

SOUTH AFRICA / JUDGMENT

# Murray and Roberts Cementation (Pty) Ltd v Electro Hydro World (Pty) Ltd and Others (2024-091607) [2024] ZALCJHB 535 (30 September 2024) [2024] ZALCJHB 535

## COURT

Labour Court Johannesburg

## BEFORE

M T M Phehane

## CASE / FILE NUMBER

2024-091607

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## Source record

IN THE LABOUR COURT OF  
SOUTH AFRICA, JOHANNESBURG  
Not Reportable  
Case No: 2024-091607

## In the matter between:

MURRAY AND ROBERTS  
CEMENTATION (PTY) LTD  
Applicant  
and  
ELECTRO HYDRO WORLD  
(PTY) LTD  
First Respondent  
SIBANYE STILLWATER  
LIMITED  
Second Respondent  
SIBANYE GOLD  
LIMITED  
Third Respondent  
SIBANYE GOLD SHARED  
SERVICES (PTY) LTD  
Fourth Respondent  
WESTERN PLATINUM (PTY)  
LTD  
Fifth Respondent  
THE EMPLOYEES LISTED  
IN ANNEXURE A TO THE  
NOTICE OF

## MOTION

Sixth to Sixty-Eighth Respondents

Heard: 30 August 2024  
Delivered: 30 September 2024

## JUDGMENT

PHEHANE, J

## Introduction

- [1] The applicant is the outgoing contractor and the first respondent (EHW) is the incoming contractor that provides services relating to the supply and operation of a grout plant that is owned by the second respondent (Sibanye).
- [2] The applicant approaches this Court on an urgent basis seeking declaratory relief to the effect that its employees listed in annexure A to the notice of motion and cited as the sixth to 68th respondents will transfer to the first respondent in terms of section 197 of the Labour Relations Act[1] (LRA) with effect from 30 September 2024 consequent upon the termination of its contract with Sibanye and the subsequent conclusion of the contract between EHW and Sibanye.
- [3] The application is opposed by EHW on the merits. Urgency is not placed in issue.
- [4] The dispute, in essence, concerns whether there has been a transfer of a business as a going concern as contemplated in section 197 of the LRA when EHW commences rendering services on 30 September 2024.
2024. The applicant contends there will be a transfer in terms of section 197 of the LRA, and EHW contends the opposite.

## Brief background and urgency

- [5] In South African mines, grout plants are erected on the land surface, where grout (a mixture of cement, fly ash and mine materials) is manufactured by a small labour component, after which it is pumped underground into mine shafts through ranges (metal pipes) for secondary support in construction. The operation is termed grout pack pumping services.
- [6] The fifth respondent owns the Karee Mine Shaft number 3 (K3) and Karee Mine Shaft number 4 (K4) located at Marikana in the North West Province. In 2005, the applicant was contracted by the fifth respondent to supply grout pack pumping services at K3. The applicant built the grout plant at K3. Raw materials, ranges, electricity, water, and communication between the surface and underground were provided by the fifth respondent (the client).

- [7] In 2021, the applicant was awarded a contract by Sibanye to refurbish and operate the grout plant at K4. The grout plant at K4 is owned by Sibanye.
- [8] The contract to refurbish and operate the grout plant at K4 was an amendment to the contract to render grout pack pumping services at K3. Therefore, the grout operations at the grout plant at K4 were carried out by the applicant in the same manner as the grout operations at the grout plant at K3, and the fifth respondent supplied water, electricity, ranges, raw materials, storage and communication between the surface and underground operations.
- [9] 63 of the applicant's employees (the sixth to 68th respondents listed in Annexure A to the notice of motion) are employed at the grout plant at K4.
- [10] In 2023, Sibanye advertised a tender to design, construct and operate a larger grout plant to supply K4. The first respondent was the successful tenderer. In the circumstances, on 30 May 2024, Sibanye gave the applicant notice that its contract with the fifth respondent would terminate with effect from 27 August 2024. The termination date was subsequently adjusted to 30 September 2024.
- [11] In a letter dated 3 June 2024, the applicant acknowledged receipt of the termination of its contract and required the details from Sibanye, of the successful and incoming contractor in order to commence discussions in terms of section 197 of the LRA.[2] The second respondent replied stating that it could not provide the applicant with the details of the incoming contractor.
- [12] On 5 June 2024, the applicant, out of caution, issued its employees through their trade union representatives, with notices that it was contemplating retrenching the employees in terms of the provisions of section 189A of the LRA.
- [13] On 25 June 2024, the applicant addressed correspondence to EHW stating that it was aware that it was taking over the grout operations at the K4 grout plant and, relying on the judgment of this Court in *Rosond (Pty) Ltd v Western Platinum Ltd and Others*[3] (*Rosond*), the applicant informed EHW that it held the view that a transfer in terms of section 197 of the LRA would take place, and therefore suggested the parties meet to discuss the transfer process.[4]
- [14] On 3 July 2024, EHW's attorney of record dispatched communication to the applicant, denying that a transfer in terms of section 197 of the LRA was applicable, as it held the view that there was no transfer of the whole or part of the business of the applicant to it and further, that the decision in *Rosond* supported EHW's contention that there was no transfer from the applicant to EHW. Put differently, EHW held the view that *Rosond* did not support the applicant's viewpoint.

- [15] In correspondence dated 9 July 2024 to EHW's attorney, the applicant's attorney of record insisted that a transfer in terms of section 197 of the LRA was applicable and invited a discussion on this. In addition, EHW was put on terms to commit to a section 197 transfer.
- [16] Between 23 to 31 July 2024, correspondence was dispatched between the parties in which either party asserted its different view on the applicability or non-applicability of section 197 of the LRA, with EHW's attorneys recording in a letter dated 31 July 2024, that the parties had reached an impasse and that this Court should pronounce on the matter.
- [17] The applicant approached this Court thereafter seeking urgent declaratory relief as aforesaid. As stated above, urgency is not contested. I am satisfied that the applicant has made out a case for urgency.

Section 197 of the LRA.

[18] Section 197 of the LRA provides as follows:

'197. Transfer of contract of employment.

- (1) In this section and in section 197A –
- (a) 'business' includes the whole or a part of any business, trade, or service; and
- (b) 'transfer' means the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern.
- (2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection
- (6) –
- (a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;
- (b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;
- (c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and
- (d) the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer.
- (3)(a) The new employer complies with subsection
- (2) if that employer employs transferred employees on terms and conditions that are on the whole not less favourable to the employees than those on which they were employed by the old employer.

- (b) Paragraph (a) does not apply to employees if any of their conditions of employment are determined by a collective agreement.
- (4) Subsection (2) does not prevent an employee from being transferred to a pension, provident, retirement or similar fund other than the fund to which the employee belonged prior to the transfer, if the criteria in section 14 (1) (c) of the Pension Funds Act, 1956 (Act No. 24 of 1956), are satisfied
- (5)(a) For the purposes of this subsection, the collective agreements and arbitration awards referred to in paragraph (b) are agreements and awards that bound the old employer in respect of the employees to be transferred, immediately before the date of transfer.
- (b) Unless otherwise agreed in terms of subsection (6), the new employer is bound by –
  - (i) any arbitration award made in terms of this Act, the common law or any other law;
  - (ii) any collective agreement binding in terms of section 23; and
  - (iii) any collective agreement binding in terms of section 32 unless a commissioner acting in terms of section 62 decides otherwise.
- (6)(a) An agreement contemplated in subsection
  - (2) must be in writing and concluded between—
    - (i) either the old employer, the new employer, or the old and new employers acting jointly, on the one hand; and
    - (ii) the appropriate person or body referred to in section 189 (1), on the other.
  - (b) In any negotiations to conclude an agreement contemplated by paragraph (a), the employer or employers contemplated in subparagraph (i), must disclose to the person or body contemplated in subparagraph (ii), all relevant information that will allow it to engage effectively in the negotiations.
  - (c) Section 16 (4) to (14) applies, read with the changes required by the context, to the disclosure of information in terms of paragraph (b).
- (7) The old employer must—
  - (a) agree with the new employer to a valuation as at the date of transfer of—
    - (i) the leave pay accrued to the transferred employees of the old employer;
    - (ii) the severance pay that would have been payable to the transferred employees of the old employer in the event of a dismissal by reason of the employer's operational requirements; and
    - (iii) any other payments that have accrued to the transferred employees but have not been paid to employees of the old employer;
  - (b) conclude a written agreement that specifies –

- (i) which employer is liable for paying any amount referred to in paragraph (a), and in the case of the apportionment of liability between them, the terms of that apportionment; and
  - (ii) what provision has been made for any payment contemplated in paragraph (a) if any employee becomes entitled to receive a payment;
  - (c) disclose the terms of the agreement contemplated in paragraph (b) to each employee who after the transfer becomes employed by the new employer; and
  - (d) take any other measure that may be reasonable in the circumstances to ensure that adequate provision is made for any obligation on the new employer that may arise in terms of paragraph (a).
- (8) For a period of 12 months after the date of the transfer, the old employer is jointly and severally liable with the new employer to any employee who becomes entitled to receive a payment contemplated in subsection
- (7) (a) as a result of the employee's dismissal for a reason relating to the employer's operational requirements or the employer's liquidation or sequestration, unless the old employer is able to show that it has complied with the provisions of this section.
- (9) The old and new employer are jointly and severally liable in respect of any claim concerning any term or condition of employment that arose prior to the transfer.
- (10) This section does not affect the liability of any person to be prosecuted for, convicted of, and sentenced for, any offence.'
- [19] In *National Education Health & Allied Workers Union v University of Cape Town and Others*[5] (NEHAWU), the Constitutional Court stated that properly construed, the objective of section 197 of the LRA serves a dual purpose: it facilitates commercial transactions and protects workers from unfair job losses. This dual purpose is consistent with the right to fair labour practices.[6]
- [20] Our Courts have interpreted the provisions of section 197 of the LRA to determine when a transfer in terms of that section is said to have occurred. What follows below is a brief overview of this jurisprudence in this regard.
- [21] For a transfer in terms of section 197 of the LRA to have occurred or to occur, there must have been or must be: (a) a transfer; (b) of a business; (c) as a going concern.[7]
- [22] In *Road Traffic Management Corporation v Tasima (Pty) Limited; Tasima (Pty) Limited v Road Traffic Management Corporation*[8] (Tasima), the Constitutional Court stated as follows with reference to paragraphs
- [43] to [46] of its dictum in *Aviation Union of SA and another v SA Airways (Pty) Ltd and others*[9] (Aviation Union):

‘Section 197 applies where: (a) a business; (b) is transferred; (c) as a going concern. These jurisdictional requirements must be met in order for section 197 to apply. Where there is a transfer of a business as a going concern, the consequences listed in section 197(2) automatically follow by operation of law.’

[23] The Constitutional Court in *Tasima* went on to state as follows at paragraph [35], quoting from its decision in *National Education Health and Allied Workers Union v University of Cape Town and Others*[10] (NEHAWU):

‘Whether the jurisdictional requirements for the operation of section 197 are present has been characterised as a factual enquiry. NEHAWU confirms this:

*“Whether [a transfer of a business as a going concern] has occurred is a matter of fact which must be determined objectively in the light of the circumstances of each transaction”.*’

[24] With reference to *Aviation Union* and its decision in *Rural Maintenance (Pty) Ltd and Another v Maluti-A-Phofung Local Municipality*[11], the Constitutional Court in *Tasima* emphasized that the causa of a transfer of a business is a precursor for the application of the jurisdictional requirements of section 197 of the LRA. In this regard, the Court stated as follows:

‘A legal causa is a prerequisite for the application of section 197. It follows that only once the source of the respective rights and obligations to effect and receive transfer has been identified, can it be determined whether the jurisdictional facts for the application of section 197 are present. Once the legal causa is identified, the factual enquiry outlined in NEHAWU can be conducted. Thus, an inquiry as to the causa must be conducted before applying the test in section 197 to the facts. Otherwise one is looking at facts without the legal parameters being in place.’[12]

[25] In *casu*, the causa is the termination of the applicant’s contract and the subsequent contracting of EHW pursuant to the award of a tender to EHW to provide grout pack pumping services at the enlarged K4 grout plant.

A transfer

[26] In *Tasima*, the following was stated in relation to what a transfer in section 197 means:

‘A transfer entails the movement of the business from one party to another, and is a concept that was intended to be widely construed. A transfer under section 197 can take the form of a myriad of legal

transactions, including mergers, takeovers, restructuring within companies, donations and exchanges of assets. In NEHAWU, this Court held that the substance rather than the form of the transaction is relevant to the determination of whether a transfer has taken place. The mode of transfer is irrelevant, and it is of no consequence whether there is a contractual link between the transferor and the transferee.’[13] [Emphasis added]

[27] It is now established that where the transfer of services is involved, what must be transferred for the transfer to fall into the purview of section 197 of the LRA, is the business that supplies the service, not the service itself. The mere termination of a service contract does not trigger the application of section 197 of the LRA.[14] The nature of the business, widely construed, must be objectively assessed to determine whether a transfer has occurred.

#### Of a business

[28] In *Tasima*, a business in the context of section 197 of the LRA was given a broad interpretation as follows:

‘..[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.’[15]

[29] The Constitutional Court referred with approval, to the approach adopted by this Court in *Harsco Metals South Africa (Pty) Ltd and another v ArcelorMittal South Africa Ltd and others*[16] (Harsco Metals) where van Niekerk J (as he then was) stated:

‘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 organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective.”’

#### As a going concern

[30] The question of whether a business has been transferred "as a going concern" is a factual enquiry to be determined objectively in light of the circumstances of each transaction.[17]

[31] The non-exhaustive list of factors that will ordinarily be relevant in consideration of whether a business is transferred as a going concern are the following:

‘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.’[18] [Emphasis added]

[32] As aptly put in *Tasima*:

‘An essential question under section 197 is whether, after the transfer, the undertaking has retained its identity. This question was addressed by the United Kingdom’s Employment Appeal Tribunal in *Kelman*, where... the statutory setting is entirely germane. What is crucial is the transfer of responsibility for the operation of the undertaking. There needs to be a comparison between the actual activities and actual employment situation in the undertaking before and after the transfer. The test set out by Mummery in *Kelman* offers salutary guidance:

*“The crucial question is whether, taking a realistic view of the activities in which the employees are employed, there exists an economic entity which, despite changes, remains identifiable, though not necessarily identical, after the alleged transfer.”[19] [Emphasis added]*

#### Argument and evaluation

[33] The applicant asserts that clause 20 of the tender document obliges EHW to comply with the provisions of section 197 of the LRA.

[34] Clause 20 of the tender document reads thus:

‘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.’

[35] EHW asserts that clause 20 of the tender document simply records that the successful tenderer is obliged to comply with the provisions of section 197 of the LRA where that section applies and contends that it does not apply for the following reasons:

1. EHW was contracted not only to render group pack pumping services but also to design, build and maintain two new plants and to sell the plants to Sibanye on completion.
2. EHW will not use the grout plant that was operated by the applicant. It will use two entirely different plants erected by it.
3. No equipment that is critical for grout plant operations was transferred from the applicant to EHW.
4. The applicant’s operations are labour-intensive. EHW operations require less labour as the equipment it uses is more technologically advanced and efficient in comparison to that that is used by the applicant. EHW asserts that it will use 35 employees to render its services and does not need the employees of the applicant.
5. EHW’s equipment will remain its own property and will not be sold to Sibanye.

[36] EHW further contends that its contract with Sibanye, following the award of the tender, does not make any provision relating to the applicability of section 197 of the LRA. EHW relies on an email by Sibanye in an effort to demonstrate that clause 20 is a standard template of the tender document, was for mere guidance and was not obligatory.[20]

[37] EHW contends in essence, that the question as to whether a transfer in terms of section 197 of the LRA has taken place turns on whether an objective fact-finding exercise discloses that the operational capacity of the applicant viewed holistically has actually transferred to it so that it can be said that EHW will conduct the same business as the applicant. EHW contends that the applicant's operational capacity has not transferred to it and therefore, section 197 does not apply.

[38] The authorities canvassed earlier in this judgment have a common thread and that is, a Court considering whether a transfer in terms of section 197 has occurred should consider substance over form in making a factual objective enquiry whether section 197 applies to a transaction.

[39] I am of the view that the approach by EHW that the question of whether a section 197 transfer has taken place hinges on whether the objective facts show that the operational capacity of the applicant viewed holistically has actually transferred to it from the applicant such that it conducts the same business as the applicant, is a narrow approach to the overall assessment that this Court is enjoined to make in making its determination.

[40] 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. EHW's reliance on *Mobile Telephone Networks (Pty) Ltd and Others v CCI SA (Umhlanga)(Pty) Ltd and Others*[21] (MTN) that the determination hinges on whether the operational capacity has transferred from the applicant to it is misplaced. The jurisprudence

guides that the specific facts of each transaction must be assessed wholly and no individual factor is decisive. In brief, the facts in MTN are that the equipment and labour or MTN's discrete business did not transfer from the transferor to MTN and the two service providers.

[41] The facts of the present case are different. In the present case, the transfer was as a result of the termination of the contract between Sibanye and the applicant and the conclusion of a contract between Sibanye and EHW pursuant to the award of the tender for the supply of grout pumping services at the K4 grout plant. The applicant was required to relinquish use and control of the K4 grout plant, that is, the premises of Sibanye, the ranges and underground facilities owned by the client, as well as the materials provided by the client. The business that supplied the service, which constituted a discrete

entity was transferred away from the applicant to EHW.

- [42] The tender document reveals that the design and construction of two new grout plants are intended to enlarge the existing K4 grout plant. The contract between Sibanye and EHW is for the operation and maintenance of the K4 grout plant. The client provided utilities, materials, storage, and communications for the applicant to render its grout pack pumping services at the K4 grout plant. The client will provide infrastructure to EHW for grout pack pumping service at the enlarged K4 grout plant.
- [43] Therefore, the undertaking, business or economic entity has retained its identity after the transfer. The economic activity remains the same and for a specified objective after the transfer and it is this: the rendering of grout pack pumping services for the K4 shaft. The K4 grout plant remains the property of Sibanye. This is clear from the tender document. The applicant has a right to use this property and grout ranges to pipe the grout while rendering its service during the duration of its contract with Sibanye. EHW has the same right after the transfer to use the premises and grout ranges. While EHW's equipment may be more technologically advanced, the identity of the business will be retained after the transfer so that the services continued by EHW will be seamless.
- [44] On the issue of different technological equipment being used to render the same business service, in *Fraser Alexander (Pty) Limited v Instasol Tailings (Pty) Limited and Others*[22] the Court said as follows:

'It does not seem to me that the use of a particular item of equipment not utilised by the applicant to achieve the same results has the consequence that there is no transfer of the business as a going concern. It may well be that the equipment brought to site by Intasol will improve the efficiency of the operation, but Intasol has not made a case to the effect that the nature of the operation is rendered any different by the introduction of a stacker or any other item of equipment, or that it is so different that one cannot say that Intasol conducts the same activities.'

- [45] Sibanye has not filed an affidavit explaining that the reference to section 197 in the tender document is a standard template. On the plain reading of clause 20 of the tender document, the tenderer is required to make provision in its tender submission for the eventuality of section 197 of the LRA. On an assessment of the facts in casu, the applicant operated the K3 grout plant and later, as an addendum to the contract, refurbished and operated the K4 grout plant. The applicant and EHW submitted a tender for the enlargement and operation of the K4 grout plant. Given the nature of the grout

business, it is improbable that this clause in the tender document is a mere standard template of a tender document.

- [46] EHW asserts that it does not need to take over the employees of the applicant to render grout services, as it has its own employees and should it require additional employees, it will use his own employees deployed at other premises. In view of the enlarged K4 grout plant that will operate, it is improbable that EHW will not require the employees of the applicant.

[47] In view of the afore-going, I find that the provisions of section 197 of the LRA find application.

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

Order

1. The application is heard as urgent in terms of Rule 38 of the Rules of this Court.
2. With effect from 30 September 2024, the employment contracts of the sixth to 68th respondents transfer from the applicant to the first respondent in terms of section 197 of the Labour Relations Act, 66 of 1995.
3. The first respondent must comply with the provisions of section 197 of the Labour Relations Act, 66 of 1995 in relation to the transfer of the sixth to 68th respondents.
4. There is no order as to costs.

M. T. M. Phehane

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Adv. Bosch Instructed by : Van Zyl's Inc. For the first respondent: Mr. Orton of Snyman Attorneys

[1] Act 66 of 1995, as amended.

[2] See: annexure "MO 8" on p 002-349.

[3]

(2017) 38 ILJ 454 (LC).

[4] See: founding affidavit at para 33 on p 002-13 to 14.

[5]

[2002] ZACC 27; (2003) 24 ILJ 95 (CC) at para [70].

[6] Section 23(1) of the Constitution of the Republic of South Africa, 1996.

[7] See: City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and Others

[2015] ZACC 8; (2015) 36 ILJ 1423 (CC) at para [35]; Road Traffic Management Corporation v Tasima (Pty) Ltd; Tasima (Pty) Ltd v Road Traffic Management Corporation [2020] ZACC 21; (2020) 41 ILJ 2349 (CC) (Tasima) at para [33].

[8] Tasima supra at para [33].

[9] [2011] ZACC 31; (2011) 32 ILJ 2861 (CC). In paras [43] to [46], the Constitutional Court stated as follows: '[43] The text of section 197(2) makes it plain that its application is dependent on the existence of a transfer. It says if a transfer contemplated in the section takes place, the legal consequences it specifies will be activated. For the consequences to be triggered, a business must be transferred as a going concern. Once a transfer of this kind occurs, it automatically carries with it all contracts of employment that existed immediately before the transfer took place. The basket of what is transferred consists of the business and employment contracts. This simultaneous transfer of business and contracts of employment does not require any declaration by a court. The employment contracts are automatically transferred together with

the business. The person to whom the business is transferred replaces the employer in terms of those contracts and assumes all

obligations of the previous employer. He or she also acquires the contractual rights of the previous employer. [44] It must be stressed that the key event which brings section 197 into play is the transfer of business as a going concern. The question whether the section applies to a particular case cannot be determined, as the Supreme Court of Appeal did, with reference to the label of the transaction effecting transfer. The section does not cite transactions to which it applies. Nor does it refer to any labels. Instead, its application must always be determined with reference to three requisites, namely, business, transfer and going concern. Business [45] As stated earlier the section would apply to any business provided that the other requirements are met. The aim is to cast the net as wide as possible. Transfer [46] For the section to apply the business must have changed hands, whether through a sale or other transaction that places the business in question in different hands. Thus the business must have moved from one person to the other. The breadth of the transfer contemplated in the section is consistent with the wide scope it is intended to cover. Therefore, confining transfers to those effected by the old employer is at odds with the clear scheme of the section.'

[9] [2011] ZACC 31; (2011) 32 ILJ 2861 (CC).

In paras [43] to [46], the Constitutional Court stated as follows:

'[43] The text of section 197(2) makes it plain that its application is dependent on the existence of a transfer. It says if a transfer contemplated in the section takes place, the legal consequences it specifies will be activated. For the consequences to be triggered, a business must be transferred as a going concern. Once a transfer of this kind occurs, it automatically carries with it all contracts of employment that existed immediately before the transfer took place. The basket of what is transferred consists of the business and employment contracts. This simultaneous transfer of business and contracts of employment does not require any declaration by a court. The employment contracts are automatically transferred together with

the business. The person to whom the business is transferred replaces the employer in terms of those contracts and assumes all

obligations of the previous employer. He or she also acquires the contractual rights of the previous employer.

[44] It must be stressed that the key event which brings section 197 into play is the transfer of business as a going concern. The question whether the section applies to a particular case cannot be determined, as the Supreme Court of Appeal did, with reference to the label of the transaction effecting transfer. The section does not cite transactions to which it applies. Nor does it refer to any labels. Instead, its application must always be determined with reference to three requisites, namely, business, transfer and going concern.

#### Business

[45] As stated earlier the section would apply to any business provided that the other requirements are met. The aim is to cast the net as wide as possible.

#### Transfer

[46] For the section to apply the business must have changed hands, whether through a sale or other transaction that places the business in question in different hands. Thus the business must have moved from one person to the other. The breadth of the transfer contemplated in the section is consistent with the wide scope it is intended to cover. Therefore, confining transfers to those effected by the old employer is at odds with the clear scheme of the section.'

[10] [2002] ZACC 27; 2003 (3) SA 1 (CC) at para [56].

[11] [2016] ZACC 37; (2017) 38 ILJ 295 (CC).

[12] Tasima at para [39].

[13] Tasima supra at para [85].

[14] See: Aviation Union.

[15] Tasima supra at para [60].

[16]

[2011] ZALCJHB 116; [2012] 4 BLLR 385 (LC) at para [25].

[17] NEHAWU, supra.

[18] Ibid at para [56].

[19] Tasima supra at para [102].

[20] Annexure "GJW 11" to the answering affidavit on p005-62.

[21]

[2023] ZALAC 10; (2023) 44 ILJ 1906 (LAC).

[22] (J2716/2016) [2016] ZALC JHB 523 (5 December 2016) at para [32].

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Prepared on 11 October 2026 · Esheria