**CONSTITUTIONAL COURT OF SOUTH AFRICA**

**Aviation Union of South Africa and Another v South African Airways (Pty) Ltd and Others**

**Case No.: CCT 08/11**

**Date of Hearing: 11 May 2011**
**Date Decided: 24 November 2011**

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**MEDIA SUMMARY**

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

On Thursday 24 November 2011 the Constitutional Court gave judgment in an application for leave to appeal in a case which concerned the meaning of a provision in the Labour Relations Act (LRA). The law says that where a business is transferred from an old employer to a new employer the workers will follow the business. More than 11 years ago South African Airways (Pty) Ltd (SAA) transferred that part of its business concerned with facilities management to LGM South Africa Facility Managers and Engineers (Pty) Ltd (LGM). Seven years later, SAA cancelled the agreement and notified LGM that it had to prepare a hand-over plan. SAA had the right to buy back or re-acquire all assets and inventory and the use of all property that had been conferred on LGM when the lease was entered into. SAA contended that this would not be a transfer of business within the meaning of the LRA and that it was not obliged to take over the LGM employees involved in the business that had originally been transferred.

The Aviation Union went to the Labour Court contending that the cancellation of the agreement would result in a transfer of business. The application was made a few days before the cancellation came into effect. SAA indicated that it would, on that date, either provide the facilities management service itself or get a temporary service provider to do so and that it would outsource the rendering of the service permanently on the completion of a tender process that was already underway.

The Labour Court held that what was to happen would not be a transfer of business <u>by</u>, but a transfer of business <u>from</u> an old employer to a new employer. According to that Court the workers would thus remain with LGM. The Labour Appeal Court (LAC) reversed this decision, holding that the word <u>by</u> had many meanings and that, there was to be a transfer of business as a going concern <u>by</u> LGM to SAA if SAA took over the provision of the service, or by LGM to the temporary service provider if the temporary service provider was to provide the service. The Supreme Court of Appeal (SCA) agreed with the Labour Court saying that <u>by</u> does not mean <u>from</u> and that the workers were entitled to no relief.

Yacoob J writing for a majority agreed with the LAC that the word by had many meanings. The majority disagreed with the SCA decision that the LAC's construction of section 197 of the LRA is distorted. According to the majority, it did not matter whether LGM transferred the business to SAA and SAA thereafter transferred the business to a temporary service provider or whether LGM transferred the business directly to the temporary service provider. In either case there would be a transfer of business by the old employer to the new employer. The workers should therefore have followed the business. The Court made an appropriate declaratory order.

Jafta J, writing for the minority, held that the interpretation given to section 197 of the LRA by the SCA was wrong. He held that the section applies to every transfer of a business as a going concern. However, he found that Aviation Union has failed to establish that the cancellation of the agreement between SAA and LGM would have resulted in a transfer of business as a going concern. He would have upheld the appeal and remitted the matter back to the Labour Court.