CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 214/15

In the matter between:

RURAL MAINTENANCE (PTY) LIMITED First Applicant

RURAL MAINTENANCE (FREE STATE) (PTY) LIMITED Second Applicant

and

MALUTI-A-PHOFUNG LOCAL MUNICIPALITY Respondent

Neutral citation:	*Rural Maintenance (Pty) Ltd and Another v Maluti-A-Phofung Local Municipality* [2016] ZACC 37
Coram:	Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J
Judgments:	Froneman J (first judgment - majority): [1] – [42] Jafta J (second judgment): [43] – [128] Zondo J (third judgment): [129] – [193]
Heard on:	03 May 2016
Decided on:	01 November 2016
Summary:	Labour Relations Act 66 of 1995 — section 197 — transfer of a business as a going concern — British Transfer of Undertakings (Protection of Employment) Regulations (TUPE Regulations) — no need shown for reformulation or development of test in terms of section 197 of LRA— leave to appeal refused

ORDER

On appeal from the Labour Appeal Court:

The application for leave to appeal is dismissed with costs.

JUDGMENT

FRONEMAN J (Moseneke DCJ, Cameron J, Khampepe J, Mhlantla J and Nkabinde J concurring):

Introduction

[1] This is an application for leave to appeal against an order by the Labour Appeal Court, upholding an appeal to it from the Labour Court. The dispute between the parties concerned the question whether there had been a transfer of business by the applicants (Rural) to the respondent (Municipality) in terms of section 197 of the Labour Relations Act (LRA).[1] The Labour Court held that there had been a transfer, the Labour Appeal Court held that there had not.

[2] Rural seeks to justify its application for leave to appeal on the basis that the Labour Appeal Court failed to apply the proper test for considering whether there has been a transfer of business under section 197 and effectively crafted and applied a new test. It argues that, in any event, in relation to transfer of a service as a business under the section, this Court should re-assess its jurisprudence in light of new developments in European employment law. In addition, Rural contends that the Labour Appeal Court made factual findings outside the case pleaded by the Municipality and seeks to lead further evidence on appeal.

[1] 66 of 1995.

[3] None of these contentions withstand scrutiny. In order to understand why, one has to look at the facts as disclosed in the papers, the Labour Appeal Court judgment and the applicable law.

Facts and pleadings

[4] The Municipality is responsible, in terms of the Constitution[2] and national legislation,[3] for the provision of services to its residents, including the supply of electricity. It appears that it allowed its electricity services to fall into disrepair. In 2011 its then municipal manager entered into an Electricity Management Contract (EMC) with Rural to manage, operate, administer, maintain and expand the municipal electricity distribution network for a period of 25 years, after which the obligation to supply electricity to residents would revert to the Municipality. In terms of the EMC 16 employees were transferred under section 197 of the LRA by the Municipality to Rural.

[5] Rural started its performance under the provisions of the EMC on 1 September 2011. It expanded the workforce to 127 employees and incurred significant expenditure on the purchase of network materials, specialised vehicles, the compiling and recordal of details of the Municipality's electrical distribution infrastructure, the mapping of townships within the Municipality's geographical area, and software systems in relation to the provision of the electrical services. It also purchased immovable property for offices and staff accommodation. This all cost in the region of R96 million.

[6] In August 2013 the Municipality informed Rural that it considered the EMC to be null and void because the erstwhile municipal manager did not have the requisite authority to conclude the EMC with Rural. The latter disputed this and contended that

[2] Section 152(1)(b) and Schedule 4B of the Constitution.

[3] Section 73 of Local Government: Municipal Systems Act 32 of 2000.

this conduct amounted to a repudiation of the Municipality's obligations under the EMC, entitling it to cancel the agreement. This contractual dispute was, and apparently still is, pending in the Free State High Court.

[7] Despite the pending action in the High Court, Rural provided the Municipality with information about the identities of the 127 employees, their employment contracts and organisational structure in the beginning of October 2014. It also handed over what it termed the "possession of the Network and the Capital Assets".[4] It proposed an agreement of the transfer of the 127 employees under section 197 of the LRA to the Municipality. The Municipality refused.

[8] Rural then sought relief in the Labour Court for an order declaring that there had been a transfer of business as a going concern by it to the Municipality and that, hence, the employment contracts of the 127 employees should be transferred to the Municipality. The Labour Court granted the relief, but the Labour Appeal Court overturned that decision.

[9] The application was brought in motion proceedings and the affidavits filed thus served as both pleadings and evidence.[5] The case advanced on behalf of Rural in the founding affidavit was based on its acceptance of the Municipality's alleged repudiation of the EMC and the resultant cancellation of the EMC. Rural averred, however, that the legal cause of the transfer was not relevant, because that issue was pending in the High Court. It stated that factually the entire electricity distribution infrastructure of the Municipality that Rural utilised, maintained, upgraded and was in control of, was handed back to the Municipality. This, it contended, amounted to the transfer of the business as a going concern in terms of section 197 of the LRA.

[4] Capital assets are defined in clause 1.3.6 of the EMC to mean the operational capital assets, which, in terms of clause 7.3, included the whole or part of the existing properties, tools, equipment and vehicles of the Municipality currently used by its electricity department. The network and related assets described in clause 1.3.17 of the EMC as "initial assets" were owned and paid for by the Municipality prior to the take-over date. Their ownership remained vested in the Municipality.

[5] See *Minister of Land Affairs and Agriculture v D&F Wevell Trust* [2007] ZASCA 153; 2008 (2) SA 184 (SCA) at para 43; *Transnet Ltd v Rubenstein* [2005] ZASCA 60; 2006 (1) SA 591 (SCA) at para 28.

[10] The Municipality disputed both the *causa* (legal cause) for the transfer, as well as the extent of the factual handing over. In regard to the former it contended that because the EMC was null and void from the outset, all that had to be effected was to restore the parties to their position prior to the conclusion and implementation of the EMC. That meant a transfer back of the employment obligations of only the 16 persons employed by the Municipality originally, not the transfer of all 127 persons employed by Rural.

[11] At a factual level the Municipality also disputed that Rural's business was transferred to it as a going concern. The answering affidavit deposed to by the municipal manager stated:

> "Rural grew the business after it was transferred to them. On their own version they invested large sums of money in making the business bigger, better, more efficient and ultimately more profitable. We know that they employed more than 100 additional people. However, they would have bought computers (hardware and software), stationery, office equipment, implemented systems (such as a debt collection system), vehicles and other related equipment needed to operate <u>their</u> business as they were conducting it. I can categorically state that since the contract 'fell through' Rural has not <u>transferred</u> their business to us as a 'going concern'. At best we have received an obligation to provide electricity to the residents but we never received their computers, systems, stationery, vehicles, equipment etc. We also have not received their debtor's book. I have not, to date, received an inventory of Rural's business. Thus its business was not transferred to us as a going concern. The meaning of 'going concern' is specific and argument on this will be presented to the court. I understand this to be a threshold requirement for the trigger of section 197." (Emphasis in original.)

[12] Similar statements are made elsewhere:

> "I deny that Rural has done enough in its papers to lay a factual foundation that demonstrates that it did transfer its business to the Municipality as a going concern. Further argument on this point will be advanced at the hearing."

Towards the end of the affidavit the following summary appears:

> "Noticeably absent from these paragraphs (in which Rural allege that they transferred their business as a going concern to us) is an itemized inventory of exactly what their business was. One would expect that an allegation of a business being transferred as a going concern would explain what the business was (assets, liabilities, etc). The founding affidavit does not do this. The founding affidavit does not even explain to us what Rural's 'business' entailed. The meaning of 'a business as a going concern' has a very specific meaning in mercantile parlance. The founding affidavit, in my submission, fails to describe Rural's business and what it would mean for it to qualify as a going concern. For example, I presume that Rural were operating from offices that were either owned by them or leased by them. I assume that Rural had assets which may have included motor vehicles, computers, laptops, cellphones, office furniture, tools, and other equipment needed to carry out its operation. I would also assume that Rural's business had both creditors and debtors. I assume it had intellectual property too. None of these aspects that one would ordinarily find in an inventory of a business being transferred as a 'going concern' are apparent from these papers. None of these aspects were factually transferred to the Municipality either. We do not have any of their assets, we do not have their motor vehicles, cellphones, computers, laptops, equipment, etc. Their contracts have not been ceded to us nor have their debtor's books. This, I respectfully submit, translates into the only inference that their *business* was not transferred to us as a *going concern*." (Emphasis in original.)

[13] In reply Rural deals with the Municipality's contention that the business had not been transferred to it as a going concern, in particular the allegation that certain assets had been retained by Rural as follows:

> "[T]he business comprises, in essence, the infrastructure for the provision of electricity services and the employees dedicated to that business. Handing over of peripheral assets such as software, vehicles and stationery are not essential for the transaction to constitute one in terms of section 197 of the LRA. The transfer of the business did not occur in a vacuum but in the *de facto* implementation of the Agreement whether the Agreement is valid or void. The Agreement did not

> contemplate that such assets would ever transfer to the Municipality as part of the business."

And further:

> "As a matter of fact and law the retention by Rural of peripheral assets such as vehicles, computers, stationery and the like does not affect this conclusion [that there has been a transfer of the business]. . . . Precisely what has been transferred from Rural to the Municipality has been dealt with above. The legal consequences thereof and the import for the application of section 197 of the LRA will be dealt with in argument."

[14] The application was thus set to be decided on the acceptance by Rural of the factual assertions by the Municipality that certain specified assets were not handed over. Rural maintained that their handing over was not necessary as a matter of law, while the Municipality contended that they were. Both parties agreed on the papers that this issue would be dealt with in legal argument.

Labour Appeal Court

[15] In its judgment dealing with the issue of whether there was a transfer as a going concern the Labour Appeal Court referred to two cases decided by the European Court of Justice[6] on which the parties placed reliance in argument, as well as a decision of the Labour Court.[7] In its evaluation of the issue the Court referred to a statement made by the English Court of Appeal in *P & O Trans-European Limited v Initial Transport Services Limited*[8] and, on the basis of this statement, concluded:

[6] *Spijkers v Gebroeders Benedik Abbatoir v Alfred Benedik en Zonen* [1986] 2 CMLR 296 (ECJ); *Oy Liikenne Ab v Pekka Liskojärvi, Pentti Juntunen* [2001] IRLR 171 (ECJ).

[7] *Harsco Metals SA (Pty) Ltd v Acelormittal SA Ltd* [2011] ZALCJHB 116; [2012] 4 BLLR 385 (LC).

[8] [2003] IRLR 128 (CA).

> "It is clear therefore that the overall assessment depends on an examination of the totality of the business; in this case, the business operated by Rural prior to the transfer."[9]

[16] The Labour Appeal Court then considered the opposing arguments on the effect of the non-transfer of certain assets. After dealing with the description of Rural's business in the founding affidavit and what it considered necessary to hand back to the Municipality it concluded:

> "In my view, given that the *onus* rests upon the respondent to show, on the probabilities, that a transfer of a business as a going concern had taken place, it cannot be said that the same business conducted by Rural had been transferred so that it was now conducted by a different entity, namely [the Municipality]. Take but one critical issue, debt collection. For debt collection to be continued seamlessly by [the Municipality], this component of the business had been conducted by Rural, it was necessary to meter the use of electricity, invoice the consumer and collect payments therefrom. Essential to this process would have been the use of software and information stored and used in digital form as had been employed by Rural. In short, the means to perform this debt collection activity had not been transferred. On its own, this was a significant component of the overall business. It supports the overall assessment that it cannot be said, on these papers, that the very business conducted by Rural had been transferred to [the Municipality]. Expressed differently, the Municipality would not have been able to continue business seamlessly after the 'transfer'. For these reasons, the appeal must be upheld."[10]

Leave to appeal

[17] The proper interpretation of the LRA will raise a constitutional issue that clothes this Court with jurisdiction, but this does not mean that this Court will hear all appeals from the Labour Appeal Court. It will only do so if the appeal raises

[9] *Maluti-A-Phofung Local Municipality v Rural Maintenance (Pty) Ltd and Another* [2015] ZALAC 41; (2016) 37 *ILJ* 128 (LAC); [2016] 1 BLLR 13 (LAC) (LAC judgment) at para 33.

[10] Id at para 37.

"important issues of principle".[11] Rural contends that there are three issues of principle which justify granting leave.

[18] The first is that the Labour Appeal Court applied a new test or approach to determine whether there had been a transfer of a business as a going concern in terms of section 197 of the LRA. In support of this argument it sought to place much reliance on the use of the word "seamlessly" in the judgment of the Labour Appeal Court, as well as on its specific discussion of debt collection as a component of the business that needed to be transferred. The former allegedly showed the application of a new test of "seamlessness", the latter an inappropriate reliance on only one aspect of what constituted a transfer of business. Neither contention can be upheld.

[19] It is clear from the portion of the Labour Appeal Court judgment discussed in paragraph 15 above that it considered that an "overall assessment" had to be made "on an examination of the totality of the business . . . operated by Rural prior to the transfer". It used "but one critical issue, debt collection" as an example in its overall assessment. This is not the formulation of a new test, or the singling out of one factor to the exclusion of others in the overall assessment, or laying down a general principle that all assets have to be transferred before section 197 is applicable. For these reasons I cannot agree with Jafta J in his judgment (second judgment) that the matter raises any new legal issue that needs to be determined on appeal.[12] It might have been better to rely on local precedent, rather than the English Court of Appeal, but as we will see the home grown variety also requires a holistic assessment of various factors.

[20] The second point of principle was said to be the Labour Appeal Court's reliance on and reference to debt collection, a fact said not to have been raised on the papers, but only in argument on appeal. As a result of this alleged defect Rural

[11] *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*NEHAWU*) at para 31. See also *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23; 2014 (6) SA 123 (CC); 2014 (10) BCLR 1195 (CC) at para 232 and *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC) at para 24.

[12] Second judgment at [45].

applied to admit further evidence before this Court for the first time. From the portions of the record quoted above it is apparent that the questions of, among other things, debtors' books and software were raised in the Municipality's opposing affidavits.[13] Rural did not seek to dispute that these items were not handed over, but explicitly contended that they were peripheral and not required to be handed over as a matter of law.[14] The facts upon which the Labour Appeal Court relied were thus not only undisputed on the record, but Rural declined the appropriate opportunity to dispute them. There is no justification to introduce evidence at this late stage of proceedings.[15]

[21] The third point was that local and international developments in relation to so-called "service provision changes", as opposed to standard transfer of businesses, necessitated the reformulation or development of our law.

[22] Rural submitted that European jurisprudence has in effect developed two different tests for transfers, one for transfer of a business or undertaking and another for service provision changes, and that the Labour Appeal Court has accepted "the introduction of the 2006 TUPE Regulations relating to a [service provision change]". It urged this Court to follow suit in order to provide clarification. There is no reason to, for the reasons that follow.

[23] The term "service provision change" was introduced into the British Transfer of Undertakings (Protection of Employment) Regulations (TUPE Regulations)[16] in 2006.[17] It is not a term used in section 197 of the LRA. Section 197(1)(a) defines

[13] See discussion above at [11] to [12].

[14] See discussion above at [13].

[15] See *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at para 43.

[16] No 246 of 2006.

[17] In section 2(1) "relevant transfer" is defined as "a transfer or a service provision change to which these Regulations apply in accordance with Regulation 3 . . . ." Regulation 3 reads:

> "(1) These Regulations apply to—

(a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;

(b) a service provision change, that is a situation in which—

(i) activities cease to be carried out by a person ('a client') on his own behalf and are carried out instead by another person on the client's behalf ('a contractor');

(ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ('a subsequent contractor') on the client's behalf; or

(iii) activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf,

and in which the conditions set out in paragraph (3) are satisfied.

(2) In this regulation 'economic entity' means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

(3) The conditions referred to in paragraph (1)(b) are that—

(a) immediately before the service provision change—

(i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;

(ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and

(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

(4) Subject to paragraph (1), these Regulations apply to—

(a) public and private undertakings engaged in economic activities whether or not they are operating for gain;

(b) a transfer or service provision change howsoever effected notwithstanding—

(i) that the transfer of an undertaking, business or part of an undertaking or business is governed or effected by the law of a country or territory outside the United Kingdom or that the service provision change is governed or effected by the law of a country or territory outside Great Britain;

(ii) that the employment of persons employed in the undertaking, business or part transferred or, in the case of a service provision change, persons employed in the organised grouping of employees, is governed by any such law;

(c) a transfer of an undertaking, business or part of an undertaking or business (which may also be a service provision change) where persons employed in the undertaking, business or part transferred ordinarily work outside the United Kingdom.

"business" as including "the whole or part of any business, trade, undertaking *or service*".[18]

[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.[19] As Yacoob J remarked in *Aviation Union,* 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".[20] The same can be said about service provision changes.

[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."[21] But this was done with acknowledgment of possible differences in language and context.[22] This Court has on many occasions warned that the use of comparative law should be treated with due regard to different contexts and

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(5) An administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities is not a relevant transfer.

(6) A relevant transfer—

(a) may be effected by a series of two or more transactions; and

(b) may take place whether or not any property is transferred to the transferee by the transferor.

(7) Where, in consequence (whether directly or indirectly) of the transfer of an undertaking, business or part of an undertaking or business which was situated immediately before the transfer in the United Kingdom, a ship within the meaning of the Merchant Shipping Act 1995 registered in the United Kingdom ceases to be so registered, these Regulations shall not affect the right conferred by section 29 of that Act (right of seamen to be discharged when ship ceases to be registered in the United Kingdom) on a seaman employed in the ship."

[18] The inclusion of "service" in the definition was effected in 2002.

[19] *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.

[20] Id.

[21] *NEHAWU* above n 11 at para 46.

[22] Id at para 47.

language.[23] *NEHAWU* is no authority for the wholesale and uncritical adoption of jurisprudence under the Acquired Rights Directive adopted by the European Commission[24] or the British TUPE Regulations.

[26] The inclusion of "service" in the definition of "business" in the LRA was enacted in 2002. It precedes the 2006 TUPE Regulations and differs in both wording and context from the latter. It is difficult to see on what basis the mere adoption of the TUPE Regulations in Britain and the jurisprudence in relation to it necessitates a reformulation or development of our existing law to incorporate a separate approach to so-called service provision changes.

[27] This Court has, in *NEHAWU*, *Aviation Union* and *City Power*,[25] consistently formulated the approach to be followed in determining whether there has been a transfer of business as a going concern under section 197.

[28] *NEHAWU* was decided before the amendment that included a "service" in the definition of "business" was applicable, but regarded the amendment as a clarification of the conclusion it reached.[26] 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

[23] *H v Fetal Assessment Centre* [2014] ZACC 34; 2015 (2) SA 193 (CC); 2015 (2) BCLR 127 (CC) at para 32. See also *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) at para 34; *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 291 (CC); 1995 (6) BCLR 665 (CC) at para 39.

[24] Directive 77/187 EEC.

[25] *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*).

[26] *NEHAWU* above n 11 at para 68.

> employer. What must be stressed is that this list of factors is not exhaustive and that none of them is decisive individually."[27]

[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.[28] The disagreement between the two judgments related to whether a transfer must already have taken place before relief could be granted and whether there was sufficient evidence to justify the relief being granted on the record before the Court.[29]

[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."[30]

[31] *City Power* too accepted and built on the foundations of *NEHAWU* and *Aviation Union.*[31] 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.

[27] Id at para 56.

[28] *Aviation Union* above n 19 at paras 35, 37, 47 and 50 (minority judgment) and para 111 (majority judgment).

[29] Id at para 82.

[30] Id at para 52.

[31] *City Power* above n 25 at paras 16, 36 and 37.

> 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."[32]

[32] Rural submitted that this consistent approach nevertheless needs clarification in the light of the Labour Appeal Court's alleged acceptance into our law of the 2006 TUPE Regulations relating to service provision changes. But this is also incorrect.

[33] It is true that in *TMS Group*[33] the Labour Appeal Court did, in the course of its judgment, refer to the TUPE Regulations. It is incorrect, however, that the Court accepted them as now constituting a separate test for service provision changes. Instead, what Davis JA did do was to continue and refer to the European Court of Justice decision in *Sodexho*:[34]

> "In my view, the approach adopted by the European Court of Justice in *Sodhexo*, supra, accords with the approach which has been adopted to section 197 by the Constitutional Court, both in [*Aviation Union*], supra and in its earlier decision of [*NEHAWU*]:
>
> > '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.'
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> See also [*Aviation Union*] supra at para 50-51."[35]

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[32] Id at para 39. See also para 38.

[33] *TMS Group Industrial Services (Pty) Ltd t/a Vericon v Unitrans Supply Chain Solutions (Pty) Ltd* [2014] ZALAC 39; (2015) 36 *ILJ* 197 (LAC) (*TMS Group*).

[34] *Carlito Abler and Others v Sodexho MM Catering Gesellschaft GmBH* [2004] IRLR 168 (*Sodexho*).

[35] Id at para 26.

[34] *Sodexho* was a case decided under the Acquired Rights Directive, and not the TUPE Regulations.[36] Its approach to the issue of the transfer of the business concerned was formulated as follows:

> "The national court, in assessing the facts characterising the transaction in question, must take into account the type of undertaking or business concerned. It follows that the degree of importance to be attached to each criterion for determining whether or not there has been a transfer within the meaning of Directive 77/187 will necessarily vary according to the activity carried on, or indeed the production or operating methods employed in the relevant undertaking, business or part of a business (Süzen, paragraph 18, and Hidalgo, cited above, paragraph 31)."[37]

This approach accords with the approach in our law, set out in *NEHAWU* and *Aviation Union*, as the Labour Appeal Court correctly pointed out.

[35] I have had the privilege of reading the judgments of Jafta J (second judgment) and Zondo J (third judgment). I can discern no new, old or important issue of principle in the application of section 197 that we differ on. What remains is an appeal on the facts, not usually a sufficient ground for this Court to interfere with the findings of a specialist tribunal like the Labour Appeal Court. Its findings are in any event not unreasonable.

[36] Suffice to compare, in this regard, the factual situation in *City Power* – an "as is" transfer of a full business – to the half-hearted return of certain components of Rural's business in the present case. The difference between the two factual situations is important in the context of the transfer of service businesses to municipalities. As

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[36] *Sodexho* above n 34. The European Court of Justice formulated the issue for decision before it as—

> "whether Article 1 of Directive 77/187 must be interpreted as applying to a situation in which a contracting authority which had awarded the contract for the management of the catering services in a hospital to one contractor terminates that contract and concludes a contract for the supply of the same services with a second contractor, where the second contractor, on the one hand, uses substantial parts of the tangible assets previously used by the first contractor and subsequently made available to it by the contracting authority and, on the other hand, refuses to take on the employees of the first contractor."

[37] Id at para 35.

noted above, *City Power* did not find that the mere termination of a service contract triggered the application of section 197 of the LRA. In that case there was a transfer of a fully functional business in its expanded form to *City Power*. Without that kind of "as is" transfer, the termination of the service contract may literally mean only a *termination* of the business, not its transfer back to the Municipality. The employment obligations of employees must then be dealt with by the erstwhile service provider under section 189 of the LRA if the business comes to an end for operational reasons. It cannot seek to transfer those obligations to the Municipality under the guise of section 197, but nevertheless seek to retain for itself the means it used to conduct the service business as is the case here. It is not only the interests of employees that must be protected in the interpretation and application of section 197, but even if their protection is of primary concern it needs to be kept in mind that the protection of workers is not solely governed by section 197 in these kinds of situations. Employees are also protected by the retrenchment provisions in section 189.[38] The choice here is which employer should be responsible for the workers affected by the change in circumstance.

[37] Rural submitted that it expanded the business and made it more profitable. The Municipality, by contrast, complains that certain necessary assets were not transferred. I agree that for a transfer of a business as a going concern to occur, not all the assets of the business have to be transferred and that it depends on the nature of the business and essentiality or otherwise of particular assets for a particular business. That factual application of a flexible test has long been at the heart of our going-concern business transfer jurisprudence. The onus rested on Rural to set out what work the more than

[38] Compare Wallis "It's not Bye-Bye to 'By': Some Reflections on Section 197 of the LRA" (2013) 34 *Industrial Law Journal* 779 at 805:

> "Reverting to the typical case, if the new provider of the service does not employ the affected workers they will become redundant from the perspective of their current employer and will be retrenched. That retrenchment arises from the economic circumstances of the service provider's business and is no different from the retrenchment that arises when there is a downturn in the market and a reduction in demand for the employer's products or services. It results in dismissal for operational requirements. To extend protection to workers in that situation under the guise of 'second generation outsourcing' or any similar label distorts the statutory protection given to workers in the context of retrenchment and provides a certain limited class of workers with greater protection than others similarly situated. This is, at least potentially, a breach of the equality provisions of the Constitution."

hundred additional employees it employed were involved in and what means were provided to them to do that work. It is common cause that certain equipment was not transferred to the Municipality, but it appears improbable that at least some of the newly employed employees did not need and use that equipment in order to do their work. Without the transfer of the means to do the work they did as part of Rural's business, there could be no transfer of the business to the Municipality as a going concern. The assets that Rural did not transfer back to the Municipality were essential to the profitability and operation of the business. Without these crucial assets, the Municipality could not have carried on the business without any major difficulties. But all this involves a disputed factual assessment – which is precisely not this Court's task. This example shows how this Court would have to make factual findings on what assets were essential for the operation of the business. But as noted earlier, it is quite inapt for this Court to adjudicate the appeal on a set of facts the Labour Appeal Court fully considered and itself determined.

[38] A final aspect remains. The Labour Appeal Court held, on the basis of *Oudekraal*[39] and *Kirland*,[40] that it should assume the validity of the EMC, despite the Municipality's contention that it was null and void for want of compliance with the prescribed procurement requirements. It did so even though the dispute about the validity of the EMC was pending in the High Court. In view of its finding that there was in any event no transfer of business, the eventual finding on the validity dispute in the High Court would have no effect. But if it had found otherwise and the High Court then held that the EMC was null and void there would have been a problem. The Municipality would then have been saddled with the employment contracts of 127 persons under the provisions of section 197, rather than only having to take over, as part of the restitution following a declaration that the EMC was null and void, the original 16 persons employed by it in relation to the electricity services.

[39] *Oudekraal Estates (Pty) Ltd v The City of Cape Town* [2004] ZASCA 48; 2004 (6) SA 222 (SCA) (*Oudekraal*).

[40] *Member of the Executive Council for Health, Eastern Cape Province v Kirland Investments* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) (*Kirland*).

[39] This provides a useful illustration of what role the *causa*, or legal cause, of any transfer of a business may play in the application of section 197 of the LRA. It is settled that the enquiry to determine whether the business is transferred as a going concern is a factual one. But the parameters of the factual inquiry are determined by the legal cause from which the transfer stems from.[41] The legal cause may be the invalidity of the underlying contract. In this case, if the EMC is held to be invalid, the legal cause of restitution demands that what Rural needs to hand back to the Municipality is the original business as operated by the Municipality at the time when it was transferred to Rural. If, however, it is held that the EMC was valid, the legal cause within which the factual inquiry (whether transfer of the business took place) must take place is the valid contract. What Rural needs to hand back is the business it operated until acceptance of the repudiation of the EMC and the cancellation of the EMC. To the extent that the second judgment finds that the legal cause is totally irrelevant, I must disagree.

Summary and conclusion

[40] On the evidence on record it was common cause that certain components of Rural's operation of the business that supplied electricity services to the Municipality were not handed back to the Municipality.[42] Despite having the opportunity to refute this evidence, Rural contended that they were peripheral to the operation of its business and need not have been handed back to the Municipality. Besides, Rural did not explain precisely what this business entailed. The Labour Appeal Court, proceeding on the accepted test of an assessment of all the relevant factors to determine whether there was a transfer of business as a going concern under section 197 of the LRA, held to the contrary. It did not apply any new test, nor has the Labour Appeal Court imported a different test in relation to the transfers of so-called

[41] *Aviation Union* above n 19 at paras 47-51.

[42] See in this regard clause 1.3.14 of the EMC which states that "'Equipment' shall mean the installed and operational electricity equipment and assets invested into by Rural as per the provisions of clause 9.5 below". Rural creates an incorrect impression that all the "operational electricity equipments" (including those upgraded and invested) were returned to the Municipality. It invested to make the business bigger, better, more efficient and more profitable. And not all the operational electricity equipments were handed to the Municipality.

"service provision changes". That term was imported into the TUPE Regulations in Britain in 2006 and does not appear in section 197 of the LRA. The definition of "business" in section 197(1) of the LRA includes a service. This Court has clarified that this means that it is the business that supplies the service, and not the service itself, that must be transferred. Both in wording and context the provisions of section 197 differ materially from those in the TUPE Regulations. No need has been demonstrated that our existing law on the interpretation and application of section 197 of the LRA is in need of reformulation or development.

[41] It follows that leave to appeal must be refused with costs, including the costs of two counsel.

Order

[42] The application for leave to appeal is dismissed with costs.

JAFTA J (Mogoeng CJ and Madlanga J concurring):

Introduction

[43] I have had the benefit of reading the judgment prepared by my colleague Froneman J (first judgment). Regrettably, I am unable to support the order proposed and the reasons advanced for it. On the contrary, I hold the view that leave to appeal must be granted and that the appeal must be successful. As I see it, the order granted by the Labour Court was correct and the subsequent order by the Labour Appeal Court was incorrect.

Leave to appeal

[44] As the first judgment rightly observes, this matter involves the application of section 197 of the Labour Relations Act (LRA). It is now trite that the interpretation and application of legislation that was passed to give effect to a right entrenched in the

Bill of Rights raises a constitutional issue. In a number of cases this Court has held that it has jurisdiction over matters involving the application and interpretation of section 197.[43] What remains for determination is the question whether it is in the interests of justice to grant leave. I think it is, for a number of reasons.

[45] The matter raises two constitutional issues of great importance which are yet to be determined by this Court. The first issue is whether, with regard to the factors relevant to deciding if there was a transfer of business as a going concern, it must be proved that all assets which were used in the operation of the business were transferred before it may be held that a transfer envisaged in section 197 had occurred. The Labour Appeal Court held that withholding some of those assets showed that there was no transfer of that sort.

[46] The other issue is whether the operation and applicability of section 197 in a particular matter depends on the validity of the transaction in terms of which the transfer was effected. Maluti-A-Phofung Local Municipality (Municipality) has resisted the claim by Rural Maintenance (Pty) Ltd (Rural), on the basis that the Municipal Manager who signed the agreement on which the claim was based had no authority to do so. The Municipality also contended that Rural did not qualify to conclude such agreement. Consequently, the validity of the agreement was pivotal to the defence raised by the Municipality.

[47] Moreover, there are reasonable prospects of success on the merits. While this is not decisive, it constitutes a weighty factor to take into consideration. The prospects of success are borne out by the conflicting outcomes reached by the other courts. The Labour Court held that a transfer contemplated in section 197 has taken place and ordered the Municipality to accept as its own employees, all workers of Rural who were engaged in the operation of the business transferred to the Municipality. In contrast, the Labour Appeal Court held that a transfer envisaged in

[43] See *NEHAWU* n 11 above; *Aviation Union* n 19 above; and *City Power* n 25 above.

the section has not occurred and reversed the order of the Labour Court. In these circumstances leave must be granted.

Issues

[48] Two main issues arise here. The first is whether the Labour Appeal Court applied the test for determining the applicability of section 197 correctly. The crucial issue being whether it was necessary for Rural to show that all assets both tangible and intangible were transferred, for Rural to succeed. Differently put, whether the Municipality may escape the legal consequences of section 197 purely on the ground that not all assets were transferred to it.

[49] The determination of the issue requires us to cast our eyes on the test laid down by this Court in *NEHAWU* and examine whether the test demands a transfer of all assets. For if it does not, then the Labour Appeal Court has erred in applying the test to the facts.

[50] The second issue relates to the defence raised by the Municipality, namely, that the agreement on which Rural relied on was invalid. This raises the complex question whether section 197 requires a valid transfer in law, for provisions of the section regarding the transfer of employment contracts to be triggered. The determination of this issue depends on the proper interpretation of section 197(2). However, before considering these two issues it is necessary to set out in detail the relevant facts, for a better understanding of the issues.

Factual background

[51] The Constitution and legislation impose on municipalities the duty to provide services like the supply of water and electricity. The municipalities must build and maintain infrastructure that enables them to fulfil the duty of providing basic services to residents and businesses. Owing to various reasons, the Municipality failed to maintain and upgrade the infrastructure it had for the supply of electricity to its

customers. The Municipality's customer base comprises approximately 121 000 households and 600 businesses.

[52] The state of disrepair of the infrastructure and equipment resulted in accidents that caused loss of life and an erratic supply of electricity which drove customers to public protests. The Municipality also failed to pay Eskom which supplied it with electricity. Its debt collection system was in chaos and as a result the Municipality was unable to collect revenue from customers for its services. The extent of the perilous state of the Municipality's affairs is best captured in an affidavit deposed to by the Municipal Manager at the time the dispute between the parties arose.

[53] Since this affidavit is crucial to the defence raised by the Municipality, it is necessary to quote copiously from it. The affidavit was filed in opposing a claim by the South African Municipality Workers Union (Union), after the signing of the agreement on which Rural relied in the present proceedings. The Union sought relief in the Labour Court against both Rural and the Municipality.

[54] In its affidavit the Municipality averred:

> "47. The relief sought by the Applicant will, if granted, have far reaching, severe and irreparable consequences not only for the First Respondent but for all persons within the area of jurisdiction of the First Respondent including the Applicant's members employed by the First Respondent. Consequently, the relief sought by the Applicant is not, it is submitted, in the public interest and is in fact contrary thereto.
>
> 48. The First Respondent is simply not in a position to effectively, properly and economically provide municipal services being electricity to persons within its area of jurisdiction and to thereby comply with its statutory obligations to provide municipal services being electricity to persons within its area of jurisdiction.
>
> 49. In regard to what is stated in paragraph 48 above:—
>
> 49.1 The First Respondent's electricity distribution infrastructure is close to collapse, with major transformers suffering oil leaks which can

cause the transformers to malfunction and the oil leaks contribute to ground pollution, and many circuit breakers are damaged beyond repair.

49.2 The First Respondent does not have the funds to either repair or replace transformers or to purchase spare transformers, new switch gear or any spare parts in respect of the First Respondent's electricity distribution infrastructure.

49.3 There are constant electricity outages occurring due to the poor state of the First Respondent's electricity distribution infrastructure.

49.4 The poor state of the First Respondent's electricity distribution infrastructure is such that there are many live electricity distribution points which are not secured and which can be accessed by members of the public and which can result in electrocution.

49.5 Due to malfunctioning switchgear, employees of the First Respondent are at serious risk of injury or death. During March 2013 an electricity substation at Phuthaditjhaba exploded, and during February 2012 an employee of a contractor engaged by the First Respondent died and an employee of the First Respondent was injured when electrical apparatus in a substation (the substation that supplies electricity to Nestlé) exploded.

49.6 The bulk of the electricity distribution infrastructure of the First Respondent requires upgrading and systematic replacing of conductors, insulators and transmission line poles.

49.7 Major investment is required in the electricity distribution infrastructure of the First Respondent in order to render the substations, transmission, distribution and reticulation systems operational and safe for use.

49.8 The First Respondent does not have the resources to effectively collect revenue from consumers. ln this regard, the First Respondent does not have the funds to employ sufficient numbers of employees or to purchase the necessary equipment required to effectively collect revenue from consumers. Furthermore, the First Respondent does not have a qualified high voltage cable jointer (who repairs cable faults) on its staff.

49.9 The First Respondent is presently heavily indebted to Eskom in respect of electricity supplied by Eskom to the First Respondent, in the amount of approximately R144 000 000,00 (one hundred and forty four million rand). The average monthly deficit, i.e. the difference between the revenue collected by the First Respondent from consumers and the cost to the First Respondent in supplying electricity to consumers, being incurred by the First Respondent is approximately R14 660 000,00 (fourteen million six hundred and sixty thousand rand). The deficit does not include the funds required to upgrade and enhance the First Respondent's electricity distribution infrastructure. For the month of June 2013, the deficit between the Eskom cost and the total amount billed to customers was R21 832 939,10 (twenty one million eight hundred and thirty two thousand nine hundred and thirty nine rand and ten cents) which excludes labour and other operational and maintenance costs.

49.10 The Electricity Management Agreement recognises the dire situation that the First Respondent finds itself in. In this regard, clause 2 of the Electricity Management Agreement states as follows

'2. Objective of the Agreement

2.1 The failed restructuring of the electricity distribution industry and subsequent formation of the regional electricity distributors have left municipalities with material maintenance and operational backlogs.

2.2 The objective of the Agreement is to provide for the appointment of Rural as management and operations service contractor of the Network for the duration of the Term, during which period Rural shall have the sole and exclusive responsibility for the management, operation, administration, maintenance and expansion of the Network.'

49.11 The Second Respondent has the resources to, in the stead of the First Respondent but subject to the ultimate supervision of the First Respondent as provided for in terms of Section 81 of the Act, provide municipal services being electricity to persons within the area of jurisdiction of the First Respondent and to collect revenue from consumers, and as appears *inter alia* from the Second Respondent's

answering affidavit the Second Respondent has invested considerable time and resources in regard to the implementation of the Electricity Management Agreement.

49.12 Without the assistance of the Second Respondent, the First Respondent will not be able to render municipal services being electricity to persons within the area of jurisdiction of the First Respondent, including members of the Applicant.

49.13 If the Electricity Management Agreement is not implemented or is set aside on review, then the First Respondent will be left in the dire situation that it finds itself in and may well not be able to continue with the supply electricity to the community. Not only will the harm to the First Respondent be severe and irreparable, more importantly the harm to persons within the area of jurisdiction of the First Respondent to whom the First Respondent is statutorily obliged to render municipal services being electricity will also be severe and irreparable, if not more severe and irreparable.

49.14 Incidents of public violence are also not uncommon with a typical electricity service delivery demonstration comprising residents of Tsheseng, Makaneng, Bolata, Makgalaneng, Thabo Tsoue, Lejwaneng, Phamong, Thaba Tsoue and Bluegumbosch having occurred on Wednesday 1 June 2011. Numerous shops were looted and shots fired with the First Respondent not having had the capacity to assist residents who were without water and electricity for a week. A team comprising Councillors, Management, SAMWU and COGTA (Department of Cooperative Governance and Traditional Affairs) undertook to investigate the causes of the problems and to set up an action plan to deal with the issues immediately. No progress was however achieved in this regard.

49.15 Subsequent to the failure to make progress with the lack of service delivery, Ungerer as a last resort submitted a request to Council in November 2011 requesting assistance to identify and appoint an alternative service delivery mechanism to actually improve service delivery to the community.

49.16 The First Respondent is plagued by constant theft of overhead copper conductors, which occurs on almost a daily basis and which results in

> electricity outages. The First Respondent does not have the funds or resources to replace the overhead copper conductors that are being stolen."

In those proceedings, the Municipality was the First Respondent.

[55] This affidavit depicts in graphic terms the poor state of the Municipality's infrastructure to the extent that it had become a danger to the public. Substations exploding and killing workers and violent protests occurring in many areas within the Municipality's jurisdiction in June 2011. A task team comprising of the Municipality's councillors, administrative staff, the Union and officials from the Department of Cooperative Governance and Traditional Affairs was formed and charged with the responsibility to investigate the causes of the violent protests and the Municipality's failure to deliver services.

[56] When the task team failed to produce a solution and protests continued unabated, a request was submitted to the Municipal Council in November 2011, asking it to identify and appoint a private service provider to take over the function of providing electricity. This request was motivated by the Municipality's lack of funds to repair the ailing infrastructure so that it could supply electricity and its inability to pay its debt to Eskom, which then stood at R144 million.

[57] Following the request and in an attempt to address problems relating to its poor service delivery, the Municipality placed an advert in newspapers circulating countrywide. One such advert was published in the *Sowetan* newspaper of 26 October 2012. This advert informed the public that the Municipality was considering an unsolicited bid to appoint Rural as a service provider to invest, upgrade, maintain and operate the electrical infrastructure of the Maluti-A-Phofung Municipality, a bid that had complied with the requirements of section 113 of the Local Government: Municipal, Finance Management Act.[44]

[44] 56 of 2003.

[58] The advert proceeded to set out reasons why the bid should not be subjected to an onerous competitive bidding process. These included the assertion that Rural was the sole provider with specialised services and expertise which would generate revenue without costs to the Municipality and enhance electricity cost savings for consumers. It was also stated that the appointment of Rural would immediately solve the poor supply of electricity if it was going to be sustainable over a long period.

[59] The advert invited the public to comment on the intended appointment of Rural by not later than 24 December 2012. It concluded by stating:

> "Bidders should be requested to submit bids or quotations valid for a period not exceeding 60 days. This period should be sufficient to enable the Municipality to complete the comparison and evaluation of bids, review the recommendation and award a contract."

[60] It is not clear from the record whether comments were received from the public and whether there were bidders other than Rural. But what is clear is that Rural was awarded the tender. However, it is important to note that in the present case the Municipality does not dispute any of these facts. Instead what is placed in issue is the validity of the agreement signed pursuant to the award of the tender.

[61] Following the award of the tender to Rural, an Electricity Management Contract was concluded by Rural and the Municipality. It was signed by the then Municipal Manager acting on behalf of the Municipality and a Director of Rural. This is the agreement in respect of which the Municipality now contends that its Municipal Manager had no authority to sign and also impugns its validity in proceedings pending in the Free State Division of the High Court (High Court).

[62] Shortly after the signing of the agreement, the Union instituted on an urgent basis an application in the Labour Court against the Municipality and Rural. This application was lodged on 17 May 2013. The Union's claim was based on the

assertion that in breach of section 78 of the Local Government: Municipal Systems Act[45] the Union was not consulted before the agreement was concluded. The Municipality and Rural filed opposing papers. The Municipal Manager who was in office then deposed to an affidavit setting out in explicit terms the depressing situation relating to the Municipality's inability to provide electricity and water to its residents and businesses. The vivid picture painted was that the Municipality had no funds to repair even that part of the infrastructure which posed a danger to the public.

[63] The affidavit pointed out that, should implementation of the agreement be stopped, the Municipality "will be left in the dire situation" and it will suffer irreparable harm. In this regard the affidavit states:

> "Not only will the harm to the [Municipality] be severe and irreparable, more importantly the harm to persons within the area of jurisdiction of the [Municipality] to whom [the Municipality] is statutorily obliged to render municipal services being electricity will also be severe and irreparable, if not more severe and irreparable."

[64] The affidavit also shows that the majority of employees did not support the relief sought by the Union. But more importantly, the Municipality admitted that Rural had taken over its business to supply electricity and that consequently the operation of section 197 of the LRA was triggered. The Municipality also acknowledged that some of its employees were transferred to Rural in terms of section 197. But because the infrastructure was in such a state of disrepair, Rural was not able to commence the supply of electricity immediately. Rural first had to fix the damaged infrastructure and replace equipment that could no longer be used.

[65] Rural incurred considerable expenditure in the process of preparing to implement the agreement. It spent approximately R70 million on electrical infrastructure mapping; about R14 million on materials like switchgears, poles, transformers, mini substations, prepaid meters and 17 light commercial vehicles. An

[45] 32 of 2000.

amount of R7.5 million was spent on purchasing two specialised trucks. Rural also purchased immovable property within the Municipality's area for about R5 million.

[66] The enormous capital and infrastructure investment was necessary to remedy the situation and prevent the collapse of the Municipality's failing electricity supply network. It also became essential for Rural to employ staff in addition to the 16 workers who were transferred from the Municipality. A total of 127 employees were appointed to operate the business.

[67] But even before Rural commenced the actual supply of electricity, on 5 August 2013 Rural received a letter from the Municipality, written by the Executive Mayor. This letter was dated 2 August 2013 and reads:

> "Rural Maintenance is hereby given notice to withdraw its resources related to the abovementioned function with immediate effect. The work currently performed is illegal within the supply area of Maluti-a-Phofung and therefore the Municipality will seek relief from the High Court in this regard. No legal relationship exists between the Municipality of Maluti-a-Phofung and Rural Maintenance as to justify such operations."

[68] The Executive Mayor made no reference to the tender that was awarded to Rural and the award, which is not disputed by the Municipality in these proceedings. Nor does she refer to the Electricity Management Contract which now the Municipality contends was signed without the necessary authority.

[69] In response to the Mayor's letter, Rural pointed out that the Municipality's action amounted to repudiation of the agreement. Rural indicated that it did not accept the repudiation, but that it had decided to hold the Municipality to the agreement. Rural insisted that the Municipality should perform its obligations in terms of the agreement. Rural concluded its response by demanding an undertaking by no later than 16h00 on 8 August 2013, that the Municipality would allow

implementation of the agreement failing which relief would be sought from the High Court interdicting the Municipality from interfering with the agreement.

[70] No undertaking was given by the Municipality. This led to an urgent application instituted in the High Court by Rural against the Municipality. The Municipality did not oppose the relief sought despite the stance that there was no legal basis for Rural to take over its supply of electricity. Consequently Jordaan J granted the following order:

> "1. The matter is heard as one of urgency and that relaxation of the usual rules as to service and time periods be condoned;
>
> 2. Pending the finalisation of an action to be instituted within 30 days for an order that the respondent be prohibited and interdicted from interfering in any way with the implementation of the electricity management agreement concluded between the applicant and the respondent on 3 April 2013;
>
> 3. Costs of this application be costs in the cause of the action to be instituted."

[71] In terms of this order the Municipality was prohibited from interfering with the implementation of the parties' agreement, pending finalisation of an action to be instituted by Rural within 30 days from the date of that order. Indeed Rural instituted the action on 26 August 2013 and that action was still pending in the High Court at the time of hearing of the application for leave in this Court.

[72] On 1 September 2013, Rural commenced with operating the transferred business of supplying electricity to businesses and households within the area of the Municipality. From 1 September 2013 up to 31 March 2014, Rural paid Eskom's account for the supply of electricity on time every month. The total amount paid to Eskom was R40 million. An amount of R172 million was spent over the same period in upgrading, maintaining and managing the electricity supply infrastructure. Rural remedied 14 415 complaints by consumers and collected payments for the electricity supplied.

[73] Although the Municipality had repudiated the agreement, it was happy to see 16 of its employees transferred to Rural and the latter assuming the responsibility of paying their salaries and other benefits. Rural trained the transferred employees to improve their skills and employed further workers from the residents of the Municipality, in accordance with its undertaking. All these employees became permanent workers of Rural and were dedicated solely to operating the business of supplying electricity.

[74] Rural put in place strict debt-collection systems. They also collected revenue from prepaid vendors and consumers who did not use pre-paid meters. Defaulters were disconnected for non-payment of accounts.

[75] However, notwithstanding the court order of 22 August 2013, the Municipality remained obstructive to the implementation of the agreement. It displayed "an utter disregard for the order and the interest of the public." It refused to pay R32.6 million in respect of its own electricity usage. On occasions the Municipality invoiced and collected revenue from consumers for the electricity that was supplied by Rural and this impacted negatively on Rural's ability to raise funds for operating the business. This conduct was in breach of the parties' agreement and also the Court's order.

[76] When Rural disconnected electricity to non-paying consumers, the Municipality would reconnect the supply. In March 2014 the Municipality made it impossible for Rural to continue operating the business of providing electricity. It informed consumers that Rural was not entitled to collect payment for electricity it supplied because Rural was not licensed. This encouraged more and more consumers to default on their payments.

[77] Out of frustration Rural threw in the towel and accepted the Municipality's repudiation of the agreement and cancelled it as from 1 April 2014. In the cancellation letter of 1 April 2014 Rural also pointed out that its employees were assaulted by municipal employees and that made it impossible for Rural to continue

operating the business. In a second letter of the same date, Rural stated that cancellation meant that the business reverted to the Municipality and as a consequence of section 197, the employees of that business were transferred with it to the Municipality.

[78] When Rural delivered information and employment contracts of the affected employees to the Municipality on 3 April 2014, its current Municipal Manager, Mr Tomo Taetsane informed Rural that the Municipality would not take over all the employees. Instead it was willing to re-employ its former employees only. It is this stance adopted by the Municipality which drove Rural to instituting the present proceedings.

Litigation history

[79] In April 2014 Rural approached the Labour Court for a declaration to the effect that as from 1 April 2014 all the employees who were engaged in the business of supplying electricity were transferred to the Municipality in terms of section 197(2) of the LRA. It also sought an order directing the Municipality to assume obligations of an employer under employment contracts of the affected employees.

[80] In substantiating its claim, Rural averred that when it cancelled the agreement:

> "78. The entire Network Business relating to all aspects of the Project, i.e. the provision of all electricity related services to inhabitants of the Municipality's jurisdictional area, has reverted back to and has been taken over by the Municipality and is already under the control of the Municipality and possession of the Network and the Capital Assets have already been returned to the Municipality.
>
> 79. The entire electricity distribution infrastructure of the Municipality that Rural and Rural Free State were in control of and utilised (and maintained and upgraded) for the provision of all electricity related services to inhabitants of the Municipality's jurisdictional area, as the Municipality had previously done, are no longer under the control of Rural and Rural Free State and has

been handed back, together with the additions and improvements thereto effected by Rural and Rural Free State, to the Municipality.

80. The bulk of the steps in the handover process have already taken place.

81. The very same Network Business will continue, and has continued, in the hands of the Municipality with effect from 1 April 2014, and as the Municipality had been doing prior to the implementation of the Agreement, the Municipality is once again providing all electricity related services to inhabitants of the Municipality's jurisdictional area."

[81] The Municipality opposed the relief sought. While not disputing that capital assets of the business, together with the entire electricity distribution infrastructure upgraded by Rural, including additions and improvement were handed over to it, the Municipality disputed that Rural's business was transferred to it as a going concern. But the Municipality did not deny that the bulk of steps in the handover process had already taken place and that the Municipality had commenced supplying electricity to consumers within its area.

[82] The reasons for disputing that what occurred was a transfer of the business back to the Municipality are contained in paragraph 47 of the answering affidavit deposed to by the current Municipal Manager. He states:

"Noticeably, absent from these paragraphs (in which Rural allege that they transferred their business as a going concern to us) is an itemized inventory of exactly what their business was. One would expect that an allegation of a business being transferred as a going concern would explain what the business was (assets, liabilities, etc.). The founding affidavit does not do this. The founding affidavit does not even explain to us what Rural's 'business' entailed. The meaning of 'a business as a going concern' has a very specific meaning in mercantile parlance. The founding affidavit in my submission, fails to describe Rural's business and what it would mean for it to qualify as a going concern. For example, I presume that Rural were operating from offices that were either owned by them or leased by them. I assume Rural had assets which may have included motor vehicle, computers, laptops, cell phones, office furniture, tools, and other equipment needed to carry out its operation. I would also assume that

> Rural's business had both creditors and debtors. I assume it had intellectual property too. None of these aspects that one would ordinarily find in an inventory of a business being transferred as a 'going concern' are apparent from these papers. None of these aspects were factually transferred to the Municipality either. We do not have any of their assets; we do not have their motor vehicle, cellphones, computers, laptops, equipment, etc. Their contracts have not been ceded to us nor have their debtor's books. This, I respectfully submit, translates into the only inference that their *business* was not transferred to us as a *going concern.*"

[83] This statement reveals the Municipal Manager's own understanding of the law relating to a transfer of business as a going concern. In his view Rural was required to describe the business and furnish an inventory of its assets and liabilities. He concludes by stating incorrectly that the Municipality did not have any of Rural's assets. This is not true. The undisputed allegation in Rural's affidavit shows that additions and improvements effected by Rural to the infrastructure were transferred to the Municipality. These included switchgears, poles, transformers, mini substations and pre-paid meters as well as electrical infrastructure mapping. These assets were additional to what Rural had received and returned to the Municipality.

[84] The Municipal Manager proceeds to state that motor vehicles, cell phones, computers, laptops and equipment were not handed over. Furthermore, he complained that debtor's books were not given to the Municipality and that contracts were also not ceded. However, he does not specify which contracts he was referring to. He then drew an inference that Rural's business was not transferred as a going concern.

[85] What emerges from the Municipal Manager's statement in paragraph 47 is that he understood the notion of a transfer of a business as a going concern as it occurs in mercantile law. The assertion that "the meaning of a business as a going concern has a very specific meaning in mercantile parlance" together with the averment that Rural should have furnished an itemised inventory of assets and liabilities reveal this misconception.

[86] But the Municipality raised other defences as well. These included the fact that the Municipal Manager who signed the agreement on its behalf had no mandate to bind it and therefore the agreement was illegal. It was also asserted that the agreement was a product of an improper relationship between the erstwhile Municipal Manager and Rural. Lastly, the Municipality contended that section 197 does not apply in circumstances where a transfer occurred pursuant to an agreement which is declared void *ab initio* (from the outset).

[87] The contentions advanced by the Municipality were rejected by Tlhotlhalemaje AJ in the Labour Court. With regard to the submission that section 197 did not apply because the transfer occurred in terms of an invalid agreement, the Labour Court invoked the decision in *Nokeng Tsa Taemane*[46] and held that the presence of a contractual link between the transferor and the transferee is not a necessary pre-condition for the application of section 197.

[88] While the Labour Court accepted that some of the assets of Rural's business such as vehicles, computers and administrative equipment were not transferred, however, it held that a transfer of business as a going concern had occurred. The Labour Court stated:

> "In this case, the Municipality accepted that it had acquired the obligation to provide electricity to its inhabitants. In this regard, it can be accepted that the business transferred was the purchase of electricity from Eskom as bulk supplier, the provision of electricity and related services to ratepayers, and most importantly, the entire infrastructure to run the entire electricity network, including transmission and distribution. That infrastructure as pointed out in the Applicants' replying affidavit included substations, switchgears, transformers, power lines, pre-paid vending systems, metering equipment etc. This infrastructure, which was transferred to the Applicants in a dilapidated state in 2011 was returned back to the Municipality in a improved and functional state in April 2014. Furthermore, it should be accepted that the business transferred, will continue to serve and service the same clients that the

[46] *Nokeng Tsa Taemane Local Municipality v Metsweding District Municipality* [2003] ZALC 81; (2003) 24 *ILJ* 2179 (LC) (*Nokeng Tsa Taemane).*

> Applicants used to service, being the inhabitants that fall under the jurisdiction of the Municipality. Thus the return of the infrastructure would enable the Municipality to continue from where the Applicants left off in providing the service in question."[47]

[89] Consequently, the Labour Court declared that with effect from 1 April 2014 the employment contracts of the affected employees were transferred to the Municipality in terms of section 197(2) of the LRA. The Labour Court refused leave to appeal but leave was granted by the Labour Appeal Court.

Labour Appeal Court

[90] Having considered foreign cases to which it was referred, the Labour Appeal Court held:

> "It is clear therefore that the overall assessment depends on an examination of the totality of the business; in this case, the business operated by Rural prior to the transfer."[48]

[91] Proceeding from the premise that the question whether there has been a transfer of business as a going concern must be assessed with reference to the business operated by Rural before the transfer, the Labour Appeal Court held that vehicles, computers and administrative equipment, which the Labour Court had regarded as peripheral assets, were used in the conduct of the business by Rural. Without transfer of those assets, the Labour Appeal Court held, it cannot be said that the same business that was conducted by Rural had been transferred and it was now conducted by the Municipality. The Court concluded that, without debtor's books, the Municipality could not seamlessly do the debt collection part of the business.

[92] Accordingly, the Labour Appeal Court held that a transfer of business as a going concern did not take place and the appeal must succeed.[49] The order of the

[47] *Rural Maintenance (Pty) Ltd v Maluti-A-Phofung Local Municipality* [2014] ZALCJHB 180 at para 29.

[48] LAC judgment above n 9 at para 33.

[49] Id at para 37.

Labour Court was set aside and replaced with an order dismissing the application with costs.

[93] It is now convenient to consider the issues arising and in doing so I propose to begin with the question whether a transfer as contemplated by section 197 took place from Rural to the Municipality. But before doing so, I must dispose of a preliminary issue. That is whether section 197 applies to a transfer to a municipality. This issue was settled by the Labour Court in *Nokeng Tsa Taemane* and this Court in *City Power*. The section does apply to transfers to municipalities.

[94] In *City Power* this Court affirmed that section 197 applies in these terms:

> "No case has been made for the preferential treatment of a municipal entity, or other entity that performs a public function akin to that of a municipality, from the application of section 197. There are numerous instances where labour legislation will have budgetary or procedural consequences for all entities, including organs of state. As the Labour Court stated, all employers, including organs of state must, when entering into contracts with service providers, make the necessary provisions or arrangements for legal eventualities like section 197. To the extent that such entities wish to avoid the provisions of section 197(2), they could seek to reach an agreement in terms of section 197(6). Section 197(6) caters for instances where the employer seeks to 'contract out' of the provisions of section 197(2). In terms of section 197(2) the specified legal consequences follow if a transfer of business as a going concern takes place, unless otherwise agreed upon in terms of section 197(6). The agreement contemplated should in terms of section 197(6), be in writing and concluded between the old employer, the new employer or the old and new employers acting jointly, on the one hand, and any person or body with whom the old employer and new employer are obliged to consult in terms of section 189 of the LRA. No such agreement was concluded between City Power and Grinpal".[50]

[50] *City Power* above n 25 at para 33.

Transfer of businesses

[95] Section 197(1) defines two words which are crucial to the interpretation of the section. These words are "business" and "transfer". The section provides:

> "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."

[96] It is quite plain that "business" as defined carries a wide meaning. The text proclaims that it includes "the whole or part of any business, trade, undertaking or service". Therefore, the business contemplated in the section may be the whole or part of a business of any type, the whole or part of a trade, the whole or part of an undertaking and the whole or part of a service. Although the section says "business" includes the whole or part of a service, this Court in *Aviation Union* pointed out that this must be understood to refer to the business entity that supplied the service and not the service itself.

[97] On this issue the minority said:

> "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."[51]

[51] *Aviation Union* above n 19 at para 52.

[98] And in similar vein the majority stated:

> "The final general observation is that, in determining whether contracting out amounts to the transfer of a business as a going concern, the substance of the initial transaction, more specifically whether what is outsourced is a business as a going concern rather than the provision of an outsourced service remains significant during subsequent transfers. If the outsourcing institution from the outset did not offer the service, that service cannot be said to be part of the business of the transferor. What happens here is simple contracting out of the service, nothing more, nothing less.
>
> There is no transfer of the business as a going concern. The outsourcee is contracted to provide the service, and becomes obliged to do so. And it is the outsourcee's responsibility to make appropriate business infrastructure arrangements. These may include securing staff, letting appropriate property for office or other work space, and acquiring fixed assets, machinery and implements, computers, computer networks and the like. Cancellation of the contract in these circumstances entails only that the outsourcee forfeits the contractual right to provide the service. The whole infrastructure for conducting the business of providing the outsourced service would ordinarily remain the property of the outsourcee."[52]

[99] Indeed what is capable of being transferred is the business or entity that provides a service and not the service itself. Put differently, a service is incapable of providing another service. Moreover, a service itself is not capable of employing workers. Instead, they may be employed by the transferor who provides a service through them to a consumer. In this context it is the transferor who transfers the business or entity in which the workers are employed. The focal point of section 197(2) is to protect the employment of the workers through the hands of whom a service or goods are supplied. Their contracts of employment get transferred together with the business or entity that provided a particular service.

[100] With regard to "transfer", *Aviation Union* tells us that:

[52] Id at paras 106-7.

> "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 affected by the old employer is at odds with the clear scheme of the section.
>
> But 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. 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 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."[53]

[101] As the Labour Court observed here, it is common cause that upon cancellation of the Electricity Management Contract the Municipality regained the right to purchase bulk electricity from Eskom and assumed the responsibility to sell the electricity to consumers within its area. In addition, the whole infrastructure to operate the electricity supply, including transmission and distribution moved from Rural into the hands of the Municipality. This infrastructure included substations, switchgears, transformers, power lines, pre-paid vending systems and pre-paid meters and other meters.

[53] Id at paras 46-8.

[102] For its part, the Labour Appeal Court found that Rural had returned to the Municipality the bulk of the assets used in the acquisition of electricity from Eskom and its distribution to consumers. The Court stated:

> "Notwithstanding this pending action, Rural delivered an information pack to appellant on 3 October 2014 containing a list of the names of the 127 affected employees, their employment contracts, an organogram of Rural's organisational structure together with a proposed agreement in terms of section 197 of the LRA. Rural then sought to transfer the 127 employees onto appellant's payroll. It returned to appellant what it termed 'possession of the Network and the Capital Assets'; in other words the electricity distribution infrastructure which consisted largely of the properties, tools equipment and vehicles that had been transferred by appellant to Rural in the first place."[54]

[103] Notwithstanding this finding, the Labour Appeal Court held that it could not be said that there was a transfer of business because some of the assets were not transferred. This conclusion constitutes the sole foundation that supported the order issued by the Labour Appeal Court. It was articulated in these terms:

> "In my view, given that the *onus* rests upon the respondent to show, on the probabilities, that a transfer of a business as a going concern had taken place, it cannot be said that the same business conducted by Rural had been transferred so that it was now conducted by a different entity, namely appellant. Take but one critical issue, debt collection. For debt collection to be continued seamlessly by appellant, this component of the business had been conducted by Rural, it was necessary to meter the use of electricity, invoice the consumer and collect payments there from. Essential to this process would have been the use of software and information stored and used in digital form as had been employed by Rural. In short, the means to perform this debt collection activity had not been transferred. On its own, this was a significant component of the overall business. It supports the overall assessment that it cannot be said, on these papers, that the very business conducted by Rural had been transferred to appellant. Expressed differently, appellant would not have been able to

[54] LAC judgment above n 9 at para 9.

> continue business seamlessly after the 'transfer'. For these reasons, the appeal must be upheld."[55]

[104] The approach adopted by the Labour Appeal Court is inconsistent with what was stated by this Court in *Aviation Union* with regard to determining whether there was a transfer of business. There it was stated that transfer of business means that the business has changed hands or that it has moved from one person to the other. On this issue the majority said:

> "It cannot be doubted that the word –'by' must be given its ordinary meaning. We must ask these questions in the inquiry whether a transaction in issue contemplates a transfer of business by the old employer to the new employer. Does the transaction concerned create rights and obligations that require one entity to transfer something in favour or for the benefit of another or to another? If so, does the obligation imposed within a transaction, fairly read, contemplate a transferor who has the obligation to effect a transfer or allow a transfer to happen, and a transferee who receives the transfer? If the answer to both these questions is in the affirmative, then the transaction contemplates transfer by the transferor to the transferee. Provided that this transfer is that of a business as a going concern, for purposes of section 197, the transferee is the new employer and the transferor the old. The transaction attracts the section and the workers will enjoy its protection."[56]

[105] Here the answer to both questions must be in the affirmative. This much is clear from the facts. The consequence of the cancellation was that the Municipality regained the right to acquire electricity from Eskom and that Rural was obliged to return to the Municipality the infrastructure and other equipment necessary for receiving the bulk electricity and distributing it to consumers. The fact that debt collection was part of the business as operated by Rural did not detract from this reality.

[106] Moreover, the Labour Appeal Court itself held that—

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[55] Id at para 37.

[56] *Aviation Union* above n 19 at para 113.

> "the business conducted by Rural operated on two legs, namely the provision of adequate infrastructure in order for residents to be supplied with electricity and the mechanism by which to generate sufficient revenue for the supply of electricity by way of an adequate billing of consumers and collection of what was owed for the supply of electricity".[57]

[107] On that approach, Rural's business had two parts to it, namely the supply of electricity and debt collection. On facts accepted by the Labour Appeal Court, the assets were used in the supply part and that part of the business passed on to the Municipality. This constituted a transfer of part of the business as contemplated in section 197(1) of the LRA. Therefore, the Labour Appeal Court erred in concluding that there was no transfer because the debt collection part of the business could not be operated seamlessly by the Municipality. That Court overlooked the fact that section 197(2) was also triggered by transfer of a part of a business.

[108] In any event the conclusion that without the debtors' books, it was impossible for the Municipality to bill consumers and collect payment is not supported by the facts. It will be recalled that what prompted cancellation was the fact that the Municipality had encouraged consumers not to pay Rural for its supply of electricity and that instead the Municipality issued invoices and collected payments for the electricity which was supplied by Rural.

Going concern

[109] For section 197(2) to be activated, it is not enough to prove that there was transfer of business from one person to the other. The transfer must have been of a particular kind. The business must have been transferred as a going concern.

[110] In *NEHAWU* this Court declared what the words "going concern" mean:

[57] LAC judgment above n 9 at para 34.

> "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. 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."[58]

[111] What requires emphasis from this statement is the fact that the enquiry is factual. There must be objectively ascertainable facts showing that the business does not remain in the same hands but that it has changed hands.

[112] The second issue that calls for highlighting in evaluating the facts is that attention must be paid to the substance and not the form of the transaction. Here transaction does not denote an agreement between the parties but a relationship that creates rights for the transferee and obligations for the transferor. The obligation must require the transferor to effect or allow a transfer to happen and the transferee must acquire the right to demand and receive the transfer.[59]

[113] The third issue that requires to be stressed is that in determining whether a transfer of business as a going concern has taken place, a court must examine whether certain factors were present. These include whether assets, workers and/or customers were transferred and whether the same business is being carried on by the transferee.

[58] *NEHAWU* above n 11 at para 56.

[59] *Aviation Union* above n 19 at para 113.

NEHAWU was at pains to underscore that this list is not exhaustive and that none of the factors is individually decisive.

[114] What is important though is the fact that the mentioned factors constitute guidelines to help a court that undertakes an enquiry on whether transfer as a going concern has occurred. As a guide it is therefore not necessary that all assets or all workers or all customers must have been transferred. Moreover, sight must not be lost of the fact that all these factors are guidelines which should not be elevated to the level of mandatory and rigid legal rules. Instead they should be taken as possible indications which must be weighed up in the process leading up to a conclusion. Our courts are familiar with the process of balancing disparate factors in order to arrive at a particular conclusion. For example, various factors are taken into account to determine whether leave to appeal to this Court should be granted. None of them is decisive. Here too the court must at the conclusion of the inquiry make a value judgement on whether the presence of each or some of the factors sufficiently show that a transfer of the business as a going concern took place.

[115] Here each of the factors mentioned were present. The bulk of assets were transferred. It bears repeating that it was not necessary for all assets to be transferred before this factor could be taken into account. Nor did the failure to transfer some of the assets prove decisively that no transfer as a going concern had occurred. Notably, all assets that were initially transferred from the Municipality to Rural were returned to the Municipality.

[116] Some workers were to be transferred from Rural to the Municipality. The latter had indicated its willingness to take over the 16 employees who were originally transferred from the Municipality to Rural. All electricity consumers within the area of the Municipality were transferred back to it. The 121 000 households and 600 businesses could only obtain their electricity supply from the Municipality as from 1 April 2014. Lastly, the Municipality as from that date operated the business of sourcing electricity from Eskom and distributing it for a fee to consumers. This was

the same business which Rural conducted before 1 April 2014. The Municipality did not have to operate exactly the same business that Rural carried out.

[117] The fact that a transferor operates an upscaled or downscaled version of the transferred business cannot mean that the business is different. The scale at which a transferred business was conducted may be influenced by a myriad of reasons. The fact that one or more parts of it are discontinued does not change the nature of the business. Accordingly, the Labour Appeal Court erred in holding that the business which the Municipality operated after 1 April 2014 was different from the one that was conducted by Rural.

[118] The Labour Appeal Court's approach would render the test for determining whether there was a transfer of business as a going concern unworkable. To illustrate this point. Take for instance a case where only part of the workforce moves with the business to the new owner and the rest of the employees decline to work for the new owner. In law they are entitled to decline. Another example is where, after the transfer, some of the customers stop supporting the business and procure their goods or services from a third party. In both instances the transferor and the transferee have no control over the issues. Coming close to what occurred here, where the transferor used rented assets to run the business, can it be said that there was no transfer contemplated in section 197(2) if she is unable to transfer all assets to the transferee. In all these instances, the answer must be that there was such a transfer if the conspectus of the facts supports that conclusion.

[119] Yet here the Labour Appeal Court approached the matter on the footing that the failure to transfer all assets was individually decisive of the question. The withholding of those assets alone meant, in the opinion of that Court, that there was no transfer of a business as a going concern. This constitutes a misapplication of the test laid down by this Court in *NEHAWU*. According to that test none of the relevant factors is individually decisive. So even if the factor, and not part of it, is entirely

absent, there may still be a transfer as a going concern. Here the absence related to part of the assets only.

Validity of contract

[120] The Municipality persisted in the argument that section 197 did not apply to the present transfer because the underlying agreement was void *ab initio* (from the outset). It was submitted that the agreement was void because the Municipal Manager who signed it was not authorised by the Municipality and that Rural did not have the necessary licence to supply electricity. In addition, it was concluded that the question whether the agreement was void *ab initio* or was once valid but later cancelled is pending before the High Court. Consequently, argued the Municipality, this Court cannot now determine whether section 197 applies until the validity of the agreement is decided by the High Court.

[121] Implicit in this argument is the proposition that for section 197 to apply, there must be a valid agreement in terms of which the transfer was effected. I disagree. The issue that is pending before the High Court relates to the validity of the agreement and has no bearing on the reach of section 197. It is simply irrelevant. This is because section 197(2) in its text does not prescribe that it applies only where the transfer is effected in terms of a valid agreement. In other words, the scope of the section is not determined, nor is it limited by the validity of an agreement.

[122] Section 197(2) provides:

> "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."

[123] The section lists four consequences that flow from the transfer of a business as a going concern. These consequences include an automatic replacement of the workers' employer by the transferee who assumes all rights and obligations of the transferor under the employment contracts, which the transferor had with the employees of the transferred business.

[124] In determining the reach of the section, closer attention must be paid to the opening words of section 197(2). In plain language the section deals with two issues in those opening words. These issues are arranged in the form of a general norm and an exception. The norm is that wherever a transfer of business takes place, the enumerated consequences follow as matter of law. This norm is depicted by the phrase "if a transfer of a business takes place".

[125] In contrast the exception is defined by the words "unless otherwise agreed in terms of subsection (6)". Properly construed, this part of the section means that if the transferor and transferee wish that the consequences of section 197(2) be excluded, they should conclude an agreement in terms of section 197(6). As this Court observed in *City Power*, that agreement must be in writing and must be concluded by the transferor and transferee on the one hand and any person or union the employers are obliged to consult in terms of section 189 of the LRA, on the other hand.

Consequently it is only an agreement envisaged in section 197(6) that may exclude the operation of section 197(2) and the consequences that flow from it.

[126] To construe the section otherwise and subjecting its application to the validity of the underlying agreement would seriously undermine its purpose. The objective of the section is to preserve employment when business exchanges hands.[60] It alters the common law position which terminated employment upon transfer of business.[61]

[127] I agree with the Labour Court here and also in *Nokeng Tsa Taemane* that the existence of a contract is not a pre-condition for the application of section 197(2) in a particular case. The section may apply even in circumstances where the transfer is based on a different legal arrangement. What activates the application of the section is the transfer of business as a going concern and not the reasons underlying the transfer.

[128] For these reasons, I would grant leave, uphold the appeal with costs and set aside the order of the Labour Appeal Court.

ZONDO J (Mogoeng CJ and Bosielo AJ concurring):

Introduction

[129] The main question for determination in this matter is whether there was a transfer of business as a going concern in terms of section 197 of the Labour Relations Act[62] (LRA) from Rural Maintenance (Pty) Limited (Rural) to the Maluti-A-Phofung Local Municipality (Municipality) on 1 April 2014. If there was, then all Rural's employees who were employed in that business at the time of the transfer became

[60] *NEHAWU* above n 11 at para 53.

[61] *Aviation Union* above n 19 at para 39.

[62] 66 of 1995.

employees of the Municipality with effect from that date. The dispute between the parties is whether such a transfer of business did take place.

[130] Rural contends that a transfer of business as a going concern did take place from itself to the Municipality and that, as a result thereof, all 127 employees that were employed in the business became employees of the Municipality. The Municipality contends that no such transfer of business occurred and, therefore, no employee of Rural became an employee of the Municipality by reason of that transfer of business. Nevertheless, the Municipality is prepared to accept 16 of the 127 employees into its employ but not the rest. The 16 employees had previously been in its employ until 1 September 2013 when Rural became their employer following a transfer of business as a going concern from the Municipality to Rural.

[131] The Labour Court decided that there had been a transfer of business as a going concern from Rural to the Municipality and that, therefore, all the 127 employees became employees of the Municipality. On appeal the Labour Appeal Court decided that there was no transfer of business as a going concern and, therefore, Rural's 127 employees did not become employees of the Municipality with effect from 1 April 2014. This meant that even the 16 employees who had previously been in the Municipality's employ and had become employed by Rural upon the transfer of business as a going concern from the Municipality to Rural remained employees of Rural.

[132] I have had the opportunity of reading the judgment by my Colleague, Froneman J (first judgment) and the judgment by my Colleague, Jafta J (second judgment). The first judgment does not only hold that there was no transfer of business as a going concern but it concludes that even leave to appeal should be refused. The second judgment concludes not only that leave to appeal should be granted but also holds that there was a transfer of business as a going concern from Rural to the Municipality and that, consequently, the 127 employees of Rural became

employees of the Municipality. It, accordingly, upholds the appeal and sets aside the decision of the Labour Appeal Court and restores the order of the Labour Court.

Background

[133] The facts of this matter have been sufficiently set out in the first and second judgments.[63] For that reason, I will not set them out here.

Jurisdiction

[134] I agree with the second judgment that this matter raises constitutional issues and that, therefore, this Court has jurisdiction.

Leave to appeal

[135] For the reasons given in the second judgment, I agree that:

(a) this matter raises important issues;
(b) there are reasonable prospects of success; and
(c) it is in the interests of justice that leave to appeal be granted.

The appeal

[136] I agree with the second judgment that:

(a) there was a transfer of business as a going concern from Rural to the Municipality; and
(b) the appeal should be upheld and the decision of the Labour Appeal Court set aside and that of the Labour Court restored.

I set out my reasons below.

[63] See first judgment at [4] to[14] and second judgment at [50] to [78].

Was there a transfer of business from Rural to the Municipality?

[137] Section 197(1) reads:

> "(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."

The definition of the word "business" is such that, when one speaks of a business, one would also be speaking of a part of a business. The word "transfer" has a special meaning given in its definition. It does not bear its ordinary meaning. It means the transfer of a business by one employer (the old employer) to another employer (the new employer) as a going concern.

[138] Section 197(2)(a) and (d) reads:

> "(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;
>
> . . .
>
> (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."

[139] It is trite that purposive interpretation is the correct approach in interpreting the LRA. The purpose of the LRA is the advancement of economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of the LRA as set out in section 1. One of these primary objects is

giving effect to and regulating the right to fair labour practices as enshrined in section 23 of the Constitution.

[140] In the interpretation and application of section 197, it is important that the primary purpose of the section be borne in mind at all times. The primary purpose of section 197 is the protection or safeguarding of the rights of employees whenever there is a transfer of business as a going concern from one employer to another.[64] The principle upon which section 197 is based is that, whenever a business in which workers are employed is transferred as a going concern from one employer to another, the workers go with the business. This avoids the loss of jobs that used to result from transfers of businesses prior to the current LRA. The transferor ceases to be the employees' employer and the transferee becomes their employer, with full recognition of their years of service, benefits and other terms and conditions of employment unless there has been an agreement in writing as envisaged in section 197(2) read with subsection (6).

[141] Our section 197 was inspired by[65] instruments such as the Acquired Rights Directive 77/187/EEC of the European Union (EU Directive) and the Transfer of Undertakings (Protection of Employment) Regulations, 1981 (TUPE Regulations).[66] Indeed, the provision shares a number of features with those instruments.[67] It, therefore, makes sense that, while mindful of the difference in language between section 197 and those instruments and the legal context in which each occurs, our

[64] *NEHAWU* above n 11 at para 53 it was said that section 197 has two purposes. These purposes were given as: (i) to facilitate the commercial transaction of transferring a business as a going concern, and (ii) to protect workers against unfair job losses. What was not said in *NEHAWU* was whether any one of those is the primary purpose of the section, and, if so, which one it is. I take the view that the safeguarding and protection of employees' employment and their rights is the primary purpose of section 197. This is in line with the pronouncement of the European Court of Justice and other courts in numerous cases that the primary purpose of instruments such as the Acquired Rights Directive 77/187/EEC of the European Union and the Transfer of Undertakings (Protection of Employment) Regulations, 1981 is the safeguarding of the rights of employees in the event of a transfer of business.

[65] *National Education Health & Allied Workers Union v University of Cape Town* (2002) 23 *ILJ* 306 (LAC); [2002] 4 BLLR 311 (LAC) at para 14.

[66] The TUPE Regulations are regulations adopted by the United Kingdom in order to give effect to the EU Directive within the United Kingdom.

[67] See above n 65 at paras 15–33. See also *Horn v LA Health Medical Scheme* [2015] ZACC 13; 2015 (7) BCLR 780 (CC) at paras 66-71.

courts should seek to benefit from the jurisprudence of other courts, particularly the European Court of Justice, as those courts' interpretation of those instruments may be helpful in interpreting our section 197.[68] In dealing with the interpretation of the EU Directive and the TUPE Regulations, the European Court of Justice and other courts have, time and again, emphasised that the purpose of the instruments is to safeguard the rights of employees in the event of a transfer of a business.[69]

[142] In *Spijkers* the European Court of Justice held that the test for determining whether there is a relevant transfer is whether the entity in question retained its identity after the transfer. To determine this, a court must have regard to all relevant factors surrounding the transaction. The European Court of Justice said:

> "It is clear from the scheme of Directive No 77/187 and from the terms of Article 1(1) thereof that the directive is intended to ensure the continuity of employment relationships existing within a business, irrespective of any change of ownership. It follows that the *decisive criterion for establishing whether there is a transfer for the purposes of the directive is whether the business in question retains its identity*.
>
> Consequently, a transfer of an undertaking, business or part of a business does not occur merely because its assets are disposed of. Instead it is necessary to consider, in a case such as the present, *whether the business was disposed of as a going concern, as would be indicated, inter alia, by the fact that its operation was actually continued or resumed by the new employer, with the same or similar activities*.
>
> In order to determine whether those conditions are met, it is necessary to consider *all the facts characterising the transaction in question*, including the type of undertaking or business, whether or not the business's tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred and the degree of similarity between the activities carried on before and after the transfer and the period, if any,

[68] *NEHAWU* above n 11 at para 47.

[69] *Power v Regent Security Services Ltd* [2008] 2 All ER 977 (CA Civ) at para 8; *Council of the Isles of Scilly v Brintel Helicopters Ltd and Ellis* [1995] IRLR 7 (EAT) (*Brintel Helicopters*) at paras 18-19; *Kelman v Care Contract Services* [1995] ICR 260 (EAT); *Landsorganisatioen I Danmark v Ny Molle Kro* [1989] IRLR 37 (ECJ) at para 16; and *Spijkers v Gebroeders Benedik Abattoir CV* [1986] 2 CMLR 296 (ECJ) at para 6.

> for which those activities were suspended. It should be noted, however, that all those circumstances are merely single factors in the overall assessment which must be made and *cannot therefore be considered in isolation*."[70]

This test has been applied and confirmed in various decisions by the European Court of Justice[71] as well as in decisions of the English Courts.[72] What is common in the cases set out above is that the court must take into account "all relevant factors" when deciding whether there has been a transfer of a business as a going concern – i.e. whether the entity retained its identity.

[143] In *Kelman* it was said that the crucial question is whether the entity remains identifiable (although not necessarily identical) after the alleged transfer. In the context of an entity that was only concerned with the provision of services, the Employment Appeal Tribunal held that there could be a relevant transfer even though there was no transfer of assets. Mummery J said in part:

> "A line of decisions of the Court of Justice on Directive 77/187/EEC culminating in *Schmidt* [1994] IRLR 302 establishes that the decisive criterion for determining whether there has been a transfer of an undertaking 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 for the industrial tribunal to examine all the facts relating both to the identity of the undertaking and the relevant transaction and assess their cumulative 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.*

[70] *Spijkers* above n 69 at paras 11–13.

[71] *Oy Liikenne Ab v Liskojärvi* [2001] All ER (EC) 544 (*Oy Liikenne*); *Mayeur v Association Promotion De L'Information Messine (APIM)* [2000] IRLR 783; *Sanchez Hidalgo and Others v Asociacion De Servivios Aser and Sociedad Cooperativa Minerva; Ziemann v Ziemann Sicherheit GmbH and Horst Bohn Sicherheitsdienst* [1999] IRLR 136; *Süzen v Zehnacker Gebaudereinigung GmbH Krankenhausservice and Lefarth GmbH* [1997] IRLR 255; *Schmidt v Spar-und Leihkasse Der Fruheren Ämter Bordersholm, Kiel und Cronshagen* [1994] IRLR 302; and *Rask v ISS Kantineservice A/S, C-209/91* [1993] IRLR 133 at para 20.

[72] *OCS Cleaning Scotland Ltd v Rudden and Olscot Ltd* [EAT/290/99]; *Kelman* above n 69; *Brintel Helicopters* above n 69; and *Kenny v South Manchester College* [1993] IRLR 265.

> *A change of employer responsible for the activities of an undertaking which continues to be identified will usually mean that there has been a relevant transfer.* The cumulative effect of the decisions on the Directive is that a transfer of an undertaking may occur for the purposes of the Directive even though . . . *there has been no transfer of the ownership of assets, tangible or intangible. . . . What matters is the transfer of responsibility for the operation of the undertaking in which the employees were employed.*"[73]

I draw special attention to the last sentence in this passage.

[144] In the present case, the Municipality has admitted that there was a transfer from Rural to itself of the responsibility to provide all electricity related services to its inhabitants. The deponent to the Municipality's answering affidavit, Mr Tomo Charles Taetsane, says:

> "Whilst I admit that the Municipality has acquired the obligation to provide electricity to its inhabitants (an obligation that previously would have rested on Rural had the contract been valid) such does not mean that the acquisition of an obligation translates into the acquisition of a business."

[145] In *Kenmir*,[74] too, it was said that the absence of a transfer of certain assets is not necessarily conclusive of a relevant transfer not having occurred, if in the particular circumstances, the transferee was able to carry on substantially the same business as before the transfer. The Court said:

> "In deciding whether a transaction amounted to the transfer of a business, *regard must be had to its substance rather than its form*, and consideration must be given to the whole of the circumstances, weighing the factors which point in one direction against those which point in another. . . . The *absence of an assignment of premises, stock-in-trade or outstanding contracts will likewise not be conclusive, if the*

[73] *Kelman* above n 69 at 267B.

[74] *Kenmir v Frizzel* [1968] 1 All ER 414 (QBD).

> *particular circumstances of the transferee nevertheless enable him to carry on substantially the same business as before*."[75]

[146] In *Oy Liikenne*, it was said that a court must determine what is essential and indispensible for the entity to carry on operating and whether such has been transferred to the transferee. The court will also need "to assess the respective importance to be given" to the separate factors.[76] In order to do this it should look at what "characterises, or what distinguishes, the economic entity which was the subject of the operation in question". The European Court of Justice held that two conditions must apply in order for the identity of the undertaking to have been maintained after the transfer:

> "First, the transferee must carry on the same economic activity as was carried on by the transferor before the transfer, or a similar activity. This first condition can be defined as the 'identity' of the activity.
>
> Secondly, there must have been the transfer of the means necessary to undertake the activity in question, or of the means required to operate it, having regard to the nature of the entity transferred. This second condition can be defined as the 'identity' of the entity.
>
> . . .
>
> The national court must therefore determine which are the essential and indispensable elements required in order for the economic entity to carry on operating and establish whether these elements have been taken over by the transferee."[77]

[147] It was further held in *Oy Liikkenne* that where an entity exists "without having any significant assets, tangible or intangible, the maintenance of its identity following a transfer affecting it cannot, logically, depend on the transfer of such assets".[78] However, where an entity "comprises significant assets which are indispensable to its operation, the absence of any transfer of those assets" usually indicates that there

[75] Id at 418E-G.

[76] *Oy Liikenne* above n 71 at para 66.

[77] Id at paras 51, 52 and 58.

[78] Id at para 60.

could not have been a relevant transfer. In *Brintel Helicopters* it was held that "in the service industry tangible assets may be unimportant or possibly non-existent".[79] What is important is "whether, having regard to all the circumstances, the economic entity identified prior to the transfer can be found after the transfer".[80]

[148] In *NEHAWU* this Court provided the test for determining whether in a particular case it can be said that a transfer of business as a going concern has occurred. It said:

> "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. 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."[81] (footnotes omitted)

This Court went on to say that each transaction must be considered on its own merits, regard being had to the circumstances of the transaction in question.[82] In *Aviation Union* this Court made it clear, after referring to the above passage, that it did not intend to supplant the *NEHAWU* test.[83]

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[79] *Brintel Helicopters* above n 69 at para 22.

[80] Id at para 24.

[81] *NEHAWU* above n 11 at para 56.

[82] Id at para 58.

[83] *Aviation Union* above n 19 at paras 111-112.

[149] In *Rask* the European Court of Justice said:

> "On the one hand, the decisive criterion for establishing whether there is a transfer within the meaning of the Directive is whether the business retains its identity, as would be indicated, in particular, by the fact that its operation was either continued or resumed.
>
> On the other hand, in order to determine whether those conditions are fulfilled, it is necessary to consider all the factual circumstances characterising the transaction in question, including the type of undertaking or business concerned, whether the business's tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred and the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities are suspended. It should be noted, however, that all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation."[84]

[150] In the present case we are dealing with a situation where the outsourcee cancelled the agreement between the parties as a result of the outsourcer's repudiation of the agreement and transferred the business back to the outsourcer and the dispute is whether there was a transfer of business as a going concern. In *Landsorganisatioen I Danmark* the European Court of Justice held that the EU Directive applied and there could be a transfer as contemplated by the EU Directive where the owner of a tavern who had leased it to someone else took it back and resumed running it as a result of a breach of the lease by the lessee. [85]

[151] The issue whether, after Rural had accepted the repudiation of the Municipality and returned to the latter certain assets including the electricity infrastructure, a transfer of business as a going concern occurred must be determined within the whole

[84] *Rask* above n 71 at paras 19-20.

[85] *Landsorganisatioen I Danmark* above n 69 at para 16.

context of what happened. That context includes that, as a matter of fact – as opposed to a matter of law – there was an agreement between Rural and the Municipality in terms of which Rural had taken over the Municipality's obligation to provide all electricity related services to the residents of the Municipality and had also taken 16 of the Municipality's workers. The Municipality says that that agreement was void from the beginning. Whether or not that agreement was valid in law is another question.

[152] Whether or not there was a transfer of business as a going concern from the Municipality to Rural and from Rural to the Municipality is not dependent on the validity of that agreement. The question is whether what occurred – within the context in which it happened – constituted a transfer of business as a going concern as contemplated in section 197. If it did, the consequences set out in section 197(2) followed. If it did not, those consequences did not follow. If a transfer of business as a going concern occurred, that remains the position even if it may be found that the transfer is the product of an invalid agreement. That is in part because, although most of the time a transfer of business as a going concern will come about as a result of an agreement between the transferor and transferee, such an agreement is not a prerequisite for a transfer of business.

[153] In the present case, one cannot wish away the fact that Rural and the Municipality entered into an agreement that envisaged that Rural would take over from the Municipality the responsibility of providing all electricity related services to the Municipality's inhabitants and that at some stage in the future that responsibility would be transferred back to the Municipality.

[154] It is important to understand certain terms that are defined in the agreement because, when Rural uses those terms in its founding affidavit, it uses them on the understanding that they carry the same meaning attached to them in the agreement. If one does not understand the meaning of those terms in the agreement, one could misunderstand Rural's case.

[155] The preamble to the agreement is to the effect that the Municipality wished "to appoint a service provider in respect of the Project" and the Municipality acknowledged Rural as having "the requisite experience and expertise to successfully plan, operate and execute the Project". The term "Project" was defined as meaning: "the management, operation, administration, maintenance and *expansion of the Network,* inclusive of the revenue management process and the implementation of a regional or local electrification programme within the Municipal boundaries as set out in the Distribution Licence". From this we can see that the Municipality effectively asked Rural to even expand "the Network" – which Rural agreed to do. What is the "Network" that Rural was required to expand?

[156] The term "the Network" is defined in the agreement as meaning: "the Municipal Electricity Distribution Network within the boundaries of the Municipality". The term "Distribution" is defined as meaning: "the conveyance of electricity at low, medium and high voltages (275kV and below) for sale to end users, and 'Distribute' and 'Distributing' shall have a similar meaning". The term "the Network Business" is defined as meaning: "the business (existing prior to the Take-Over Date) of management, operation, administration, maintenance and expansion of the Network, inclusive of the revenue management process and the implementation of a regional or local electrification programme within the boundaries of the Municipality". The term "Capital Assets" is defined as meaning: "the Operational Capital Assets referred to in clause 7.3 and the Network". Clause 7.3 reads: "Rural shall be entitled to make use of the whole or part of the existing properties, tools, equipment and vehicles ("Operational Capital Assets") of the Municipality currently utilised by the Municipality's electricity department".

[157] The term "Equipment" is defined as meaning: "the installed and operational electricity equipment and assets invested into by Rural as per the provisions of clause 9.5 below". Clause 9.5 reads:

> "All Equipment installed by Rural for the operation and management of the Network shall be for the account of Rural and shall remain the property of Rural until termination of the Agreement as per clause 15 below. The provisions hereof shall apply notwithstanding the installation of such Equipment on the Municipal premises or the accession thereof to any of the Municipal assets or that the equipment may be incorporated into or form part of other goods or change their essential character. All Equipment, whether fixed to immovable property or not, shall be deemed to remain movable property and be deemed to be severable without injury to either property."

The term "Initial assets" means "the Network and related assets owned and paid for by the Municipality prior to the Take-Over Date, the ownership of which shall remain vested in the Municipality". The term "Services" refers to "all matters pertaining to the management and execution of the Project".

[158] Rural's founding affidavit in the Labour Court was deposed to by Mr Bester. Mr Bester refers to various clauses of the agreement and says that it is self-evident from the terms of the agreement that:

- Rural would be responsible for the entire Network Business (essentially the provision of all electricity related services to the inhabitants of the Municipality's jurisdictional area) which, prior to the implementation of the agreement, was the responsibility of the Municipality.
- Rural and the Municipality intended that the transfer of the Network Business from the Municipality to Rural would be a transfer in terms of section 197.
- Rural had onerous obligations under the agreement and was subject to strict performance objectives.
- Rural and the Municipality intended for Rural to employ and train sufficient staff to meet the strict performance objectives imposed on it.
- Rural would use the existing Network and Capital Assets to perform the services, would make substantial capital investments to maintain and upgrade the Network and would utilise the services of certain employees

of the Municipality to operate the Network Business, being the employees who operated the Network Business whilst employed by the Municipality and who would cease employment with the Municipality and would become employees of Rural.

– Upon the termination or the cessation of the agreement, the Network Business would revert to the Municipality to operate the Network Business (i.e. provide all electricity related services to the inhabitants of the Municipality's jurisdictional area) as it had been doing prior to the implementation of the agreement.

The Municipality only denies these averments in so far as they may be in conflict with what it had said in other parts of its affidavit. To a large extent in those other parts of its affidavits the Municipality was saying nothing more than that there was no transfer of business as a going concern from Rural to the Municipality.

[159] Mr Bester says in Rural's founding affidavit that, before 1 September 2013, the Municipality had been rendering—

> "the management, operation, administration, maintenance and expansion of the Municipal electricity distribution network within the boundaries of the Municipality inclusive of the revenue management process and the implementation of a regional or local electrification programme within the boundaries of the Municipality (essentially the provision of all electricity related services to inhabitants of the Municipality's jurisdictional area)."

He then says that with effect from 1 September 2013 Rural "commenced rendering the aforesaid business / service". Mr Bester makes these averments in paragraph 17.1 of Rural's founding affidavit and the Municipality does not dispute any of them. Mr Bester goes on to say that "[t]he aforesaid activity constitutes a 'business' or 'a service' as envisaged in terms of Section 197(1) of the LRA". The Municipality has not disputed this averment either.

[160] From what Mr Bester says in paragraphs 17.1 and 17.2 of Rural's founding affidavit, we know exactly what the "business" is that the Municipality was "running" prior to 1 September 2013. In paragraph 17.1 Mr Bester says that a transfer of business as a going concern took place from the Municipality to Rural with effect from 1 September 2013. The Municipality does not dispute this save in so far as it says in effect that the agreement, valid or invalid, did not trigger the operation of section 197. The Municipality does not substantiate this assertion.

[161] Mr Bester also said in paragraph 17.1 that, with effect from 1 September 2013, Rural commenced rendering the aforesaid business or service which the Municipality had outsourced to it. From this statement – which the Municipality does not dispute – we know that, with effect from 1 September 2013 Rural began rendering the same service to the inhabitants of the Municipality that the Municipality had been rendering before 1 September 2013. That service is that of the management, operation, administration, maintenance and expansion of the municipal electricity distribution network within the boundaries of the Municipality inclusive of the revenue management process and the implementation of a regional or local electrification programme within the boundaries of the Municipality. Mr Bester says that all of this refers essentially to the provision of all electricity related services to the inhabitants of the Municipality. This means that we know exactly what business was transferred from the Municipality to Rural and what "business" Rural continued between 1 September 2013 and 1 April 2014.

[162] Mr Bester goes on to say that with effect from 1 April 2014 Rural ceased to render the services referred to above, i.e. the services that he said essentially constitute the provision of all electricity related services to the inhabitants of the Municipality. Mr Bester goes on to say that "the aforesaid services will be rendered, and is now being rendered, by the Municipality". Once again, the service that Mr Bester says was already being rendered by the Municipality is the same service Rural had been rendering between 1 September 2013 and 1 April 2014. The Municipality does not dispute that Rural stopped providing these services with effect from 1 April 2014 and

that, thereafter, it is the Municipality that provided these services to its inhabitants. Mr Bester concludes that the "business or service that was initially transferred from the Municipality to Rural . . . has reverted back, or has transferred back to the Municipality". He says that, alternatively, a new transfer of a business in its own right has taken place from Rural to the Municipality. The Municipality disputes this conclusion.

[163] Mr Bester refers to the answering affidavit of the Municipality filed in the Labour Court to oppose an application brought by the South African Municipal Workers Union (SAMWU) to interdict the implementation of the agreement. He then says that in that affidavit—

- the Municipality acknowledged that the take-over by Rural of the Network Business triggered the operation of section 197;
- the Municipality acknowledged further that certain employees of the Municipality would be transferred to Rural pursuant to the provisions of section 197.

[164] Mr Bester concludes in paragraph 45.3 that a transfer of a business (a service) (i.e. the Network Business – the provision of all electricity related services to the inhabitants of the Municipality's jurisdictional area) as a going concern as envisaged in terms of section 197 took place from the Municipality to Rural. There is no effective challenge to this averment by the Municipality.

[165] Mr Bester also states that—

> "[t]he entire Network Business relating to all aspects of the Project, ie. the provision of all electricity related services to the inhabitants of the Municipality's jurisdictional area, has reverted back to and has been taken over by the Municipality and is already under the control of the Municipality and possession of the Network and the Capital Assets have already been returned to the Municipality."

The Municipality does not deny this averment. The reference to "Capital Assets" is a reference to the Operational Capital Assets referred to in clause 7.3 of the agreement and the Network. In clause 7.3 the Operational Capital Assets are defined as "the whole or part of the existing properties, tools, equipment and vehicles of the Municipality" that were utilised by the Municipal electricity department at the time of the conclusion of the agreement. The Network had also been returned. The Network is defined in the agreement as "the Municipal Electricity Distribution network within the boundaries of the Municipality".

[166] Mr Bester also states that—

> "[t]he entire electricity distribution infrastructure of the Municipality that Rural and Rural Free State were in control of and utilised (and maintained and upgraded) for the provision of all electricity related services to inhabitants of the Municipality's jurisdictional area, as the Municipality had previously done, are no longer under the control of Rural and Rural Free State and has been handed back, together with *the additions and improvements thereto effected* by Rural and Rural Free State, to the Municipality."

The Municipality does not deny this averment. Mr Bester adds: "The bulk of the steps in the handover process have already taken place". The Municipality does not deny this averment either. Mr Bester also states that—

> "[t]he *very same Network Business* will continue, and *has continued, in the hands of the Municipality with effect from 1 April 2014* and, as the Municipality had been doing prior to the implementation of the agreement, *the Municipality is once again providing all electricity related services to inhabitants of the Municipality's jurisdictional area.*"

This averment is also not denied by the Municipality. This means that the Municipality accepts the averment that after 1 April 2014 it effectively rendered the services which Rural had been rendering.

[167] At this stage it is important to point out that when Mr Bester refers to "Network Business" in the passage in the preceding paragraph, he is referring to the Network Business as defined in the agreement. That definition refers to "the management, operation, administration, maintenance and expansion of the Network inclusive of the revenue management process and the implementation of a regional or local electrification programme within the boundaries of the Municipality". That is the same as the business that Rural took over from the Municipality. Indeed, it is the same business that Rural had been conducting or the same service that Rural had been rendering to the inhabitants of the Municipality between 1 September 2013 and 1 April 2014. The passage quoted in the preceding paragraph means that from 1 April 2014 the Municipality was providing all the electricity related services to its inhabitants that Rural had been providing between 1 September 2013 and 1 April 2014.

[168] Mr Bester further states that—

> "[t]he entire customer base of approximately 121 095 households and 597 businesses must now be served by the Municipality for which they need the affected employees. It is impossible for the Municipality to render the aforesaid Services to the aforesaid households and businesses without the affected employees."

This is not denied by the Municipality. Mr Bester also says that the business – which is the provision of all electricity related services to the inhabitants of the Municipality's jurisdictional area – "remains the same after the transfer but in different hands". This is not denied by the Municipality. He goes on to say that—

> "the residents (households and businesses) to whom Rural and Rural Free State provided all electricity related services are the same that the Municipality will provide all electricity related services to and has been providing to since 1 April 2014 (the same residents that the Municipality provided all electricity related services to prior to the implementation of the agreement) and such residents retain the same needs."

[169] Finally, Mr Bester states:

> "The same Capital Assets and infrastructure that Rural and Rural Free State utilised (and maintained and upgraded) to provide all electricity related services to inhabitants of the Municipality's jurisdictional area will be utilised by the Municipality and since 1 April 2014 are being utilised by the Municipality to provide all electricity related services."

In addition, Rural had used the Operational Capital Assets of the Municipality in rendering all electricity related services to the Municipality's inhabitants. The Operational Capital Assets were the existing properties, tools, equipment and vehicles of the Municipality which had been used by the Municipality's electricity department before 1 September 2013. Obviously, with effect from 1 April 2014 when Rural transferred the business back to the Municipality, the Municipality began to utilise the operational Capital Assets as well to render all electricity related services.

[170] Although it is true that Rural did not transfer certain assets to the Municipality, those were not assets that the Municipality had made available to Rural to use. Furthermore, the fact that in a certain transaction certain assets have not been transferred does not, generally speaking, on its own preclude a transaction from being a transfer of business as a going concern. The Municipality seems to think that all assets must be transferred before one can speak of a transfer of business as a going concern.

[171] Mr Bester makes it clear in his affidavit what it is that Rural required in order to provide all the electricity related services to the inhabitants of the Municipality. He says Rural needed to be in control of and to utilise "the entire electricity distribution infrastructure of the Municipality" which Rural had maintained and upgraded. He puts it thus in paragraph 79:

> "The entire electricity distribution infrastructure of the Municipality that Rural and Rural Free State were in control of and utilised (and maintained and upgraded) for the

> provision of all electricity related services to inhabitants of the Municipality's jurisdictional area, as the Municipality had previously done. . . ."

[172] Mr Bester even says that, when Rural handed the entire electricity distribution infrastructure, referred to in the above passage back to the Municipality, it did so "together with the additions and improvements thereto effected by Rural and Rural Free State . . .". Nowhere in its answering affidavit does the Municipality dispute what Mr Bester says in paragraph 79. In paragraph 89 Mr Bester also states:

> "The same Capital Assets and infrastructure that Rural and Rural Free State utilised (and maintained and upgraded) to provide *all electricity related services* to inhabitants of the Municipality's jurisdictional area will be utilised by the Municipality and since 1 April 2014 are being utilised by the Municipality to provide all electricity related services."

Rural said that the assets that it did not transfer to the Municipality were not essential for the provision of all the electricity related services that the Municipality had to provide and which Rural had been providing. Rural said that they were peripheral. The Municipality did not show how and why those assets were essential for the rendering of the electricity related services.

[173] Rural points out that it incurred considerable expenditure in respect of the purchase of network materials such as—

- switch gears, poles, transformers, mini substations and prepaid meters, and, the purchase of 17 new light commercial vehicles totalling R13 523 766,51;
- two specialised trucks being an Iveco 4x4 Live Line Truck and an Iveco 6x6 drill rig totalling R7.5 million;
- electrical infrastructure mapping (i.e. the compiling and recordal of the Municipality's electrical distribution infrastructure); the mapping of townships within the geographical area of the Municipality; software systems in regard to the electricity metering, billing, collection,

customer care, fault desk, call centre, technical services and the like; salaries, legal costs, travel costs, technical investigations, and financial investigations and feasibility study costs totalling R69 987 804,00; and

– immovable property in Harrismith to be used to construct offices for Rural's employees and staff accommodation. Rural says that the total cost of the immovable property including construction would be about R5 million.

The Municipality does not deny any of these averments.

[174] Mr Bester also states that enormous capital and infrastructure investment was required to remedy the situation that resulted from the Municipality's failure to properly maintain its electricity distribution infrastructure and prevent the collapse of its failing electricity supply network. He states that this necessarily required the employment of a sufficiently large and capable workforce to properly manage the Network Business. Mr Bester adds that at all times the Municipality was aware of the extent to which Rural had to increase the workforce to manage and operate the Network Business and it was considered justified having regard to the size of the community that had to be served, the critical status of the infrastructure and the overall risk to the public as a whole. None of these averments is denied by the Municipality. All the deponent to its answering affidavit says is that these averments are irrelevant and that, "when all of this took place", he was the Director of Sport in the Municipality and had no personal knowledge of electricity issues at the time.

[175] Mr Bester states that during the period from 1 September 2013 to 1 April 2014 Rural and Rural Free State "employed various persons, the majority being from the local community and allocated prior appointed employees, to the Network Business to enable them to effectively perform the Services". Mr Bester then points out that the affected employees who consisted of the "(15) employees who were previously employed by the Municipality and became employed by Rural Free State as well as additional employees employed by Rural and Rural Free State, were dedicated to

rendering the services in respect of the Network Business to enable Rural to meet the performance objectives imposed on it in terms of the Agreement". Mr Bester states that "[t]hese employees' functions and duties related solely to rendering the Services in respect of the Network Business, i.e. solely to the rendering of all electricity related services to inhabitants of the Municipality's jurisdictional area, and all such employees were permanently employed in the business". Later on, Mr Bester states that all "the affected employees [who] became permanently employed in the Network Business were integral to and were solely dedicated to conducting the Network Business and the provision of the Services".

[176] A reading of the Municipality's answering affidavit in the Labour Court reveals that the Municipality's main difficulty with the proposition that there was a transfer of business as a going concern from Rural to the Municipality is the notion that the Municipality would suddenly have many additional workers on its payroll – workers which the new Municipal Manager says the Municipality has no budget for.

[177] One answer to the Municipality's concern about the impact that having all the 127 employees in its employ will have on its budget is to be found in what this Court said in *City Power*. There, this Court said:

> "There are numerous instances where labour legislation will have budgetary or procedural consequences for all entities, including organs of State. As the Labour Court stated, all employers, including organs of State must, when entering into contracts with service providers, make the necessary provisions to arrangements for legal eventualities like section 197. To the extent that such entities wish to avoid the provisions of section 197(2), they could seek to reach an agreement in terms of section 197(6). The agreement contemplated should in terms of section 197(6), be in writing and concluded between the old employer, the new employer or the old and new employers acting jointly, on the one hand, and any person or body with whom the old and new employer are obliged to consult in terms of section 189 of the LRA."[86]

[86] *City Power* above n 25 at para 33.

[178] Another answer to this is that, if, in terms of section 197(2) of the LRA, there was a transfer of business as a going concern from Rural to the Municipality and all those additional workers were employed by Rural in the business that was transferred to the Municipality, then the Municipality became their employer by operation of law. That is one of the consequences of the occurrence of a transfer of business as a going concern. However, when one considers the burden that the additional workers would be on the Municipality one should remember three points.

[179] The first point is that Rural did not just decide unilaterally to employ additional workers to the 16 that it had taken over from the Municipality. The agreement between Rural and the Municipality effectively required Rural to employ more workers. In terms of clause 2.2 of the agreement Rural was given "the sole and exclusive responsibility for the management, operation, administration, maintenance *and expansion* of the Network, including the revenue management process, the implementation of a local and regional electrification programme and to regulate matters pertaining to the Project." In terms of clause 7.1 of the agreement Rural was "responsible for the *provision of all labour*, transport and material *required to operate, maintain and expand the Network*." It, therefore, seems to me that the agreement between Rural and the Municipality contemplated that Rural would have to employ more workers. It is inconceivable that the Municipality could have thought that Rural would have been able to provide the services it was contractually obliged to render with only the 16 workers that it had taken over from the Municipality.

[180] The second point to be borne in mind is that the Municipality cannot render efficient and effective electricity related services with 16 employees. It needs many more workers than that. In *City Power* one of the points that this Court made was that—

> "section 152(1)(b) of the Constitution provides that municipalities should ensure provision of services in a sustainable manner. Section 152(2) states that a municipality must strive, within its financial and administrative capacity, to achieve the objects of local government set out in subsection (1). Section 160(1)(d) provides

> that a Municipal Council may employ personnel that are *necessary* for *the effective* performance of its functions."[87]

This makes it clear that a municipality has the constitutional power to employ the number of employees "that are necessary for the effective performance of its functions".[88]

[181] This Court went on to say in the next paragraph in *City Power*:

> "All those provisions of the Constitution do not conflict with the LRA but simply state the manner in which a *sustainable and effective local government* should be achieved. City Power did not demonstrate that the consequences of section 197 would defeat the objectives of these provisions of the Constitution."[89]

[182] The third point to be borne in mind is that our law provides an employer which finds itself in the position of the Municipality with an escape route so that that employer need not have a permanent burden of excess workers. The remedy provided for by the LRA is that, whereas the old employer is not entitled to dismiss its excess workforce prior to a transfer of business as a going concern if the reason for dismissal is related to the transfer of the business as a going concern, the transferee employer is entitled to terminate the services of its excess workers for operational requirements after complying with the relevant procedures.[90] Section 187(1)(g) of the LRA provides that a dismissal is automatically unfair if the reason for the dismissal is the transfer, or, a reason related to the transfer, contemplated in sections 197 or 197A.[91]

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[87] Id at para 31.

[88] Id.

[89] Id at para 32.

[90] Section 189 of the LRA.

[91] Section 197A provides for the transfer of contracts of employment in circumstances where the old employer becomes insolvent or where a scheme of arrangement or compromise is being entered into to avoid winding-up or sequestration for reasons of insolvency.

[183] When the new employer terminates the services of its excess workers for operational requirements within 12 months after a transfer of business as a going concern has occurred, the old employer – in this case Rural – would be jointly liable with the new employer to pay the employees any monies to which the employees would be entitled by reason of the dismissal for operational requirements. This is based on section 197(8). The provision reads:

> "(8) For a period of 12 months after the date of the transfer, the old employer is jointly and severally liable with the new employer to any employee who becomes entitled to receive a payment contemplated in subsection (7)(a) as a result of the employee's dismissal for a reason relating to the employer's operational requirements or the employer's liquidation or sequestration, unless the old employer is able to show that it has complied with the provisions of this section."

[184] Another way for an employer in the Municipality's position to limit its financial obligations arising from a transfer of a business as a going concern is provided for in section 197(7). The provision reads:

> "(7) The old employer must—
>
> (a) agree with the new employer to a valuation as at the date of transfer of—
>
> (i) the leave pay accrued to the transferred employees of the old employer;
>
> (ii) the severance pay that would have been payable to the transferred employees of the old employer in the event of a dismissal by reason of the employer's operational requirements; and
>
> (iii) any other payments that have accrued to the transferred employees but have not been paid to employees of the old employer;
>
> (b) conclude a written agreement that specifies—
>
> (i) which employer is liable for paying any amount referred to in paragraph (a), and in the case of the apportionment of liability between them, the terms of that apportionment; and

(ii) what provision has been made for any payment contemplated in paragraph (a) if any employee becomes entitled to receive a payment;

(c) disclose the terms of the agreement contemplated in paragraph (b) to each employee who after the transfer becomes employed by the new employer; and

(d) take any other measure that may be reasonable in the circumstances to ensure that adequate provision is made for any obligation on the new employer that may arise in terms of paragraph (a)."

[185] It is clear from the authorities including *NEHAWU* that various factors must be taken into account in determining whether or not there has been a transfer of business as a going concern from the old employer to the new employer. Some of the factors are:

(a) whether there has been a transfer of assets, tangible and intangible;
(b) whether or not workers are or have been taken over by the new employer;
(c) whether customers are transferred;
(d) whether or not the same business is being carried on by the new employer;
(e) whether goodwill has been transferred; and
(f) whether the responsibility or obligation has been transferred.

[186] In the present case the Municipality's first contention was that, until the High Court had decided on the validity of the agreement, the issue of the transfer of business as a going concern should be stayed. The next contention by the Municipality is that no transfer of business as a going concern from Rural to the Municipality occurred because Rural did not transfer certain assets to the Municipality. Out of all the factors that are required to be taken into account to determine whether there has been a transfer of business as a going concern, as indicated above, the only factor upon which the Municipality relies to contend that there has been no such transfer of business as a going concern is that certain assets

were not transferred. It is fair to infer from this that the Municipality accepts that the rest of the factors support the proposition that there was a transfer of business as a going concern from Rural to the Municipality.

[187] The Municipality does not say that Rural did not hand over any assets at all. It accepts that the assets that Rural had taken over from it were all handed back. Indeed, the Municipality even accepts that Rural returned those assets with even improvements and additions. The Municipality's complaint is simply that certain assets were not handed over to it. The Municipality's complaint seems to suggest that all assets used in the business are required to be transferred before there can be a transfer of business as a going concern. That is not the law. Indeed, the authorities make it clear that there can be a transfer of business as a going concern even in a situation where no assets have been transferred at all. It depends on the nature of the business and the essentiality or otherwise of particular assets for a particular business. If you transfer a soccer club business, provided the players go with the business, it may not be important to transfer any immovable property or even vehicles before it can be said that there has been a transfer of business as a going concern. Where the business relates to the provision of a service, the transfer of assets may not be essential.

[188] In the present case Mr Taetsane did not even know for certain all the assets that he said were not handed over to the Municipality by Rural. He said:

> "We know that they employed more than 100 additional people. However, they would have bought computers (hardware and software), stationary, office equipment, implemented systems (such as a debt collection system), vehicles and other related equipment needed to operate their business as they were conducting it. I can categorically state that since the contract "fell through" Rural has not transferred their business to us as a "going concern". At best we have received an obligation to provide electricity to the residents but we never received their computers, systems, stationary, vehicles, equipment, etc. We also have not received their debtor's book. I have not, to date, received an inventory of Rural's business. Thus its business was not transferred to us as a going concern. The meaning of "going concern" is specific

> and argument on this will be presented to the court. I understand this to be a threshold requirement for the trigger of section 197."

[189] Later on Mr Taetsane complained again. He said that he presumed that Rural was operating from offices either owned or leased by them. He said that he presumed that Rural had assets such as motor vehicles, computers, laptops, cellphones, office furniture, tools and other equipment needed to carry out its operation. He said that the Municipality was not given a list of Rural's debtors and creditors nor was it given Rural's intellectual property or debtor's books.

[190] Two things are conspicuous by their absence in the Municipality's answering affidavit. The first is that the Municipality does not anywhere say that, since 1 April 2014 when, according to Rural, a transfer of business as a going concern occurred from Rural to the Municipality, it had not been able to provide all the electricity related services to its inhabitants because of Rural's failure to hand over certain assets. In fact, Mr Bester said more than once in Rural's founding affidavit that, since 1 April 2014, the Municipality had taken over the responsibility of providing the same services that Rural had been providing between 1 September 2013 and 1 April 2014 and was actually providing the services and not once did the Municipality deny those averments.

[191] The second is that the Municipality has not anywhere in its answering affidavit said that the assets that Rural did not hand over to it were essential for it i.e. for the Municipality to continue to operate the "business" that Rural contends it had transferred to it. One understands why the Municipality could not say this. It is because the truth of the matter is that, after Rural had stopped providing all the electricity related services to the Municipality's inhabitants with effect from 1 April 2014, the Municipality carried on with the business of providing those services without any major difficulties. All that happened is that the "business" of providing the electricity services to the inhabitants changed hands but it remained the same. The

authorities are clear. When that happens, there has been a transfer of business as a going concern.

[192] In the result, I conclude that the Labour Appeal Court erred in holding that there was no transfer of business as a going concern from Rural to the Municipality and that, therefore, the Municipality did not become the employer of the 127 employees upon the transfer of the business as a going concern. In my view, the appeal should be upheld and the order of the Labour Appeal Court set aside and replaced with an order dismissing the appeal before that Court. That will automatically reinstate the order of the Labour Court.

Order

[193] Accordingly, I would make the following order:

1. Leave to appeal is granted.
2. The appeal is upheld with costs.
3. The order of the Labour Appeal Court is set aside and replaced with the following:

   "The appeal is dismissed with costs."

For the Applicants:	P J Pretorius SC and L Hollander instructed by Webber Wentzel Attorneys
For the Respondent:	A Redding SC, K Hopkins and S Freese instructed by Majavu Inc