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EMPLOYMENT

The requirements for the transfer of a business as a going concern

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ISSUE

What is the proper test for determining whether a transfer of a business as a going concern has occurred?

COURT'S DECISION

In the case of *Rural Maintenance (Pty) Ltd v Maluti-A-Phofung Local Municipality* [2016] ZACC 37, the Court had to consider whether there had been a transfer of a business as a going concern.

The Maluti-A-Phofung Local Municipality ('the Municipality') was found to have a constitutionally legislated duty to provide services to its residents, including the supply of electricity. The Municipality however had neglected this duty and allowed the electricity services to fall into disrepair in 2011. The then Municipal manager then entered into an Electricity Management Contract ('EMC') with Rural Maintenance (Pty) Ltd ('Rural Maintenance'). In terms thereof Rural Maintenance would manage the municipal electricity distribution network for a period of 25 years, after which the Municipality would be reinstated as the supplier of electricity. The EMC provided that 16 employees were transferred in terms of section 197 of the LRA by the Municipality to Rural Maintenance.

Rural Maintenance started performing its duties on 1 September 2011. During this period Rural Maintenance incurred significant expenditure amounting to approximately R96 000 000. They also expanded the workforce from the initial 16 employees to 127 employees. In August 2013, the Municipality informed Rural Maintenance that it considered the EMC to be null and void because at the time of entering into the contract, the municipal manager did not have the requisite authority to conclude the EMC. Rural Maintenance disputed this but nonetheless regarded such conduct as a repudiation which they accepted.

Rural Maintenance then sought a declaratory order that there had been a transfer of the business as a going concern (back) to the Municipality. As a consequence the 127 employees should be transferred to Municipality. The Labour Court held that a transfer had occurred. However on appeal the Labour Appeal Court ('LAC') held that no such transfer had occurred.

At the Constitutional Court, Rural Maintenance argued, among others, that the LAC had failed to apply the proper test for determining whether there had been a section 197 transfer and, in doing so, had created a new test.

Section 197 of the LRA provides that the automatic transfer of the contracts of employment of employees, from the transferor of the business to the transferee, takes effect only if a *business* is transferred from one employer to another *as a going concern*.

Section 197(1) also provides that –

- "Business" includes the whole or a part of any business, trade, undertaking or service.
- "Transfer" means the transfer of a business by one employer ("the old employer") to another employer ("the new employer") as a going concern.

The majority of Constitutional Court Justices found that the LAC had *not* applied a new test. Rather they found that the meaning of "service" in section 197(1)(a) refers to the business that supplies the service, and not the service itself.

The Constitutional Court also considered the test formulated in *NEHAWU v University of Cape Town* [2002] ZACC 27, which was subsequently followed in *Aviation Union of South Africa v South African Airways (Pty) Ltd* [2011] ZACC 39 and *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd* [2015] ZACC 8. This approach took account of a non-exhaustive list of factors to determine whether a transfer of a business as a going concern had occurred. These factors included "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."

When the parties entered into the EMC, certain assets were transferred from the Municipality to Rural Maintenance. Rural Maintenance then transferred only some of the assets back to the Municipality. Some of those assets which were not transferred back were essential to a number of employees performing their jobs. Rural Maintenance argued that these assets were merely peripheral to the business. However, the Constitutional Court held that "without the transfer of the means to do the work they did as a part of Rural's business, there could be no transfer of the business to the Municipality as a going concern."

In essence, although the service of providing electricity had reverted to the Municipality, the business which rendered that service had not transferred.

In conclusion, the majority judgment held that the test for determining whether a transfer has taken place is whether, after the transfer, the business retains the identity it had before the transfer.

The Constitutional Court dismissed the Rural Maintenance's application with costs.

IMPORTANCE OF THIS CASE

The Constitutional Court re-iterated what is required for a transfer of a business as a going concern to take place in terms of section 197. The definition of "business" in section 197(1) of the LRA includes a service, therefore it is not enough for the goods or services of a company to be transferred, but rather what is required is that the business that supplies the service must be transferred.

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