THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 1142/15

In the matter between:

SATAWU	First Applicant
PUTCO (PTY) LTD	Second Applicant
And	
MEC: GAUTENG FOR ROADS & TRANSPORT	First Respondent
AUTOPAX PASSENGER SERVICES (SOC) LTD	Second Respondent
MINISTER OF TRANSPORT	Third Respondent
TAWUSA	Fourth Respondent

Heard: 2 July 2015

Delivered: 15 July 2015

Summary: s 197 of the LRA and changes in service providers

JUDGMENT

WHITCHER J

Introduction

[1] The issue in this application is whether section 197 of the LRA applies to a change in service providers for the provision of bus operating services. Autopax ("the respondent") opposes the application.

[2] With effect from 1 July 2015, Autopax replaced Putco as the bus operator on eight subsidised bus routes operated by the GDRT. This further to the conclusion of a service provision contract between the GDRT[1] and Autopax on 29 June 2015 ('the contract').

[3] The applicants contend that Autopax has taken over from Putco, the contractual right to perform the services (and government subsidy linked thereto), the eight sets of bus routes, the existing bus timetables and fare structure, 25 000 passengers (i.e. customers) who use the bus routes on a daily basis, the existing bus stops and terminals, one of Putco's bus depots (Putco has leased it to Autopax), a workshop (previously leased from a third party by Putco and now leased from the third party by Autopax) and some bus drivers (albeit on fixed-term contracts and lesser terms and conditions of service). The respondent disputes this contention.

[4] It is common cause that Autopax has not taken over from Putco, the busses used by Putco, certain other assets in the form of diesel stock, fuel storage tanks and dispensing equipment, a standby plant, compressor and mobile ticket office, certain premises used by Putco situated in Everton and Kathorus and the balance of the affected employees.

[1] Gauteng Department of Roads and Transport.

[5] It is common cause that the services rendered by Autopax with effect from 1 July 2015 were rendered on a substantially uninterrupted basis.

Case law

[6] The highest-ranking judgment on section 197 and outsourcing (or insourcing) is the Constitutional Court's judgment in *Aviation*.[2] Further to the Constitutional Court's judgment in *Aviation*, the LAC has handed down a trilogy of judgments dealing with section 197 in the context of outsourcing (or insourcing) – *City Power (LAC)*[3] (which was upheld on appeal by the Constitutional Court[4]), *Unitrans (LAC)*[5] (which upheld the judgment of Van Niekerk J in *Unitrans (LC)*[6]) and *MTN*.[7] The Constitutional Court's judgment in *City Power*, the judgment of the EAT[8] in *Numast*[9] and the judgment in *Sodexho* (adopted in *Unitrans*) are also important for present purposes. Predictably each side emphasized different aspects of these judgments.

[2] *Aviation Union of SA & another v SA Airways (Pty) Ltd & others* (2011) 32 *ILJ* 2861 (CC).

[3] *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd & others* (2014) 35 *ILJ* 2757 (LAC) ('*City Power (LAC)*').

[4] *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd & others* (2015) 36 *ILJ* 1423 (CC) ('*City Power (CC)'*).

[5] *TMS Group Industrial Services (Pty) Ltd t/a Vericon v Unitrans Supply Chain Solutions (Pty) Ltd & others* (2015) 36 *ILJ* 197 (LAC) ('*Unitrans (LAC)*').

[6] *Unitrans Supply Chain Solutions (Pty) Ltd & another v Nampak Glass (Pty) Ltd & others* (2014) 35 *ILJ* 2888 (LC) ('*Unitrans (LC)*').

[7] *Communication Workers Union and Others v Mobile Telephone Networks (Pty) Ltd and Another* (DA10/13) [2015] ZALAC 8 (21 April 2015) ('*MTN*').

[8] Employment Appeal Tribunal. The EAT is the UK equivalent of our LAC.

[9] *Numast and another v P&O Scottish Ferries and another* [2005] ICR 1270 (EAT).

The applicants' submissions on the case law

[7] In *City Power (LAC)*, having quoted the Constitutional Court's finding in *UCT* on the meaning of a 'going concern',[10] Davis JA found as follows:

> 'In essence the approach adopted in [*UCT*] follows that of the European Court of Justice in the application of the Business Transfer Directive (2001/23/EC)[11] which is applicable in the European Union, and dictates that a transfer must relate to an autonomous economic entity (defined to mean an organized group of persons and assets facilitating the pursuit of an economic activity that promotes a specific objective). In turn this involves a determination whether that entity retains its identity after the transfer; that is, the transferor must carry on the same or similar activities with the personnel and/or the business assets without substantial interruption.'[12] (Emphasis added.)

[8] The applicants refer to this as the 'economic entity approach' and state that Davis JA went on in City Power (LAC) to adopt this approach in finding:

> 'The transfer of a going concern does not mean that, upon the termination of a service contract by one party and a subsequent appointment of another service provider, a transfer of the contract … sufficient to satisfy the requirements of s 197 has been effected. The question is whether the

[10] *NEHAWU v University of Cape Town* (2003) 24 *ILJ* 95 (CC) ('*UCT*') at para 56 (cited with approval in *SAA* at para 50): '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. They must all be considered in the overall assessment and therefore should not be considered in isolation.'

[11] The key provision is article 1(1)(b) of the Business Transfer Directive, which provides that 'there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary' (emphasis added). The two key judgments by the ECJ on this issue are *Spijkers v Gebroerders Benedik Abattoir* [1986] ECR 1119 (ECJ) and *Suzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice* [1997] IRLR 255 (ECJ).

[12] *City Power (LAC)* at para 23.

activities conducted by a party such as [the old service provider], constitute a defined set of activities which represents an identifiable business undertaking so that when a termination of an agreement between [the old service provider] and [the client] takes place, it can be said that this set of activities, which constitutes a discrete business undertaking has now been taken over by another party.'[13] (Emphasis added.)

[9] In *Unitrans (LC)*, Van Niekerk J held:

'In short: the warehousing service provided by the [old service provider] to [the client] constituted an economic entity, or, put another way, an organised grouping of resources. This comprises, at least, the contractual right to perform the [warehousing] services, the assets owned by [the client] but used by the affected employees, the specific activities performed by the affected employees and the employees themselves. This economic entity constitutes a service for the purposes of s 197(1).'[14] (Emphasis added.)

[10] Having found that the service provided by the old service provider constituted an economic entity (made up of various components), Van Niekerk J went on to consider whether that entity retained its identity after the transfer, such as to trigger section 197:

'To the extent that the contractual right to provide warehousing services now vests in [the new service provider], the same assets are used to provide those services and the activities conducted at [the client's] behest are substantially the same as those performed by the [old service provider] prior to 1 February, the business performed by the [old service provider] has transferred as a going concern to the new service provider]. To use the language of the warehousing agreement, the infrastructure that passed to the [old service provider] when it assumed obligations in terms of the contract reverted to [the

[13] *City Power (LAC)* at para 24.

[14] *Unitrans (LC)* at para 29.

client], and has been made over to [the new service provider].'[15] (Emphasis added.)

[11] Section 197 was found to apply despite the fact that no physical assets or employees transferred from the old to the new service provider, with the transfer of the right of use of the client's assets from the old to the new service provider having been sufficient to trigger section 197. As Van Niekerk J put it, although no physical assets transferred, the 'comprehensive right of use of the infrastructure and the assumption of control over that infrastructure [were] the key triggers' to section 197 applying (on the facts).[16] For this, Van Niekerk J relied on two important judgments of the ECJ.[17]

[12] In *Unitrans (LAC)*, the LAC upheld the judgment of Van Niekerk J. As appears from the following passage, the LAC (per Davis JA) again followed the economic entity approach:

- 'In this case, the service which was provided was that of warehousing. It was initially provided to [the client] by [the old service provider]. As in the case of *Sodhexo* … the warehouse operation service constituted a discrete business. At the date of the inception of its agreement with [the client], the [new service provider] assumed the right to use [the client's] assets and infrastructure in order to continue to provide the same service to [the client] as had previously been provided by the [old service provider].'[18] (Emphasis added.)

- 'The necessary facilities were handed over to the [new service provider] in a state in which [it] was able to carry on the same activity which had previously been conducted by [the old service provider]. It performed these services on the premises of [the client]. It employed [the client's] computer

[15] *Unitrans (LC)* at para 30.

[16] *Unitrans (LC)* at para 30.

[17] *Carlito Abler v Sodhexo MN Catering Gesellshaft GmbH* [2005] IRLR 168 (ECJ) (in finding that a transfer of a right of use can trigger section 197); and *Allen & others Amalgamated Construction Co Ltd* [2000] IRLR 119 (ECJ) (in finding that a transfer of physical assets is not necessarily required in order for section 197 to apply).

[18] *Unitrans (LAC)* at para 30.

system and other equipment and carried on the same activity of warehousing…This evidence justifies the conclusion that there was a transfer for a business as a going concern from the old employer to the new employer.'[19] (Emphasis added.)

- 'For all the reasons set out in this judgment, the service provided by [the old service provider] and now by [the new service provider] in terms of the warehousing agreement, which was entered into between [the old service provider] and [the client] and the same service which is now provided to [the client] by the [new service provider], constitutes a business sufficiently demarcated to justify the conclusion that when this business was taken over by the [new service provider] … there was a transfer of a business as [a] going concern.'[20] (Emphasis added.)

[13] Earlier on in its judgment, the LAC confirmed that our courts have been influenced by the ECJ's judgments on the Business Transfer Directive (and went on to uphold Van Niekerk J's reliance on its judgments).[21] Davis JA also made reference to TUPE,[22] and with reference to an English law text, explained that, under TUPE, a SPC[23] triggers a business transfer (akin to section 197) and that a SPC occurs:

> '… on a change (other than on a one-off or short-term basis or in relation to the supply of goods) to the identity of the person who has the conduct of activities to which an organised grouping of employees has principally been dedicated for a particular client.'[24] (Emphasis added.)

[19] *Unitrans (LAC)* at para 32.

[20] *Unitrans (LAC)* at para 36.

[21] *Unitrans (LAC)* at para 21.

[22] Transfer of Undertakings (Protection of Employment) Regulations 2006. TUPE implemented into UK law the requirements of the Business Transfer Directive.

[23] Service provision change.

[24] *Unitrans (LAC)* at para 22, quoting Wynn-Evans *The Law of TUPE Transfers* (2013) at 60-61.

[14] As appears from the passages from its judgment quoted above, the LAC applied section 197 in the manner in which a SPC transfer occurs under TUPE. This to the extent that the LAC found that where the service provided by the old service provider constituted an economic entity (comprising an organised grouping of employees) and where the new service provider conducts the same activities as the old service provider did for the same client, section 197 is triggered.

[15] In *MTN,* the LAC (per Davis JA) followed *City Power (LAC)*, in finding as follows:

> 'As this Court remarked in *City Power …* a court is required to examine the substance of the agreement to determine whether an entity retains its identity after a transfer so that it can be concluded whether the transferor carries on the same or similar activities with the same personnel and/or business assets without substantial interruption. As the court stated:
>
> "[t]he question is whether the activities conducted by a party such as first respondent [i.e. the old service provider] constitute a defined set of activities which represents an identifiable business undertaking so that when a termination of an agreement between first respondent and appellant takes place, it can be said that this set of activities, which constitutes a discrete business undertaking has now been taken over by another party."[25] (Emphasis added.)

[16] The LAC went on to adopt an 'economic entity' approach in the following terms:

> 'Returning to the law, the application of s197 depends upon a finely grained analysis of the facts of a particular case. Such an analysis will produce an answer to the key question, whether in substance a discrete business operation had been transferred from entity A to B. …

[25] *MTN* at para 13.

> In my view, the evidence which was provided to the court *a quo* justifies an answer that the second respondent was operating a call centre as a discrete business. The fact that it was its only business is hardly material to the case. In terms of clauses 7 and 8 of the agreement, second respondent could not, without permission of first respondent, operate a call centre for another cell phone company. It was therefore not surprising that, in relation to the running of a call centre business for a cell phone company, second respondent had but one client. Outside of a cell phone company, it was possible for second respondent to create another business. The fact that it had but one client and operated a discrete business for this client should not detract from a conclusion that it was operating a call centre business which constituted a discrete business, sufficient to fall within the scope of s197 of the LRA.'[26] (Emphasis added.)

[17] This judgment is the high water mark of the LAC's jurisprudence adopting the economic entity approach. As far as the LAC was concerned, the fact that the old service provider used to operate a discrete business (a call centre) and that it was insourced and then operated by MTN was enough to trigger section 197. This despite the fact that there was no transfer of assets from the old service provider to MTN and that the bulk of the work done in the call centre had been done by agents (sourced from a TES by the old service provider), who had not transferred to MTN.

[18] From an overall perspective, the state of our law is well captured by PAK le Roux in a recent article on outsourcing and section 197:[27]

> 'When one considers the above decisions it seems that most outsourcing transactions, and the second generation transfers that flow therefrom, could fall within the ambit of s 197. The fact that no assets transfer and that no provision is made for the transfer of employees is of less importance. The Labour Court decision in the *Unitrans* decision found that a going concern transfer could take place where the right to use (as opposed to ownership of) the "infrastructural assets" of the client transferred from one contractor to

[26] *MTN* at paras 20-21.

[27] PAK le Roux 'Outsourcing and s 197 of the LRA' 2015 (24) 7 *Contemporary Labour Law* 61 at 70.

another. The emphasis placed on the activities carried on also support such an approach.' (Emphasis added.)

[19] In summary, on the line of judgments discussed above, where there is a change in service providers, section 197 will be triggered in circumstances where:

19.1. the old service provider was operating a discrete business (i.e. an economic entity) *vis-à-vis* the client;

19.2. that entity retains its identity after the change in service providers, which will be the case if the new service provider (i) carries on the same or similar activities (ii) with the personnel and / or the business assets used by the old service provider (iii) without substantial interruption; and

19.3. business assets in this context has a wide meaning to include, for example, the right of use of the client's assets (for example, a warehouse).

[20] The judgment of the EAT[28] in *Numast*[29] is important for present purposes because the facts are broadly analogous to the present matter. The case involved a change in service providers in the transport industry (the provision of ferry services in Scotland) where there was no transfer of the principal assets, i.e. the ferries.

[21] In finding that there was, nevertheless, a transfer under TUPE, the EAT endorsed these findings by the Employment Tribunal:

'The Tribunal found that it was incorrect to say in the present case that *no* significant assets were transferred, even if the ships were not. They found that there was a strong correlation between the various premises and piers

[28] Employment Appeal Tribunal. The EAT is the UK equivalent of our LAC.

[29] *Numast and another v P&O Scottish Ferries and another* [2005] ICR 1270 (EAT).

occupied and used respectively by POSF and Northlink at the various ports. This obviously came about by means of the termination of leases or licences which had been granted by the various port or harbour authorities to POSF, and the subsequent granting of fresh leases or licences for practically the same properties to Northlink. These included not merely buildings and yards but berths and piers. They held that the numerous premises and piers at the various ports were essential and integral to the operation of the ferry service, as conducted by POSF and Northlink, and constituted significant tangible assets which were transferred. They noted that no such element was present in *Oy Liikenne*.

Summarising their findings on the matters other than the transfer of tangible assets, they attached importance to the transfer of a significant intangible asset, namely the government subsidy; to the fact that 90% of the seafarers previously working for POSF were taken on by Northlink; and to the fact that passengers who had used the ferries in POSF's time inevitably transferred to Northlink (there being no alternative, other than by air, and none at all if one wished to bring a car). All of these factors pointed in the direction of the transfer of an undertaking.

As to the degree of similarity between the activities carried on before and after the transfer, the Tribunal found on the facts that there was a high degree of similarity. …

The Tribunal's conclusion on this issue was that an observer would conclude that the ferry service to the Northern Isles had continued just as it had done before – no doubt with a number of changes and improvements, but basically continuing the same service. They found that there was retention of identity with the business being continued as a going concern, and accordingly that the undertaking was transferred to Northlink within the meaning of TUPE.'[30] (Emphasis added.)

[22] With reference to the summary of the law set out above, the applicants submit that in the first instance, it is clear that Putco operated a discrete business (i.e. an economic entity) *vis-à-vis* the GDRT in respect of the affected contracts.

[30] *Numast* at paras 29-31 and 33.

This in circumstances where it assembled an organised grouping of resources and employees in order to perform the services under the affected contracts.

[23] They further submit that the economic entity retained its identity after the change in service providers to Autopax, given that Autopax carries on the same activities in the same manner, namely the provision of bus operating services on the eight subsidised bus routes operated by the GDRT, using ex-Putco bus drivers, using business assets used by Putco, namely the eight sets of bus routes, the existing bus time-tables, the existing fare structure, the estimated 25 000 passengers who use the bus routes on a daily basis, the existing bus stops and terminals and Putco's bus depot in Mamelodi and given that the services are to be rendered on a substantially uninterrupted basis.

[24] The applicants submit that Autopax's decision to employ ex-Putco drivers is highly significant, and clearly demonstrates that the relevant economic entity retains its identity in the hands of Autopax. This much is clear from the judgment of the UK Court of Appeal in *RCO*, in which the following was held:[31]

> 'RCO's admitted willingness to take on the workforce by way of re-employment on its terms and conditions, in preference to automatic employment on terms and conditions applicable as a result of a transfer under TUPE, was relevant to the crucial issue of retention of identity. The fact that RCO needed a workforce to operate the contract at Fazakerley; the fact that RCO was willing to re-employ at Fazakerley the workforce employed at Walton; and the fact that the workforce would have been taken on by RCO, if they had accepted RCO's offer to re-employ them on its terms and conditions: all this is relevant evidence pointing to, rather than away from, RCO's own recognition of the reality of the continuity of the entities and the retention of identity.' (Emphasis added.)

[25] The applicants submit that even though there has been no transfer of the primary assets (i.e. the busses), certain other assets in the form of diesel stock, fuel storage tanks and dispensing equipment, a standby plant,

[31] *RCO Support Services v Unison* [2002] IRLR 401 (CA) at para 32. .

compressor and mobile ticket office, certain premises used by Putco situated in Everton and Kathorus and only some of the employees were taken over, this is not a bar to section 197 applying. This is clear from, *inter alia*, *Unitrans (LAC)* and *Numast*.

Findings

[26] Two factual elements are necessary to trigger section 197 of the LRA. The first is that there has been a transfer of business. The second is that the transfer of business was as a 'going concern'.

[27] It is now trite that there does not necessarily have to be evidence of a direct transfer of business, such as through a sale, between a transferor and a transferee for section 197 to apply. In *Aviation,* the Constitutional Court held:

> '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'[32].

[28] While the ways by which a business may change hands and still be covered by section 197 may be broad in scope, 'whether a transfer as contemplated in section 197 has occurred or will occur is a factual question. It must be determined with reference to the objective facts of each case'[33].

[29] Dealing with the termination of service contracts awarded to a third party, the court stated:

> '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

[32] *[2012] 3 BLLR 211(CC)* at para 46
[33] ***Aviation***, supra

> 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.
>
> For a transfer to be established there must be components of the original business which are passed on to the third party. These may be in the form of assets or the taking over of workers who were assigned to provide the service. The taking over of workers may be occasioned by the fact that the transferred workers possess particular skills and expertise necessary for providing the service or the new owner may require the workers simply because it did not have the workforce to do the work. Without the protection afforded by section 197, the new owner with no workers may be exposed to catastrophic consequences, in the event of the workers declining its offer of employment.[34]

[30] The respondents' first challenge is that there can have been no transfer of business at all. Putco has simply surrendered a permit and terminated a contract with the GDRT to transport passengers on a subsidized basis in certain areas. As Putco will continue providing commuter services in other areas within Gauteng, the business, or part of Putco's business in providing subsidized commuter services, is not being transferred.

[31] Put differently, the respondents suggest that Autopax it will be appointed to render a commuter service, and not to continue with the business that Putco was engaged in.

[32] I am unpersuaded by this argument. Section 197 envisages the transfer of a 'part of a business'. In my view, a part could be a geographically defined part. It is no argument against the fact that a transfer of a part of a business has occurred that the transferor continues to trade in the same industry but having vacated a particular area of trade.

[34] *Aviation*, supra, at para 47 and 48

[33] The nature of the vacation of an area of trade is also relevant. Putco is not, in any meaningful sense, free to offer the same service to other clients in the area in question. This business has, albeit indirectly and broadly speaking, passed on to Autopax.

[34] The common business activity performed by Autopax and Putco in a specific geographical area, with merely a date on a contract separating them, indicates to me that sufficient components of Putco's business passed to Autopax for this to constitute a transfer of a business, as defined.

[35] The real issue at stake here, however, is whether there was a transfer of a business as a going concern sufficient to trigger section 197.

[36] In *Aviation*, this is a second, separate question:

> '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.
>
> Consistent with this approach is the fact that the operation of the same business by the transferee is in and of itself not determinative of the question whether a transfer as a going concern has taken place. There must be other indicators that support the conclusion that when a business passed to the new owner, it was transferred as a going concern. These indicators include whether assets, employees or customers were taken over by the new owner.'

[37] The constitutional court cited with approval the view expressed in *NEHAWU v University of Cape Town*[35] that, in deciding whether a business has been

[35] (2003) 24 *ILJ* 95 (CC) at para 56.

transferred as a going concern, the substance of the transaction trumps its form.

[38] The court in *NEHAWU* also specified that the transfer of intangible assets are just as relevant as the transfer of more obvious physical assets in determining disputes of this nature. Naturally, the list of factors is not exhaustive and none of them is individually decisive. The court repeated the well-established evidentiary maxim that factors tending to indicate a transfer of business as a going concern must all be considered in an overall assessment and not in isolation.

[39] The LAC in *MTN* (supra) recently underscored the importance of delving into the facts of each particular case:

> Returning to the law, the application of section 197 depends upon a finely grained analysis of the facts of a particular case. Such an analysis will produce an answer to the key question, whether in substance a discrete business operation had been transferred from entity A to B'.

[40] In *City Power*, the LAC considered the meaning of the term 'going concern'. It found that:

> 'In essence the approach adopted in [*NEHAWU*] follows that of the European Court of Justice in the application of the Business Transfer Directive (2001/23/EC) which is applicable in the European Union, and dictates that a transfer must relate to an autonomous economic entity (defined to mean an organized group of persons and assets facilitating the pursuit of an economic activity that promotes a specific objective). In turn this involves a determination whether that entity retains its identity after the transfer; that is, the transferor must carry on the same or similar activities with the personnel and / or the business assets without substantial interruption.'[36] (Emphasis added.)

[36] *City Power (LAC)* at para 23.

[41] The 'autonomous economic entity' test the applicants' proposed this court apply adds a little depth to the definition of a 'going concern' set out in *Aviation*. For a business to be transferred as a going concern there must be components - whether assets, employees or customers - constituting an autonomous economic entity that are transferred from the original employer and retain their identity in the new employer.

[42] I was also referred to *Numast*[37] where a new service provider operated from the same 'premises and piers' at various ports as an old service provider. These were held, by the United Kingdom equivalent of our LAC, to be essential and integral to the operation of the ferry service and thus constituted significant tangible assets which were transferred.

[43] As it turns out, I do not need to rely on *Numast* to develop our law on the transferability of intangible assets and the retention of the identity of a business after transfer. These issues are exhaustively covered in domestic jurisprudence. What is particularly edifying in *Numast*, however, was the connection implied between how integral to the operation of the new business the components that are transferred from the old business need to be, for the transfer to be as a going concern. The more integral the transferred business components or assets are to the new service provider, the more significant these are in establishing that a business was transferred as a going concern.

[44] It stands to reason. In the sale of a business, the transfer of premises which the new owners do not need to use and will or can easily replace, has less significance in establishing that the transfer of a business as a going concern has happened than if the premises were integral to its further operations.

[45] It is now time to look closely at the substantiation the applicants provide for the claim that there was a transfer of business as a going concern between Putco and Autopax. They contend that the following transfers between the relevant companies have occurred: the contractual right to perform the services (and government subsidy linked thereto); the eight sets of bus routes; the existing

[37] *Numast and another v P&O Scottish Ferries and another* [2005] ICR 1270 (EAT).

bus timetables; the existing fare structure; the 25 000 passengers (i.e. customers) who use the bus routes on a daily basis; the existing bus stops and terminals; Putco's bus depot in Mamelodi; a workshop previously rented from a third party by Putco and now rented by Autopax and some Putco bus drivers (albeit on fixed-term contracts and lesser terms and conditions of service).

[46] Helpfully, the applicants summarise what has not been taken over. This includes: the buses used by Putco to service the 8 routes; assets such as diesel stock, fuel storage tanks and dispensing equipment, a standby plant, compressor and mobile ticket office; premises used by Putco situated in Everton and Kathorus and the balance of the affected employees.

[47] It is common cause that there will be no interruption in the service between the time Putco stops the service and Autopax provides it.

[48] The second list is an important one. It not only contains the type of things that make up the rump of what is classically transferred between businesses when the transfer is of a going concern. It is also a list that starkly exposes the relative tenuousness of the links between Putco and Autopax's businesses set out in the applicants' first list.

[49] As it turns out, Autopax also disputes the factual accuracy of most of the things the applicants say were transferred from the original service provider. Before assessing how significant it is that certain assets or components were taken over by the new service provider so as to establish whether the transfer was as a going concern, these factual disputes must be resolved.

[50] As difficult as it is to do on the papers, determining these factual disputes also disposes of certain of the applicants' arguments. Logically, if an asset or business component cannot be said to be transferred between businesses, directly or via a common client, then the presence of such a competent in the business of the new service provider does establish an identity with the old. There must be some other reason for any similarity in operations; such as the

use of common raw material or infrastructure, compliance with the same law or regulation, or a response to the same market forces.

Transfer of a right to provide a service

[51] Turning to specifics, the applicants submit that, properly construed, the permit to undertake the same service now being provided by Autopax, was an asset in the hands of Putco. The fact that there was no transfer of a permit between Putco and Autopx, but that Autopax acquired a permit from the regulating body (a third party) does not detract from this. In this case what has been transferred is a component of Putco's business which enabled it to perform the self-same services now being rendered by Autopax.

[52] I accept that Putco has given up both its contractual right to provide the service, and the permits necessary to enable it to do so. Autopax has further not taken these over in any legal sense. It is not going to use any residual time remaining on old permits. It has concluded a new agreement with the GDRT and will be issued with new permits. Nevertheless, in substance, there has been a transfer of a right by a common 'client' to perform a general service once performed by the old company to a new service provider. Putco has moreover vacated the area from a business point of view, and the service will be uninterrupted. Further to this, a key and identical feature of both contracts is that the businesses receive a government subsidy to run their operations. These features strengthen the idea that a discrete part of a business has, in substance, been ceded to Autopax.

Bus routes and timetables and fare

[53] The applicants contend that these items facilitate the business and are thus part of the income producing component of the business. The respondent contends that bus routes are established for the convenience of commuters and all subsidised operators are required to use them. I am mindful of the fact that even intangible assets may be relevant in determining whether a transfer of business as a going concern has occurred. However, on the face of it, a

bus route on public roads, determined by a third party, does not seem to be a component of the original business taken over by Autopax.

[54] The same goes for bus timetables. I accept the respondent's argument that departure times are determined by demand, the route length and operational factors, such as traffic. None of these belong to Putco or Autopax. By analogy, the opening and closing times of a new restaurant are hardly assets obtained from the old restaurant. In my view, the fact that bus timetables are the same is not, in the circumstances of this case, a reliable indicator supporting the conclusion that a business has passed to the new service provider as a going concern. The sameness is a function of features extraneous to the transfer.

[55] The respondent states that the fare structure is predetermined, based on the subsidy. They are also not Putco's fares. There is nothing before me to gainsay this. I can see how a confidential price list or discounting structure may constitute a component of a business transferred to a successor. However, the price at which an original owner of a garage sold petrol is hardly transferred to the new owner if he sells fuel at the same price. Common regulations affect certain prices.

25000 Passengers

[56] It is tempting to see the 25000 passengers who use the bus services as a set of individual clients transferred between businesses. However, it is also true that no passengers are required to make use of the bus service. No averment was made that there are existing ticket contracts in place which Autopax must honour. Rather, as contended by the respondent, it stands to reason that some passengers use the service on some days but not on all days. New commuters may use the service and existing ones leave the service because of changes in jobs, circumstances and location. The predictable 25000 commuters who decide on any given day to use the bus service are no more capable of being taken over by the new business as the predictable 10 customers who decide on any given day to buy a cigarette from a corner shop.

[57] Having said that, it is possible, in the most general terms, to take over a base of potential customers, especially in circumstances where demand for a service is high, there are few alternatives for customers, the transferor exits the scene completely and there is little or no interruption in service. I am therefore satisfied that Putco's general customer base was transferred to Autopax.

Use of bus stops and terminals

[58] In deciding the issue of the use of the same bus stops and terminals, I am aware of the ruling in *Unitrans* which dealt with a warehouse service and where this court found section 197 applied despite the fact that no physical assets or employees transferred from the old to the new service provider. Of significance in that case was the transfer of the right of use of the client's assets (the same warehouse, equipment, forklifts, computers, printers, IT systems, furniture used by the old service provider in terms of the warehousing agreement) from the old to the new service provider. This was sufficient to trigger section 197. Van Niekerk J held that, although no physical assets transferred, the 'comprehensive right of use of the infrastructure and the assumption of control over that infrastructure necessary for the purposes of continuing the relevant services [were] the key triggers' to section 197 applying (on the facts).[38]

[59] The LAC confirmed this approach:

> 'The necessary facilities were handed over to the [new service provider] in a state in which [it] was able to carry on the same activity which had previously been conducted by [the old service provider]. It performed these services on the premises of [the client]. It employed [the client's] computer system and other equipment and carried on the same activity of warehousing… This

[38] *Unitrans (LC)* at para 30 and 31.

evidence justifies the conclusion that there was a transfer for a business as a going concern from the old employer to the new employer.'[39]

[60] In reply, the respondent states that the municipality approves the location of bus stops and terminals. They do not belong to Putco or the GDRT and thus cannot be taken over. Factually, there is nothing before me gainsaying this.

[61] The respondent goes on to then argue that the fact that neither the old service provider nor the 'client' owns the asset in question distinguishes this case from *Unitrans*. I disagree. Looking at substance and not form, although bus stops and terminals are assets not owned by the 'client', they do strike me as infrastructure, over which the GDRT can, practically, assign right of use. Autopax can thus gain a measure of delegated operational control and use over these facilities, like Putco earlier had.

Mamelodi depot

[62] Based on *Unitrans* the depot is obviously part of the necessary infrastructure previously used by Putco to render the service in question and Putco has assigned the right of use to Autopax. The respondents, however, argued that in any event the taking over of a single depot out of eight routes carries little, if any weight, in the overall assessment. I return to this issue later on.

Use of some former drivers

[63] Autopax admits using some former drivers of Putco, but contends that this was merely to top up an already existing resource of drivers of Autopax. I note here that in an agreement referred to by the parties as the HOA, Autopax agrees to ensure that 75% of its employees who are to work on the contract will be drawn from the Putco employees who had worked on the 8 routes in question (albeit on fixed-term contracts and lesser terms and conditions of service). However the agreement is conditional on a legal finding that s 197

[39] *Unitrans (LAC)* at para 32.

applies in this case and the applicants in any event dispute the validity of the agreement.

Going Concern

[64] As set out in *NEHAWU*, the factors tending to indicate a transfer of business as a going concern must all be considered in an overall assessment and not in isolation. I might add that, in this assessment, assets that were not transferred may speak as loudly as those that were.

[65] On my analysis, the only assets or components actually transferred between the businesses are the contractual right to perform the business, a general customer base, the right of use of bus stops and terminals, the right to use one depot out of many and the use of some former drivers of Putco to top up Autopax's existing resources. It is not a long list.

[66] For any of the transferred business components to assume significance in establishing the second question of whether the transfer of business was as a going concern, these components should be integral to the operations of Autopax.

[67] In a highly regulated industry, taking over the contractual right to provide a service is a necessary but, on its own, nebulous factor as far as establishing that a going concern has been transferred. The same goes for receipt of a government subsidy. More detail is needed on how the new service provider will carry on its business, so to speak, on top of the contractual right it has gained. In this case, features such as the use of the same bus stops and terminals, which tend to establish identity, compete with features such as that Autopax will use its own busses and mostly its own depots, workshops and employees. The latter features tend to suggest the business transfer was not of 'a going concern'.

[68] Taking over some drivers to top up Autopax's existing resources is not an impressive factor in establishing a transfer of business as a going concern.

The rump of Autopax's drivers are from its existing staff. Sourcing additional drivers from the ranks of former Putco employees seems more a matter of convenience than need.

[69] I have found that the use of the bus stops and terminals are components of the business of the old service provider taken over by the new. However, it is worth mentioning that in *Unitrans,* a transfer of a business as a going concern was found to have occurred not solely because the client's warehouse was available to both old and new service providers in operating their businesses. The LAC additionally noted that:

> 'Appellant was required to make use of the same equipment and IT systems that were previously employed by first respondent including forklifts, computers, printers, a computer system as well as other assets such as furniture.' (Emphasis added)

[70] It thus made sense, when warehousing work was transferred to a new service provider, to talk of a "business sufficiently demarcated to justify the conclusion that when this business was taken over by the [new service provider] … there was a transfer of a business as [a] going concern".'[40]

[71] We do not know for sure what the result would have been in *Unitrans* if the transferrable asset was the right to use the client's warehouse and little else. What is evident is that the court in *Unitrans* had a lot more to go on, such as the required use of the same equipment and computer systems, in reaching its conclusion that the business was transferred from one service provider to another as a going concern. I would suggest that the use of the same equipment and computer system weighed heavily in the court's assessment as well as the fact that this was required by the client. The transfer of these components was integral to the new service provider's future operations.

[72] A few significant factual features distinguish *Numast* from the present matter. The bus stops are, in my view, not akin to the numerous "premises and piers"

[40] *Unitrans (LAC)* at para 36.

at various ports which the court in *Numast* found were "integral to the operation of the ferry service, as conducted by [both service providers]." The use of each individual pier to upload passengers and cargo was granted after a formal licence application to a separate authority. Berths were similarly allocated. This is not, as I understand it, the situation with bus stops and terminals.

[73] It also stands to reason that, as sites where customers (and cargo) are loaded, piers are far fewer, more exclusive and limited real estate than the sides of roads. If, for some reason, any of the individual bus stops were not available to Autopax, I would imagine that new bus stops could be erected and new terminals found with much greater ease than obtaining new piers or berths at ports. I am not suggesting that a bus stop can properly be erected anywhere along a road. I make the observation, which I believe is obvious, that a subsidised commuter bus service in South Africa stands in a qualitatively different relationship to the sites where its customers get on or alight than a Scottish provider of subsidized commuter, cargo and livestock transport. Taking over particular bus stops seems far less integral to the operation of a bus service. It thus follows that the significance of these assets being transferred *in casu* is less indicative of a transfer of a business as a going concern having occurred than in *Numast*.

[74] As an aside, I note the considerable effort expended in *Numast,* in trying to distinguish, not entirely convincingly, the facts of that matter from the European Court of Justice's decision in *Oy Liikenne v Pekka Liskojärvi.*[41] The latter court held that "in a sector such as scheduled public transport by bus, where the tangible assets contribute significantly to the performance of the activity, the absence of a transfer to a significant extent from the old to the new contractor of such assets, which are necessary for the proper functioning of the entity, must lead to the conclusion that the entity does not retain its identity. Consequently, in a situation such as that in the main proceedings, Directive 77/187 does not apply in the absence of a transfer of significant

[41] [2001] All ER (EC) 544 at para 42

tangible assets from the old to the new contractor." Translated into South African terms, the highest court in Europe found that a transfer of a public transport business as a going concern could not be inferred in the absence of the transfer of major assets.

[75] The court in *Numast* did affirm that the absence of a transfer of vehicles was a significant feature tending to weigh against a transfer as a going concern having occurred.

[76] In my view, considered as a set, the components of the original business that were transferred to the new service provider, Autopax, are too meagre and fragmented to support the conclusion that the transfer of business was as a 'going concern'. The portion of the original business that they represent is largely subsumed by the components, assets and staff that the new service provider brings to the business.

[77] In the language of *City Power* and *Unitrans*, the activities of Putco that were transferred to Autopax do not constitute a discrete, autonomous, demarcated and identifiable business undertaking, thus a going concern.

Deemed Transfer

[78] In the event that I find, as I have, that no transfer of business as a going concern occurred, the applicants invite me to infer that the GDRT and Autopax deliberately evaded the operation of section 197 by failing to agree to take over Putco's workers. In such a circumstance and following foreign law, the court was urged in effect to deem that a transfer of business did actually occur.

[79] The legal principle they would like this court to develop can be summarised as follows: if there was a deliberate decision not to take on staff with the objective of evading the application of section 197, then this is a relevant consideration in determining that there was indeed a transfer of an undertaking as a going concern.

[80] The foreign case law and domestic legal authority cited is certainly interesting. I am not sure this development is necessary but I am loathe to be dismissive of attempts to develop our law with reference to principles in operation in other jurisdictions. However, for reasons stated below, it is unnecessary to go down this path in any further detail in the present case.

[81] The applicants found their allegation that the GDRT and Autopax sought to evade their section 197 obligations on the interpretation of a statute. They claim that the NLTA[42] provides two options to the GDRT, as represented by the MEC, upon the cessation of the contract with the existing service provider:[43]

(i) the GDRT is able to conclude a further negotiated contract with the existing service provider (i.e. extend that contract); or

(ii) the GDRT must run a tender process (compliant with section 217 of the Constitution and the PFMA[44]), whereupon it is able to conclude a contract with the new service provider in accordance with the model tender contract promulgated in terms of the NLTA ('the model contract').

[82] Clause 28.1 of the model contract stipulates that 'subject to section 197 … the [new] operator must source the required employees from the operator of the previous contract and guarantee the jobs of those employees.'

[83] The applicants submit that the words 'subject to section 197' do not detract from these express obligations, which equates to the section being operative and obligatory.

[42] National Land Transport Act 5 of 2009.

43 Section 42 of the NLTA. RA: p 263, paras 5; p 273, paras 16-20; p 277, paras 31-32.

[44] Public Finance Management Act 29 of 1999.

[84] As such, the applicants argue that the GDRT and Autopax, by agreeing to effectively insource the services, contrary to the provisions of the NLTA and section 217 of the Constitution, are attempting to avoid and frustrate the application of section 197.

[85] That is not the way I interpret the relevant clause. I agree with the respondents' submission that whether or not the new operator must source employees from the outgoing one is subject to whether or not section 197 of the LRA applies. I have found that it does not. The model contract does not purport to make section 197 applicable.

Conclusion

[86] I find that in this case there has been no transfer of a business as a going concern and that section 197 of the LRA does not apply to the change in service providers. I do not think it appropriate to award costs, considering the nature of the applicants (a union) and the importance of the case.

Order

[87] The application is dismissed with no order as to costs.

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B Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

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