LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA9/21

In the matter between:

KING CETSHWAYO DISTRICT MUNICIPALITY	**Appellant**
and	
WATER AND SANITATION SERVICES SOUTH AFRICA (PTY) LTD	**First Respondent**
MUNICIPAL AND ALLIED TRADE UNION OF SOUTH AFRICA	**Second Respondent**
SOUTH AFRICAN MUNICIPAL WORKERS UNION	**Third Respondent**
THE EMPLOYEES WHOSE NAMES ARE LISTED IN ANNEXURE "A" TO THE NOTICE OF MOTION	**Fourth to Further Respondents**
UMGENI WATER	**Six Hundred and Sixty Seventh Respondent**

Heard: **5 March 2024**

Delivered: **10 January 2025**

Coram: **Mlambo JA, Nkutha-Nkontwana JA and Jolwana AJA**

Summary: **Section 197 of the Labour Relations Act 66 of 1995 – Municipality outsourcing provision of bulk water supply through tender and allowing outsourcee to use its assets – only assets owned by Municipality returned to it upon expiration of tender – outsourcee retaining assets owned by it – difference in asset and labour reliant businesses when determining existence of a transfer.**

Held: **Return of assets by an outsourcee constitutes a transfer if they are core assets that allow the same business providing the service to operate in different hands.**

Appeal dismissed.

JUDGMENT

MLAMBO, JA

Introduction

[1] This is an appeal with the leave of the court *a quo*, brought against its judgment and order where it found that the first respondent's business was transferred to the appellant in terms of section 197 of the Labour Relations Act[1] (LRA).

[2] The appellant, a local government and district municipality formerly known as uThungulu District Municipality is located in the KwaZulu-Natal province and currently known as the King Cetshwayo District Municipality. The first respondent is an international company that supplies water services in Africa and the Middle East. It employs over 1,200 employees to provide *inter alia* bulk water solutions to various municipalities across South Africa. The second and third respondents are the trade unions whose members were formerly employed by the first respondent before the disputed transfer took place. No relief is sought against them. The fourth to further

[1] Act 66 of 1995, as amended.

respondents are the 666 employees who were employed by the first respondent before the disputed transfer. Umgeni Water was joined as a party in the court *a quo* as it had taken over some of the functions previously performed by the first respondent.

Background

[3] In 2003, the appellant awarded a tender to the first respondent who was then responsible for the management, operation and maintenance of water and wastewater treatment facilities and associated distribution infrastructure. That tender ran from 1 July 2003 to 30 June 2008. From the initial tender granted in 2003, the first respondent was the successful bidder in two further tenders. Those ran from July 2008 to June 2012 and the third from 1 July 2013 and ended on 30 June 2015 i.e. three tenders in all. No further tender was put out thereafter, instead the contract was extended annually from time to time until Umgeni Water took over some of the services from 1 July 2020 on an interim basis.

[4] Following the conclusion of the third tender, the parties concluded a new service level agreement (SLA). This SLA was later amended to give effect to an agreement between the parties that the first respondent would render call centre services on behalf of the appellant.

[5] Before the final extension of the tender to 30 June 2020, the first respondent raised the issue of section 197 of the LRA applying at the termination of the SLA. Its view was that should this be the case, then the 666 employees would be transferred to the appellant municipality. Its view was that in terms of clause 2.2.3.2.1 of the third tender's SLA, if the employees were not transferred to the appellant municipality, then they should be transferred to the new service provider. This clause of the SLA provided that:

> 'Key Labour Principle (with reference to LRA)
>
> All affected employees, currently employed by WSSA (Pty) Ltd on the Works, will be given the following options:

- to be redeployed within WSSA (Pty) Ltd; or

- to be transferred to the new operator in the event that this contract be awarded to an alternative operator.

- staff compliment will fluctuate throughout the duration of the contract as schemes are commissioned and decommissioned.'

[6] The appellant municipality denied that there was a section 197 transfer and took the view that the first respondent was attempting to avoid its financial obligations by transferring the employees to it instead of undertaking a retrenchment process if it was not going to use them on future projects. It further denied that the conditions for a section 197 transfer can be defined by the parties to a contract. Its view was that without establishing a transfer of a business as a going concern, there can be no talk of a section 197 transfer, despite the contractual wording used. It asserted that there was no transfer because if the first respondent's version was accepted, then every tender put out by government would result in the application of section 197 once such a tender expired or had otherwise ended. Lastly, the appellant, attacked the extensions of the contract after the expiry of the third tender as unlawful as they allegedly were non-compliant with section 217 of the Constitution[2], due to the lack of an open and competitive bidding process.

[7] Having failed to reach agreement on the transfer of the employees or the application of section 197 of the LRA, the first respondent approached the Labour Court for a declarator that the transfer took place.

In the Labour Court

[8] Relying on the Constitutional Court's decision in *Rural Maintenance (Pty) Limited and Another v Maluti-A-Phofung Local Municipality*[3] (*Rural Maintenance*) the

[2] Constitution of the Republic of South Africa, 1996.
[3] [2016] ZACC 37; (2017) 38 ILJ 295 (CC).

court *a quo* found, and the appellant accepted that the character of the entity receiving the business was irrelevant. It found that the considerations that mattered were that such entity must be capable of being an employer, that what is transferred should not change character post-transfer and that the Public Finance Management Act[4] does not exempt the provisions of the LRA from applying to organs of state.

[9] The court *a quo* also dismissed Umgeni's contention that the appellant sought to rid itself of a bloated workforce, holding that section 197 applies as a matter of law, making motive irrelevant to its application. However, it accepted that subject to Umgeni and the appellant entering into an agreement for the provision of bulk water services, their then interim arrangement was not a transfer for the purposes of section 197. This as Umgeni had not decided which of the water services it would provide to the appellant.

[10] The court *a quo* then endeavoured to determine which of the water services provided by the first respondent were now left with the appellant. It found that the assets which were owned by the appellant but used by the first respondent such as boreholes, pipes and reservoirs, were the essential components of the business of supplying bulk water services. Upon termination of the SLA, the return of these assets to the appellant therefore constituted a transfer of a business as a going concern because the appellant, should it provide the service itself, or any service provider it appoints, will need those critical assets to provide the service. Thus, the employees were not a labour service being provided, and their lack of transfer to the appellant did not mean there was no section 197 transfer.

Submissions in this Court

[11] The appellant submits that the *causa* for the transfer was at best the termination of the SLA and at worst for the first respondent, the termination of an unlawfully extended contract (the 2013 tender). It then goes to allege that on the facts, there was no transfer of a business in that the first respondent failed to define the nature of the business that was transferred. In support of this, it says that no

[4] Act 1 of 1999.

assets (at most a non-exclusive right of use being terminated), employees or customers were transferred. In relation to the customers, it submits that no customers were taken over. In this regard it says that it (appellant) was the first respondent's customer in terms of the terminated service agreement and as such, it could not then become a customer of itself, i.e. water users were never customers of the first respondent. It then goes on to state that the first respondent concedes that certain assets were not transferred to the appellant, such as the tools and equipment i.e. vehicles, office space, laboratory equipment and the telecommunication system used to run the call centre. It further submits that the first respondent conceded that these were the assets required to provide the service and that the employees were not an essential feature to provide the service.

[12] In relation to the overlap in services provided, namely, the call centre management and water tankering services that it insourced, the appellant submits that the call centre operates with its own internal staff and that the water tankers were always its property and that it utilises its own drivers. The appellant further supports this assertion by noting that the first respondent accepts that when it operated the call centre, it only had four employees and no drivers. It concludes this point by stating that the first respondent's business can continue, showing that it was merely a service that was provided to it, and then terminated at the expiration of the SLA.

[13] On the absence of a transfer, the appellant distinguishes this matter from those in *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and Others*[5] (*City Power*) – on the basis that no technology, assets, employees and customers were taken over, *Aviation Union of South Africa and Another v SAA (Pty) Ltd and Others*[6] (*Aviation Union*) – on the basis that assets, inventory, lease of property, computers and access to network services were not transferred, and *Road Traffic Management Corporation v Tasima (Pty) Limited; Tasima (Pty) Limited v Road Traffic Management Corporation*[7] (*RTMC*) – where the new operator assumed full control of the premises, the operation system and extensive infrastructure such

[5] [2015] ZACC 8; 2015 (6) BCLR 660 (CC).
[6] [2011] ZACC 31; 2012 (1) SA 321 (CC).
[7] [2020] ZACC 21; 2020 (10) BCLR 1227 (CC).

as assets, information and intellectual property. In their view, this matter is similar to *Rural Maintenance*[8] where the Constitutional Court rejected the assertion that the alleged transferred business comprised the "*infrastructure for the provision of electricity services and the employees dedicated to that business*". The appellant further argues that the first respondent failed to transfer other assets which were not owned by it such as the vehicles and lab equipment. The appellant maintains that no section 197 transfer should be found to have occurred, because it would set the precedent that the termination of every government contract would result in a section 197 transfer.

[14] From the above, the appellant criticises the judgment of the court *a quo* on two main grounds. Firstly that it was incorrect to find a transfer of municipal assets when in reality, only a non-exclusive right of use was provided to the first respondent and the ownership always vested with it (appellant). Secondly that it erred by finding that the call centre function had been taken over as this finding imposed an evidential burden on it to prove that it had not taken the service over.

[15] The appellant's final submission relates to the Key Labour Principle provision in the SLA, which it submits was a quasi-contractual claim. As a result, it should have been interpreted in line with the *Natal Joint Municipal Pension Fund v Endumeni Municipality*[9] principles, namely taking into account the language and context while seeking to obtain a sensible meaning. On this approach, the appellant submits that the clause is not clear that the employees have been given the option to either transfer to the appellant or to a new service provider upon termination of the SLA, and that an insourcing arrangement would not constitute an "award" for the purposes of the clause.

[16] As to the preliminary point based on the power of attorney, raised by the first respondent, nothing much needs to be said about this point, the power of attorney having been filed though belatedly.

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[8] *Rural Maintenance* above fn 3.
[9] [2012] ZASCA 13; [2012] 2 All SA 262 (SCA).

[17] On the merits, the first respondent submits that the Key Labour Principles clause of the tender makes it clear that on termination, the employees would either be transferred to the appellant or whichever service provider succeeds it in providing the bulk water services. Its main contention is that this was not a mere cancellation of a service contract. It disputes the appellant's assertion that the decision in *Aviation Union*[10] can be distinguished from this matter. In its view, this case is relevant as the Constitutional Court made it clear that where the assets required to perform the service are removed from the service provider, the business transfers back to the holder of the required assets.

[18] The first respondent denies that it failed to define the nature of the business that was transferred. It refers to portions of its founding affidavit in the court *a quo* where it stated that its business comprised of certain tools and equipment, vehicles, office and workshop facilities and a laboratory. Further that it explained the number of employees it has and their roles as well as the assets belonging to the appellant and how they all came together to provide the business of the provision of water services to the appellant. It is on this basis that it asserts that upon termination of the SLA, the business transferred back to the appellant.

[19] Again relying on *Aviation Union*,[11] it submits that the Constitutional Court has already dealt with the question of the presence or not of a transfer in circumstances where the core assets are not owned by the service provider. It further relies on two other cases dealing with the significance or lack thereof concerning employees in an asset heavy business or service. The first is the Labour Court decision in *Franmann Services (Pty) Ltd v Simba (Pty) Ltd and Another*,[12] which quoted the decision of the European Court of Justice in *Carlito Abler and Others v Sodexho MM Catering Gesellschaft GmbH*[13] (*Sodexho*).The Labour Court held that the failure to transfer staff in an asset heavy business was not indicative of there not being a transfer of a business. From this, the first respondent submits that the appellant makes much of the ownership of the assets, when the true criterion is whether the right to use the

[10] *Aviation Union* above fn 6.
[11] Id.
[12] [2012] ZALCJHB 86; (2013) 34 ILJ 897 (LC).
[13] [2004] IRLR 168.

assets has been transferred. It submits that the *Sodexho*[14] judgment found favour in the Constitutional Court's decision in *Rural Maintenance*,[15] where it was held that the degree of importance of each criterion depends on the nature of the business carried out. The first respondent concludes this submission by pointing out that the nature of the assets owned by the appellant and used by it were so significant to the supply of the services that without them, they would not have been able to provide the same service, as it now vests with the appellant.

[20] The second case is that of *TMS Group Industrial Services (Pty) Ltd t/a Vericon v Unitrans Supply Chain Solutions (Pty) Ltd and Others*[16] (*TMS*), where this Court affirmed the Labour Court's finding that the appointment of a new service provider who continued to use infrastructure such as premises, assets and IT systems of the outsourcing party constituted a transfer from the previous to new service provider. In its view, the question to be asked is what the nature of the service was (the provision of bulk water services), the main assets used to deliver that service (those owned by the appellant such as boreholes, pipes and reservoirs) and where those assets were following the termination of the service agreement (by the appellant). Thus, the first respondent argues, the main or critical components, much like the decision in *Sodexho*,[17] have been transferred to the appellant and constitute such for the purposes of section 197.

[21] The first respondent submits that the employees were not the main component of the business, and thus their lack of transfer to the appellant is of no consequence to the application of section 197. It further submits that the consequences for employees cannot depend on an agreement between the new and old employers outside of section 197. As to the call centre, the first respondent supports the court *a quo*'s finding that the appellant failed to show how the service operates differently from when the first respondent ran it. Its view is that the provisions of the contract show that there was contemplation of a transfer once the

[14] Id.
[15] *Rural Maintenance* above fn 3.
[16] [2014] ZALAC 39; [2014] 10 BLLR 974 (LAC).
[17] Fn 13 above.

first respondent's services are terminated because the new service provider would be providing the same economic activity as the first respondent.

Section 197 of the LRA

[22] Section 197 of the LRA provides as follows in relevant part:

'(1) In this section and in section 197A –

(a) "business" includes the whole or a part of any business, trade, undertaking or service; and

(b) "transfer" means the transfer of a business by one employer ("the old employer") to another employer ("the new employer") as a going concern.

(2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6)—

(a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;

(b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;

(c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and

(d) the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer.'

[23] In *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others*[18] (*NEHAWU*), the Constitutional Court said the purpose of this section was to strike a balance between the interests of employees and employers when a business is transferred as a going concern. In changing the common law regime where the new employer was free to terminate all existing contracts of employment, the LRA introduced changes that sought to—

> '[p]rotect 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 a 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.'[19]

[24] Section 197 sets out the duties of the old and new employers regarding the legal consequences of the transfer in relation to employees. The facts that should be present for a section 197 transfer to take place are: (1) a business, trade, undertaking or service that is, (2) transferred as (3) a going concern.[20]

[25] The main contention in the matter before us is whether the return of assets owned by the appellant municipality to it by the first respondent, can constitute a transfer for the purposes of section 197. Secondary to this is if such a return of assets did constitute a transfer, then whether all the necessary assets were returned as it is common cause that the first respondent did not return its own assets that it also used in the provision of the bulk the water services. This latter consideration relates to whether the retained assets were core assets required for the provision of bulk water services.

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[18] [2002] ZACC 27; 2003 (3) SA 1 (CC)
[19] Id at para 53.
[20] *RTMC* above fn 7 at para 33.

[26] In *RTMC*,[21] the majority of the Constitutional Court affirmed what was said two decades earlier in *NEHAWU.* There, the court said "*whether [a transfer of a business as a going concern] has occurred is a matter of fact which must be determined objectively in the light of the circumstances of each transaction*".[22]

[27] It went on to say that the first step is to find a legal cause of a transfer before deciding whether the jurisdictional facts have been met. The majority held that –

> '[a] legal causa is a prerequisite for the application of section 197. It follows that only once the source of the respective rights and obligations to effect and receive transfer has been identified, can it be determined whether the jurisdictional facts for the application of section 197 are present. Once the legal causa is identified, the factual enquiry outlined in *NEHAWU* can be conducted. Thus, an inquiry as to the causa must be conducted before applying the test in section 197 to the facts. Otherwise one is looking at facts without the legal parameters being in place.'[23]

[28] I endorse the court ***a quo's*** finding that the *causa* potentially giving rise to section 197 was the termination of the SLA. The nature of the supply of the bulk water services in this matter fits into the wide definition given to the terms business or service.[24] Clearly, the business or service was the provision of the bulk water supply and the related services.

[29] Turning to the requirement that the business be a going concern, in *RTMC*, the majority of the Constitutional Court held that—

> '[i]n determining whether there has been a transfer as a going concern, a primary consideration is the nature of the business. A distinction is generally drawn between labour intensive and asset-reliant services. This consideration

[21] Id at para 35.
[22] *NEHAWU* above fn 17 at para 56.
[23] *RTMC* above fn 7 at para 39.
[24] *Aviation Union* above fn 6 at para 52; *Food and Allied Workers Union v Cold Chain (Pty) Ltd and Another* [2009] ZALC 109; (2009) 30 ILJ 2919 (LC) at para 25.

arises because the transfer of employees alone, without the transfer of any assets, may not necessarily give rise to the transfer of a business as a going concern.'[25]

[30] This makes it clear that the role played by either employees or assets are fact dependant and the lack of transfer of one or the other cannot be dispositive of whether there was a transfer as a going concern. In this instance, the fact that the employees were not transferred would be of no moment if we find that the business was asset reliant.

[31] In *Aviation Union*, the minority of Constitutional Court also interpreted the meaning of going concern when it said:

'The phrase "going concern" has been construed to include not only that the business has changed hands but that it is exactly the same business that continues to operate. We are told that to determine this fact one must look at various factors, none of which is decisive. These factors include whether or not the same business is being carried on by the party who received it. Therefore, proof of the fact that performance of the same services was to continue, albeit under different hands, does not establish a transfer as a going concern. Something more is required.'[26]

[32] I find that the business of supplying the bulk water services was indeed a going concern because in substance, there is virtually no difference in how it was conducted before and after the expiry of the SLA. The appellant's residents had the same water supply before and after the expiry of the SLA. Further to this, the "Key Labour Principle" clause of the SLA shows that the appellant knew that should the first respondent no longer be chosen to provide the bulk water, it would have to take over the supply of water itself, or to transfer the business to an alternative service provider. However, this aspect should not be given too much weight because the application of section 197 is not dependent on the labels parties give to the

[25] *RTMC* above fn 7 at para 95.
[26] *Aviation Union* above fn 6 at para 74.

transaction or potential transactions. I now turn to the question of whether the business was transferred from the first respondent to the appellant when the SLA expired.

[33] The appellant's claim in this regard that the termination or end of all government tenders would be transfers as going concerns in terms of section 197 of the LRA is not sustainable. Such an approach places form over substance. Instead each of the section's individual requirements must be determined based on the nature of the business or service carried on before and after the termination or end of the tender. Indeed, in *City Power*,[27] a key factor identified by the Constitutional Court when granting leave to appeal was the question of whether the effects of section 197 can follow for organs of state whose budgets are strictly governed by legislation. This question was answered in the affirmative. Similarly in this matter, merely because the outsourcing was done through a government tender, does not in itself determine whether section 197 applies. The nature of the outsourcing agreement must be determined in each individual case.

[34] The appellant contends that even if we find that the supply of bulk water was a business, and that the return of municipal assets could in theory constitute a transfer, because not all assets were transferred, this matter would be akin to that in *Rural Maintenance*. It is common cause that the first respondent used its own vehicles and laboratory equipment, obtained its own office space and in the call centre, used its own telecommunication system. None of these assets or systems were transferred to the appellant. The question that then arises is whether the assets that were retained by the first respondent were core assets that were required to be transferred in order for the same business to continue operating before and after the expiration of the SLA.

[35] This submission cannot be accepted when one considers the absolute necessity of those assets by looking at the business before and after the expiry of the SLA. The court *a quo* correctly found that those assets do not change the fact that what one sees is the same business but in different hands. Put simply, they

[27] Above fn 5.

were not core assets. These facts place the matter squarely within the ambit of *Sodexho*,[28] *TMS*,[29] and *Dimension Data (Pty) Ltd and Others v GWB Technologies CC t/a GWB Technologies and Others*.[30] The appellant tried to frame this matter in line with the decision in *Rural Maintenance* but on the facts, it is clear that it is more in line with the decision in *City Power*. In *Rural Maintenance*, there was no return of the core assets required for the business, while in *City Power*, the core assets of providing the business which were owned by City Power were returned and provided to the new service provider who then managed the same business. The result is that all three requirements for a section 197 transfer to the appellant were met and there was a transfer of the business as a going concern from the first respondent to the appellant.

[36] The ineluctable conclusion is that the appeal must fail. Section 197 was clearly implicated as the business of providing bulk water supply was transferred to the appellant when the service agreement was terminated.

[37] In the circumstances, the following order is granted:

Order

1. The appeal is dismissed.

2. There is no order as to costs.

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[28] Above fn 13.
[29] Above fn 16. In this case, there was a second generation outsourcing agreement where the outsourcee was given a right of access to use the outsourcers assets and warehouse. This Court, upholding the Labour Court's decision found that the business of managing the warehouse was "*in such a state that it [could] be carried on by the transferee if [they] so wishe[d]*".
[30] [2022] ZALCJHB 97; (2022) 43 ILJ 1824 (LC). In this case, the City changed service providers for its End User Computing services. The Labour Court found that the change constituted a section 197 transfer in circumstances where the employees were stationed at the City's premises and the new service provider "*utilised the City's infrastructural assets, including its Information Technology Service Management tool, networking and Microsoft software, and the City's Outlook email addresses and Microsoft patching tool*". This even as the previous service provider rendered these services "*using their own laptops, handheld devices, power supply units, and the like*".

Mlambo JA

Nkutha-Nkontwana JA and Jolwana AJA concur.

APPEARANCES:

FOR THE APPELLANT: P Wallis SC, with him S Kushaba
Instructed by Strauss Daly Incorporated, Umhlanga

FOR THE FIRST RESPONDENT: A Redding SC, with him P Maharaj-Pillay
Instructed by Fairbridges Wertheim Becker Attorneys, Sandton