



EMPLOYMENT

Navigating Section 197 in Public Service contracts: Lessons from the King Cetshwayo District Municipality case

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Introduction

ISSUE

In the case of *King Cetshwayo District Municipality v Water and Sanitation Services South Africa (Pty) Ltd and others* the Labour Appeal Court (“**LAC**”) had to determine whether there had been a transfer of a business in terms of section 197 of the Labour Relations Act 66 of 1995, as amended (the “**LRA**”). This after the Labour Court (“**LC**”) found that there had been a transfer.

FACTS

For the period 2003 to 2015, Water and Sanitation Services South Africa (Pty) Ltd (“**WSSA**”) won three successive tenders to manage, operate and maintain water and wastewater treatment facilities and related distribution systems for the Municipality. During this time the Municipality allowed WSSA to use its assets in carrying out the service. Following the conclusion of the

third tender, the Municipality and WSSA entered into a service level agreement (“SLA”), which was renewed from time to time. Before the final renewal WSSA brought to the attention of the Municipality that in terms of the Key Labour Principle clause in the SLA, the employees would transfer either to the Municipality or to the service provider who took over the service provision if they could not redeploy their employees elsewhere. This would, in the opinion of WSSA, be a transfer of a business in terms of section 197.

The Municipality argued that WSSA was attempting to avoid its financial obligations by transferring the employees to it instead of undergoing the retrenchment process. It further argued that the WSSA failed to define the nature of the business transferred and that instead there was merely a termination of a non-exclusive right of use since ownership of the assets had always vested with the Municipality. In addition, it argued that no employees or customers were taken over by the Municipality and that certain assets needed to provide the services had not been transferred. In summary, WSSA had only provided a service that terminated when the SLA expired and finding otherwise would establish a precedent where the termination of every government contract leads to a section 197 transfer.

WSSA denied that the termination was a mere cancellation of the service contract. For this contention it relied on *Aviation Union of South Africa and Another v SAA (Pty) Ltd and Others*,^[1] where the Constitutional Court held that where assets required to perform a service are removed from the service provider, the business transfers back to the holder of the assets. WSSA argued that the employees were not central to the business, so their non-transfer to the Municipality was irrelevant to the applicability of section 197, but the agreement with the Municipality suggested that section 197 did apply.

FINDINGS

The LC ruled that the identity of the entity receiving the business was irrelevant as long as it could be an employer, and the business's nature should remain the same post transfer. The Court also stated that WSSA's motive was irrelevant, as section 197's application was a legal matter. The LC found that assets like boreholes, pipes, and reservoirs, which WSSA used and returned to the Municipality, were essential to providing bulk water services. Thus, their return was considered a business transfer.

For section 197 to apply, three factual elements must be present: a business, a transfer of that business, and the transfer occurring as a “going concern.” The LAC agreed with the LC that the termination of the SLA was the event that triggered the potential application of section 197. The LAC ruled that providing bulk water services qualified as a business and referred to *Road Traffic Management Corporation v Tasima*,^[2] which emphasised that the nature of the business, whether asset reliant or labour intensive, plays a key role in determining if the transfer is a going concern. The LAC ruled that the absence of employee transfer was irrelevant in this case because the business was asset reliant.

The LAC rejected the Municipality's argument that all government tenders would automatically lead to Section 197 transfers. Instead each case should be assessed based on the specific nature of the business or service being provided. In this case, the Municipality was aware that if WSSA ceased providing services, it or another service provider would take over. The Municipality's argument that the failure to transfer certain assets meant the SLA merely ended and did not result in a transfer was dismissed. The court determined that the assets not transferred were not core to providing the service and the overall business continued in a similar form. The court concluded that all three requirements for a section 197 transfer were met, confirming that the business was transferred as a going concern to the Municipality.

CONCLUSION

Whether section 197 applies is a matter of fact and is specific to the facts of each case. Where a business is heavily asset reliant and those assets are transferred, or returned by an outsourcing company, it is likely that section 197 will apply regardless of whether or not employees are transferred. It is thus important to understand what the consequences of outsourcing assets to a party providing services on your behalf will be.

^[1] 2012 (1) SA 321 (CC).

^[2] 2021 (1) SA 589 (CC).



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