EMPLOYMENT

Collision on the Section 197 Highway

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Road Traffic Management Corporation v Tasima (Pty) Limited; Tasima (Pty) Limited v Road Traffic Management Corporation [2020] ZACC 21.

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The Constitutional Court had the occasion to once again interpret and apply section 197 of the Labour Relations Act No.66 of 1995 ("LRA"), to a certain set of complex facts.

It is apposite to start by setting out the contentious provisions of the LRA. Section 197(1) provides that:

"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."*

The consequence of section 197 is that all employment contracts which existed immediately prior to the transfer are automatically transferred to the new employer. This secures an employee's continuity of employment and preserves all rights and obligations between the employer and employee which existed prior to the transfer.

In this article, we discuss the divergent interpretations ascribed to section 197 by the majority and minority judgments in the above matter ("*Tasima*"). Thereafter, we offer our view as to which interpretation is consonant with the facts that were before the Court.

Briefly stated, the facts of the matter are that Tasima (Pty) Limited ("Tasima") was awarded a contract by the Department of Transport ("the Department") to render services related to designing, developing and maintaining a system known as eNaTIS. This is a system which connects the Department to various licensing institutions, vehicle manufacturers, banks and the South African Police Service. The system further enables the Department to perform its regulatory function of driver, learner and vehicle licensing, as well as vehicle roadworthiness and the general implementation of road traffic laws.

As such, Tasima worked on the system known as the National Traffic Information System ("NaTIS"), and upgraded it to produce what is now referred to as the eNaTIS. The service contract known as the Turnkey Agreement was for an initial period of five years, after which the product thereof (eNaTIS), would be migrated to the Road Traffic Management Corporation ("RTMC") in accordance with a Migration Plan. Tasima was paid by the Department for the services it provided under the aforementioned contract.

The five year period elapsed, however the service contract was extended albeit unlawfully. This led to litigation between the parties which resulted in a decision commonly referred to as *Tasima I*, wherein the Court ordered that the eNaTIS be migrated to the Department. This was held to constitute a section 197 transfer. As such, subsequent litigation which hinged on whether the migration of the eNaTIS to the Department constituted a section 197 transfer transpired and eventually reached the Constitutional Court on appeal.

The majority judgment, written by Theron J, dismissed the appeal and held that the eNaTIS and related services were transferred to the RTMC in terms of section 197. In doing so, the majority stated that the decision in *Tasima I* created new rights and obligations whereby the eNaTIS had to be transferred from Tasima to the RTMC. In other words, that decision was the legal *causa* of the transfer.

The minority judgment, written by Jafta J, upheld the appeal and held that no transfer in terms of section 197 had occurred. The reasons thereof were that the supply of services to the public, which is what the eNaTIS enabled, did not constitute Tasima's business. Instead, Tasima's business comprised the designing, developing and maintaining of information systems, of which the eNaTIS was one such system. As such, that business was never transferred from Tasima to the Department.

Reliance was placed by both judgments on various cases which included the following:

> *– Aviation Union South Africa and Another v SAA (Pty) Ltd and Others [2011] ZACC 31 ("Aviation Union");*
>
> *– City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and Others [2015 ZACC 9 ("City Power"); and*
>
> *– Rural Maintenance (Pty) Ltd and Another v Maluti-A-Phofung Local Municipality [2016] ZACC 37 ("Rural Maintenance").*

Aviation Union dealt with the termination of an outsourcing agreement between SAA and a company called LGM. A tender had been awarded to LGM whereby it took over the facilities management operations of SAA. The Court held that section 197 involves a factual inquiry which is determined by reference to the objective facts of each case. As such, the Court considered the fact that LGM ceased to have access to and control of the assets and amenities it needed to conduct the facilities management operations upon termination of the agreement by SAA. In that regard, it held that a section 197 transfer had taken place.

The case of *City Power* dealt with the outsourcing of electrical services by City Power, a municipal entity. Following a public tender process, Grinpal, a private company, was appointed to render electrical services to the residents of Alexandra. This agreement was terminated some years later by City Power and upon termination, City Power took over Grinpal's infrastructure to render the electrical services until a new service provider was appointed. In a unanimous judgment, the Constitutional Court adopted a test developed by *NEHAWU v University of Cape Town and Others* [2002] ZACC 27 ("*NEHAWU*") to hold that City Power had taken over an "as is" business with all its complex network infrastructure, assets, know-how, and technology required for the provision of the related services. As such, a section 197 transfer had occurred. The relevant portion of *NEHAWU* reads as follows:

> *"[56] In deciding whether a business has been transferred as a going concern, regard must be had to the substance and not the form of the transaction. A number of factors will be relevant to the question whether a transfer of a business as a going concern has occurred, such as the transfer or otherwise of assets both tangible and intangible, whether or not workers are taken over by the new employer, whether customers are transferred and whether or not the same business is being carried on by the new employer. What must be stressed is that this list of factors is not exhaustive and that none of them is decisive individually."*

The Court in *Rural Maintenance* dismissed the appeal on the basis of what was transferred not being an "as is" business. The Court noted that it was faced with a "half hearted return of certain components of Rural's business", because certain equipment that constituted the necessary means to perform the work in question was not transferred to the Municipality. In that regard, the Court held as follows:

> *"[37] The assets that Rural did not transfer back to the Municipality were essential to the profitability and operation of the business. Without these crucial assets, the Municipality could not have carried on the business without any major difficulties."*

Considering the above case law and the facts of the present matter, we demonstrate why, in our view, the migration of the eNaTIS from Tasima to the RTMC did not constitute a transfer in terms of section 197 of the LRA.

Taking *NEHAWU's* "snapshot" test adopted by the Court in *City Power*, there was no transfer of assets, customers and/or employees from Tasima to the RTMC in the present case. Furthermore, the RTMC did not carry on the same business as Tasima. Rather, Tasima's business, as correctly put by the minority judgment, comprised the designing, developing and maintaining of information systems. Therefore, the RTMC was not assuming Tasima's business but rather a product that came as a result of Tasima's business.

This takes us to the Turnkey Agreement which was declared invalid and set aside. That setting aside constituted a termination of a service contract which is different from the transfer of a business as a going concern. As such, Tasima retained its business. This accords with the Court in *Aviation Union*, where it was stated that the termination of a service contract and subsequent award of it to a third party does not, in itself, constitute a transfer in terms of section 197. In such an instance, the service provider loses the contract but retains its business.

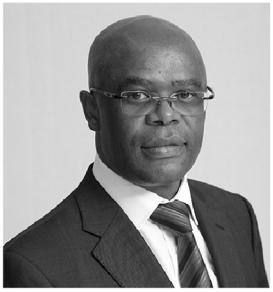
We do not agree with the majority when it says that the RTMC's concession that the eNaTIS constituted Tasima's sole business means that it must be accepted as such. A concession by the RTMC cannot change the fact that Tasima's business did not include the supply of services to the public. To take the example used by Jafta J, Cash Paymaster Services ("CPS") was responsible for effecting social grants on behalf of the South African Social Security Agency ("SASSA"). However, the payment of social grants was never considered to be CPS' business. Equally so, in operating the eNaTIS and performing some of the Department's functions, Tasima cannot be said to have assumed those functions as its business.

Given that Tasima's business was not transferred in terms of section 197, the employment obligations remained with Tasima upon termination of the Turnkey Agreement. This reasoning is drawn from the decision in *Rural Maintenance*, where the Court held that the termination of a service contract may literally mean only a termination of the business, and not its transfer. In such an instance, the employment obligations remain that of the erstwhile service provider under section 189 of the LRA.

In light of the above, we are of the view that the order of the Court in *Tasima I* merely gave effect to the logical consequence of the Turnkey Agreement. That consequence was the migration of the eNaTIS to the RTMC in terms of the Migration Plan which never contemplated the transfer of a business as a going concern. In so doing, Tasima was not transferring its business of designing, developing and maintaining information systems, but rather a redeveloped system which it had operated and maintained on behalf of the Department for a service fee.

What is clear from this case is that the application of the principles pertaining to section 197 of the LRA remains fluid and dependent on the objective facts of each case. No hard and fast method of interpreting section 197 has been developed and it remains unlikely that such a development will emerge from our jurisprudence anytime soon. As such, the question of section 197 is far from being settled.

What the decision of the majority in this case does is to add difficulty to the interpretation of section 197. Firstly, there's the issue of the legal *causa* of a transfer which is a concept that finds no place in the provisions of section 197. As such, this seeks to add a further requirement which is that there should be a legal *causa* before a transfer in terms of section 197 can take place. We respectfully disagree with this view for the simple reason that section 197 does not make provision for such a requirement. The other issue of concern is the viewing of a product (eNaTIS) as a business. We moved from the assumption that the eNaTIS is a business for all intents and purposes. However, we still hold the view that on the facts, the eNaTIS did not constitute a business for the reason that it was a product which was redesigned and developed for the Department's use. The last issue is the difficulty such a precedent presents for companies and government to enter into Turnkey Agreements. We do not align with the thinking that such arrangements would normally involve one entity assuming the business of the other. By their nature, Turnkey Agreements are meant to allow the client of a contractor to receive a complete and developed facility or system so that it is ready for use when delivered. As Jafta J put it, this enables the recipient or user to simply "turn a key" to operate the developed system. In this case, that system is the eNaTIS which makes it clear that same cannot be regarded as a business. In any event, business or not there was no transfer in terms of section 197.



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