did occur in relation to and flowing from the agreement concluded between the respondents.

[50] On the present papers the appellants were not entitled to any order that "the already implemented transfer of the contracts of employment" be declared invalid and/or null and void. That there was such a transfer was not established on the papers. If, on the disclosure of the information referred to above and on further investigation, it transpires that such a transfer took place, the appellants may take such steps as they are advised to do.

[51] There was no basis in law on which the Court **a quo** could have declared the "already given offers of employment" to some of the appellants to be invalid and/or null and void.

[52] The appellants were not entitled to an order that the "statutory safeguards provided for

in section 197(2)(a)" be incorporated in the agreement concluded between the respondents or that the agreement incorporate a clause providing that the purchaser retain all the employees of the seller on terms not less favourable than those applicable prior to the sale. The rights of the appellants will be dependent on the precise nature and effect of the agreement concluded between the respondents read with the applicable statutory provisions. When that has been determined the appellants may take such steps as they are advised to do for the safeguard of their rights.

[53] There was no basis in law on which the respondents could have been ordered to incorporate into their agreement provision for the organisational rights of NEWU. Those rights either exist or they do not.

[54] On the present papers there was no basis in law on which an order declaring the contracts of employment concluded on 30 June 1997 between the second respondent and the employees which it "re-employed" to be invalid and of no force and effect, could have been granted by the Court **a quo**. If in due course it transpires that in fact these contracts fell foul of the provisions of section 197, it will be open to the appellants, if so advised, to seek appropriate relief in that regard. Insofar as reliance was sought to be placed on the undertaking allegedly given at the time the application in the Court **a quo** was postponed, suffice it to say that the second respondent was not a party thereto.

[55] The question of costs remains.

(1) The appellants have achieved substantial success on appeal and, subject to

what follows, are entitled to the costs thereof as against the first respondent. The record on appeal contained a transcription of the oral argument presented in the Court **a quo**. That transcription ran to 82 pages. Rule 5(12)(b) of this Court provides that, unless the merits of the appeal are affected thereby, the record of oral argument in the court below must not be included in the record on appeal. The only portion of the record of oral argument which was of assistance in the appeal was the 4 pages reflecting the amended relief being sought by the appellants. The costs of appeal will accordingly not include the costs of 78 pages of the record of oral argument. The costs of appeal will also not include the costs of the aspects referred to in [59] and [60] below.

(2) Kriel and Fraser should not have been joined as parties in the Court **a quo**. On the other hand those two persons, while not raising a plea of misjoinder, actively opposed the application. In the circumstances it would be fair that no costs order be made in respect of the suit between the appellants and them.

(3) The effect of the order to be made on appeal is that the appellants should have been substantially successful in the Court **a quo**. The appellants are accordingly entitled to the costs of those proceedings. An order to that effect can, however, only properly be made against the first respondent. The appellants' notice of motion in terms gave notice that only in the event of any of the other respondents opposing the application would a costs order be sought against them. The second respondent was accordingly entitled to sit back secure in the knowledge that whatever order was made on the merits of

the application its failure to oppose the application rendered it immune to a costs order against it.

[56] Two further aspects require to be considered. The appellants failed timeously to deliver a power of attorney authorising NEWU to prosecute the appeal on their behalf as required by Rule 6(1) of this Court. The point was taken in the heads of argument filed on behalf of the first respondent, it being contended that the appeal was on that basis fatally defective. In response thereto the appellants (per the first appellant) filed an affidavit confirming that in fact NEWU had been duly authorised to prosecute the appeal on their behalf. The purpose of Rule 6(1) is to prevent appeals being prosecuted by a representative purportedly on behalf of a litigant while that representative in fact has no mandate to do so. The affidavit referred to sufficiently establishes the required authority on the part of NEWU and in fact constitutes a power of attorney. The explanation for the failure to file a power of attorney timeously or, indeed, at all prior to receipt of the first respondent's heads of argument - said to be due to considerations of urgency and geographical distances - is in fact no explanation. Nevertheless, fairness dictates that the late filing of the power of attorney be condoned.

The costs of the affidavit referred to cannot, however, be for the account of the first respondent.

[57] It was also necessary for the appellants to seek an extension of the time within which to file the record on appeal. The failure to file the record timeously was not due to the fault of any of the parties, but to an administrative error. The costs of the application

for the extension must accordingly lie where they fall.

[58] In the result the following order will issue:

(1) The appeal is upheld to the extent set out in paragraph (2).

(2) The order of the Labour Court is set aside and for it is substituted the following:

"1. The first respondent is ordered forthwith to furnish the appellants' trade union, National Entitled Workers' Union, with

(a) a copy of the notice of intention to alienate its business and/or assets to the fourth respondent published by the first respondent in terms of section 34 of the Insolvency Act, No. 24 of 1936, alternatively, and in the event of no such notice having been published, to advise the said trade union accordingly;

(b) full details of all the first respondent's assets and liabilities immediately prior to the sale agreement concluded between the first and fourth respondents;

(2) The first and fourth respondents are ordered forthwith to furnish the appellants' said trade union with the original or, alternatively, a copy of the, sale agreement concluded between the said respondents.

(3) The applicants' costs will be paid by the first respondent."

(3) The costs of the appeal will be paid by the first respondent; provided that such costs shall not include:

(a) the costs of the inclusion in the record on appeal of 78 pages of the oral argument in the Court **a quo**;

(b) the costs of the affidavit filed on behalf of the appellants relating to their failure to file a power of attorney authorising NEWU to prosecute the appeal on their behalf;

(c) the costs of the appellants' application for an extension of time within which to file the record on appeal.

_____
KROON JA

I agree

_____
MYBURGH JP

I agree

_____
FRONEMAN DJP

DATE OF HEARING: 11 February 1998

DATE JUDGMENT DELIVERED: 13 February 1998

FOR APPELLANTS: M. D. Maluleke

FOR RESPONDENTS: D. Coetsee