



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA132/24

In the matter between:

ELECTRO HYDRO WORLD (PTY) LTD

Appellant

and

MURRAY AND ROBERTS CEMENTATION (PTY) LTD

First Respondent

SIBANYE STILLWATER LIMITED

Second Respondent

SIBANYE GOLD LIMITED

Third Respondent

SIBANYE GOLD SHARED SERVICES

Fourth Respondent

WESTERN PLATINUM (PTY) LTD

Fifth Respondent

**EMPLOYEES LISTED IN ANNEXURE A
TO THE NOTICE OF MOTION**

Sixth to Sixty-Eight Respondent

Heard: 18 November 2025

Delivered: 27 November 2025

Coram: Van Niekerk JA, Waglay AJA, et Chetty AJA

JUDGMENT

WAGLAY AJA

Introduction

- [1] This appeal, with leave granted by way of petition, concerns the question of whether the business conducted by the first respondent (respondent) was transferred as a going concern to the appellant in accordance with section 197 of the Labour Relations Act¹ (LRA).
- [2] Before turning to the main appeal, it is necessary to discuss the respondent's postponement application, in which the respondent sought that the main appeal be postponed to an alternative date in the first term of 2026. The application was opposed by the appellant.
- [3] The application for postponement was decided on 4 October 2025 and, following consideration of the parties' submissions, was subsequently refused with reasons to follow.
- [4] The reasons are set out in this judgment.

Postponement application

- [5] On 15 October 2025, the first respondent filed an application for the postponement of the appeal hearing on the grounds that its preferred counsel, Advocate Craig Bosch, was unavailable to attend these appeal proceedings on the set down date. Advocate Bosch's unavailability is due to a part-heard trial, for which he is on brief, taking place during the week of 17 November 2025 in the Labour Court, Cape Town, which matter was set down for hearing prior to this appeal.

¹ Act 66 of 1995, as amended.

- [6] Before the launch of its application, the respondent approached the registrar of this court, requesting that the appeal be heard virtually, which request was refused.
- [7] In its application for postponement, the first respondent contends that it stands to suffer prejudice should it not be represented by its chosen counsel who had been involved in the dispute from its inception, who was familiar with the dispute at hand and who the respondent had confidence in and further that, although it had secured the services of alternative counsel, and which appointment was communicated by the respondent as early as 10 October 2025, this appointment was done out of caution and had not yet been confirmed.
- [8] In opposing the application, the appellant submits that the postponement sought was neither prudent nor well founded particularly as the newly appointed counsel has had more than a month to prepare for the hearing, that the appeal turns on a reassessment of jurisprudence concerning the application of s 197 to the facts and that the appellant and the affected employees (the sixth to further respondents) stand to suffer prejudice should the postponement be granted.
- [9] The prejudice to the employees is evident: at present, some 63 employees are likely to be impacted by the judgment of this court, in that, depending on the conclusions reached, the risk of a section 189 retrenchment process looms overhead. This is so as the respondent has issued retrenchment notices as far back as 5 June 2024 to the 63 employees, in '*an abundance of caution*' following the termination of its service agreement.
- [10] In that sense, the unavailability of a particular counsel where another has already been briefed, has had a month to prepare for the hearing and who is in possession of the heads of argument already prepared by the original counsel seems inconsequential in light of the number of employees impacted should these proceedings be postponed to a later date, especially where these employees have been waiting since 5 June 2024 to find out whether they have jobs or not. This alone justifies the refusal of the postponement application.

- [11] This court's refusal of the application is further fortified by the consideration of the greater impact of postponements on court processes in general, a public interest consideration.
- [12] It is well documented that the Labour Courts are experiencing extensive backlogs in the setting down of matters for hearing, where thousands of disputes are referred to it every year, with limited resources available for their adjudication and case management. In turn, the Labour Appeal Court has experienced an increase in the number of appeal disputes referred to it and although this court is not plagued by the same backlog as that experienced in the Labour Court, there is now a strain on the resources available within this court to ensure that the appeals referred to it are heard and decided expeditiously.
- [13] When matters are postponed, their impact is not limited to the parties themselves but to greater court processes where resources must be re-allocated, judges appointed and rolls adjusted to accommodate new dates. A postponement has a compounding impact on the administration of court processes, and in this case, the reason proffered for the postponement does not justify the sweeping impact of the decision if so granted.
- [14] Finally, and without in any way diminishing the value of counsel's appearance in proceedings, it bears emphasis that this matter comes before the Court as an appeal on the papers. The parties have filed a substantial record and comprehensive heads of argument, and the Court's determination will ultimately rest not only on oral submissions but on the full set of documents properly before it. In these circumstances, the respondent cannot credibly contend that it will suffer undue prejudice from Advocate Bosch's absence, when its case is fully articulated in its papers and the issues for decision are clearly set out therein.
- [15] On these bases, the postponement application was refused.

Background

- [16] To understand the appeal, it is necessary to canvass the operation and services provided by the appellant and respondent to put their cases in perspective.
- [17] In South African mines, grout plants are constructed and maintained for the purposes of distributing grout to underground mine shafts for the construction of secondary support of newly excavated shaft tunnels, the construction of winch beds and such other underground activities as required by the mine. The manufacturing and distribution (or pumping) of grout occurs in two phases: grout is produced above ground and then pumped through ranges (or metal pipes) into grout bags in underground mine shafts.
- [18] The appellant and the respondent are both in the business of grout pack pumping, and both engage in the construction, operation and maintenance of these grout plants for a range of mine shafts.
- [19] In 2005, the respondent was awarded a contract by the fifth respondent, Western Platinum, for the construction, supply and operation of a grout plant at the Karee no. 3 (K3) shaft at the Karee Mine in Marikana, North West. Although the respondent would be responsible for the operation of the plant, its ownership vested in Western Platinum.
- [20] Western Platinum provided the utilities, materials and storage facilities through which the respondent could carry out its service including providing electric power, compressed air, potable water, grout ranges and their associated materials, grout bags, grout mixture, the communication system between the work face and grout plant and storage space for the respondent to store the materials supplied by Western Platinum used in the performance of its services.
- [21] In November 2021, the respondent was appointed to refurbish, operate and maintain the grout plant at Karee no. 4 mine shaft (K4) with effect from 1 December 2021, and in this respect, it employed 63 workers to fulfil its

services at K4. This appointment was done by way of an amendment to the existing K3 contract.

- [22] To meet increased production, the fourth respondent, Sibanye Gold Shared Services (Pty) Ltd, sought the construction of a larger grout plant and on 23 March 2023, the respondent received a tender enquiry for the design, construction and operation of two new plants.
- [23] The respondent submitted its bid in respect of the provision of these services, as did the appellant, and the appellant was ultimately successful in its bid.
- [24] On 30 May 2024, Sibanye Gold Limited issued a letter to the respondent terminating its contract with effect from 27 August 2024, which termination was later amended to 30 September 2024.
- [25] What then followed was a series of correspondence between the appellant and the respondent regarding the respondent's assertion that, as the appellant was the incoming contractor tasked with operating the grout plant at K4, s 197 of the LRA had been triggered, resulting in the transfer of the contracts of employment of the 63 employees engaged at K4 from the respondent to the appellant. The appellant denied that any such transfer had taken place as (i) the appellant would be implementing a new shift system; (ii) the appellant would use its own existing employees to fulfil its obligations under the contract; (iii) the old K4 grout plant will be decommissioned and a new plant will be constructed by the appellant; (iv) Sibanye will purchase equipment from the appellant which would be utilised by the appellant in fulfilling its services; (v) the transaction amounts to the replacement of one contractor with another pursuant to a tender process; and (vi) it is not a tender requirement that s 197 applies.
- [26] In disputing the non-applicability of s 197, the respondent points to clause 20 of section 1 of the tender document, which provides that:

‘SECTION 197 OF THE LABOUR RELATIONS ACT (LRA)

In the event that the incumbent service provider no longer requires the services of its employees in the provision of the services stipulated in the

scope of work, the successful Tenderer shall be obliged to abide its obligations in terms of Section 197 of the LRA in that regard and make provision for such eventuality in its Tender submission accordingly.'

- [27] On 18 July 2024, following a discussion with an employee of Sibanye, Sibanye clarified the inclusion of clause 20 in the tender documents by way of email. In this correspondence, Sibanye's position was that clause 20 was part of a standard template and was not intended to provide guidance or advice on the treatment of incoming or outgoing employees.
- [28] A referral to the Labour Court was made seeking a declaratory order on an urgent basis.

In the Labour Court

- [29] Following consideration of the provisions of s 197 as a whole, together with relevant case law, the court *a quo* held that, in determining whether s 197 finds application, it is required to undertake a factual enquiry to assess whether the business that performs an economic entity has retained its identity post the transfer.
- [30] The court noted that the transfer was a result of the termination of the contract between Sibanye and the respondent and the conclusion of a contract between the appellant and Sibanye following the award of the tender for the supply of grout pumping services at the K4 grout plant. The court held that the effect of the termination of the respondent's contract meant that the respondent was required to relinquish use and control of the K4 grout plant, its ranges and underground facilities, as well as the materials provided to it by the client. Thus, the business that supplied the service (which constituted a discrete entity) was transferred from the respondent to the appellant.
- [31] In reviewing the tender document, the court noted that the design and construction of the two new grout plants were intended to enlarge the existing K4 grout plant and that the contract between Sibanye and the appellant was for the operation and maintenance of the K4 grout plant. In considering the

contracts concluded between the respondent and Sibanye and that of the appellant and Sibanye, the court recorded that, under both contracts, Sibanye provided utilities, materials, storage and communications for the rendering of grout pack pumping services at K4. In essence, both the respondent and appellant operated under the same arrangements and conditions and continued rendering grout pack pumping services at K4, albeit at an enlarged plant, in the case of the appellant.

- [32] The court *a quo* rejected the appellant's approach that the applicability of s 197 hinged solely on whether the objective facts showed that the 'operational capacity' of the respondent had transferred. It found that this was a narrow approach in light of the overall assessment required, and held that the appropriate enquiry is whether the business that performs an economic entity has retained its identity post transfer, given the broad definition of 'business' under s 197.
- [33] The court was not persuaded by the appellant's argument that its overall operation, one which was less labour-intensive and more technologically advanced than that of the respondent during its tenure as service provider, fundamentally altered the nature of the economic activity transferred.
- [34] As to the appellant's submission that clause 20 of the tender document was merely a standard clause with no bearing on the award of the tender, the court found that, in the absence of an affidavit from Sibanye confirming that it was a standard template, and on a plain reading of clause 20, the appellant was required to make provision for the application of s 197. The court concluded: *'Given the nature of the grout business, it is improbable that this clause in the tender document is a mere standard template'*.²
- [35] On this basis, the court determined that the undertaking, business or economic entity retained its identity after the transfer in that the same economic activity and objective remained, being the rendering of grout pack pumping services for K4. Accordingly, s 197 applied.

Grounds of appeal

² At para 45.

- [36] The appellant has delivered a detailed notice of appeal, taking issue with the judgment of the court *a quo* on no fewer than 15 grounds. I do not intend to repeat every single ground of appeal here, save to say that, in essence, the appellant contends that the wrong legal test was applied in determining whether s 197 of the LRA found application, and, coupled with factual errors, led the court to find (incorrectly) that s 197 applied.
- [37] The appellant argues that the court focused too heavily on the so-called ‘identity question’ and failed to properly interrogate the applicable principles in light of all of the facts before reaching its conclusion that there was a transfer of a business as a going concern.
- [38] A further complaint is that the court *a quo* placed undue weight on the mere fact that both the appellant and the respondent rendered a grout pumping service. According to the appellant, this led the court to overlook the proper legal inquiries into whether there was a transfer of assets, employees and operational capacity in a manner contemplated by s 197.
- [39] The appellant also advances a series of related challenges regarding the court’s alleged failure to make critical findings on the transfer (or lack thereof) of tangible and intangible assets, the applicable infrastructure, and the number and categories of employees. It maintains that the court ignored key evidence demonstrating that the appellant would provide its own specialised equipment and adopt different staffing models, operational methods and technological processes, such that there could be no seamless continuation of the same business once it began operation of the plants.
- [40] Central to the appeal is the contention that the court misinterpreted clause 20 of the tender document, effectively treating it as imposing a statutory obligation to comply with s 197. The appellant asserts that the clause was never intended to create such an obligation where s 197 did not otherwise apply, and that the court erred in accepting it as so without properly interpreting its content, particularly in the light of the confirmatory affidavits filed by Sibanye confirming the view that the clause was a part of its standard template and not intended to hold parties to the provisions of the section.

- [41] Finally, the appellant challenges the finding that the business retained its identity post-transfer. It argues that the scope and operational nature of the appellant's work, particularly the construction and operation of technologically advanced new grout plants with different operational capacities, render the two undertakings materially distinct. On the appellant's version, these factors dispel any conclusion that a going concern was transferred from the respondent to the appellant as contemplated in s 197.

In this Court

Appellant's submissions

- [42] In being awarded the tender for the construction, operation and maintenance of the two new grout plants, the appellant was not given the right of use of the respondent's existing grout plant, but rather was contracted to build and operate two new plants which were geographically, technologically and operationally distinct from that of the old plant operated by the respondent. This is demonstrated through the manner in which the respective parties managed staffing and shift arrangements, wherein the appellant's operations are less labour-intensive than those of the respondent, with a greater emphasis being placed on technological innovation and resource management.
- [43] At the termination of its agreement with Sibanye, the respondent did not transfer certain critical tangible and intangible assets to the appellant necessary for the performance of the service of grout pack pumping and maintenance. This includes its computers, accounting, administration, human resources, payroll, logistics and engineering software, printers, furniture, manual dice cutters, welding machines and hand working tools. Instead, the appellant supplied all of these assets itself.
- [44] Turning to clause 20 of the tender documents, the appellant submits that two confirmatory affidavits deposed to by Sibanye employees confirm the appellant's averments that clause 20 was a part of a standard template and

was not intended to provide guidance or advice on the treatment of outgoing and incoming employees.

- [45] The appellant holds that the fact that the same services are performed by the old and new contractors is not a relevant consideration in the question of whether s 197 finds application. Instead, what must be considered and compared are the businesses of the outgoing and incoming contractors, consisting of specific business components.
- [46] The appellant submits that the court *a quo* erred by finding that the fact that the word 'business' in s 197 must be construed broadly was relevant to the determination of the matter, where it is common cause that the respondent conducted a business as envisaged by the terms of the section. The court was called to determine whether this business had transferred as a going concern.
- [47] The court had erroneously relied on the legal principle that the word 'business' must be construed broadly to support its view that the applicable test to determine the application of 197 entails an assessment of the identity of the old and new contractor's respective businesses, and that it had erroneously attributed the 'identity test' as the only prevailing test to be used to determine whether s 197 finds application despite the test laid out in *NEHAWU*³ and its application in subsequent judgments of this Court and the Constitutional Court.
- [48] In discussing the test laid out by *NEHAWU*, the appellant submits that *NEHAWU* has never been interpreted to mean that all aspects of a business, even aspects which are indispensable to provide the contracted service, must transfer for s 197 to apply and that over the years, the courts have succinctly articulated what it is about comparative businesses that needs to be the same, and that transferred from the old to the new contractor for s 197 to find application being economic entity, identity and 'operational capacity'. Of the three phases, operational capacity most accurately captures what the focus of

³ 2003 (2) BCLR 154 (CC).

a s 197 is, being whether the important, essential and indispensable means to conduct a particular service are transferred from the old employer to the new.

- [49] In discussing the nature of the business components and the degree of granularity of the assessment of such business components, the appellant submitted that, although the business components that constitute a business will vary based on a number of factors including the industry in which the business operates, case law tells us that these components include *inter alia*, tangible and intangible assets; managerial and non-managerial employees; the numbers and skills of the employees assigned to perform different tasks; the manner in which work is organised; the operating methods; the customers, contracts with customers and customer good will. And that new technology should be regarded as a business component that must be assessed when undertaking a 197 enquiry.
- [50] The appellant submits three categories of assets are relevant to the enquiry and are essential business components, (i) the contractor's right to use Sibanye's infrastructure consisting of utilities, grout ranges, the storeroom and the client's obligation to provide the contractor with raw materials; (ii) the contractor's right to use Sibanye's infrastructure in the form of the plant and the fixed equipment therein; and (iii) the other equipment that the contractors will utilise to conduct their business like laptops, software, printers, furniture and tools. Although the first category of assets will transfer to the appellant, the remaining two will not, as the appellant has not been contracted to utilise the existing grout plant at K4; rather, it was contracted to construct two new plants and sell them and all equipment to Sibanye. With respect to the third category, the appellant would be required to supply these assets itself as the respondent has not transferred them to it. Thus, save for one category of assets, no other important business components will transfer from the respondent to the appellant and this is not enough to support the contention that the appellant conducts the same business as the respondent, that a discrete economic entity was transferred away from the respondent to the appellant, that the operational capacity of the respondent was transferred to the appellant or that the identities of the two contractors' businesses are the same. Therefore, no s 197 transfer has taken place.

Respondent's submissions

- [51] The respondent disputes the appellant's submissions that the court had applied the incorrect test in determining the applicability of s 197 to the dispute; rather, that the court had presented a different formulation of the same question raised in *NEHAWU*, that is, asking whether the transferred business has retained its identity, which is equivalent to asking whether the business is 'the same', and further that, regardless of how the question is framed, in each case the court is required to compare the business in the hands of the transferor with what is in the hands of the transferee to decide if they are sufficiently similar.
- [52] Turning to the appellant's submission that the court had placed undue emphasis on the fact that the contractors performed the same services with respect to Sibanye, the respondent notes that the activity or function a business performs is a factor to be considered in determining whether there has been a transfer as a going concern, as determined by the Constitutional Court in *Tasima*⁴ and that although the court had said that the transfer of the activity alone cannot constitute the transfer of a going concern, this does not mean that the activity should not be taken into account at all.
- [53] In discussing the application of s 197, the respondent submits that the objectives of the section, being the promotion of economic development, social justice and labour peace and the protection of workers against job losses, are realised by keeping employees in their employment, thus suggesting a more generous interpretation of the section.
- [54] Turning to the question of whether there was a transfer as a going concern, the respondent submits that, prior to the cancellation of its agreement with Sibanye, its business entity relating to the K4 shaft comprised of the service it performed for the client; the employees performing the services; the client; a grout plant provided by the client of which the client retained ownership; the use of the client's grout ranges through which to pump the grout mixture; the utilities, raw materials, storage space and communications systems provided

⁴ *Road Traffic Management Corporation v Tasima (Pty) Ltd; Tasima (Pty) Ltd v Road Traffic Management Corporation* (2020) 41 ILJ 2349 (CC).

by the client and access to the premises underground where the services are performed.

- [55] After the transfer, the entity in the hands of the appellant will comprise the same services performed by the respondent for the client; employees performing the services; the client; a grout plant (albeit larger and generating more output) provided by the client of which the client retains ownership; the use of the client's grout ranges through which to pump the grout mixture; the utilities, raw materials, storage space and communication systems provided by the client and access to the premises underground where the services will be performed.
- [56] If the above is correct, so the submission goes, the inescapable conclusion to be reached is that the economic entity that was in the hands of the respondent retained its identity after the transfer.
- [57] The appellant's submission that it will not have the right to use the grout plant used by the respondent, but rather that it will build its own new plant, is of no consequence when consideration is placed on the fact that the appellant is in the same position as the respondent when it was providing the service prior to cancellation of the contract. Further, the fact that the respondent will not use the same plant but will nevertheless use another plant provided by the client does not detract from the fact that, taking a realistic view and putting substance over form, there exists an economic entity, which, despite changes, retains its identity.
- [58] That the appellant was not taking over the respondent's plant is not an overriding factor, and that it would seriously undermine the scope and protection of s 197 if the court were to hold that where a service provider was using infrastructure supplied by the client, the section would only apply if the same infrastructure was utilised by the new service provider.
- [59] On the transfer of the plant from the respondent to the appellant, the respondent submits that the plant was never its to transfer, where the business bundle comprised and continued to comprise whatever Sibanye decided to provide to the relevant contractor therefore, the business in the

hands of the respondent and then in the hands of the appellant must be seen as comprising, not a specific grout plant, but rather whatever grout plant the client provides for the contractor to manage and operate.

- [60] The respondent disputes the appellant's contention that there is no transfer as a going concern as the grout plant it will use is significantly different from the plant used by the respondent in that the appellant's design consists of two plants, which each contain a newly designed shear mixer and storage tank systems and further that the appellant will be designing, building and maintaining the two new plants and thereafter sell the plant and its equipment to Sibanye. The respondent disputes that the new plants will be significantly different from the existing plant, or that there will be any change to the manner in which grout is to be mixed or pumped, because there is no change in the manufacturing and pumping process, only the hardware used in the process.
- [61] On the contention that the utilisation of loadcells are a unique feature of the plants constructed by the appellant, which was not a feature of the respondent's plant, the respondent submits that this addition is not significant, as all they simply do is measure the weight of the bulk cement which is hardly a significant addition sufficient to distinguish the manner in which the appellant produces grout from the process utilised by the respondent.
- [62] With respect to the contention that the appellant will be using its own equipment in the form of laptops, accounting, administration, human resources, payroll, logistics and engineering software, printers, furniture, kitchen equipment and tools, the respondent submits that these are all items that would be used to properly manage any business, that they are cosmetic and of little assistance in seeking to determine whether the business has remained the same.
- [63] Turning to the point of a different staffing structure and shift system, the respondent contends that the difference in the number of employees used by the appellant and the respondent is due to the capacity of the plant relative to the client's grout requirements and has nothing to do with the vastly different staffing structure or shift system.

- [64] Finally, turning to the issue of clause 20, the respondent contends that there was no communication regarding the application of s 197, other than what was in the tender conditions, until after the contract had been awarded to the appellant. Thus, there was no reason to believe that the application of the section was not contemplated until very late in the day, and there was no basis for the appellant to have failed to make provision for the section to apply.
- [65] In conclusion, the business that was in the hands of the respondent transferred to the appellant as a going concern because, having regard to what transferred and holding substance over form, it is the same business in the hands of the appellant, and the appeal ought to fail.

Evaluation

Section 197: General

- [66] Section 197 of the LRA regulates the employment-related consequences of transferring the whole or part of a business.⁵ The section seeks to protect the employment of workers and to minimise the tension and resultant labour disruptions that might arise from the transfer and/or sale of businesses. As confirmed by the Constitutional Court, s 197 serves a dual purpose of *'facilitat[ing]... commercial transaction while at the same time protecting workers against unfair job losses.'*⁶
- [67] This dual purpose is given effect to by subsection (2), which provides for the automatic and obligatory transfer of an employment contract when the underlying transaction is the transfer of a whole or part of a business as a going concern. In that regard, three requirements must be met for a transaction to trigger the application of s 197, namely there must be i) a transfer by one employer to another; ii) the transferred entity must be the whole or part of a business (an economic entity capable of being transferred); and iii) the business must be transferred as a going concern (or the economic entity that is transferred retains its identity after the transfer).

⁵ A van Niekerk, N Smit, M Botha et al, *Law@Work*, 6th ed, LexisNexis at p 390.

⁶ *NEHAWU* fn 3 at para 53.

- [68] A court, when faced with a dispute concerning a s 197 transfer, will undertake a factual enquiry⁷ with consideration of all the circumstances relevant to the specific transaction, having regard to, among others, the terms of the transaction and its agreements, the transfer of other assets, the transfer of customers, whether the business is being carried on by the new employer, etc.
- [69] It is necessary to first determine the legal *causa* for transfer⁸, and once established, a factual consideration of the circumstances can be undertaken to determine if a s 197 transfer has occurred.
- [70] The LRA contains a broad definition of the word ‘business’, which is defined to include ‘*the whole or any part of a business, trade or undertaking or service*’.
- [71] The Constitutional Court in *Road Traffic Management Corporation v Tasima (Pty) Limited; Tasima (Pty) Limited v Road Traffic Management Corporation*⁹ (*Tasima*), to give clarity to this definition, held that:

‘A business can consist of a variety of components, including both tangible and intangible assets, goodwill, a management staff, a general workforce, premises, a name, contracts with particular clients, the activities it performs, and its operating methods.’

This is not a closed list, but the factors must be sufficiently connected to form an ‘economic entity’ capable of being transferred.

- [72] The Courts have held that the transfer of a business as a going concern is effected when the economic entity which comprises the business retains its identity after the transfer. Typically, the identity of the entity that comprises a business comprises the employees, the premises, fixtures and fittings, stock, contracts, book debts, trademarks and other tangible and intangible assets. This does not mean that it is never possible to transfer an undertaking or business without a transfer of all or some of the components of the business;

⁷ See: *Mobile Telephone Networks (Pty) Ltd & others v CCI SA (Umhlanga) (Pty) Ltd & others* (2023) 44 ILJ 1906 (LAC).

⁸ *Aviation Union of SA & another v SA Airways (Pty) Ltd & others* 2012 (1) SA 321 (CC); *Road Traffic Management Corporation v Tasima (Pty) Ltd; Tasima (Pty) Ltd v Road Traffic Management Corporation* (2020) 41 ILJ 2349 (CC)

⁹ (2020) 41 ILJ 2349 (CC).

rather, as held by the Constitutional Court in *NEHAWU v University of Cape Town & others*¹⁰ (*NEHAWU*) a number of factors will be relevant to the question of whether a transfer of a business as a going concern has occurred, and none of these factors is individually decisive when making the determination.

Legal causa for transfer

- [73] Per *Tasima*¹¹, the first step in a s 197 inquiry is to find the legal causa of the transfer before deciding whether the jurisdictional facts have been met.¹²
- [74] The court *a quo* found that the cause of the transfer was the termination of the respondent's contract for the operation and maintenance of the plant and the provision of grout pack pumping services, and the subsequent contract with the appellant, pursuant to the award of a tender to the appellant, is for the provision of operation and maintenance services and grout pack pumping services.
- [75] In its assessment of the implication of clause 20, the court *a quo* held that, on a plain reading of clause 20, the tenderer was required to make provision in its tender submissions for the eventuality of s 197 and that on the assessment of the facts and given the nature of the grout business, it was improbable that the clause was a mere standard template of a tender document. These findings are impugned by the appellant, who submits that clause 20 cannot, on its own, trigger the application of s 197 where the legal and factual requirements for a transfer are otherwise not met. Properly interpreted, the clause merely anticipates that *if* s 197 applies, the incoming contractor must comply with it and make provisions accordingly. The appellant did not make provision for s 197 in its tender application, and its tender was accepted. It further contends that the application of s 197 was not a term of its commercial agreement with Sibanye and that Sibanye itself dispelled any reliance on

¹⁰ Ibid fn 3.

¹¹ *Tasima* supra at para 39.

¹² *King Cetshwayo District Municipality v Water and Sanitation Services South Africa (Pty) Ltd and Others* (2025) 46 ILJ 1111 (LAC).

clause 20 through communications confirming that the clause formed merely part of a standard tender template and was not intended to regulate the treatment of incoming or outgoing employees. In essence, the appellant submits that it bore no contractual obligation to accept the respondent's employees under s 197, nor does clause 20 give rise to a s 197 transfer.

[76] According to the respondent, clause 20 of the tender documentation expressly contemplated the application of s 197 in the event that the incumbent service provider no longer required the services of its employees and obliged any successful tenderer to make provision for such an eventuality in its bid. In response to the appellant's contention that it had made no provision for s 197 in its tender application, and that s 197 did not feature in its commercial agreement with Sibanye, the respondent argues that, until after the award of the contract, there was no communication from Sibanye or any other party suggesting that clause 20 was to be disregarded or that the application of s 197 was not envisaged. The only information available at the time of tender submission was the text of clause 20 itself. Accordingly, there was no basis for the appellant to assume that s 197 was irrelevant or would not apply. In short, the tender documents themselves contemplated the possibility of a s 197 transfer should the respondent be unsuccessful in its bid, and it was incumbent on the appellant to frame its tender on that basis.

[77] While I am hesitant to accept that the express reference to s 197 in clause 20 of the tender documentation carried no legal implication and constituted merely as boilerplate wording, particularly with respect to the respondent's point that the appellant knew as early as its bid that there was at least a possibility of s 197 arising, little ultimately turns on this point. As this Court held in *King Cetshwayo District Municipality v Water and Sanitation Services South Africa (Pty) Ltd and Others*¹³ (*King Cetshwayo*), 'the application of section 197 is not dependent on the labels parties give to the transaction or potential transactions'. Thus, the enquiry does not hinge on whether the parties have included s 197 in their contractual documentation or not, but on

¹³ (2025) 46 ILJ 1111 (LAC) at para 32.

whether the underlying transaction gives rise to a transfer as a matter of fact and law.

- [78] In this case, the true legal *causa* flows from the termination of the respondent's contract and the award of the contract to the appellant.

Business

- [79] It is common cause that what the respondent had in its hand was a business. The controversy arises over whether such a business was transferred as a going concern.

Transferred as a going concern

- [80] Case law tells us that we must analyse and identify the nature of the business before and after the alleged transfer to determine whether the business was transferred as a going concern. Is it the same business in the hands of the appellant as it was in the hands of the respondent?

- [81] In *casu*, much is made about the court *a quo*'s characterisation of the test to be applied in determining whether s 197 finds application, wherein the court held that:

‘Our Courts have stated that a business in the context of section 197 is to be construed in broad terms and a factual enquiry is to be made to assess whether the business that performs an economic entity has retained its identity post the transfer. The test is not whether the operational capacity has transferred.’ (Own emphasis)

- [82] This, the appellant argues, is a misunderstanding or mischaracterisation of the test laid out by *NEHAWU* and subsequent jurisprudence emanating from the Constitutional Court, thus informing the court's incorrect conclusion that s 197 applies. In *NEHAWU*, the court held as follows:

‘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’. 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. 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.’¹⁴

[83] I agree with the respondent that the court *a quo* essentially rephrased the same question presented in *NEHAWU*. This rephrased formulation had no bearing on the overall assessment the court was called to undertake, as the court understood the test it needed to apply when assessing the relevant facts before it.

[84] That being said, the court *a quo*’s dismissals of the relevance of ‘operational capacity’ (as expounded by this court in the judgment of *Mobile Telephone Networks (Pty) Ltd & others v CCI SA (Umhlanga) (Pty) Ltd & others*¹⁵ (*MTN*)) appear to be on the same mistaken premise that it too represents a competing or alternative test for determining whether s 197 applies. Therein, this Court held as follows:

‘The essence of a section 197 status is that, as a fact, an actual transfer of operational capacity occurred.’¹⁶

[85] The court *a quo* therefore fell into the same mistake that underlies the appellant’s submissions on the ‘identity test’ and its application within the Labour Court judgment.

[86] The ‘distinction’ between the different formulations presented by the court *a quo* and this court in *MTN* is simply one of terminology rather than substance, as the essential focus remains on the overall factual assessment for

¹⁴ Ibid fn 3 at para 56.

¹⁵ Fn 7 at para 11.

¹⁶ Ibid.

consideration in the determination of whether the respondent's business transferred to the appellant as a going concern, and the submissions in that respect are therefore irrelevant.

- [87] Returning to the enquiry, the nature of the business must be considered when determining whether there has been a transfer as a going concern, the Constitutional Court in *Tasima* held that:

'In 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 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.'¹⁷

- [88] It seems to me that the business of grout pumping is, by its nature, an asset-reliant business or service where the core infrastructure necessary to perform the service, being the grout plants (or at least a right of use of the plants), the ranges, the utilities and raw materials are owned and supplied by Sibanye, the client. This has remained true for both the respondent and the appellant in their respective tenders as service providers.

- [89] Mlambo AJA (as he then was) in *King Cetshwayo*, and in discussing the above as appearing in *Tasima*, held that:

'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.'¹⁸

- [90] In light of the above, the appellant's argument that the employees were not transferred is, as aptly argued by counsel for the respondent, a chicken-and-egg argument, where, of course, if an employer disputes the applicability of s 197 as a whole, there would be no transfer of the incumbent's employees, hence the need for litigation to resolve it, and although the transfer of

¹⁷ *Tasima* supra at para 95.

¹⁸ *King Cetshwayo* supra at para 30.

employees is a relevant consideration, it is not a determinative factor.¹⁹ Further, to permit the transferor employer to avoid any potential obligations under s 197 simply by electing not to transfer any employees with a business that is transferred as a going concern, would defeat the purpose of s 197.

- [91] On the evidence, against the test established in *NEHAWU*, the factual picture that emerges is relatively straightforward. Before termination of its contract, the respondent's business consisted of operating and maintaining a grout plant at K4 shaft (constructed by the respondent but owned and provided by Sibanye) and supplying grout pack pumping services to the mine shaft. Following termination and the award of the new contract, the appellant's business consisted of operating and maintaining two larger grout plants at K4 shaft (constructed by the appellant but owned and provided by Sibanye) and supplying grout pack pumping services to the mine shaft, albeit at an increased capacity and enhanced efficiencies.
- [92] When the business is viewed holistically, in terms of its purpose, inputs and end results, the core economic activity remains essentially constant in that raw materials are combined to produce grout, and that grout is pumped underground for secondary support, for packing into grout bags or stored. Thus, notwithstanding changes in scale, technology or even location on the surface, the substance of the business in the hands of the appellant is materially the same as that previously conducted by the respondent.
- [93] The appellant seeks to distinguish its business from that of the respondent on the basis that it is more technologically advanced, and that it employs a less labour-intensive staff complement, operating on a different shift system to ensure the efficient provision of its services to its client.
- [94] However, these operational distinctions, both in technological inputs and staffing and shift structures, even when considered in their totality, do not assist the appellant. In substance, the appellant continues to perform the same core function as that performed by the respondent, the provision of grout pumping services, using the same inputs supplied by Sibanye to

¹⁹ See also: *Aviation Union* at para 112.

Sibanye. The fact that the service is now delivered more efficiently, and at a larger scale across two plants rather than one, does not alter the essential nature of the service being performed.

[95] The appellant further argues that the respondent had not transferred its critical tangible and intangible assets to it, among them being its computers, accounting, software, furniture, and hand tools and that, without this equipment, business administration, management, operational and logistical planning, engineering design, and communication cannot be efficiently conducted, and maintenance of the plant cannot be done. The respondent submits in essence that these items are standard in any office setting and are cosmetic and of little assistance.

[96] A similar argument was raised in *King Cetshwayo*, wherein the appellant municipality argued that upon the termination of its service level agreement with the first respondent for the supply of bulk water services, the respondent had not transferred its own vehicles, lab equipment, office space and telecommunication system to the appellant, which raised the question of whether the assets that were retained by the contractor were core assets that were required to be transferred in order for the same business to continue operations before and after the cancellation of the contract. The Court held:

‘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 were not core assets. These facts place the matter squarely within the ambit of *Sodexho*, *TMS*, and *Dimension Data (Pty) Ltd and Others v GWB Technologies CC t/a GWB Technologies and Others*. 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.’

[97] In looking at the business before and after the termination of the respondent's contract and the award of the tender to the appellant, it cannot be said that the computers, software, furniture, printers and similar office equipment were core assets. The essential operational capacity, being the ability to provide grout-pumping services using the infrastructure (i.e. ranges), utilities, raw materials and such other assets supplied by Sibanye, remained intact. Section 197 does not require the transfer of every single asset to give rise to a transfer, only those assets without which the business cannot be carried on. On the facts, the appellant was able to continue the same economic activity seamlessly, confirming that the items relied upon are not determinative of whether a transfer of a business as a going concern occurred or not.

[98] When the totality of the facts is considered, the economic entity that previously existed in the respondent's hands is the same in the hands of the appellant after the award of the contract to it; the addition of new technologies or a change in staffing structures does not detract from that as the same core infrastructure as provided by the client has remained, the same service is being rendered and to the same client and thus, s 197 applies. On this basis, the appeal stands to be dismissed.

[99] In the premises, the following order is made:

Order

1. The appeal is dismissed.
2. There is no order as to costs.

Waglay AJA (JP Ret)

Van Niekerk JA et Chetty AJA concur.

APPEARANCES:

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FOR THE FIRST RESPONDENT: R Itzkin

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