

SOUTH AFRICA / JUDGMENT

Dimension Data (PTY) Ltd and Others v GWB Technologies CC and Others (J 478/2022) [2022] ZALCJHB 97; (2022) 43 ILJ 1824 (LC) (9 May 2022)

[2022] ZALCJHB 97

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

J 478/2022

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Source record

The

Labour Court of South Africa, Johannesburg

Reportable

Case

No: J 478/2022

In

the matter between:

DIMENSION
DATA (PTY) LTD
First Applicant
VANITY
CONSULTING (PTY) LTD
Second Applicant
YAETSHO
SOLUTIONS (PTY) LTD
Third Applicant
And
GWB
TECHNOLOGIES CC t/a GWB TECHNOLOGIES
First Respondent
CITY
OF JOHANNESBURG METROPOLITAN MUNICIPALITY
Second Respondent
EMPLOYEES
OF DIMENSION DATA (PTY) LTD Third
to Eighteenth
LISTED
IN ANNEXURE 'A'. Respondent
EMPLOYEES

OF VANITY CONSULTING (PTY) LTD
Nineteenth to Thirty-
LISTED
IN ANNEXURE
'B'
Fourth Respondent
EMPLOYEES
OF YAETSHO SOLUTIONS (PTY) LTD
Thirty Fifth to Fiftieth
LISTED
IN ANNEXURE
'C' Respondent

Heard: 6 May 2022

Delivered: 9 May 2022
(In
view of the measures implemented as a result of the Covid 19
pandemic, this judgement was handed down electronically by
circulation
to the parties' representatives, by email. The date
on which the judgment is delivered is deemed to be 9 May 2022.)

JUDGMENT

VAN NIEKERK, J

Introduction

[1] This case concerns the employment-related consequences of a change in service provider. The applicants seek a declaratory order to the effect that the termination of a service agreement between them and the second respondent (City), and the award of a tender by the City to the first respondent (GWB) to provide the same services, constitutes the transfer of a business as contemplated by section 197 of the Labour Relations Act[1] (LRA).

[2] The City abides by the decision of the Court; the third to fiftieth respondents (employees) do not oppose the application. The application is opposed only by GWB. In essence, GWB contends that its successful tender for the services (referred to as end-user computing services or 'EUC services') has had the consequence of no

more than the termination of one service level agreement and the commencement of another. Put another way, GWB disputes that its

conclusion of an agreement to provide the EUC services to the City triggers section 197, and that it has any obligation in law to employ any of the applicants' employees on not less favourable conditions of employment, or at all.

[3] Although the issue of urgency was contested in the papers, it was not pursued when the application was argued. Applications such as the present are inherently urgent. In the present instance, the transaction that forms the subject of these proceedings took effect on 1 May 2022. It is in the interests of all parties (and in particular the employees) that the status of the employees is determined without further delay. Insofar as GWB suggests that any urgency was self-created, it is not in dispute that GWB appeared initially to accept that section 197 applied to the change in service provider. It was only in late March 2022 that GWB adopted the stance that section 197 did not apply, a position communicated to all of the

applicants only by 1 April 2022. What followed was a series of discussions between the parties aimed at a resolution to the impasse

that had developed. These discussions, which were followed by an exchange of proposals that continued until 22 April 2022, regrettably

did not bear fruit, and the present application was filed on the same date. I am satisfied that the applicants acted with due diligence in the circumstances, and that the application is urgent.

Brief factual background

[4] In 2016, the first applicant (Didata) secured the contract to provide EUC services to the City. The second applicant (Vanity) is a subcontractor appointed by Didata to deliver EUC services to the City. It employs 16 employees who, together with the employees of Didata and the third applicant (Yaetsho), provide EUC services to the

City. Yaetsho is similarly a subcontractor appointed by Didata to provide EUC services to the City; it employs 16 employees who

together with the employees of Didata and Vanity, deliver EUC services to the City. All of the employees who are party to this

application are engaged in the provision of EUC services.

[5] It is not disputed that the EUC service providers must support, service, maintain and repair the City's IT infrastructure. EUC services, previously referred to as 'desktop support', are wide ranging. They encompass IT-related assistance to end-users (in the present instance, City employees) on a day-to-day basis. EUC services are provided in real time and at any location, as needed. In order to provide the EUC services, Didata utilised the City's infrastructural assets, including its Information Technology Service Management (ITSM) tool, networking and Microsoft software, and the City's Outlook email addresses and Microsoft patching tool. The applicants' employees were stationed at the City's premises, and provided services using their own laptops, handheld devices, power supply units, and the like.

- [6] The initial outsourcing of the EUC services by the City occurred in 2000, when a nearly identical tender was awarded to IBM South Africa. After that date, there have been a number of other service providers

appointed on nearly identical terms, Didata's immediate predecessor being EOH Mthombo (Pty) Ltd.

- [7] The employees are divided into three teams, with no regard to their particular employer and no division of roles, with some employees serving more senior levels of the City's management and some providing services on a standby basis, 24 hours a day, seven days a week. There is a dispute as to whether the teams are replaceable –

GWB contends that its employees are capable of providing the same service without interruption. What is not disputed is that the EUC services are delivered in what is colloquially referred to as a 'tower', meaning that the employees engaged in providing the services are dedicated to that function and are not engaged in other more broadly IT-related services provided by Didata to the City.

- [8] The service level agreement in terms of which Didata delivers EUC services to the City has terminated. As I have indicated, with effect from 1 May 2022, GWB has been appointed to provide the EUC services

after a successful tender.

- [9] The bid document makes specific reference to section 197. The request for proposals states that the successful bidder "may be required to comply with the provisions of section 197 of the Labour Relations Act". The bid document goes on to provide, in the next sentence, that "[t]he successful bidder will be required to employ the transferred employees on terms and conditions that are overall not less favourable to the employees than those on which they were employed by the old employer".

- [10] From mid-December 2021, when it was notified by the City that it had been awarded the tender to provide EUC services until mid-March 2022, GWB appears to have accepted that section 197 applied to any change in service provider in its favour. Specifically, GWB's chief executive officer, Mr. E Mabasa (Mabasa), approved a draft communication which Didata intended to send to its employees, and which specifically referred to a section 197 transfer. After his approval, the communication was circulated by Didata to the affected employees. As early as 11 February 2022, Mabasa requested meetings to discuss the section 197 transfer. Two meetings were held in the presence of GWB's labour consultant. On 7 February 2022, a draft agreement was prepared and sent to GWB, expressly addressing the application of section 197 to the pending change in service provider. Furthermore, GWB concluded a non-disclosure agreement with the applicants which expressly acknowledges that the outsourcing of EUC services to GWB triggers section 197. Notably, it was only after receiving the confidential information contemplated by the non-disclosure agreement that GWB's stance on the application of section 197 changed. In a communication addressed to the City

and forwarded to Didata on 17 March 2022, Mabasa advised that because it would be rendering the services on a 24/7 basis, section 197 would not be triggered, GWB would consider offering only 17 of the 48 affected employees contracts of employment on GWB's terms and

conditions.

- [11] Mabasa's averments that the negotiations conducted between the parties were concerned with the question of whether section 197 applied (as opposed to the terms on which it might be implemented), and that all of the communications and terms of the non-disclosure agreement were agreed on the assumption that the application of section 197 had yet finally to be established, are wholly implausible. GWB's submission in these proceedings is that section 197 applies or does not apply as a matter of law. This position is incongruent with GWB's averment that during February and March 2022, the parties were negotiating the application of section 197. The terms of the discussions between the parties and their communications were such that it is most improbable that the parties were discussing whether section 197 applied. It is more probable than not that Mabasa believed that section 197 applied and commenced negotiations on an agreement to provide for the terms of its implementation. It was only after the non-disclosure agreement was signed and the terms and conditions of the applicants' employees were provided to GWB that the backpedalling exercise recorded in the founding affidavits commenced.
- [12] Despite further discussions between the parties and their legal representatives, no agreement could be reached on whether section 197 applied to the change in the provision of the EUC services, and the present proceedings were instituted.
- [13] GWB does not dispute that the City has requested that it employ the same employees who are currently engaged to provide the EUC services, nor that it offered, at a meeting on 13 April 2022, to employ 20 of these persons. GWB also does not dispute that it has made four offers of employment to the current cohort of employees, three of whom have accepted. GWB does not seriously dispute that in a meeting between the parties (including the City) held on 13 April 2022, the City expressed the view that it wished the same employees to continue servicing the EUC services contract, without interruption, and that it envisaged only a change in the service provider.

Legal principles

- [14] The principles that regulate the transfer of a business and its employment-related consequences are well-established. Section 197 of the LRA is intended to vary the common law by protecting employees' security of employment on transfer (provided certain conditions are met), and oblige the employer acquiring the business to take over a business bundle that includes the employment contracts concluded between the transferor employer and its employees. The substitution of the transferee employer for the transferor takes place by operation of law, without the need to consult with or secure the consent of the affected employees. Section 197(1) provides:

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

- (a) ‘business’ includes the whole or part of any business, trade, undertaking or service; and
 - (b) ‘transfer’ means the transfer of a business by one employer (“the old employer”) to another employer (“the new employer”) as a going concern.
- (2) If a transfer of a business takes place, unless otherwise agreed in terms of sub-section (6) –
- (a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;
 - (b) all the rights and obligations between the old employer and an employee at the time of transfer continue in force as if there had been rights and obligations between the new employer and the employee;
 - (c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation the new employer; and
 - (d) the transfer does not interrupt and employee’s continuity of employment, and an employee’s contract of employment continues with the new employer as if with the old employer.’

[15] The application of section 197 to the sale or other similar disposition of a business is relatively easily established. The application of the section to outsourcing arrangements and changes in service providers is more complex, if only because any business in these

circumstances is likely to be short on assets and labour intensive. Nonetheless, the application of section 197 to outsourcing,

insourcing and changes in service provider has been the subject of a number of judgments by the Constitutional Court. The most recent is *Road Traffic Management Corporation v Tasima (Pty) Ltd; Tasima (Pty) Ltd v Road Traffic Management Corporation*[2] (Tasima). Here, the Court confirmed that the fundamental purpose underlying section 197 is the variation of the common law consequences of the transfer of a business as a going concern. Once a transfer of the kind identified by section 197(1) occurs, all contracts of employment that existed immediately before the transfer took place are automatically transferred to the transferee (the new employer), by operation of law, together with the business. For section 197 to apply, there are three conditions, all of which must be met simultaneously. These are:

a transfer;

of a business (the transfer must be of the whole or part of a business);

as a going concern.[3]

[16] Each of these requirements which, in combination, trigger the application of section 197 have been interpreted by the South African Courts, by and large, using the language of the European Court of Justice in the application of the Business Transfers Directive applicable in

the European Union[4]. The Courts have held, in summary, that a transfer must relate to an economic entity (defined to mean an organised grouping of persons and assets facilitating the exercise of an economic activity that pursues a specific objective), and a determination of whether that entity retains its identity after the transfer.

[17] Section 197(1)(a) provides that a ‘business’ also includes a part of a business. In *Tasima*, the Constitutional Court held, in relation to that definition:

‘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... [These] components [do] not constitute a closed list, but must be sufficiently connected to one another so as to form an ‘economic entity’ that is capable of being transferred’.[5]

[18] In *Aviation Union of South Africa and Another v South African Airways (Pty) Ltd and others*[6] (*Aviation Union*), Jafta J held that section 197 applies to “any business provided that the other requirements are met. The aim is to cast the net wide as possible”.

[19] In relation to the existence of a transfer for the purposes of section 197, Jafta J said the following:[7]

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

[48] For a transfer to be established there must be components of the original business which are passed on to the third party...’

[20] In other words, when section 197 is sought to be applied to a change in service providers, what must be transferred is the business that supplies the services. The mere termination of a service contract does not, without more, constitute a transfer as a going concern for the purposes of section 197. There must be further indicators, such as whether assets, employees or customers were taken over by the transferee employer.[8]

[21] In relation to the requirement that a business be transferred as a going concern, in *Aviation Union*, the Court emphasised that what matters during the factual enquiry is substance rather than form. Jafta J stated:[9]

‘Although the definition of business in section 197(1) includes a service, it must be emphasised that what is capable of being transferred is the business that supplies the service and not the service itself. Were it to be otherwise, a termination of a service contract by one party and its subsequent appointment of another service provider would constitute a transfer within the

contemplation of the section. That this is not what the section was designed to achieve is apparent from its scheme, historical context and its purpose. The context referred to here is the alteration of the common law consequences on employment contracts, when the ownership of a business changes hands.'

[22] Tasima,[10] affirms that in determining whether there has been a transfer as a going concern, a primary consideration is the nature of the business. The Court said the following:

'[95] ...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.

[96] Where services are involved, this court has held that what must be transferred is the business that supplies services – not the service itself. That being so, the mere termination of a service contract would not, without more, constitute a transfer within the contemplation of s 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. In *Aviation Union*, this court was confronted with the question of whether a clause in an outsourcing contract contemplated the transfer of a business or simply the outsourcing of a service. This court considered the fact that both the premises from which the business was conducted and the assets with which it was conducted were transferred as being indicative that there had been a transfer of a business which supplied services as a going concern, rather than a mere outsourcing of a service. On this basis, it concluded that s 197 applied in that matter.'

[23] The Court went on to record[11] that on the facts in *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd* and others[12], City Power had taken over operation of the electricity services previously rendered by a different service provider. It had been

agreed that they would be a full handover of the infrastructure, software and databases relating to a prepaid electricity project from the outgoing service provider to the client, City Power. City Power had refused to take transfer of the outgoing service provider's

employees. The question before the Court was whether the outgoing service provider's business had transferred to City Power as a going concern. The Court held that there had been a transfer of the business as a going concern, as the outgoing service provider's

business had continued, albeit in the hands of another entity. The Court noted[13] that in *City Power*:

'This court stressed that where there has been a transfer of the business 'as is' with all of the complex network infrastructure, assets, know-how, and technology required to operate the business and continue rendering services, a transfer of a business as a going concern has taken place for the purposes of s 197.'

[24] In relation to the ‘going concern’ requirement, in *Aviation Union*, the Constitutional Court addressed what is meant by a ‘going concern’ in relation to a change in service provider:[14]

‘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 service was to continue, albeit under different hands, does not establish a transfer as a going concern. Something more is required.’

[25] Finally, in *Tasima*, the Court confirmed that the application or otherwise of section 197 is in essence a factual enquiry, but that the facts should not be tested against section 197 before the legal causa of a transfer is examined.[15] The Court referred to *Rural Maintenance (Pty) Ltd v Maluti-A-Phofung Local Municipality*,[16] where Froneman J said the following:

‘...It is settled that the enquiry to determine whether the business is transferred as a going concern is a factual one. But the parameters

of the factual enquiry are determined by the legal cause from which the transfer stems from. The legal cause may be the invalidity of the underlying contract. In this case, if the EMC is held to be invalid, the legal cause of restitution demands that what Rural needs to hand back to the municipality is the original business as operated by the municipality at the time when it was transferred to Rural. If, however, it is held that the EMC was valid, the legal cause within which the factual enquiry (whether transfer of the business took place) must take place is the valid contract.’

[26] The existence of a causa of any transfer in terms of section 197 in the present instance is not controversial – it is the termination of the service level agreement between the applicants and the City, by the effluxion of time, and the contract concluded between the City and GWB.

[27] The crisp issue in dispute is whether the EUC services performed by the applicants for the City prior to 1 May 2022 is a specific and identifiable component of their business (i.e. an economic entity capable of being transferred) and if so, whether the award of the tender to the first respondent, in terms of which the first respondent is to provide the EUC services with effect from 1 May 2022, resulted in a transfer of that business for the purposes of section 197(1).

[28] The principle that must be transferred is the business that supplies the service and not the service itself, is more easily stated than applied. The line between the application of section 197 or not is often fine, a point illustrated by two cases decided in this Court. The first is *Unitrans Supply Chain Solutions (Pty) Ltd and another v Nampak Glass (Pty) Ltd and others*[17] (*Unitrans*), where the Court held that section 197 was triggered in circumstances where an incoming service provider was permitted the right of use of infrastructural assets owned by the client, and necessary for the purpose of continuing the relevant service. In that case, the Court referred to *Carlito Abler and others v Sodexho MM Catering Gesellschaft*

mbH,[18] (Sodexho) a case that concerned a change in service providers contracted to provide catering at a hospital. In essence, the Court was satisfied

that section 197 was triggered by the right of use of the infrastructural assets by the incoming service provider in circumstances where it would provide the same services from the same premises, without interruption. In particular, the Court noted that the services that the incoming service provider had been contracted to perform could only be performed at the client's production

facility, and that it would make use of equipment and IT systems used by the outgoing service provider, including access to the client's computer system that enabled the movement of stock to be tracked. In contrast, in *Dimension Data (Pty) Ltd v Omega Digital Services (Pty) Ltd* and another[19] (Omega) this Court (per Lagrange J) held that section 197 was not triggered when a change in service provider occurred, in circumstances where the services comprised the maintenance and repair of audio-visual and videoconferencing facilities. The Court distinguished *Unitrans* on the basis that in Omega, the nature of the services concerned only the maintenance of the client's infrastructure. The Court likened the nature of the service to that of a property company contracting with the different lift service company to maintain the proper functioning of its lifts, even if the former lift service company had dedicated teams of technicians devoted to the lift servicing needs of the client. In other words, the fact that a dedicated team might be used to render the services is not sufficient in itself to describe the service as an economic entity capable of being transferred as a going concern.[20] As Jafta J put it in *Aviation Union*, 'something more is required'.

Analysis

[29] I deal first with the requirement that the EUC Services comprise a 'business' for the purposes of section 197.

[30] It is not in dispute that GWB has been awarded a tender for the performance of the EUC services as a discrete function, separate from other IT services provided by Didata to the City. The service level agreement between the City and GWB regulates only the provision of the EUC services, and the provision of the EUC services is the only IT-related service that GWB has been contracted to perform for the City.

[31] GWB does not seriously dispute that the EUC services are performed by an organised grouping of the same employees who have for many years provided the same service to the same client, the City, and that over the years, the contracts of employment of the affected employees have simply been transferred from one service provider to the next. To the

extent that GWB seeks to dismiss these historical agreements by way of a submission to the effect that it constitutes similar evidence

and that in any event, GWB is not bound by the manner in which respective service providers have chosen to deal with their employees

in the past, the significance of each historical transaction for present purposes is that an identifiable and organised group of

employees has, for more than 20 years, consistently performed an identifiable function for the City. Indeed, the EUC services function

was put out to tender as a discrete unit. As I have indicated, it is not in dispute that GWB has been awarded a tender only for the provision of the EUC services, with the service level agreement having been concluded solely to provide those services. Given the evolution and adaptation of the exact nature of the business over time, if only to account for developments in technology, the history of the provision of EUC services indicates the existence of a discrete business, capable of being transferred.

[32] To the extent that GWB contends that the relevant economic entity is Didata, the service provider, this contention confuses the concept of a business with that of a legal entity. For the purposes of section 197, a 'business' does not necessarily refer to a legal entity – a business can comprise of a wide variety of components.[21] GWB's further submission that the provision of EUC services by the applicants did not constitute a 'business' because it consists of employees who report to managers who are responsible for multiple projects, there is no merit in this submission. The mere fact that employees who make up a business may report to managers who also oversee other aspects of a business does not mean that the functions performed by those employees cannot constitute a business. In any event, GWB's submissions have no factual foundation. The undisputed facts are that the employees report to a team leader. Further, Didata confirms that the EUC services will be transferred with Mr. Sello Moseki, its manager. Moseki is identified in the notice of motion and described as an operations manager.

[33] All of the above factors lead to the conclusion that the provision of the EUC services constitutes a discreet, organised grouping of employees solely dedicated to the provision of EUC services to the City. The provision of EUC services is thus a 'business' for the purposes of section 197.

[34] Turning next to the requirement of a 'transfer', GWB relies on Omega to contend that the termination of the service level agreement between Didata and the City and GWB's appointment to provide the EUC service is no more than that, i.e. the termination of one contract and the commencement of another. In Omega, the analogy adopted by the Court in relation to the maintenance of lifts is illustrative of the limited application of its conclusion – a contract to maintain a lift installation on a client's premises. In Omega, as I have noted, the services comprised the service and maintenance of audio-visual equipment, being the property of the client. Lagrange J recorded that the service provider was required to provide all equipment, tools, materials and personnel necessary to perform the services, and was further required to determine the characteristics, quality, requirements and quantity of the service it delivered, remaining the owner of all work and intellectual property provided.[22] What is of some significance in Omega is the absence of any right of access to and control

over infrastructure, and a right by the service provider to provide the services in the manner that it wished. The facts of the present case are rather different, and more closely approximate TMS Group Industrial Services (Pty) Ltd t/a Vericon v Unitrans Supply Chain Solutions (Pty) Ltd and others,[23] where the Labour Appeal Court (LAC) held that the conclusion of a new service agreement in respect of the management of a client's

warehousing and distribution planning functions triggered the application of section 197. In the course of the judgment, the Court

made reference to the European law regarding changes in service provision and their potential to give rise to a transfer of an

undertaking. Referring to Wynn-Evans The Law of TUPE Transfers (2013), the Court noted that for there to be a service provision change giving rise to a transfer undertaking, the requirements to be satisfied with are that firstly, there must be an organised group of employees principally dedicated to the contract or activity prior to the transfer; secondly, the contract award must be ongoing rather than on a once-off short-term basis, and not related to the supply of goods.[24] The Court noted:

‘in summary, the SPC regulations seek to address the problem of outsourcing. Thus these regulations cover the case where an activity is not carried out by A on its own behalf but is carried out instead by B on behalf of A. The activity which is carried out then ceases to be carried out by B on behalf of A and is then carried out by C, the new contractor on behalf of A.’[25]

[35] The Court then made reference to Sodexho, in which a change in service provider to provide catering services to a hospital was held to trigger the applicable transfer of

undertakings provisions since the tangible assets required for the activity to continue were taken over by the incoming service provider in the form of the premises and equipment provided by the hospital, and indispensable for the preparation and distribution of meals to hospital patients and staff, was sufficient, in circumstances where “...given their captive status, the new contractor necessarily took on most of the customers of its predecessor”[26]. The LAC considered this approach to be consistent with that adopted to section 197 by the Constitutional Court in both Aviation Union and National Education Health and Allied Workers Union v University of Cape Town and others[27]. Of particular significance was the fact that the facilities to provide the services in question were handed over to the incoming

service provider in a state sufficient for it to carry on the very same activity that had previously been conducted by the outgoing

service provider, on the same premises, employing the client's computer systems and other equipment.

[36] What the approach adopted by the LAC in Unitrans entails, when a Court assesses what has been transferred from the outgoing to the incoming service provider, is to have particular regard to any assumption of the right of use of the client's infrastructural assets, and to

whether the incoming service provider is to provide the same services on the same premises, without interruption, to the same client. What is also significant is GWB's successful offers of employment made to at least some of the applicants' employees, and the City's clear preference for continuity. All of these factors are indicative of a transfer of the business 'as is', with all of the access to infrastructure, technology, know how, institutional knowledge required to operate the business and continue rendering the EUC services.

- [37] In short, Omega can be distinguished on the facts. The EUC services extend beyond the maintenance of a physical installation, and it is not open to the provider of the EUC services to provide them in the manner that it deems fit. The applicants have established that there is a transfer of a business for the purposes of section 197.
- [38] Whether or not the EUC services have been transferred as a going concern requires a determination of whether "[w]hat is transferred is a business in operation so that the business remains the same but in different hands".[28] Todd et al. suggest that what this exercise entails is taking a snapshot of the entity prior to the transfer and assessing its components, and then comparing the picture with one of the business after the transfer. Provided the business remain substantially the same in the hands of the transferee employer, the transfer 'as a going concern' element of the application of section 197 will be satisfied.[29]
- [39] When, with effect from 1 May 2022, GWB takes over the provision of the EUC service, it will be obliged to provide almost identical services to those provided by the applicants, using the same physical and incorporeal assets as those used by the applicants, and using the same intellectual property and institutional knowledge used and owned by the applicants.
- [40] To the extent that GWB seeks to contend that the services that it has been contracted to provide to the City are different and that its modus operandi in providing EUC services will be different, when the answering affidavit is shorn of references to the broader scope of the Didata contract and limited to the provision of EUC services (as I have indicated, the only service that GWB has been appointed to provide) the services are virtually identical. GWB contends that it will be obliged to render services on a 24/7 basis; the applicants already provide services on that basis. In any event, the variation of the times at which a service is to be provided does not necessarily mean that a different service is provided.
- [41] The difference in 'methodology' for which GWB contends is no difference at all. In substance, the applicants provide the EUC services on a 24/7 basis, using remote access tools when necessary and providing network monitoring services on a basis that would collect data on the health, performance and age of the City's hardware. It is clear from the evidence that GWB has been contracted to provide the same service as the applicants did, and that any differences are marginal.

[42] In summary: on termination of the Didata service level agreement and the simultaneous appointment of GWB to provide the EUC services, section 197 was triggered. The provision of the EUC services comprises a discrete economic entity, and access to the City's IT infrastructure has been handed over to GWB to enable it to carry on the same activity as previously carried out by the employees, on the same premises and for the benefit of the same client. It follows that the applicants are entitled to the relief that they seek.

Costs

[43] The Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness. The Constitutional Court has remarked, more than once, that the rule ordinarily applicable in the civil Courts, i.e. that costs follow the result, does not apply.[30] The Court must take into account all relevant circumstances and exercise a discretion, having regard to what the law and fairness

requires. There are two circumstances in which this Court is reluctant to make orders for costs. The first is where individual

employees, in good faith, pursue legitimately felt grievances against their employers. To the extent that the spectre of an adverse order for costs may disincline aggrieved employees to refer their disputes to this Court, the Court is conscious of the need to keep its doors open to those employees who fall into the above category. As the Constitutional Court recently observed, the right to fair labour practices and the right of access to courts ring hollow when employees are at risk of an adverse costs order in circumstances where such an order might act as a deterrent to enforcing their rights.[31] The second circumstance where parties to a collective bargaining relationship are in dispute and where an order for costs may save to prejudice that relationship. In other words, where an adverse order for costs may pose a threat to labour peace, the Court will ordinarily be reluctant to make such an order.

[44] This case falls into neither category. In essence, it is a dispute between two employers, who contest the application of section 197 and where the employees are the proverbial ham in the sandwich. There is no reason to deny the applicants their costs given that they have had to resort to litigation to protect their interests and have succeeded in securing the order that they sought. Insofar as it was submitted on behalf of the first respondent that the costs of two sets of attorneys and counsel ought not to be allowed, the founding affidavit makes clear that although the first applicant and the second and third applicants respectively seek the same relief, the notice of motion is signed by both the first applicant's attorneys, and those representing the second and third applicants. Each firm of attorneys briefed counsel to represent the first applicant and the second and third applicants respectively. The first applicant and the second and third applicants were fully entitled to take independent advice, to file founding and replying affidavits and to instruct their own counsel. There is thus no reason to deny the first applicant and the second and third applicants respectively their costs. To the extent that counsel for the first respondent submitted that it was not necessary to brief two counsel, in my view, the matter was sufficiently complex to warrant

the attention of two counsel, particularly within the time constraints applicable.

[45] In this premises, I make the following order:

Order

1. The application is enrolled to be heard as one of urgency in terms of rule 8 of the Rules for the conduct of proceedings in the Labour Court Rules and the applicants' non-compliance with the rules in relation to forms, time periods and services is condoned.
2. It is declared that the termination of the agreement pursuant to which the end user computing services of the second respondent were provided by the applicants and the award of a tender to the first respondent for the provision of those services with effect from 1 May 2022, constitutes the transfer of a business as contemplated by section 197 of the Labour Relations Act, 66 of 1995.
3. The first respondent is to pay the applicants' costs, including the costs of two counsel in each instance, where so employed.

André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the First Applicant: R

Tulk, with her T Ngakane

Instructed by: Eversheds

Sutherland (SA) Inc

For the Second and Third Applicants: RJ Moultrie SC, with him K Dewey

Instructed by:

Padayachee Attorneys

For the First Respondent:

HM Viljoen

Instructed by:

Cowan Harper Madikizela Attorneys

[1] Act No. 66 of 1996, as amended.

[2]

(2020) 41 ILJ 2349 (CC).

[3] Aviation Union of SA and another v SA Airways (Pty) Ltd and others

(2011) 32 ILJ 2861 (CC) at paras 43-45; Tasima at para 33.

[4] Council Directive 2001/23/EC of March 2001.

[5] Tasima at para 60.

[6] 2012 (1) SA 321 (CC) at para 45.

[7] Ibid at paras 47 – 48.

[8] Ibid at paras 30 and 31.

[9] Ibid at para 52.

[10] Tasima supra at para 95 and 96.

[11] Ibid at para 97.

[12]

(2015) 36 ILJ 1423 (CC).

[13] Tasima supra at para 97.

[14] Aviation Union supra at para 74.

[15] Tasima supra at para 36.

[16]

(2017) 38 ILJ 295 (CC) at para 39.

[17]

(2014) 35 ILJ 2888 (LC).

[18]

[2004] IRLR 168 (ECJ).

[19]

(2020) 41 ILJ 2453 (LC).

[20] Ibid at para 31.

[21] Tasima at para 60.

[22] Omega supra at para 30.

[23]

(2015) 36 ILJ 197 (LAC).

- [24] Ibid at para 22.
- [25] Ibid at para 24.
- [26] Sodexho at para 36.
- [27] 2003 (3) SA 1 (CC).
- [28] Ibid at para 56.
- [29] Todd, Du Toit & Bosch, Business Transfers and Employment Rights in South Africa, Lexis Nexis South Africa, 2004 at p 49.
- [30] Union for Police Security and Corrections Organisation v South African Custodial Management 2021 (11) BCLR 1249 (CC) at para 24.
- [31] Solidarity obo Members v Barloworld Equipment Southern Africa and Others (case no: CCT102/21 unreported judgment dated 6 May 2022) at para 79.
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