REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J859/14

In the matter between:

RURAL MAINTENANCE (PTY) LTD	**First Applicant**
RURAL MAINTENANCE FREE STATE (PTY) LTD	**Second Applicant**
and	
THE MALUTI-A-PHOFUNG LOCAL MUNICIPALITY	**First Respondent**
THE SOUTH AFRICAN MUNICIPAL WORKERS UNION	**Second Respondent**
THE EMPLOYEES WHOSE NAMESE ARE LISTED IN ANNEXURE "A: TO THE NOTICE OF MOTION	**Third and Further Respondents**

Heard: **24 April 2014**

Delivered: **21 May 2014**

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

[1] The Applicants approached the Court to seek declaratory relief in the following terms;

1.1 "With effect from 1 April 2014, the employment contracts of the Third and Further Respondents are transferred to the First Respondent (The Municipality) in terms of section 197 (2) of the Labour Relations Act[1] (the LRA),

1.2 Directing the Municipality to comply with the provisions of section 197 in relation to the transfer of the Third to Further respondents from the Applicant to the Municipality"

[2] The application was opposed by the Municipality. It was not disputed that the matter was indeed urgent. The Second Respondent recorded its intention to abide by the Court's decision.

Background:

[3] The First Respondent is a local municipality situated in the Free State province. Its area of jurisdiction covers Harrismith, Kestell and Phutaditjhaba. About 335 784 inhabitants in over 121 095 households and about 597 businesses within its area of jurisdiction depend on the Municipality for the provision of services including electricity. According to the Applicants, the Municipality is one of the poorest in South Africa, and has since its establishment in December 2000, struggled to provide services to its inhabitants, including the provision of electricity.

[4] The First Applicant (Rural) is a utility specialist which specialises in assisting *inter alia* municipalities and local government structures in the provision of electricity to consumers. It conducts electricity turn-around projects through the deployment of skilled labour, expertise and capital investment. It has a track record dating back to 1993 when it was an operator for Eskom, performing first line maintenance and operations for newly electrified townships. In its papers, Rural contends that it is the market leader in Southern Africa in the private operation and turn-around of struggling municipal and utility concerns

[5] The Second Applicant (Rural Free State) is the administrative arm of Rural, and its wholly owned subsidiary. The two entities operated together as a single business unit in relation to utility management which in this particular

[1] Act 55 of 1996

matter, involved the management, operation, administration and expansion of electricity distribution networks.

[6] In 2011, the Municipality looked at the possibility of Rural taking over the management of its electricity distribution network, including the provision of electricity related services to its ratepayers. This resulted in the conclusion of an Electricity Management Contract ("the EMC") between the Municipality and Rural on 3 April 2011, which contract was signed by Mr. L M Ntombela ("Ntombela") the Municipal Manager at the time on its behalf. The objective of the EMC was to provide for the appointment of Rural as management and operations service contractor of the Network for the duration of its term. During that period, it was envisaged that Rural would have the sole and exclusive responsibility for the management, operation, administration, maintenance and expansion of the Network, including the revenue management process, the implementation of a local and regional electrification programme and to regulate all matters related to the project.

[7] The Applicants' contention is that the contract contemplated a transfer of a business (network) in terms of section 197 of the LRA. This transfer also entailed the transfer of employees from the Municipality to Rural. In terms of the EMC, Rural would also take over the provision of management, upgrading and expansion of the electricity supply network within the Municipality's jurisdiction. Amongst other provisions of this agreement were that the contract was to endure for 25 years after which period, it was envisaged that the operations would revert back and be transferred to the Municipality, including various assets utilised by Rural in the execution of the EMC.

[8] The purpose of entering into the EMC was essentially to turn around the electricity supply means of the Municipality, which had over the years been in a dysfunctional state. This required massive capital investment as well as an increase in human resources. The contract was implemented with the Applicants taking over the electricity operations of the Municipality, which included receipt of 16 employees transferred from the Municipality.

[9] Rural was advised in writing on 25 January 2013 that its bid had been accepted, and it had immediately started preparations. The implementation of the EMC faced its first hurdle when on 17 May 2013, SAMWU brought an application for an interdict. Rural and the Municipality opposed that application. That matter was ultimately removed from the court roll in the Cape Town Labour Court on 22 November 2013. SAMWU pursued the same relief against Rural in the Free State High Court. The second hurdle however came about on 2 August 2013 when the Municipality sent a letter to Rural advising it that it would not abide by and did not consider itself bound by the EMC. The Municipality further indicated its intention to seek relief from the High Court in regard to the EMC. The Municipality's contention in this regard is that the actions of the then Municipal Manager Mr. Ntombela in concluding the contract were *ultra vires,* thus rendering the contract void *ab initio*.

[10] The Applicants launched an application to compel specific performance by the Municipality with the EMC on 12 August 2013. An order was granted by the Free State High Court preventing the Municipality from interfering with the implementation of the EMC pending the finalisation of the action to be instituted by the Applicants.

[11] Rural had acted in terms of the provisions of the EMC and had taken over the electricity operations of the Municipality with effect from 1 September 2013. It took over the management, administration maintenance and expansion of the Municipal electricity distribution network within the boundaries of the Municipality, including revenue management, the implementation of regional and local electrification programme.

[12] Rural had also taken over 16 employees from the Municipality. In addition to these employees, Rural had subsequently employed, trained and despatched more employees, mostly from the local community. Before and during the period within which the contract was implemented, the Applicants had increased the workforce to a total of 127 employees, being the affected employees in the present application. Other than the employment of new employees to provide the services required in terms of the EMC, Rural had

also incurred costs in relation to the purchasing of equipment, immovable property, materials, vehicles, electrical infrastructure mapping, software etc.

[13] Further in complying with the obligations imposed by the EMC, Rural had between September 2013 and 31 March 2014, paid the Bulk Supply Account issued by Eskom; utilised the existing electricity distribution infrastructure of the Municipality and invested over R172m in maintaining, upgrading and managing the Network. It had also provided all electricity related services to ratepayers, remedied consumer complaints, paid the employees' salaries, trained them, and collected revenue from consumers.

[14] The Applicants' contention however is that during the period 22 August 2013 to 31 March 2014, the Municipality had acted in an obstructive manner as it had continuously breached and repudiated the contract by its conduct. The Applicants had as a result, accepted the Municipality's repudiation and have since cancelled the contract with effect from 1 April 2014. It was the Applicants' contention that the termination of the contract triggered the provisions of section 197 of the LRA.

[15] Following the acceptance of the repudiation by the Municipality, Rural had then on 3 April 2014, delivered the information pack to Municipality containing the schedule attached to the notice of motion, the organogram, employment agreements of the affected employees, and the proposed section 197 agreement.

[16] It is further common cause that the Municipality has offered to accept back the 16 employees that were initially in its employ. It has however denied liability in respect of the remaining employees on the basis that it disputes that a section 197 transfer has occurred. The new Municipal Manager, Tomo Taetsane further oppsed the granting of the relief on the following grounds;

(a) Rural had accepted the transfer of the 16 employees whose functions related solely to the 'rendering of all electricity related services' that had been outsourced to it by the Municipality. It had however thereafter, enlarged its work force to 127 employees, grew its business, invested large sums of money in making its business bigger, better, more efficient and more profitable. Rural had however failed to transfer their business as a going concern when the contract fell through, as they failed to transfer the tools necessary to continue with the provision of the service, including computers, vehicles, stationary, equipment and an inventory of all its assets.

(b) It was accepted that the Municipality had acquired the obligation to provide electricity to its inhabitants. However, this did not imply that the acquisition of an obligation translated into the acquisition of the business.

(c) The Municipality had a right to repudiate the EMC as it was illegal to begin with, and it would accept that the 16 employees that were transferred under section 197 would be returned to the Municipality if the contract is illegal and *void ab initio*. In the same token, the Municipality contended that the 16 employees never ceased to be its employees because the contract was *void ab initio*. The other employees could not however be accepted as they did not form part of the 'first generation transfer'. Furthermore, some of the employees sought to be transferred were debt collectors and administrative functionaries, and it was not clear to the Municipality as to which of these employees worked for Rural and which for Rural Free State.

(d) The relief sought by the Applicants was unprecedented, and would create fiscal difficulties for the Municipality, which had a limited budget to accommodate an additional 111 employees.

(e) The implementation of section 197 in the manner suggested by the Applicants would also unintentionally bring about a transgression of the separation of powers doctrine, and it was not for judges to allocate budget for municipalities.

(f) The Municipality never acquired the business of the Applicants as a going concern, and furthermore, that which was transferred by the Applicants to the Municipality was insufficient to trigger the operation of section 197.

The validity of the EMC and evaluation:

[17] The Municipality's main contention was that the EMC was probably the product of an improper relationship between the erstwhile Municipal Manager, Ntombela (referred to as a 'rogue')[2], and the Applicants. To this end, it was contended that there could be no talk of the Applicants positively acting in a manner that causes the business to be transferred back to the Municipality. In pursuing this argument further, it was contended that the 'transfer back' would have occurred by operation of the principle *restitution in integrum*, and that restitution was the *antithesis* of a positive act. In argument, Adv Hopkins on behalf of the Municipality submitted that the principles set out in *MEC for Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd* [3] found no application in this case, and that there was no need on the part of the Municipality to set aside the offending contract.

[18] The Applicants' response was that since a transfer was a question of fact and of 'substance rather than form', there was no necessity for a formal underlying contract. To this end, it was contended that the alleged invalidity of the original outsourcing agreement did not render the admitted transfer back to the Municipality a transfer other than a section 197 transfer, and that a valid contractual arrangement was not a prerequisite for the operation of section 197. Furthermore, it was argued that the dispute in this regard was before another Court for determination, and that this was a matter which this Court should not be burdened with.

[19] In *Nokeng Tsa Taemane Local Municipality and Another v Metsweding District Municipality and Others*[4], this court had held that the lack of a contractual link between the transferor and the transferee is not a necessary

[2] At para 11.1 of the answering affidavit
[3] (77/13) [2014] ZACC 6
[4] (2003) 24 ILJ 2179 (LC) at 2183

pre-condition for the application of section 197. This approach is in line with the purpose of this provision which primarily seeks to protect employees whose security of employment and rights are compromised as a result of business transfers[5]. I am furthermore not persuaded by the argument that the principle enunciated in *Kirkland* cannot find application in this case, and that it was not necessary for the Municipality to have set aside the offending contract to counter the Applicants' argument that the validity of the contract was irrelevant for the purposes of the provisions of section 197.

[20] In *Kirkland*, Cameron J addressed the issue of the need of government, and by implication, municipalities to act in the face of what was perceived to be invalid administrative actions on the part of its officials in the following emphatic terms[6];

> 'Can a decision by a state official, communicated to the subject, and in reliance on which it acts, be set aside by a court even when government has not applied (or counter-applied) for the court to do so? Differently put, can a court exempt government from the burdens and duties of a proper review application, and deprive the subject of the protections these provide, when it seeks to disregard one of its own officials' decisions? That is the question the judgment of Jafta J (main judgment) answers. The answer it gives is Yes. I disagree. Even where the decision is defective – as the evidence here suggests – government should generally not be exempt from the forms and processes of review. It should be held to the pain and duty of proper process. It must apply formally for a court to set aside the defective decision, so that the court can properly consider its effects on those subject to it.'

[21] Based on the principles set out in the authorities cited above, I am not persuaded that the validity or otherwise of the EMC, or the fact that the EMC is being challenged in another court has a bearing on the applicability of the provisions of section 197 in this case. It was common cause that the matter before the Free State High Court to challenge the validity of the EMC is to be heard in October 2014. Until the EMC is set aside, it engendered legal

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[5] See *COSAWU v Zikhethele Trade (Pty) Ltd & Another* [2005] 9 BLLR 924 (LC).
[6] At para 64 of the majority judgment

consequences[7], including those envisaged in the provisions of section 197 of the LRA. To this end, it follows that further arguments advanced on behalf of the Municiplaity to the effect that as a consequence of the invalidity of the EMC there could not have been a positive action on the part of the Applicants for the purposes of section 197, should also found not to be sustainable.

The Legal Framework pertaining to section 197 and Evaluation:

[22] Section 197(1) provides that:

> "(1) In this section and in section 197A –
>
> (a) 'business' includes the whole or 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 sub-section (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 transfer continue in force as if there 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 the new employer; and
>
> (d) the transfer does not interrupt and employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer."

[7] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; 2004 (6) SA 222 (SCA). (See also para 102 of *Kirkland*, and the authorities cited therein).

[23] Whether there has been a transfer of a business as a going concern for the purposes of section 197 is a matter of fact, to be determined objectively. An enquiry in this regard has to be made into[8];

(a) existence of a transfer by one employer to another;
(b) whether there was a transfer of a business; and
(c) whether the business is transferred as a going concern

[24] The purpose of section 197

> '… is to protect the employment of the workers and to facilitate the sale of businesses as going concerns by enabling the new employer to take over the workers as well as other assets in certain circumstances. The section aims at minimising the tension and the resultant labour disputes that often arise from the sales of businesses and impact negatively on economic development and labour peace. In this sense, section 197 has a dual purpose; it facilitates the commercial transactions while at the same time protecting the workers against unfair job losses.'[9]

[25] Amongst the consequences that flow from a transfer are that 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. Furthermore, 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.

[26] Section 197 and section 197A will be applicable where a business is 'transferred' from one employer to another in the sense that what is transferred must be a business in operation, so that the business remains the same but in different hands. In *Schutte & others v Powerplus Performance (Pty) Ltd & another*[10], this court had accepted that section 197 need not be limited in its application to conventional transferring transaction. Thus the

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[8] *Aviation Union of South Africa & another v South African Airways (Pty) Ltd & others* [2012] 3 BLLR 211 (CC).
[9] *NEHAWU v University of Cape Town & others* (2003) 24 ILJ 95 (CC) at para 53
[10] (1999) 20 ILJ 655 (LC) at 671

substance of the transaction rather than its form would determine whether a transfer had taken place or not[11].

Was there a transfer of the business from the Applicants to the Municipality as a going concern?

[27] In explaining the concept of a 'transfer', Jafta J in *Aviation Union* stated the following'

> "But whether a transfer as contemplated in section 197 has occurred or will occur is a factual question. It must be determined with reference to the objective facts of each case. Speaking generally, a termination of a service contract and a subsequent award of it to a third party does not, in itself, constitute a transfer as envisaged in the section. In those circumstances, the service provider whose contract has been terminated loses the contract but retains its business. The service provider would be free to offer the same service to other clients with its workforce still intact".[12]

> And,

> "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 section 197, the new owner with no workers may be exposed to catastrophic consequences, in the event of the workers declining its offer of employment"[13].

[28] As to what constitutes a 'going concern' was explained in *NEHAWU*[14] in the following terms:

[11] *NEHAWU* at para 56
[12] At para 47
[13] At para 48
[14] At para 56

> "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." (References omitted) 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 a business has been transferred as a going concern, regard must be had to the substance and not the form of the transaction.(References omitted) 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. They must all be considered in the overall assessment and therefore should not be considered in isolation".

[29] In this case, the Municipality accepted that it had acquired the obligation to provide electricity to its inhabitants. In this regard, it can be accepted that the business transferred was the purchase of electricity from Eskom as bulk supplier, the provision of electricity and related services to ratepayers, and most importantly, the entire infrastructure to run the entire electricity network, including transmission and distribution. That infrastructure as pointed out in the Applicants' replying affidavit included substations, switchgears, transformers, power lines, pre-paid vending systems, metering equipment etc. This infrastucture, which was transferred to the Applicants in a dilapidated state in 2011 was returned back to the Municipality in a improved and functional state in April 2014. Furthermore, it should be accepted that the business transferred, will continue to serve and service the same clients that the Applicants used to service, being the inhabitants that fall under the jurisidiction of the Municipality. Thus the return of the infrastructure would enable the Municipality to continue from where the Applicants left off in providing the service in question.

[30] In my view, the only issue in this case is whether the failure to transfer anciliary tangible and non-tangible assets such as computers, vehicles and other equipment to continue the service it used to render, negates the operation of the provisions of section 197.

[31] 'Business' in section 197 (1) (a) is defined to 'include the whole or part of that business, trade, undertaking or service'. In this case, it was not in dispute that what was being transferred back to the Municipality was the business of providing a service in the form of electricity to its inhabitants. In this regard,

(a) The entire business relating to the provision of all electricity related services to inhabitants of the Municipality has been transferred back to it. The network and capital assests have been returned to the Municipality, and are now under its control and possession. The entire electricity distribution infrastructure, together with additions and improvements thereto, have been handed to it.

(b) The same business which was conducted by the Applicants during the period 1 September 2013 until 1 April 2014 was now being conducted by the Municipality, which has the same clients and was providing the same services. It was the same business in different hands.

[32] The Municipality in denying that a transfer had taken place had implored the Court to adopt a 'snapshot' approach as was the case in *FAWU v The Cold Chain (Pty) Ltd & another*[15], and also in *CEPPAWU v Hydro Colour Inks & another*[16]. In accordance with this approach, a 'snapshot' of the entity before the transfer should be made to assess its components, and to compare this picture to the one taken of the business after the transfer, to establish whether it is substantially the same business but in different hands.

[33] In applying this approach to the facts of this case, it was contended that the founding affidavit did not take a snapshot of Rural immediately before it was purportedly transferred to the Municipality, and merely explained how it had incurred expenditure in the acquisition of various assets in the operation of its

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15 2010 (1) BLLR 49 (LC)
16 2011 (32) ILJ 1677 (LC)

business. In regard to what the snapshot looked like after the transfer to the Municipality, it was contended that Rural has not created an inventory of the assets that were transferred to the Municipality, and that it has not transferred all of the assets, tangible and intangible to the Municipality. It was argued that Rural had merely given the Municipality's infrastructure back to it with whatever improvements may have been done. In this regard, it was argued that this was not the same thing as transferring "all of the assets used by the transferor in the operation of its business as a going concern". It was conceded that the Municipality could carry on trading to some extent as it could provide electricity to residents because it had acquired the infrastructure from the Applicants to do so. In other respects however, it was contended that the Municipality could not trade as it did not acquire all of the assets needed to operate business as it was being operated before.

[34] It was further argued that the Applicants expected the Municipality to acquire the employment contracts in circumstances where it was unclear from their papers which component of the business the employees were working in. In the Municipality's view, the Applicants sought to 'dump' the employees onto it without transferring the concomitant tools that the employees would have used whilst operating the Applicants' business. Furthermore, it was submitted that it was difficult to decipher which of the employees could be linked to the assets that were transferred as opposed to those that were not transferred.

[35] The Municipality held the view that its contentions further found support in *Aviation Union*, where it was accepted that the outsourcing of a 'service' fell within the definition of a 'business' as contemplated by section 191 (1). Jafta J has however cautioned that section 197 was only triggered when 'the business that supplied the service' was transferred and not the service itself'.

[36] The Applicants on the other hand conceded that they had retained certain peripheral assets used in the conduct of the business such as vehicles, computers, administrative equipment and the like. It was however contended on that it was not essential to a section 197 transfer for all the assets of the business to be transferred. The comprehensive right of use of the infrastructure and the assumption of control over the infrastructure are 'key

triggers' for the operation of section 197. To this end, it was argued that where the transferee of the business was permitted or resumes the right of use of infrastructural assets necessary for the continuation of the relevant service, a transfer will take place.

[37] Craig Bosch[17] holds the view that the test for a transfer as a going concern is an objective one and view the approach in *NEHAWU*[18] as amounting to taking a 'snapshot'. It is however suggested that in order to avoid technicalities and to ensure a wider scope of the application for section 197, it is sufficient that the business remains *substantially* the same in the hands of the transferee.

[38] In my view, a consideration of whether what has been transferred in this case is a business in operation, and whether the business that was transferred by the Applicants remains the same but in the hands of the Municipality, must take the following factors into account;

38.1 Section 81 of the Municipal Systems Act 2000 provides that:

> "(1) If a municipal service is provided through a service delivery agreement in terms of section 76 (b), the municipality remains responsible for ensuring that that service is provided to the local community in terms of the provisions of this Act, and accordingly, must-
>
> (d) must ensure continuity of the service if the service provider is placed under judicial management, becomes insolvent, is liquidated or is for any reason unable to continue performing its functions in terms of the service delivery agreement; and
>
> (e) must where applicable, take over the municipal service, including all assets, when the service delivery agreement expires or is terminated"

38.2 The business of supply of electricity to consumers within the jurisidiction of the Municipality comprised principally the infrastructure required to transmit and distribute electricity supplied by Eskom to

[17] In Chapter 2: The Applicability of Section 197: Business Transfers and Employment Rights in South Africa Todd, Chris and du Toit D'Arcy and Bosch, Craig Business Transfers and Employment Rights (2004) LexisNexis, Butterworths, Durban at p49

[18] *Ibid* at para 56

consumers, and the equipment used to facilitate the collection of revenue. This part of the business, which is the core for successful service delivery (of electricity) has been transferred back to the Municipality. At least, in view of the repudiation of the EMC, the provisions of the Municipal systems Act as indicated above become applicable.

38.3 When the EMC was concluded and the 16 employees were transferred to Rural, the intention was to at all times, to continue to maintain and service the electricity network so that inhabitants can enjoy that service. For the purposes of compliance with the EMC, it could not have been expected of the Applicants to service that contract with those few employees. It could not have been expected of the Applicants to service the EMC without taking the measures it took in relation to the buying of equipment and general assets necessary to fully service that agreement.

38.4 Despite the Municipality's contentions that it is not responsible for the other 111 employees, it has not indicated in its papers as to how it envisages to continue to provide the same service as previously provided by the Applicants without the employees required to do so. In my view, there is no sense in accepting back the transfer of the huge infrastructure network when there would be no employees to maintain and service it. That infrastructure was revamped at a huge cost to the rate payers, and it would be senseless to have it deteriorate back to where it was prior to 2011, simply on account of lack of human resources to maintain it. To this end, the Municipality needs the relevant employees to conduct the relevant electricity supply services. I did not understand it to be in dispute that these employees were properly trained in this regard and that they have the necessary expertise to do so. The Applicants' concerns in that the Municipality may 'cherry-pick' certain employees and thereby avoid its obligations in terms of section 197 of the LRA is not misplaced.

[39] In addressing the nature of business to be transferred for the purposes of section 197, the Honourable Van Niekerk J in *Harsco Metals SA (Pty)Ltd & another v Arcelormittal SA Ltd & others* [19] had the following to say;

> "Useful as these authorities are, in South Africa, in relation to the definition of a 'business' for the purposes of s 197, the judgment of the Labour Appeal Court in *SAMWU v Rand Airport Management Co Ltd* (citation omitted) remains the authority by which I am bound. In that case, the court concluded that the outsourcing of gardening and security functions at an airport management by the employer were businesses capable of being transferred in terms of s 197, despite that fact that it did not appear that any assets, goodwill, operational resources or workforce were to be transferred. No distinction was drawn between a business that is largely employee-reliant, as opposed to an asset- reliant business. Nor was it suggested that in the former, greater weight ought to be attached to the number of employees transferring as opposed to the latter instance, in which the number of assets transferring might attract greater weight. If, as in that case, a grouping of relatively unskilled employees and the work they perform, with no assets appearing to be the subject of any transfer, comprises a 'business' for the purposes of s 197, then it is difficult to conceive, in the context of an outsourcing transaction, of an economic entity that would not be capable of transfer in terms of the section."

[40] In line with the above authorities, it follows that the Municipality's contentions that there could not have been a transfer on the basis that other assets belonging to the Applicant were not transferred cannot be sustainable. A lack of transfer of other assets, both tangible and intangible is not determinative of whether a transfer has taken place or not. To nick-pick as to what should or needs to be transferred might in my view lead to an abuse and blatant circumvention of the provisions of section 197.

[41] The Municipality despite lamenting the fact that such outstanding assets have not been transferred back, has not indicated how this would prevent it from continuing to provide the service in question. It follows that having taken over the business of providing electricty, the Municipality must also make its own

[19] (2012) 33 ILJ 901 (LC) at para 29

arrangements in respect of the facilitation of that service. In the same vein, it is also not clear from its papers as to how the Municipality proposes to continue providing the service in question with the infrastructure that was transferred without these employees.

[42] A transfer of a business, including a service as in this case will comprise of more than one feature, inclusive of employees, the service to be provided and the equipment to be utilised in providing that service once transferred. What is of importance however is the effect of that transfer, and whether what has been transferred remains the same or substantially the same after the transfer. In this case, and in the light of what has been stated elsewhere in this judgment in regard to what has been transferred, I am satisfied that the business of providing a service to the local inhabitants, as previously in the hands of the Applicants and now transferred to the Municipality, remains the same, and to this end, it is cocnluded that there has been a transfer of a business as going concern as contemplated in section 197.

[43] The Municipality had also raised concerns about the effect of the order sought by the Applicants on the basis that firstly, such an order violated the constitutional principle of separation of powers, and linked to that, that such an order would place further strains on its budget.

[44] In answering the above concerns, one must not lose sight of the primary purpose of the provisions of section 197, which as stated in *NEHAWU*, is to promote economic development, social justice and labour peace.[20] In the first instance, when the EMC was concluded, it must have been a matter that was budgetted for. To this end, it must have been anticipated by the Municipality that more employees would be employed to service that contract, and surely that must have been an item catered for in the contract. Since that contract was cancelled, I did not understand that the allocated budget in respect of that contract was to be diverted somewhere else more important than the provision of the service in question. Secondly, the provsions of the Municipal Systems Act obliges the Municipality to render the service in question, and it

[20] at para 62

cannot be expected of it to do so with less than the employees that the Applicants had employed to provide the same service.

[45] In view of the purpose of section 197, it could not have been envisaged that within the public service, budgetary constraints would prevail over the employees' rights to fair labour practices as contemplated in section 23 of the Constitution. To this end, the arguments surrounding the budget of the Municipality cannot be a consideration for the purposes of section 197 where it is found to be operative. The argument that with such an order the court would be trampling on policy considerations and the Municipality's rights to govern its own affairs cannot prevail. The same conclusions need to be made in regards to the question of separation of powers.

[46] The role of the courts under our Constitution is to protect the Constitution, and in particular individual fundamental rights. In asserting this function, there may be perceptions that the courts may have offended the constitutional principle of separation of powers. In making orders that have the effect of protecting fundamental rights, the court has remained sensible to the legitimate constitutional interests of the Municipality as against its constitutional obligations, and the constitutional rights of employees and its inhabitants. This case is about the fundamental rights of the employees affected by the transfer. The right to fair labour practices is one of those individual fundamental rights that this court is called upon to protect at all times. In this regard, when this court interprets and applies the provisions of section 197 insofar as they may be applicable and operative within a municipality, it cannot be seen to be crossing that line when in doing so, it merely does what is required of it constitutionally.

[47] The doctrine of separation of powers is of great importance in our democracy and a legal attack of such a nature requires meaningful presentation of facts and properly considered legal arguments[21]. It thus is not sufficient for the

[21] *Member For The Executive Committee-Department of Local Government and Housing-Gauteng Province v Kolombea Mirriam Hlompho* CASE NO: 9509/2011 (ZAGPJHC/2011 - South Gauteng High Court)

Municipality as in this case, to simply allege that in granting the order sought, the court will cross the line of separation of powers.

[48] I fail to appreciate how it would be acceptable for this court to make any such findings pertaining to the applicability of section 197 within the private sector, and not so, within the public sector on account of *inter alia*, budgetary constraints or the fear that the court may have offended the principles of separation of powers. Once a distinction has to be made as to when and how these provisions should be applied and interpreted, depending on whether it is within the public or private sector, it would create an inequitous and untenable position. In my view, it cannot be said that the court crosses a line when it makes an order that employees previously employed to ensure delivery of a service to about 121 095 households and 597 businesses should continue to be employed, in order for the Municipality to continue to provide that service. Such an order in my view, and more pertinently in this case, would be appropriate, and serves a dual purpose of protecting the individual employees' fundamental rights under section 23 (1) of the Constitution, and also of those of the inhabitants of the Municipality under section 152 (1) (b) of the Constitution[22].

*Co*sts:

[49] It is trite that this court will make an order of costs, having had regard to considerations of law and fairness. Having taken these factors into account, and the circumstances of this application, I conclude that any adverse cost order would be inappropriate.

Order:

i. It is declared that with effect from 1 April 2014, the employment contracts of the employees listed in annexure "A" of the Applicants' Notice of Motion are transferred to Maluti-A-Phofung Local Municipality

[22] **Objects of local government**
152 (1) The objects of local government are-
(a) …..
(b) to ensure the provision of services to communities in a sustainable manner

(The Municipality) in terms of section 197 (2) of the Labour Relations Act.

ii. The Municipality is directed to comply with the provisions of section 197 in relation to the transfer of the employees as mentioned above.

iii. There is no order as to costs.

Tlhotlhalemaje

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TLHOTLHALEMAJE, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	Adv. Paul Pretorius SC with Adv. Andrew Snider
Instructed by :	Webber Wentzel
For the First Respondent:	Adv. Kevin Hopkins with Adv. Sandra Freese
Instructed by:	Majavu Inc