THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case No: J2163/19

Reportable

In the matter between:

DIMENSION DATA (PTY) LTD	**Applicant**
and	
OMEGA DIGITAL SERVICES (PTY) LTD	**First Respondent**
SASOL SOUTH AFRICA (PTY) LTD	**Second Respondent**

Heard: 7 November 2019

Delivered: 13 December 2019

Summary: (S 197 transfer – whether replacement of service provider maintaining and service audio-visual video-conferencing facilities belonging to and amounts to a transfer of a business under s 197 – citation of respondent incorrect – correct respondent addressing merits of case against it – amendment of citation permitted)

JUDGMENT

LAGRANGE J

Background

[1] The applicant ('Dimension') claims that the termination/nonrenewal of the master agreement and signature document concluded with it and Sasol, in terms of which it maintained and repaired audio-visual and videoconferencing facilities of Sasol, together with the conclusion of an agreement between the second respondent ('Sasol') and the first respondent ('ODS' or 'Omega Services') in terms of which Omega Services would provide the same services constitutes a transfer of a business as a going concern in terms of section 197 of the LRA.

[2] In consequence, it also claims that Dimension's employees who were devoted primarily to providing those services ought to have been transferred automatically on 30 November 2019 being the date of transfer. It also seeks an order requiring the first respondent to conclude an agreement with the applicant in terms of s 197 [7] of the LRA within two weeks of the court order.

Points in limine-

[3] Omega raised two *in limine* issues. Firstly, since Dimension had not cited its employees who were part of the dedicated team working on the Sasol facilities this amounted to non-joinder of legally interested parties whose employment status is inextricably linked to the outcome of this application. I agree that ordinarily they ought to have been joined as they have a legal interest in the outcome of the proceedings. However, the fourteen affected employees all assigned affidavits confirming that they had sight of the urgent application but chose not to intervene and to abide by the decision of the court. They also acknowledged that the purpose of the application was to determine if their employment had been transferred in terms of section 197. In the circumstances I am satisfied that no purpose would be served joining the affected employees.

[4] Secondly, the applicants had incorrectly cited Omega Digital Technologies (Pty) Ltd instead of Omega Digital Services (Pty) Ltd as the company to which it claimed that the services rendered at Sasol had been transferred to under section 197. Dimension sought to correct this by filing a notice to amend the citation of the first respondent. Strictly speaking, the citation of the incorrect party required an application to substitute Omega Digital Services (Pty) Ltd ('Omega Services') for Omega Digital technologies (Pty) Ltd ('Omega Technologies').

[5] Omega Services cited a number of authorities including *Solenta Aviation (Pty) Ltd v Aviation @ Work (Pty) Ltd* 2014 (2) SA 106 (SCA), *Associated Paint & Chemical Industries (Pty) Ltd T/A Albestra Paint And Lacquers v Smit* 2000 (2) SA 789 (SCA) in which the courts have declined to accept the correction of the citation of the party, when the correction in fact identifies a different juristic entity from the first cited entity. However, in those cases it was the identity of the plaintiff, which the

relevant party sought to vary. Accordingly, the initiating pleadings did not correctly describe the true creditor, and could not avail the true creditor when a plea of prescription was raised by the debtor party, even if the debtor acknowledged the true creditor's identity. In each of those cases, the correction of the creditor's identity was not accepted as a variation of the identity of the plaintiff, and a plea of prescription was upheld.

[6] However, in this instance it is the citation of the respondent which the applicant sought to change. The answering affidavit was deposed to by the Chief Operating Officer of Omega Services. While correctly pointing out that Omega Technologies had been incorrectly cited as the company assuming responsibility for the audio-visual services, the answering affidavit addressed Dimension's factual averments on the basis that Omega Services was the true respondent, whereas it could have simply pointed out the error and not filed any answering affidavit. In the circumstances, I am satisfied that Omega Digital services became a respondent party to the application when it joined issue with the applicants in filing the answering affidavit opposing the merits of the application.

[7] Accordingly, the citation of Omega Digital technologies should be amended to recognize the true respondent as Omega Digital Services.

Urgency

[8] Omega does not contest the issue of urgency, but points out that nothing prevented Dimension from approaching the court after 2 October 2019 when it formed its final opinion of the matter, instead of 6 November 2019. The date of termination of Dimension's contract with Sasol was extended to 30 November 2019. While the matter could have been moved with more expedition, I am satisfied that Dimension acted with sufficient celerity given the timing of the critical event to bring the matter to court.

Merits:

Brief summary of material facts:

[9] In February 2016, Dimension concluded a so-called Master Agreement and a Signature Document to service, support and maintain the audio visual and video conferencing facilities of Sasol, in particular, at what was then its new head office in Sandton. The service provided falls into three broad subdivisions namely: video helpdesk; first line support and time support and maintenance. The Dimension employees performed the work at the Sasol premises just like any other Sasol staff. The nature of these component parts of the whole service can be described, in brief, as follows:

> 9.1 The video helpdesk service entails ensuring that the numerous meeting and conference rooms have properly functioning audio and visual support, as well as updating software and maintaining hardware used by Sasol. All the hardware and software used belongs to Sasol and was licensed to Sasol. The helpdesk responds to approximately 600 calls or email notifications per month. A certain amount of analysis of those calls is conducted by Dimension.
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> 9.2 The first line support function essentially refers to Dimension staff responding to reports reaching the helpdesk. Initially, the Dimension technician will try and 'walk' the Sasol employee through the steps to resolve the problem, but if that fails then a support engineer is notified to go to the relevant venue to resolve the issue and a report is logged on the system.
>
> 9.3 The uptime support and maintenance function principally involves the replacement of vital equipment that cannot be repaired or restored to a functional state onsite.

[10] This year, a new tender was issued by Sasol to provide the same services. Both Dimension and Omega tendered for the contract and it was awarded to Omega. The scope of work in the new contract is slightly wider than that in the original one, as it requires Omega to render similar services at Sasol sites.

[11] Dimension utilizes the infrastructure tools and equipment, software and methodologies of Sasol in rendering its services relating to audio-visual and videoconferencing. Dimension maintains that the rights to use such infrastructure is

an essential component of providing the services and will transfer to Omega on termination of Dimension's contract.

[12] While admitting that the audio-visual and videoconferencing facilities at Sasol's head office are part of the infrastructure used by Sasol and its employees, Omega disputes that the provision of such facilities is part of Sasol's business *per se*.

[13] Omega did record its willingness to allow affected employees at Dimension to apply for positions at Omega and resign from Dimension if they were successful.

[14] Sasol has never engaged its own employees to provide these services which were first provided by Dimension when it won the three-year contract. Thus, this is not a case where an existing in-house service was outsourced to third-party contractors. However, Dimension contends that the fact that it provided the services as third party to Sasol from inception is immaterial in determining whether a s 197 transfer is taking place. Consequently, it is also irrelevant whether or not employees of Sasol were initially transferred to it when it undertook to provide the services in question.

[15] Dimension concedes that Omega might deliver these services to Sasol using a different *modus operandi* to the one it uses in rendering the service but the service outcomes are essentially the same and the difference in *modus operandi* does not alter the section 197 character of the changeover, which it submits amounts to a transfer in terms of that section.

[16] It is not common cause that a certain number of Dimension's personnel are permanently deployed to render the service presently, however Omega contends this is simply a reflection of the way Dimension chose to provide the service and is not a distinguishing feature of the service itself.

Material issues in dispute

[17] Omega contends that when it commences rendering the services under the new tender this will amount to nothing more than a change of service provider after Dimension's three-year contract expires through the effluxion of time.

[18] Omega disputes that Dimension permanently engaged personnel to fulfil its obligations under the Sasol contract. To refute this, Dimension provided contracts of employment of the affected employees.

[19] Omega further denies that giving the affected employees of Dimension an opportunity to apply for vacancies was an attempt to cherry pick staff for the Sasol contract. Omega insists that it has no need for any Dimension resources to fulfil its obligations under the contract but it could have other vacancies for such skilled personnel.

[20] Dimension contends that the existence of a transition date supports its argument that the new contract awarded to Omega amounts to a section 197 transfer. Dimension also sought in its replying affidavit to reinforce this argument by referring to an email sent to it by Sasol when it requested its personnel to be temporarily withdrawn to attend hearing of this application. Dimension had arranged for a standby team to release the onsite engineers. In response to this request, Sasol sent the following email to Dimension:

> " Hi Corrie,
>
> Are the guys really required at the court proceedings on Thursday?,
>
> We cannot risk having a complete new team on site, our customers are used to a certain level and way of service, a new team will not work for us…"

Dimension cites this as evidence of the dedicated and discrete nature of the service it provides to Sasol, which cannot be readily substituted at short notice.

[21] Dimension further contends that the 197 transfer is not dependent on whether or not there was a physical transfer of assets because the courts have recognized that a comprehensive right to the *use* of assets and infrastructure and the assumption of control over those assets may trigger a s 197 transfer. Omega argues that the service it is contracted to provide is not to use the assets of Sasol to provide the service but rather to support, service, maintain and repair those assets, equipment, tools and infrastructure of Sasol comprising its audio-visual and video-conferencing facilities.

[22] Further, Omega contends that the work it renders is not delivered through the mechanism of a discrete entity but is a service which Dimension can render at other clients' premises. Omega denies that it needs any of the tools, equipment, personnel, know-how or expertise of Dimension to provide the services in its contract with Sasol. Accordingly, it cannot be said that a discrete business entity comprising a going concern is simply changing hands.

Evaluation

[23] What distinguishes this case from the *TMS Group Industrial Services (Pty) Ltd t/a Vericon v Unitrans Supply Chain Solutions (Pty) Ltd & others*[1] case, which Dimension claims is closely comparable to the facts in this matter, is that, in that matter the warehousing function, which was outsourced but was fulfilled using the assets of the client (Nampak) was described as an economic entity or an organized grouping of resources namely the provision of warehousing services. TMS took over Nampak's warehousing operation using the same infrastructure Nampak previously used to discharge those obligations by Unitrans. The LAC characterised the situation, and cited the judgement of Van Niekerk J in the court *a quo*, thus:

> "[9]…he services that the appellant [TMS] was contracted to perform could only have been performed at the production facility of third respondent [Nampak], at the same site and within the same premises as first respondent [Unitrans] had previously discharged its obligations under its contract with

[1] (2015) 36 ILJ 197 (LAC)

third respondent. Absent any averment to the contrary, it was also reasonable to conclude that appellant would make use of the same equipment and IT systems that had been employed by first respondent, including forklifts, furniture and a computer system that was driven by the software of third respondent, enabling the movement of stock to be tracked. All of the assets were and remained the property of third respondent and had been employed by the first respondent and, in all probability, by the appellant in the discharge of its obligations to third respondent.

[10] On this basis Van Niekerk J concluded:

> 'The warehousing service provided by the first applicant to Nampak constituted an economic entity, or, put another way, an organised grouping of resources. This comprises, at least, the contractual right to perform the services, [with?] the assets owned by Nampak but used by the affected employees, the specific activities performed by the affected employees and the employees themselves. This economic entity constitutes a service for the purposes of s 197(1).'

[11] Van Niekerk J went further to hold that, to the extent that a contractual right to provide warehousing services now vested in appellant, the very same assets which were used to provide the same services by first respondent to third respondent were now employed by the appellant; hence the infrastructure that was used to discharge the obligations of appellant passed from first respondent, upon the assumption of its obligations pursuant to the contract to third respondent and upon the conclusion of the initial contract. They were then made over to [the] appellant after appellant had entered into its relationship with third respondent."[2]

[24] Dimension argues that: the scope of work to be performed by Omega is virtually identical to that performed by it; Sasol retains ownership of the IT and physical infrastructure necessary to provide the services and the right of control and use of the necessary Sasol IT and physical infrastructure will pass from Dimension to

[2] At 202-203

Omega Services on the effective date. Although no assets will transfer from Dimension or Sasol to Omega Services, that is not decisive. What is crucial is that Omega Services will assume the comprehensive *right of use* of Sasol's IT infrastructure, *in order to continue to provide the same service* to Sasol as previously provided by Dimension.

[25] To reinforce its argument, Dimension placed much emphasis on the importance attached to the European jurisprudence and directives applicable to business transfers in that jurisdiction, after citing *dicta* in the LAC decisions in City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd & others[3] and *Unitrans* . For convenience the relevant extracts are reproduced below:

After citing section 197, the LAC in *Grinpal* stated:

> "[16] This provision was subjected to a careful and definitive scrutiny by the Constitutional Court in Aviation Union of SA & another v SA Airways (Pty) Ltd & others 2012 (1) SA 321 (CC); (2011) 32 ILJ 2861 (CC). As the facts of Aviation are relevant to the present dispute they require recitation.
>
> [17] In 2000, South African Airways (SAA) took a decision to outsource certain of its non-core business in order to reduce its maintenance costs which were in excess of R130 million per annum. It put its facilities management operation out to tender. The tender was awarded to LGM. Following the award of the tender, LGM and SAA concluded an outsourcing agreement in terms of which the facilities management operations were transferred from SAA to LGM. The agreement was to endure for ten years, terminating on 31 March E 2010. In terms of the agreement, LGM would provide services for a fee. The assets and inventory relating to these services were sold to LGM, but on termination of the agreement, SAA would be entitled to repurchase these assets, LGM would be afforded the use of office space, workshops, airport, aprons, computers and the SAA network at all designated airports. Upon termination of the agreement, SAA would be entitled to have the services transferred back to it or to a third party and to

[3] (2014) 35 *ILJ* 2757 (LAC)

obtain assignment of all third party contracts of the LGM. Employees of SAA, who were engaged in the performance of these services, were automatically transferred to LGM in terms of s 197 of LRA.

[18] In June 2007 SAA terminated the agreement, owing to a breach committed by LGM. Two months later it put out to tender certain of the services performed by LGM. According to LGM, employees who had been employed by LGM, pursuant to its obligations under the outsourcing agreement with SAA, were now to be retrenched. The appellant sought assurance from SAA that, upon termination of the outsourcing agreement, LGM's employees would be retransferred to SAA. SAA's stance was that there was no legal obligation requiring it to take the workers back. It was within this context that appellant launched an application for declaratory relief against SAA and LGM I pursuant to s 197 of LRA.

[19] The dispute was heard in the Labour Court, this court and the Supreme Court of Appeal. Suffice to note that it finally reached the Constitutional Court where two judgments were delivered, one by Jafta J, on behalf of a minority, and one by Yacoob J, on behalf of the majority of the court. Of particular relevance is the approach adopted by Yacoob J (at para 113) to the proper enquiry to be conducted to determine whether the transaction in issue contemplates a transfer of business by an old employer to a new employer:

> 'Does the transaction concerned create rights and obligations that require one entity to transfer something in favour or for the benefit of another or to another? If so, does the obligation imposed within a transaction, fairly read, contemplate a transferor who has the obligation to effect a transfer or allow a transfer to happen, and a transferee who receives the transfer? If the answer to both these questions is in the affirmative, then the transaction contemplates transfer by the transferor to the transferee. Provided that this transfer is that of a business as a going concern, for purposes of s 197, the transferee is the new

employer and the transferor the old. The transaction attracts the section and the workers will enjoy its protection.'

[20] Applying this approach to the facts of SAA, Yacoob J found that LGM had received the transfer of fixed assets, inventory, the use of space at airports, SAA computers, computer network service and lease of property all of which was necessary to conduct the services to be supplied by LGM. Thus (at para 120) —

> '[a]s the agreement rightly states LGM acquired the whole of the infrastructure necessary for the conduct of the business. It did not have to secure a property or computers or network services or anything of the kind'.

The question that vexed the Constitutional Court concerned the effect of the termination of the outsourcing agreement between LGM and SAA. This required the court to examine the so-called second generation transfer, that is, one from the original outsourcee to the outsourcer. Yacoob J found that the answer to whether s 197 of LRA applies in this case, to a large extent, depended on whether once the contract was cancelled LGM would be entitled to continue to use the computers, airport space, lease the property and return the fixed assets and inventory. Thus (at para 121) —

> 'if the assets necessary to operate the business stay with LGM, then the business would not be transferred. If they do not stay with LGM but go back to SAA, or to another service provider, there is a transfer of business'.

[21] On the basis of this conclusion, the majority of the court found that the effected termination of the agreement contemplated a transfer of the business as a going concern. The only question remained as to whether the business as a going concern was to be transferred to SAA or to an interim service provider. So long as there was a transferor, the identity of that entity

or person was of no material significance to the issuing of the declarator sought by the appellant.

[22] Given that the difference of approach between the minority and majority judgments turned essentially on the appropriate remedy, it is significant for the purposes of this dispute that Jafta J reiterated the test for determining whether a business was transferred as a going concern, as being that which had been adopted by the Constitutional Court in National Education Health & Allied Workers Union v UCT & others 2003 (3) SA 1 (CC); (2003) 24 ILJ 95 (CC) at para 56:

> '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. 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.'

[23] All of these factors indicate that a court is required to examine the substance of the agreement to terminate the outsourcing, in this case between appellant and first respondent. In essence, the approach adopted in NEHAWU follows that of the European Court of Justice in the application of the Business Transfers Directive (2001/23/EC) which is applicable in the European Union, and dictates that a transfer must relate to an autonomous economic entity (defined to mean an organized group of persons and assets facilitating the pursuit of an economic activity that promotes a specific objective). In turn this involves a determination whether that entity retains its identity after the transfer; that is, the transferor must carry on the same or similar activities with the personnel and/or the business assets without substantial interruption. See in this connection Spijkers v Gebroeders

Benedik Abattoir CV [1986] 2 CMLR 296 (ECJ) and the instructive E judgment of Van Niekerk J in Unitrans Supply Chain Solutions (Pty) Ltd & others v Nampak Glass (Pty) Ltd & others [2014] ZALCJHB 61 at para 15 [reported at (2014) 35 ILJ 2888 (LC) – Eds].

[24] The transfer of a going concern does not mean that, upon the termination of a service contract by one party and a subsequent appointment of another service provider, a transfer of the contract sufficient to satisfy the requirements of s 197 has been effected. The question is whether the activities conducted by a party, such as first respondent, constitute a defined set of activities which represents an identifiable business undertaking so that when a termination of an agreement between first respondent and appellant takes place, it can be said that this set of activities, which constitutes a discrete business undertaking, has now been taken over by another party. "

(Dimension's emphasis)

Further, Dimension emphasized the importance of the transfer of an activity from one entity to another, citing the following extract from *Unitrans*:

"[30] In this case, the service which was provided was that of warehousing. It was initially provided to third respondent by first respondent. As in the case of Sodexho, the warehouse operation services constituted a discrete business. At the date of the inception of its agreement with third respondent, appellant assumed the right to use third respondent's assets and infrastructure in order to continue to provide the same service to third respondent as it had previously been provided by first respondent. As Mr van Esch said in his answering affidavit, the warehouse services, which were presently performed by the appellant can only be performed at the production facility of third respondent. Thus, the services are 'performed at the very same site and fixed premises as the services that were performed by Unitrans in terms of the warehousing agreement'. Appellant was required to make use of the same equipment and IT systems that were previously

employed by first respondent including forklifts, computers, printers, a computer system as well as other assets such as furniture.

[31] This uncontested evidence provided the basis by which to determine whether there has been a transfer of business as a going concern by an old employer to a new employer. The concept of a going concern is not a novel concept within South African law. For example, s 11(1)(e) of the Value Added Tax Act 89 of 1991 refers to an enterprise 'which is disposed as a going concern'. The term 'going concern' is well known in comparative value added tax jurisprudence. The New Zealand High Court, in interpreting the equivalent concept in New Zealand legislation, which legislation formed the basis of the South African Value Added Tax Act, said the following about the meaning of going concern: 'The activity must be one which is handed over to the transferee in such a state that it may be carried on by the transferee if he so wishes.' CIR v Smith's City Group Ltd 1992 (14) NZTC 9,140 at 9,143.

[32] This dictum is particularly illuminating in the present case. The activity which was carried on by first respondent flowed from the relationship entered into between appellant and third respondent. The necessary facilities were handed over to the appellant in a state in which appellant was able to carry on the very same activity which had previously been conducted by first respondent. It performed these services on the premises of third respondent. It employed third respondent's computer systems and other equipment and carried on the same activity of warehousing described in the evidence provided by virtue of third respondent's Mr van Esch. This evidence justifies the conclusion that there was a transfer of a business as a going concern from the old employer to a new employer."[4]

(Dimension's emphasis)

[26] Lastly, Dimension contended that South African law on transfers is largely congruent with European law under the Business Transfers Directive (2001/23/EC) and the British law on the TUPE Regulations. Following this argument, Dimension

[4] At 208-209

submits that the TUPE regulation which specifically defines a particular form of a transfer of an undertaking, namely a service provision change ('SPC') is consistent with the concept of a transfer of a service under section 197 of the LRA.

[27] According to Wynne-Jones, the author of *The law of TUPE Transfers*[5], referred to by Dimension's counsel:

> "An SPC occurs on a change (other than on a one-off or short-term basis or in relation to the supply of goods) to the identity of the person who has the conduct of activities to which an organized grouping of employees has principally been dedicated …
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> For there to be an SPC certain other requirements must be satisfied:
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> - there must be an organized grouping of employees principally dedicated to that contract or activity prior to the transfer;
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> - the activities in question must remain fundamentally the same after the putative transfer;
>
> - the new service provider must be retained on an ongoing basis rather than on a one-of and short-term basis; and
>
> - the activities must not relate to the supply of goods."

[28] While it is true that South African courts have drawn on European jurisprudence on transfers of undertakings in the task of interpreting section 197, care must be taken not to simply incorporate *holus bolus* specific statute instruments promulgated under European or British legislation, into our law. Froneman J in *Rural Maintenance (Pty) Ltd & another v Maluti-A-Phofung Local Municipality* [6] cautioned against such a tendency:

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[5] 2nd edition

[6] (2017) 38 *ILJ* 295 (CC)

> "[25] In NEHAWU support was found for the court's reasoning on the purpose of s 197 in 'comparable foreign instruments and foreign case law construing these instruments'. But this was done with acknowledgment of possible differences in language and context. This court has on many occasions warned that the use of comparative law should be treated with due regard to different contexts and language. NEHAWU is no authority for the wholesale and uncritical adoption of jurisprudence under the Acquired Rights Directive adopted by the European Commission or the British TUPE Regulations.
>
> [26] The inclusion of 'service' in the definition of 'business' in the LRA was enacted in 2002. It precedes the 2006 TUPE Regulations and differs in both wording and context from the latter. It is difficult to see on what basis the mere adoption of the TUPE Regulations in Britain and the jurisprudence in relation to it necessitates a reformulation or development of our existing law to incorporate a separate approach to so-called service provision changes."[7]

[29] In this regard, it is important not to neglect the requirement that for a transfer to take place under section 197, the court must be satisfied that what has taken place entailed the transfer of a business by one employer to another employer as a going concern. In *Imvula Quality Protection (Pty) Ltd & others v University of South Africa*[8], the LAC held:

> "To constitute a transfer of a business as a going concern, not all the assets of the business need to be transferred, nor do all the relevant employees. But what must be transferred are those assets and personnel that are essential to the business as it was operated by the transferor. The transfer allows the actual business or a clearly demarcated portion thereof to operate seamlessly after the transfer."[9]

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[7] At 305.

[8] (2019) 40 ILJ 104 (LAC)

[9] At 111, para [21].

[30] Omega identifies a number of factors in the master agreement which Dimension concluded which militate against the conclusion that a transfer of a service entity is under consideration in this case. Thus, Sasol does not provide any equipment, tools, materials or personnel to assist Dimension in performing its contractual obligations. Also, Dimension must determine the characteristics, quality, requirements and quantity of the service it delivers and remains the owner of all the work it delivers and intellectual property provided. Sasol may also reject work provided and appoint a third party to fulfil the work at Dimension's expense if it fails in its obligations.

[31] While considerations like these might be relevant, it is the type of service provided and the way in which the service rendered by Dimension and by Omega is reliant on equipment and infrastructure belonging to Sasol, which is a crucial consideration. In this instance, the work to be performed by Dimension's successor, Omega Services, is the maintenance and servicing of existing audio-visual infrastructure of Sasol. Merely because Omega Services will be working on the same infrastructure and ensuring its effective functioning does not imply such infrastructure is part of the *means by which* it renders the service it provides. Rather it is the maintenance of that very infrastructure itself which is the service rendered. To my mind this is little different conceptually from a property company contracting with a different lift service company to maintain the proper functioning of its lifts, even if the former lift service company had a dedicated team of technicians devoted to the lift servicing needs of that company. It would stretch the concept of a business as a going concern to consider the lifts which are to be serviced and maintained as the infrastructure of the business which is transferred. Merely because a dedicated team might be used to render the service is not, in my view, sufficient to describe the service as an economic entity that can be transferred as a going concern.

[32] In light of the reasoning above, I am satisfied that the awarding of the new contract to service and maintain Sasol's audio-visual and conferencing facilities to Omega Services after terminating Dimension's contract did not give rise to a transfer of a service under section 197 of the LRA.

[33] There are no employee parties that have incurred any legal costs in this application, and there is no reason in my mind why costs should not follow the cause as they would in a normal commercial dispute between private companies.

Order

[1] The citation of the respondent is amended to read Omega Digital Services (Pty) Ltd instead of Omega Digital Technologies (Pty) Ltd.

[2] The matter is dealt with as one of urgency and any noncompliance with the requirements of the Rules of the Labour Court pertaining to service and time periods is condoned.

[3] The application is dismissed.

[4] The applicant must pay the respondent's costs.

Robert G Lagrange
Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant:	G A Fourie assisted by M Lennox instructed by Eversheds Sutherland (SA) Inc.
For the Respondent:	S Snyman of Snyman Attorneys