IN THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable

CASE NO: PR188/23

In the matter between:

NELSON MANDELA BAY MUNICIPALITY **Applicant**

and

SOUTH AFRICAN ROAD PASSANGER

BARGAINING COUNCIL (SARPBAC) **First Respondent**

SPECTRUM ALERT ITS (PTY) LTD **Second Respondent**

SHERIFF WEST, GQEBERHA **Third Respondent**

Heard: 28 August 2025

Delivered: This judgment was handed down electronically by circulation to the Applicant's and the First and Second Respondent's Legal Representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing - down is deemed to be 12H00 on 10 March 2026.

JUDGMENT

LALLIE J

[1] Change is intrinsic to the employment relationship. One of the statutory provisions which regulate the change is section 197 of the Labour Relations Act[1] (the LRA). The applicant instituted these proceedings with the aim of obtaining an order declaring that the second respondent was never transferred to it as envisaged in section 197 of the LRA. It further seeks an order directing the third respondent to release its busses form attachment and an order reviewing and setting aside the attachment in execution of its busses by the third respondent. In the event of a finding being made that a transfer in terms of section 197 of the LRA did take place between the applicant and the second respondent, the applicant sought an order reviewing and setting aside the transfer based on the principle of legality. The application is opposed by the first respondent.

[2] The second respondent initially filed a notice to abide the court's judgment in this matter. Submissions on behalf of the third respondent were later filed. I accept in the applicant's contention that in terms of the doctrine of peremption the third respondent is not at liberty to act inconsistently with the notice to abide. The decision it took is binding. It may not deviate from it particularly without good cause.

[3] The factual background to this dispute is that the applicant entered into a service level agreement (SLA) with the second respondent in terms of which the second respondent would render the municipal public transport service on behalf of the applicant on a designated route within the applicant's municipal area. The SLA provided that the second respondent would utilize existing infrastructure and the applicant's busses in providing the public transport

[1] Act 66 of 1995, as amended.

service. The applicant and the second respondent then entered into a contract in terms of which the applicant leased its busses to the second respondent for utilization in the public transport service. The second respondent used its own staff including drivers to conduct the transport business.

[4] The second respondent fell within the jurisdiction and scope of the first respondent's main collective agreement. In February 2019, the first respondent conducted a compliance inspection at the second respondent and discovered non-compliance with the terms of the first respondent's main collective agreement. The first and second respondent resolved the issue of the non-compliance by reaching an agreement which is embodied in an arbitration award dated 29 April 2019 (the first arbitration award). The salient terms of the first arbitration award were that the second respondent undertook to comply with the terms of the main collective agreement with immediate effect. The compliance included payment of across the board increments and bonuses for 2018 in the amount of R4 469 217,84. The second respondent undertook to pay the amount in equal instalments over 12 months from 1 June 2019. The parties agreed that in the event of the second respondent's failure to honour the agreement the full amount would become due and payable immediately from the date of default. Owing to the second respondent's non-compliance with the first arbitration award and further non-compliance with main collective agreement a second arbitration award was issued on 25 March 2022. In the arbitration award the second respondent was ordered to pay the first respondent an amount of R9831 808,60 in 12 instalments from 7 April 2022 to 7 March 2023. The second respondent paid a portion of the amount and in November 2022 a sum of R4 101 904,32 remained unpaid.

The first respondent's efforts to obtain the outstanding payment were unsuccessful. The second respondent directed it to the applicant on the basis that the applicant was in control of the second respondent's operations.

[5] The second respondent breached various clauses of the SLA and on 2 November 2022 the applicant brought the breaches to its attention and sought an undertaking that they would be attended to within 14 days. The undertaking was not given. In January 2023 the applicant was informed that the second respondent's bank account had been placed on hold by its bankers owing to in-house dispute between board members. As a result of its bank account being placed on hold, the second respondent committed further breaches of the SLA including failure to render the continuous municipal transport service.

[6] On 31 January 2023, the applicant reminded the second respondent that it was acting in breach of the SLA and gave it 48 hours to submit a remedial plan in terms of clause 27.3 of the SLA failing which it would take over the operations of the public transport service. As no remedial plan was submitted the applicant took over the operations, maintenance and administration of the municipal public transport service with effect from 3 February 2023. On 8 February 2023, Ms Somjaliso (Somjaliso), the applicant's Executive Director: Roads and Transport, sent a letter to the second respondent's staff members informing them that the applicant had invoked its rights in terms of clause 28 of the SLA. She further informed them that clause 28 allowed the applicant to place the second respondent under administration with a management structure to undertake full control of the second respondent.

[7] The second respondent failed to pay the amounts due to the first respondent in terms of the second arbitration award leading the latter to enforced the second arbitration award by having a writ issued. As the value of the second respondent's assets was low, the first respondent caused several busses that formed the subject of the lease to be attached. In April 2024 the second respondent owed the first an amount of R7 189 745,96.

[8] Acting in terms of the conduct standard of 2023 issued by the Financial Services Conduct Authority the first respondent sought to know from the second respondent the name of the person who would be personally liable for compliance with its obligations under the main collective agreement. In a letter of 31 July 2023 the second respondent informed the first respondent to direct the query to the applicant based on Somjaliso's letter of 8 February 2023. It is the first respondent's case that a transfer as envisaged in section 197 of the LRA occurred between the applicant and the second respondent from February 2023.

[9] The facts of this matter are largely not in dispute. Amongst the points of contention is the applicant's allegation that in the letter of 8 February 2023, Somjaliso mistakenly stated that clause 28 of the SLA which she invoked permitted the applicant to place the second respondent under administration with a management structure to undertake its full control. It was submitted on behalf of the applicant that Somjaliso was mistaken, acted unlawfully and without authority. Because of her unlawful conduct, so went the argument, the contents of her letter were null and void. It was further submitted that none of the applicant's conduct falls within the realm of section 197 of the LRA and for that reason a finding should be made that no transfer as contemplated in

section 197 of the LRA occurred between the applicant and the second respondent.

[10] The applicant and first respondent relied on the interpretation of the provisions of section 197 of the LRA by this court, the Labour Appeal Court as well as the Constitutional Court to batress their arguments. They have, in some instances, relied on the same authorities. They were in agreement that what triggers section 197 of the LRA is stated in *Aviation Union of SA and Others v SA Airways (Pty) Ltd and Others*[2], a decision which was referred to with approval in various subsequent Constitutional Court judgments. In *Aviation Union of SA (Aviation Union)* it was held that for section 197 of the LRA to be triggered three conditions must be met. The first is the existence of a business, the second is transfer and the third is as a going concern.

[11] The applicant denied that the transfer took place. Both parties correctly argued, based on authorities that a transfer of business can occur in various ways including a sale, exchange, merge, take-over or an exchange of assets or a donation. The list is not closed. In support of its contention that there was no transfer of business the applicant submitted that after the second respondent had committed various breaches of the SLA it required it to submit a remedial plan after which it would be entitled to carry on with the operations and maintenance of the transport service in terms of the SLA.

[12] I have rejected the applicant's contention that there was no transfer and accepted the first respondent's contradictory version. The reasons are that on the applicant's version, when the second respondent committed a number of

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[2] (2011) 32 ILJ 2861 (CC)

breaches of the SLA it took over control of the public transport operation until the second respondent had submitted an acceptable remedial plan which would entitle it to carry on with the operations. The applicant had therefore taken over the second respondent's control of the operations.

[13] The applicant informed the second respondent through its attorney's letter dated 28 March 2023 in unequivocal terms that it had taken over the operation of the public transport. In the same letter it informed the second respondent not to commence with the municipal public transport services as contained in the VOCA until it had submitted a written remedial program. The following paragraphs of the letter express the applicant's take over of the municipal public transport service:

> "3.2 Regard being had to your reply letter of 2 February 2023, in response to our letter of 31 January 2023, pertaining the subject matter, your client, Spectrum Alert, remains under an obligation in terms of the VOCA to submit an acceptable written remedial program to the NMBM before it can recommence with the administration, maintenance and operations of the municipal public transport service;
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> 3.3 In the absence of a written remedial program acceptable to the NMBM, your client, Spectrum Alert, has no right or entitlement to commence with any of the administration, maintenance and or operations of the municipal public transport services which forms the basis of the VOCA."

[14] The following letter written by Somjaliso on 8 February 2023 to the second respondent's staff confirms that in February 2023 the applicant took over the total control of the second respondent:

"Communication protocols

This serves as notice to all Spectrum Alert staff that a Section 28 process, as stipulated in the Vehicle Operating Company Agreement signed between the NMBM and Spectrum Alert ITS has now been evoked by NMBM as of 3rd February 2023. Section 28 allows the NMBM to place Spectrum Alert under administration in a situation where there is breach of contract or where the NMBM deems that the operations are compromised.

As part of the process, the NMBM has put in place a management structure to undertake full control of Spectrum Alert. The team structure is defined below:…

Therefore, all communication to all staff will be centralized via the office of the Acting Manager or the delegated official as per the management structure as highlighted above. All approvals will be issued in writing by the Acting Manager.

You are therefore obligated to abide by the above-mentioned resolutions."

[15] The applicant took over the administration, maintenance and operations of its municipal public transport services, put the second respondent under administration and put a management structure to undertake full control of the second respondent. No part of the municipal public transport which formed the second respondent's business was left under its control. Nothing precluded the applicant from choosing a solution which permitted the second respondent to retain its business while correcting its non-compliance with the SLA. The applicant's submission that the second respondent's conduct of preparing its employee's pay slips supports its version that it is in control of its business cannot assist it. The preparation is done on the instructions of the

applicant who uses the second respondent's drivers and pay their salaries. As the second respondent did not submit the remedial plan the applicant sought its business is still under the full control of the applicant. The total control of the second respondent the applicant assumed unilaterally constituted a transfer as envisaged in section 1987 of the LRA. The issue of the legality of Somjaliso's conduct will be dealt with later in this judgment to avoid repetion. I took it into account in reaching the finding that a transfer occurred.

[16] The provisions of section 197 of the LRA are triggered when the transfer that has taken place is a transfer of the whole or part of a business, trade, undertaking or service. The applicant submitted that no business was transferred from the second respondent. It relied on *MTN and Others v CCI SA and Other*[3]. In that case MTN entered into an exclusive agreement with CCI SA (CCI) for the rendering of call centre services. A year later because of the high call volumes the agreement stopped being exclusive as MTN had acquired the services of two additional service providers. When MTN's contract with CCI expired, the call volumes the latter serviced were taken over by the 2 additional service providers. In overturning the Labour Court judgment that the provisions of section 197 of the LRA had been triggered the LAC found that the call centre services the CCI provided constituted a discrete contract. It further found that CCI's major business was its contractual entitlement to perform call centre service. Its secondary asset was the physical tools of the trade of a call centre such as the office furniture. A further asset of CCI was the labour intensive productive capacity of the persons delivering the service. The LAC concluded that no contract, tools of trade or

[3] [2023] 10 BLLR 1006 (LAC) 15 June 2023.

labour had been transferred from CCI to the other 2 service providers and that the transfer of call volumes from CCI to them did not constitute a transfer of CCI's business as a going concern.

[17] The first respondent insisted that a business was transferred from the second respondent to the app*licant. It relied on Road Traffic Management Corporation v Tasima (Pty) Limited; Tasima (Pty) Limited v Road Traffic Management Corporation*[4] where it was held that the definition of what constitutes a business is not limited to a closed list. In determining the business the integral parts of the entity must be sufficiently connected to form an economic entity that is capable of being transferred. The first respondent also relied on the definition of business in *Harsco Metals SA (Pty) Limited v Arcelormittal SA Limited*[5] (*Harsco Metals*) which was referred to with approval in *Tasima*. In *Harsco Metals* business is given the following definition:

> "The definition [of a business] is broad, but it requires the court to subject the entity that is the subject of a transfer to scrutiny. In doing so, the courts have … adopted the concept of an 'economic entity' defined as 'an organized grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective."

[18] The applicant's argument supported by the *CCI* judgment cannot succeed because the circumstances in CCI are distinguishable from those of the case before me. Each case is determined on its own merits. It is noteworthy that nothing in the CCI judgment detracts from the interpretation and definition of business in the authorities the first respondent relied on. The interpretation is

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[4] [2020] 12 BLLR 1173 (CC)
[5] (2012) 33 ILJ 901 (LC) at para 25.

consistent with the wide definition of 'business' in section 197 which includes an undertaking or service. It is common cause that when the applicant took total control of the second respondent it consisted of an organized group of persons as it is a company with its own board. It is not in dispute that the second respondent had assets which the third respondent found in its office when he attempted to execute a writ. It is also not in dispute that when the applicant and the second respondent concluded the SLA the second respondent was exercising an economic activity which pursued a specific objective of providing a municipal public transportation service on behalf of the applicant. It is in that business entity that the applicant leased its busses to with the view of facilitating the rendering of the service. The second respondent had its own employees and complied although erratically, with the provisions of the first respondent's main collective agreement by making the required payments. The second respondent's employees, its assets, its board and the applicant's busses it hired formed an integral part of its business. I must therefore accept that a business as defined in section 197 of the LRA was transferred from the second respondent to the applicant.

[19] The applicant denied that there was a transfer of business as a going concern from the second respondent. Amongst the authorities the applicant relied on is *NEHAWU v University of Cape Town*[6]and *Rural Maintenance (Pty)n Ltd and Another v Maluti -A- Phofung Local Municipality*[7] where the Constitutional Court held that the test to determine whether the business was transferred as a going concern is objective. It involves an overall assessment of the situation

[6] [2003] 24 ILJ 95 (CC) 119F-120A.
[7] 2017 (1) BCLR 64 (CC).

and with no single definitive factor. The applicant also relied on the following *dictum* in *Tasima*[8] *(supra)*:

> "[96] Where services are involved, this Court has held that what must be transferred is the business that suppliers the services - not the service itself. That being so, there mere termination of a service contract would not, without more, constitute a transfer within the contemplation of section 197. There must be other indicators, such as whether assets and customers were transferred to the new owner and whether employees were taken over by the new owner"

[20] The authorities the first respondent relied on include the *NEHAWU* judgment the applicant relied upon. The first respondent, however, relied on paragraph 56 of the judgment which reads as follows:

> "[56] The phrase "going concern" is not defined in the LRA. It must therefore be given its ordinary meaning unless the context indicates otherwise. What is transferred must be a business in operation "so that the business remains the same but in different hands." 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

[8] At para [96].

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.

[21] An overall assessment of the facts before me supports the conclusion that what was transferred form the second respondent was a business as a going concern. It is common cause that at the time the applicant took over the second respondent's municipal public transport business it was in operation. It had its employees who were addressed by Somjaliso in the letter of 8 February 2023. The problems it encountered at the time did not extinguish its existence. The business remained the same when it moved from the second respondent to the applicant's hands. The second respondent's employees also fell under the control of the applicant which continued paying their remuneration. The totality of the facts placed before me prove that the second respondent's municipal public transport business which it conducted on behalf of the applicant was transferred to the latter as a going concern.

[22] The applicant's alternative argument was that should it be found that its conduct in dealing with the second respondent fell within the ambit of section 197 of the LRA, any control it might have had would be unlawful and irregular. The applicant submitted that its powers are regulated by legislation and the Constitution of the Republic of South Africa, 1996 (the Constitution) and that any conduct inconsistent with the relevant pieces of legislation was unlawful. It submitted that in terms of the Municipal Systems Act[9] (Systems Act) and the Municipal Finance Management Act[10] (MFMA) it had no authority to control the second respondent or put it under administration. A transfer of the second

[9] Act 32 of 2000.
[10] Act 56 of 2003.

respondent to the applicant as a going concern would have unlawfully made it a municipal entity. The applicant also relied on the interpretation of the principle of legality provided in *Affordable Medicines Trust and Others v Minister of Health and Others*[11]. In that case it was held that public power may not be exercised beyond that which it is conferred by law.

[23] The applicant's argument based on the breach of the Systems Act and the MFMA was refuted by the first respondent's argument based on section 210 of the LRA which provides as follows:

> "If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail."

[24] The application of section 210 of the LRA in disputes based on the operation of section 197 of the LRA is enunciated as follows in *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and Others*[12]*:*

> "[27] The implications of sections 66 and 93 of the Municipal Systems Act read with sections 152 and 160 of the Constitution are that municipalities are obliged to conduct all matters affecting their employees in terms of the Municipal Systems Act. A reading of those provisions alone would suggest that section 197 of the LRA is not applicable to employees of a municipal entity even if those employees are eligible for automatic transfer. The consequence would be that all municipal entities would be immune from section 197 of the LRA. That was not the purpose of the legislation. A reading of both Acts shows that the LRA supersedes the Municipal Systems Act.

[11] 2006 (3) SA 247 (CC) at para 49.

[12] [2015] 8 BLLR 757 (CC) at para [27] and [28].

[28] Section 66 is contained in Chapter 7 of the Municipal Systems Act. Section 52 is also contained in the same Chapter and provides:

> "In the event of any inconsistency between a provision of this Chapter, including the Code of Conduct referred to in section 69, or a regulation made for the purposes of this Chapter, and any applicable labour legislation, the labour legislation prevails."

A transfer as envisaged in section 197 of the LRA took place by operation of the law. The applicant's argument that the finding is in conflict with the Systems Act and the MFMA cannot assist it because in terms of section 210 of the LRA the finding that the transfer took place prevails over any finding on the issue based on other pieces of legislation other than the constitution. The finding that a transfer of the second respondent to the applicant took place by operation of law cannot be vitiated by the fact that the applicant acted beyond its powers.

[25] As a transfer in terms of section 197 of the LRA occurs by operation of law, the applicant's argument and authorities regulating debts and writs of execution between the first and second respondent are superceded by the provisions of section 197 of the LRA. As the second respondent's municipal public transport service business was transferred to the applicant as a going concern, the applicant and the first respondent acquired all the rights and obligations provided in section 197 of the LRA flowing from the transfer. There was no need, contrary to the applicant's view, for the second respondent to allege of suggest that there was a transfer. As the first respondent did not

base its case on a transfer by agreement the applicant's argument that there was non-compliance with the provisions of section 197(7) of the LRA cannot assist it.

[26] The applicant did not act unreasonably in bringing this application. A costs order against it will therefore not be appropriate.

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

1. A transfer in terms of section 197 of the Labour Relations Act 66 of 1995 as amended took place between the applicant and the second respondent.

2. The application is dismissed.

3. There is no order as to costs.

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MZN Lallie

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate S. Patel
Instructed by	Kuban Chetty Inc
For the First Respondent:	Advocate F. Le Roux
Instructed by	Ivings McFalane Attorneys
For the Second Respondent:	Mr S. Nkontso of Nkontso Attorneys