REPUBLIC OF SOUTH AFRICA

Reportable

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 890/17

In the matter between:

TASIMA (PTY) LTD	First applicant
and	
ROAD TRAFFIC MANAGEMENT CORPORATION	First respondent
DEPARTMENT OF TRANSPORT	Second respondent
DIRECTOR GENERAL:	
DEPARTMENT OF TRANSPORT	Third respondent
MINISTER OF TRANSPORT	Fourth respondent
EMPLOYEES LISTED IN ANNEX "A"	Fifth to 84th respondents

Heard: 16 May 2017

Delivered: 25 May 2017

SUMMARY: Urgent application – LRA s 197 – whether employees transferred automatically from Tasima to RTMC pursuant to Constitutional Court order.

JUDGMENT

STEENKAMP J

Introduction

[1] Tasima (Pty) Limited developed, managed and maintained the electronic National Transport Information System (eNaTIS) for the Department of Transport in terms of an agreement with the State. After a long history of litigation pertaining to extensions of the agreement, the Constitutional Court ordered Tasima "to hand over the services and the electronic National Traffic Information System to the Road Traffic Management Corporation."[1]

[2] Up until a few months ago, the Road Traffic Management Corporation (RTMC) and its attorney of record consistently accepted that this handover would be a transfer of a business as a going concern in terms of s 197 of the Labour Relations Act[2] and that all Tasima's employees would automatically be transferred to the RTMC. On 5 April 2017 the RTMC forcibly took occupation of Tasima's offices and took control of eNaTIS. But it now refuses to take over the employees, saying in its answering affidavit in this application – for the first time – that s 197 does not apply.

[3] The RTMC's takeover of Tasima's offices without taking over the employees necessitated an urgent application to this Court by Tasima. It seeks an order in terms of s 197 that the employment contracts of some 80 of its employees transferred automatically to the RTMC with effect from 5 April 2017 (or 23 December 2016).

[4] The application was heard as an urgent one on 16 May 2017. The applicant requested a judgment to be handed down by 25 May, being the date of the next payroll run affecting the employees. The pleadings comprised 943 pages and the heads of argument – involving five counsel, including three silks, and their instructing attorneys – more than another

[1] *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (SA).

[2] Act 66 of 1995 (the LRA).

100 pages. This judgment has therefore been drafted in some haste (amidst a full urgent court roll) and without all the details and discussion that it justifies. Both parties accept that the application is indeed urgent.

Background facts

[5] The eNaTIS is a nationwide system that was developed in accordance with the National Road Traffic Act[3] to record, administer and maintain information and perform functions pertaining to road traffic management, such as issuing motor vehicle and drivers' licenses, administering traffic fines, roadworthiness of vehicles etc. It administers over R14 billion in road traffic revenue annually; has more than 2 400 sites nationwide; manages more than 11 million vehicles; and generates more than R440 million per year in transaction fees. It acts as the interface among the Department of Transport, all licensing institutions and municipalities, the public and a variety of institutional users (including SAPS, motor vehicle manufacturers and banks).

[6] The Department of Transport [DoT] entered into an agreement with Tasima in 2001 to develop, operate, manage and maintain eNaTIS. It was meant to be a five year project but in 2010 it was extended until 2015. That gave rise to extensive and acrimonious litigation. It ended up before the Constitutional Court on 24 May 2016. Six months later, on 9 November 2016, that Court made the following order:[4]

> "1. Within 30 days of this order, Tasima is to hand over the services and the electronic National Traffic Information System to the Road Traffic Management Corporation.
>
> 2. Unless an alternative transfer management plan is agreed to by the parties within 10 days of this order, the handover is to be conducted in terms of the Migration Plan set out in schedule 18 of the Turnkey Agreement."

[7] Much correspondence ensued. Tasima and the RTMC held meetings to agree to a "transfer management plan". At a meeting on 18 November

[3] Act 93 of 1996.

[4] The Court handed won four separate judgments, that penned by Khampepe J being the majority judgment. Zondo J and Froneman J handed down separate concurring judgments.

2016 everyone agreed that s 197 applied to all of Tasima's staff members. That was recorded and confirmed in subsequent correspondence. For example:

7.1 On 28 November 2016 the RTMC's attorney of record, Mr Selepe, wrote:

> "Considering that the RTMC has agreed on the transfer of staff directly engaged on the system in terms of section 197 of the Labour Relations Act (LRA), the handover plan under discussion is still the best way to implement the handover expeditiously, with the minimum amount of risk to the System."

7.2 On 5 December 2016 Mr Selepe reiterated:

> "…This is despite the clear terms of the [CC order] and our client's commitment to take over your client's employees in terms of section 197 of the Labour Relations Act, 1995. It ought to be borne in mind that these are the very same employees running the eNaTIS system to be transferred…The takeover of your current employees in terms of section 197 of the LRA and the experience of your ex-employees permits for an expeditious handover and obviates a lengthy period of handover advocated by your clients."

7.3 On 27 February 2017 – a mere three months ago – Mr Selepe reiterated that his client, the RTMC, wanted to start with "the section 197 transfer" and continued:

> "In November 2016, and again on 23 February 2017, in meetings attended by both your client and our client, our clients agreed that section 197 applies and our client was ready to receive the transferred employees on the same terms and conditions of their current employment…
>
> Insofar as your letter of 26 February 2017 is concerned our client again places on record that it will honour the provisions of section 197 as contained in [*sic*] the Labour Relations Act…"

[8] And on 1 March 2017 – less than two months before this application was launched – Mr Selepe once again confirmed:

> "Our client has agreed without any reservations[5] to take over all your client's employees in terms of the provisions of s 197 of the LRA."

[9] Given this clear understanding, Tasima sent the RTMC an employee transfer agreement on 9 March 2017 in order to give effect to RTMC's undertakings (through its own officials and its attorney) to give effect to s 197. But that never happened.

[10] On 16 March 2017 the RTMC, the Department of Transport and the Minister of Transport launched an urgent application in the High Court seeking clarity on their interpretation of the Constitutional Court order. On 3 April 2017 Tuchten J granted the following order:

> "1. [Tasima and its officers] are hereby directed forthwith:
>
> 1.1 to vacate the premises located at 13 Howic Close, Waterfall Park, Bekker Road, Midrand (the premises) from which [Tasima] operates the electronic National Traffic Information System (eNaTIS); and
>
> 1.2 to hand over control of the eNaTIS system to [the RTMC]; and
>
> 1.3 to hand over to the RTMC all access codes, keys, source codes and data necessary to access such premises and to operate the eNaTIS.
>
> 2. If [Tasima and its officers] fail to comply with this order, the Sheriff is authorised and directed to evict such respondents from the premises and to take all steps necessary, including using the services of specialist or expert service providers, to give effect to this order."

[11] On 5 April 2017 Tuchten J declined Tasima's application for leave to appeal. On the same day, officials and security guards of the RTMC – accompanied by the Sheriff – broke the lock to the gate to Tasima's premises, took over control of its premises and systems, evicted its employees, and told them not to return.

[12] Tasima then launched this application. In its answering affidavit, the RTMC – still represented by the same attorney – now says that, contrary to its earlier assurances, s 197 does not apply.

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[5] My emphasis.

RTMC's new position

[13] The RTMC now says that s 197 does not apply, for the following reasons:

13.1 The RTMC and the Department of Transport (DoT) are creatures of statute and public bodies exercising a public power for the public benefit. They do not run a "business" and do not make a profit. The RTMC is therefore not a "business" as contemplated by s 197 and cannot receive a trading business (i.e. Tasima) as a going concern.

13.2 The undertaking transferred from Tasima is not an "economic entity" that can be transferred from one undertaking to another. It is not an economic entity because the system is one for the public benefit and it does not involve commercial exploitation for profit.

13.3 The transfer is that of a "service" only, and not a "business". Tasima's business, which provides the eNaTIS service, is not being transferred.

[14] The RTMC also now argues that the underlying contract does not trigger s 197.

Evaluation

[15] The interpretation and application of s 197 has led to much litigation. To recap, the relevant part reads as follows:

"**Section 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, 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.

(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.

The applicable legal principles

[16] Section 197 applies when a "business" is transferred by the old employer to the old employer as a going concern. Once that happens, the employees' contracts of employment are automatically transferred to the new employer.

[17] A "business" is broadly defined to include "the whole or a part of any business, trade, undertaking or service".[6] The Constitutional Court has affirmed that the aim of the definition is to cast the net as widely as possible.[7] And in *Harsco*[8] Van Niekerk J remarked that "it is difficult to conceive … of an economic entity that would not be capable of transfer in terms of the section".

[18] As Mr *Franklin* submitted, it is telling that the Constitutional Court, in applying s 197 on a number of occasions, has not adopted the English and European law in interpreting and applying the section. In the recent decision of *Rural Maintenance (Pty) Ltd v Maluti-A-Phufong Local*

[6] My emphasis.

[7] *Aviation Union of South Africa v South African Airways (Pty) Ltd* 2012 (1) SA 321 (CC) ["*Aviation Union*"] par [45].

[8] *Harsco Metals South Africa (Pty) Ltd v ArcelorMittal South Africa Ltd* (2012) 33 *ILJ* 901 (LC) par [27].

Municipality[9] that Court pointed out that in English and European jurisprudence different tests applied to the transfer of a business or undertaking, on the one hand, and to a "service provision change" on the other hand. The inclusion of the term "service" in the definition of "business" in the LRA was enacted in 2002, before the 2006 TUPE regulations. Froneman J cautioned:

> "[24] The use of terms or concepts not found in the wording of section 197 to determine whether a transaction falls under the terms of section 197(1) and (2) may be misleading and has the potential to bring about an incorrect result. As Yacoob J remarked in *Aviation Union*[10], the evaluation of whether there has been a transfer of business as a going concern under section 197 "is complex enough without it being burdened with questions about the 'generation' of outsourcing". The same can be said about service provision changes.
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> [25] In *NEHAWU* support was found for the Court's reasoning on the purpose of section 197 in "comparable foreign instruments and foreign case law construing these instruments." But this was done with acknowledgment of possible differences in language and context. This Court has on many occasions warned that the use of comparative law should be treated with due regard to different contexts and language. *NEHAWU* is no authority for the wholesale and uncritical adoption of jurisprudence under the Acquired Rights Directive adopted by the European Commission[11] or the British TUPE Regulations.
>
> …
>
> "[27] This Court has, in *NEHAWU, Aviation Union* and *City Power*,[12] consistently formulated the approach to be followed in determining whether there has been a transfer of business as a going concern under section 197.
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> [28] *NEHAWU* was decided before the amendment that included a "service" in the definition of "business" was applicable, but regarded the amendment

[9] (2017) 38 *ILJ* 295 (CC); [2017] 3 BLLR 258 (CC) [*"Rural Maintenance"*].

[10] *Aviation Union of South Africa v South African Airways (Pty) Ltd* [2011] ZACC 39; 2012 (1) SA 321 (CC); 2012 (2) BCLR 117 (CC) (*Aviation Union*) at para 105.

[11] Directive 77/187 EEC.

[12] *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd* [2015] ZACC 8; (2015) 36 *ILJ* 1423 (CC); 2015 (6) BCLR 660 (CC) (City Power).

as a clarification of the conclusion it reached. Ngcobo J formulated the approach as follows:

'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."

[29] Both the majority and minority judgments in *Aviation Union* relied on and endorsed this approach to the interpretation and application of section 197 of the LRA. …

[30] Importantly, and helpfully, Jafta J in the minority judgment also dealt with the inclusion of service in the definition of a business in section 197(1):

'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.'

[31] *City Power* too accepted and built on the foundations of *NEHAWU* and *Aviation Union*. It is important to note that *City Power* did not find that the mere termination of a service contract triggered the application of section 197 of the LRA. It followed the approach in *NEHAWU* and *Aviation Union* and determined the question on the facts:

'On the present facts, there is no dispute that City Power took over the full business 'as is', with all of the complex network infrastructure, assets, know how, and technology required to install and operate the prepaid electricity system with the clear intention of maintaining uninterrupted electricity services to Alexandra Township. The project continued after termination of the service level agreements and completion of the handover process. The business is identifiable and it is discrete. Ultimately a business of providing a system of prepaid electricity to residents of Alexandra continued, save that it was now conducted by a different entity.'

[19] It is against these principles that the factual and legal circumstances around the transfer from Tasima to the RTMC must be considered.

Public bodies and economic entity

[20] The RTMC argues that a service transferred to a public authority which is of a regulatory nature is not an economic entity. For this it relies on English and European authorities.

[21] Section 197(1)(a) defines a "business" to include the "whole or part of any business, trade, undertaking or service."

[22] Despite this wide definition adopted by the legislature and adopted by the South African courts – including the highest court – Mr *Redding* argued for a more restrictive interpretation when dealing with a public body such as the RTMC. His starting point is the dictionary meaning of "business" in the *Oxford English Dictionary* (2 ed 1989), viz "a commercial enterprise regarded as a going concern; a commercial establishment with all its trade liabilities etc.". And "trade" is defined as "the practice of some occupation, business or profession habitually carried on, especially when practised as a means of livelihood or game"; and "undertaking" as "an action, work etc. undertaken or attempted, an enterprise". He did not refer to the definition of "service". The OED defines it, *inter alia*, as the "provision of a facility to meet the needs or for the use of a person or thing".

[23] As the Constitutional Court noted in *Rural Maintenance*, s 197 was preceded by the Council Directive 77/187/EEC applicable to the European Community. Effect was given to this directive in the United Kingdom through the Transfer of Undertakings (Protection of Employment) Regulations ("TUPE").[13] But Froneman J foreshadowed the cautious note he sounded recently in *Rural Maintenance* when sitting in an early case dealing with s 197 in the Labour Appeal Court:[14]

> "The usefulness of these comparative provisions should not be overstated. The differences in wording from section 197 are quite obvious, as is the fact that they find their applications in societies different in history and development from our own. It would be unnecessarily parochial, though, not to enquire whether the treatment of these provisions in these

[13] SI 1981/1974.

[14] *Foodgro, a division of Leisurenet Ltd v Keil* (1999) 20 *ILJ* 2521 (LAC) par 18.

> jurisdictions does not provide some insight for the proper interpretation and application of section 197 of the Act."

[24] To answer the question of what a business or part of a business is, regard must be had to the various elements that might comprise a business. Todd, Du Toit & Bosch[15]state that a *business* could have "a variety of components: tangible or intangible assets, goodwill, management staff, a workforce, premises, its name, contacts with particular clients, the activity it performs, its operating methods etc." The entity being transferred, they point out, will necessarily contain some or all of these features "but it is not sufficient that an entity simply contains these things". The various components of a business must be sufficiently linked and structured "so as to be identifiable as an entity". They say the various components must somehow "hang together". This line of reasoning has been recognised by the ECJ which has stated that an *economic entity* for the purposes of the Acquired Rights Directive constitutes "an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective".[16]

[25] Mr *Redding* pointed out that this approach has also been adopted by this Court in *Harsco*:[17]

> "Section 197 (1) defines a 'business' to include 'the whole or any part of a business, trade or undertaking, or service. The definition 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 drawn on the jurisprudence developed by the European Court of Justice in applying EU Directives on the Transfer of Undertakings, and 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'."

[26] But Van Niekerk J didn't stop there in *Harsco.* He continued:[18]

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[15] *Business Transfers and Employment Rights in South Africa* (LexisNexis 2004) 33.

[16] See *Suzen v Zehnacker Gebaudereinigung GmbH Krankenhausservice* [1997] IRLR 255 (ECJ) par 13 and *Allen v Amalgamated Construction Co Ltd* (2000) IRLR 119 (ECJ) par 24.

[17] *Harsco Metals (SA) Pty Ltd v ArcelorMittal SA Ltd* (2012) 33 *ILJ* 901 (LC); [2012] 4 BLLR 385 (LC) par 25.

[18] Par 27.

> "Useful as these authorities are, in South Africa, in relation to the definition of a 'business' for the purposes of s 197, the judgment of the Labour Appeal Court in *SAMWU v Rand Airport Management Co Ltd* [19] remains the authority by which I am bound. In that case, the court concluded that the outsourcing of gardening and security functions at an airport management by the employer were businesses capable of being transferred in terms of s 197, despite that fact that it did not appear that any assets, goodwill, operational resources or workforce were to be transferred. No distinction was drawn between a business that is largely employee-reliant, as opposed to an asset-reliant business. Nor was it suggested that in the former, greater weight ought to be attached to the number of employees transferring as opposed to the latter instance, in which the number of assets transferring might attract greater weight. If, as in that case, a grouping of relatively unskilled employees and the work they perform, with no assets appearing to be the subject of any transfer, comprises a 'business' for the purposes of s 197, then it is difficult to conceive, in the context of an outsourcing transaction, of an economic entity that would not be capable of transfer in terms of the section."

[27] Mr *Redding*'s reliance on the English and European jurisprudence must be evaluated in the light of those remarks of Van Niekerk J. Like him, I am bound by *Rand Airport* and, more recently, by the Constitutional Court in *Rural Maintenance.* And in that case, Froneman J once again cautioned against "the wholesale and uncritical adoption of jurisprudence under the Acquired Rights Directive adopted by the European Commission or the British TUPE Regulations."

[28] Nevertheless, Mr *Redding* valiantly sought solace in an English tax case.[20] The Institute of Chartered Accountants performed a regulatory function and was not a commercial business. The court found that it was not engaged in an economic activity for the purposes of Value Added Tax legislation:

> "From these cases I conclude that the concept of an economic activity is an activity which typically is performed for consideration and is connected with

[19] [2005] 3 BLLR 241 (LAC).

[20] *Institute of Chartered Accountants in England and Wales v Customs and Excise Commissioners* [1997] STC 115 5 (CA) 116 c-f.

economic life in some way or another. But it is not an essential characteristic that it should be carried on with a view to profit or for commercial reasons but it must be an activity which is analogous to activities so carried on. An activity which consists in the performance of a public service to which the idea of commercial exploitation with a view to profit or gain is alien is not of an economic nature particularly where the activity is one typically of a public authority.

Applying these criteria to the activities of the Institute I find that they are not activities of an economic nature. There are activities which Parliament has decreed should be carried out for the protection of the public and are to be regarded as the exercise of public control over those who engage in financial services, auditing and insolvency practice. The fact that the Institute generates revenue from the issue of licences, certificates or maintenance of the register to cover overheads does not of itself mean that it is an economic activity. In carrying out this activity the Institute is performing public services to which the very idea of commercial exploitation with a view to profit is alien. Further they are typical of the activity of a public authority. Though connected with the activity of the profession of accountancy, the activity of the Institute does not consist in the supply of such services for consideration but in ensuring that those in the profession who provide such services do so in accordance with the law's requirements."

[29] But it must be borne in mind that the purpose of s 197 is to protect employees' rights. When interpreting the facts of this case and the purpose of the legislation, it must be interpreted in that context. As this Court stated in *COSAWU v Zikhethele Trade (Pty) Ltd*[21] (even in the context of European law):

"[T]he decisive criterion for determining whether there has been a transfer of an undertaking (read 'business') is whether, after the alleged transfer, the undertaking has retained its identity, so that employment in the undertaking is continued or resumed in the different hands of the transferee. In order to determine whether there has been a retention of identity it is necessary to examine all the facts relating both to the identity of the undertaking and the relevant transaction and assess their cumulative

[21] (2005) 26 *ILJ* 1056 (LC) paras 34-35 [per Murphy AJ, as he then was]. On appeal, only the point of non-joinder was upheld.

effect, looking at the substance, not at the form, of the arrangements. The mode or method of transfer is immaterial. The emphasis is on a comparison between the actual activities of and actual employment situation in an undertaking before and after the alleged transfer. *Kelman v Care Contract Services* [1995] ICR 260. What seems to be critical is the transfer of responsibility for the operation of the undertaking. Mummery J's conclusion in *Kelman* offers a salutary guideline. He said:

'The theme running through all the recent cases is the necessity of viewing the situation from an employment perspective, not from a perspective conditioned by principles of property, company or insolvency law. 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'."

[30] Casting his net wider, Mr *Redding* then referred to *Henke v Gemeinde Schierke ("Brocken")*[22], where the ECJ considered the question of whether the transfer of administrative services from a municipality to an administrative entity which constituted an "administrative collectivity" was a transfer of a business or undertaking in terms of the acquired rights directive. The ECJ concluded that the transfer carried out between the municipality and the administrative connectivity related only to activities involving the exercise of public authority it stated that "even if it is assumed that those activities had aspects of an economic nature, they could only be ancillary".

[31] But in South African law, no court – including the highest court – has made this distinction. In *City Power* the Constitutional Court specifically dealt with the question whether section 187 applies to a municipal entity. It found that it does. It also applied s 197 to organs of state or public authorities in *Rural Maintenance* and in *NEHAWU v UCT*. Interpreting the legislation with its purpose in mind, I can see no reason to create such a distinction now.

[22] [1996] IRLR 701 at par 17.

[32] As Todd et al[23] state:

> "'Business' and 'trade' could be taken to indicate a commercial enterprise aimed at the generation of profit. But 'undertaking' and 'service' could also refer to entities of a non-commercial nature. The fact that section 197 is not limited in its scope to commercial ventures is reinforced by the fact that it applies to both private and public sector transfers."[24]
>
> "[T]he section cannot be limited in its application to those entities that are aimed at making a profit for the business. It is sufficient that the relevant entity facilitates the exercise of an economic activity.[25] In addition, as mentioned above, section 197 applies to both the private and public sector. There are unlikely to be many public sector entities, or parts thereof, that are directed at making a profit. It can also not be required that the business actually be making a profit in order for section 197 to find application. That much is apparent from the fact that section 197A regulates the consequences of transfers in circumstances of insolvency.[26]"

[33] I need not add anything more. I agree with the authors. I do not agree with Mr Redding that s 197 does not apply to public entities or that the business being transferred needs to be a profit generating economic entity.

Transfer of a "service" or a "business as a going concern"?

[34] The RTMC argues that, what has been transferred in this case, is not a business or service "as a going concern", but "a system together with the services related to it". Thus, it argues, s 197 does not apply.

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[23] Todd, Du Toit & Bosch *Business Transfers and Employment Rights in South Africa* [2004] pp 33 and 37.

[24] My underlining. The authors it is noteworthy that art1(c) of the European Directive states that the directive applies to "public and private undertakings engaged in economic activities whether or not they are operating for gain". Undertakings do not therefore necessarily operate for gain. They point to the decisions of the ECJ in *Dr Sophie Redmond Stichting v Bartol* [1992] IRLR 366 (ECJ); *Collino and Chiappero v Telecom Italia SpA* [2000] IRLR 788 (ECJ); and *Godrich v Public & Commercial Services Union* [2002] EWHC 1642 (Ch), where the English High Court held that trade unions are 'undertakings' for the purposes of the TUPE regulations, despite the fact that they are not constituted for the pursuit of some commercial benefit.

[25] *Suzen v Zehnacker Gebaudereinigung GmbH Krankenhausservice* above para 13.

[26] See also *Stofberg v Ladybrand Ko-operatiewe Landbou Maatskappy Bpk* 1970 (2) SA 57 (O) at 57 where the court held that an entity need not be profit-generating in order to be regarded as a business. De Villiers J stated (at 62F): "Die woord 'besigheid' kan meer as een betekenis hê en die maak van 'n wins is nie 'n noodwendige vereiste nie."

[35] I do not agree. It is quite apparent that the sole purpose of Tasima's business was the provision of the eNaTIS service. Tasima performed no other business. That business has been transferred to the RTMC in line with the order of the Constitutional Court. The RTMC has taken control of the premises previously occupied by Tasima, and it is using the assets, information and electoral property previously used by Tasima to render the same services. It liaises with the same service providers and makes the same payments.

[36] The transfer of eNaTIS from Tasima to the RTMC bears all the hallmarks of the following statements by the Constitutional Court in *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd*[27]:

> "On the present facts, there is no dispute that City Power took over the full business 'as is', with all of the complex network infrastructure, assets, know how, and technology required to install and operate the prepaid electricity system with the clear intention of maintaining uninterrupted electricity services to Alexandra Township. The project continued after termination of the service level agreements and completion of the handover process. The business is identifiable and it is discrete. Ultimately a business of providing a system of prepaid electricity to residents of Alexandra Township continued, save that it was now conducted by a different entity.
>
> It follows that there was a transfer of business from Grinpal to City Power as a going concern; which means that the contracts of employment of Grinpal's employees were automatically transferred to City Power. "

[37] One only needs to substitute "Grinpal" with "Tasima", "City Power" with "the RTMC" and "the prepaid electricity system" with eNaTIS to conclude that, on the facts of this case, the handover ordered by the Constitutional Court is a transfer contemplated by s 197.

[27] 2015 (6) BCLR 660 (CC); [2015] 8 BLLR 757 (CC); (2015) 36 *ILJ* 1423 (CC) [*City Power*] paras 39-40.

The contract and the date of transfer

[38] As set out in the Constitutional Court judgment[28], the original contract was entered into in July 2001. It should have terminated on 31 May 2007. It was then extended on a month to month basis until April 2010. Then it was extended for another five years, from 12 May 2010 until April 2015. The Constitutional Court found that the May 2010 extension was unlawful. But, as Khampepe J pointed out in the majority judgment:[29]

> "[185] The expiry of the extension is thus no justification for ignoring court orders. Not only was the Corporation bound by the orders that did not expressly impose obligations on it, but the Fabricius J order unambiguously interdicted it from 'taking steps which have the effect of rerouting any of the work' until the Mabuse J order had run its course. The Corporation was not permitted to assume that once the extension period had expired, it was entitled to take over the running of the system immediately. Until the transfer management procedures have run their course, or the contract is set aside, the High Court orders continued to have effect. I therefore cannot agree with the first judgment's conclusion that 'there are no facts on record showing that by taking preparatory steps at the beginning of 2015, the Department and the Corporation were in contempt of various orders'. For as long as the contract persisted, the High Court orders had to be obeyed."

[39] Turning to an appropriate remedy, Khampepe J held that, from 23 June 2015 – the date of Hughes J's order – the extension no longer had any legal effect and the interim interdicts issued by the High Court fell away. Nevertheless, in the period between the granting of the extension and its setting aside, the applicants were constitutionally obliged to comply with the various court orders granted. The Court then crafted a "just and equitable remedy" and took this into account:[30]

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[28] *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC).

[29] At para 185 (my underlining).

[30] At para 206.

> "In the present matter, not only was the extension of the contract between the Department and Tasima unlawful, but it has now expired. It can only be in the best interests of the public that the hand-over of the services and the eNaTIS to the Corporation happens as expeditiously as possible."

[40] It is against that background that the Constitutional Court ordered Tasima to hand over the services and the eNaTIS to the RTMC within 30 days.

[41] The RTMC now submits that the underlying contract dictating what is to be transferred, is the original Turnkey Agreement concluded in 2001. It argues that the subsequent extensions of that agreement are invalid and void *ab initio* and that the original agreement does not envisage a s 197 transfer.

[42] The RTMC appears to accept the following statement in Tasima's replying affidavit :

> "Tasima did not simply develop a system (with a staff complement focused only on development), which it is now returning, as an isolated, self-standing asset, to the State. Tasima did indeed develop the eNaTIS system, which went live in April 2007 (more than 10 years ago). Since April 2007, however, Tasima has operated, maintained, supported and managed the eNaTIS system and services as well as developing new functionalities and modules as well as amending the system to take account of legislative amendments as and when required by the State. It has employed the Tasima staff solely to discharge these functions and render the eNaTIS system and services to the Republic on behalf of the State and the DoT, and these functions comprise the entirety of Tasima's business. At all times relevant to this application, the State has paid for all Tasima staff employed."

[43] But, argues the RTMC, Tasima's business only expanded after the Turnkey Agreement came to an end in 2007. The expansion, it argues, extended beyond the scope of the Turnkey Agreement and had its origins in the extended contract. The extended contract was declared void *ab initio* by the Constitutional Court. Nothing after the Turnkey Agreement remains. It has all been undone and set aside by the Constitutional Court. Tasima cannot locate its cause of action in this section 197 application on a transaction that has been undone, set aside, and declared void *ab initio*.

[44] That argument, it seems to me, is not sustainable on a reading of the Constitutional Court order.

[45] The Constitutional Court[31], in its judgment and order of 9 November 2016, found that the 2010 extension of the initial agreement (and not the agreement itself) was unlawful. But it proceeded to grant a "just and equitable order in the circumstances" in terms of s 172 of the Constitution. It ordered no retrospective relief, but ordered Tasima to hand over the services and the eNaTIS system to the RTMC within 30 days. That order clearly contemplated an existing system; it further provided that, unless an alternative transfer management plan was agreed to, it had to be conducted in terms of the existing migration plan set out in the existing Turnkey Agreement.

[46] Before the Constitutional Court, as Mr *Franklin* pointed out in his argument, the DoT and RTMC never requested that Tasima hand over some 2007 version of the system and services. On the contrary, everyone was cognisant of the fact that the totality of the system and services were to be handed over, and that the handover would include the operation, management, support and maintenance of the system, and not just some final product. And the RTMC has now, in fact, on 5 April 2017, taken control and transfer of the entirety of the eNaTIS system and services. That is in line with the order of the Constitutional Court; that order could not have envisaged that the extended agreement had no legal effect between 2007 and 2015.

[47] It seems to me that the Constitutional Court did not set aside the extension of the agreement from 2007 to 2010; and that it set aside the 2010 extension only prospectively after it had expired. And after the judgment of Hughes J on 23 June 2015 until the Constitutional Court's judgment of 9 November 2016 a series of High Court orders bound the State, including the RTMC.

[48] I agree with the applicant that the *causa* of the transfer that took place on 5 April 2017 was the order of the Constitutional Court of 9 November 2016, and not the original 2007 agreement.

[31] in *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC).

[49] Whether a transfer of a business as a going concern within the meaning of the LRA occurred is a question of fact, as the Constitutional Court held in *NEHAWU v UCT*[32]:

> "The phrase "going concern" is not defined in the LRA. It must therefore be given its ordinary meaning unless the context indicates otherwise. What is transferred must be a business in operation 'so that the business remains the same but in different hands.' Whether that has occurred is a matter of fact which must be determined objectively in the light of the circumstances of each transaction. 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."

[50] In this case the entire eNaTIS system and services (as they stood and were being operated and performed) were transferred on 5 April 2017. The RTMC has itself effected, by force, this complete transfer. I agree with Tasima that it does not lie in its mouth now to say that for the purposes of section 197, this Court should create the fiction that what was transferred was something else, namely only the system and services as they existed at May 2007.

[51] The effective date is also clear from the provisions of s 197(2) itself:

> "(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

[32] 2003 (3) SA 1 (CC) para 56.

> (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."

[52] There is no doubt that the actual transfer took place on 5 April 2017, pursuant to the order of the Constitutional Court. That is the effective date, and that is the date on which the RTMC was substituted in the place of the old employer (Tasima) in respect of all contracts of employment in existence immediately before the date of transfer.

Estoppel and waiver

[53] Apart from an objective evaluation of the facts leading me to conclude that the transfer is one envisaged by s 197, the RTMC is precluded from resiling from its earlier representations and undertakings by the principle of estoppel. It has repeatedly, through statements under oath by its officials and through correspondence from its attorney, accepted that s 197 applied; that it would take transfer of all supplier and third party agreements, and that it would, without any reservations or conditions, take over Tasima's employees in terms of s 197. Tasima has relied on these representations and has acted accordingly.

[54] I had the pleasure of reading a judgment of the English Chancery Division dating from 1874, referred to by Mr *Franklin*. Remarkable for its brevity and clarity, the Court *a quo* in *Eaglesfield v Marquis of Londonderry*[33] had this to say about a misrepresentation made due to the advice of an attorney:

> "Of course, solicitors can give wrong advice as well as other people… But does that make it a misrepresentation of law? A misrepresentation of law is this: when you state the facts, and state a conclusion of law, so as to distinguish between facts and law. The man who knows the facts is taken to know the law; but when you state that as a fact which no doubt involves, as most facts do, a conclusion of law, that it still a statement of fact and not a statement of law."

[33] (1876) IV ChD 693 at 702-704.

[55] In this case, the RTMC's representatives stated on numerous occasions, often under oath, that the transfer of eNaTIS from Tasima to the RTMC was a s 197 transfer and the RTMC would automatically take over all contracts of employment. That was a statement of fact, although it involved a conclusion of law – and in support of that conclusion, they were advised throughout by their attorney of record, Mr Selepe. As the Court *a quo* stated in *Eaglesfield*:

> "It is not the less a fact because that fact involves some knowledge or relation of law."
>
> "Is it in a Civil Court to be said, that the man who either through carelessness or negligence so misleads another as to induce him to part with valuable property, is not to be liable? Is he not to be liable, because he was misled by the advice of his solicitor? In all transactions in which men are liable they must choose their agents, whether legal or otherwise; and, having chosen them, they are responsible for their acts".
>
> And:
>
> "Here the defendants say, and say with truth, that what they did they did on the advice of their solicitor. I am not going to say a word that will annoy them, or injure them as regards their position in the world as honourable and honest men. I have no doubt that, as they say, they were ignorant, and did what they did on the advice of their solicitor, and with no intention to deceive or defraud anybody. But I must nevertheless hold them responsible to the same extent as if they had actually known that what they were stating was really, as it was in fact, untrue."

[56] That judgment was overturned on appeal; but, as explained by the Lord Chief Justice, that was because he found that the plaintiffs were not, in fact, misled. As I read the appeal judgment, it did not overturn the principles relating to misrepresentation – even if acting on the advice of a solicitor – set out by the court *a quo*. And the passage I quoted above dealing with representations of law and fact was quoted with approval by Wessels JA in *Sampson v Union & Rhodesia Wholesale Ltd* 1929 AD 468 at 479. And he continued:

> "For a party to a contract to say: 'I put this meaning on that clause' is a statement of fact, and as far as he is concerned it will bear that construction

> even if A would have borne a different construction in law, had he said nothing about it. It would be most inequitable to allow the party who induces the other party to sign by telling him what he means by a clause in the contract to turn around after the contract has been signed and say: 'You ought not to have been misled by my assurance that I would always give the same meaning to the contract which I gave to it when I induced you to the contract; you ought to have been more vigilant and ascertained the true legal meaning of the clause.' If one contracting party gives an assurance to the other that he will read a clause in a particular way and the latter trusts the former and believes his assurance, then he cannot afterwards turn around and say: 'You ought to have known the law of construction and not have accepted my assurance.'"

[57] In this case, the RTMC chose its attorney. Acting on the advice of that attorney, it represented to Tasima that the transfer of eNaTIS was one governed by s 197. They are still represented by their chosen attorney. Tasima has throughout acted on that understanding, until it was surprised by the RTMC's *volte face* in its answering affidavit, when it submitted a case contrary to its earlier assurances. The RTMC must be held to its earlier acts and representations.

Conclusion

[58] I am satisfied that the handover of the services and the electronic National Traffic Information System to the Road Traffic Management Corporation in terms of the order of the Constitutional Court of 9 November 2016 is a transfer of a business as contemplated by s 197 of the LRA. The consequence is that the new employer (the RTMC) is automatically substituted in the place of the old employer (Tasima) in respect of all contracts of employment in existence immediately before the transfer, i.e. on 5 April 2017.

[59] I am also persuaded that the information pertaining to the monthly salaries and cost to company remuneration of each of the affected employees should be kept confidential.

Costs

[60] Tasima asked that the RTMC be ordered to pay punitive costs on the scale as between attorney and own client. It also submitted that Messrs Kara-Vala (the RTMC's divisional head and the deponent to the answering affidavit) and Msibi (the RTMC's CEO) should be ordered to show cause why they should not personally be held liable for the cost of this application on the scale as between attorney and own client.

[61] That submission was made on the basis that Messrs Kevin Kara-Vala and Makhosini Msibi misled Tasima as to the RTMC's position; that, unlike the defendants in *Eaglesfield*, they are not "honourable and honest men" who mistakenly acted on the advice of their attorney. But I am not persuaded that it is the case, or that their actions call for a possible *de bonis propriis* costs order. I accept that their understanding may have changed only after taking fresh legal advice, and that their stance now is based on that advice.

[62] Nevertheless, Tasima has had to incur significant legal costs in circumstances where it had been led to believe, until it had sight of the RTMC's answering affidavit, that there was little reason to approach this Court. The underlying issue was uncontentious: Everyone agreed that it was a s 197 transfer and that the RTMC would take over all of Tasima's employees. The RMTC's sudden *volte face* gave rise to urgent and extensive litigation, involving many reams of pleadings and a number of legal advisors. There is no reason in law or fairness why the RTMC should not pay those costs; and, given the urgency of the matter and the extensive drafting and research it generated, two counsel were justified. The postponement on 5 May 2017 was occasioned by the late delivery of the RTMC's answering affidavit. It should also pay those costs.

Order

[63] I therefore make the following order:

63.1 It is declared that, with effect from 5 April 2017, the contracts of employment of the 5th to 84th respondents transferred automatically from the applicant (Tasima (Pty) Ltd) to the first respondent (the Road Traffic Management Corporation) in accordance with the provisions of section 197 of the Labour Relations Act (Act 66 of 1995).

63.2 The RTMC is directed to pay the 5th to 84th respondents from 5 April 2017 to the date of the final determination of the order in subparagraph 1 above:

63.2.1 on a monthly basis on or before the 25th of each month, the amounts set forth under the column headed “Monthly CTC excl 13th cheque, annual bonus, overtime, standby allowance, birthday voucher and night shift allowance” as set out in Annexure “C” to Annexure “FM 11.6” to the founding affidavit of Fannie Lynen Mahlangu; and

63.2.2 on an annual basis, any additional amounts making up the column headed “Annual Total CTC” as set forth in that schedule.

63.3 The confidentiality regime set out in paragraph 107 of the founding affidavit applies.

63.4 The RTMC is ordered to pay the costs of this application, including the costs of two counsel, and including the costs of 5 May 2017.

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Anton J Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	A E Franklin SC, JPV McNally SC and A Rowan
Instructed by	Webber Wentzel.
FIRST RESPONDENT:	A Redding SC and K Hopkins
Instructed by	Selepe attorneys.