

Business transfers: when is enough not enough?

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The Constitutional Court in a majority judgment rejected, in no uncertain terms, three important arguments advanced in support of an application for leave to appeal the Labour Appeal Court's (LAC) decision in *Maluti-A-Phofung Local Municipality v Rural Maintenance (Pty) Ltd and Another*.



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The issues central to the dispute were whether components vital to run a business were withheld by the transferor and if so, whether - as a result - the business did not transfer as a going concern for purposes of s197 of the Labour Relations Act, No 66 of 1995 (LRA).

The Municipality, responsible for supplying electricity to residents, outsourced the function of supplying electricity to Rural, a service provider. The municipal manager concluded a contract with Rural, in terms of which Rural was appointed 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 back to the Municipality”.

Rural also accepted 16 dedicated employees from the Municipality in terms of a transfer agreed to be governed by s197 of the LRA.

When the outsourcing agreement came to an end, Rural returned to the Municipality the electricity distribution infrastructure consisting of tools, equipment, properties and vehicles that the Municipality had initially transferred to Rural. Rural also sought to transfer 127 (instead of 16) employees to the Municipality, as Rural had expanded the business. Rural argued this resulted in a transfer of the business as a going concern in terms of s197 of the LRA.

The Municipality disputed that the business transferred and claimed that Rural failed to return vital components of the business such as that of metering, billing and collecting the debts (Vital Components) to run the business. It claimed not enough of the business of Rural was handed to the Municipality. Rural in turn disputed that the Vital Components were vital or required for the Municipality to run the business previously conducted by Rural.

The LAC held that it was clear that the overall assessment of whether a business transferred “seamlessly” depends on examining the totality of the business operated by Rural before the transfer and that the test so applied was also in accordance with the test applied in terms of the TUPE Regulations.

The LAC overturned the Labour Court’s decision and held that a significant component of the overall business was not retransferred by Rural to the Municipality and that, as a result, the business conducted by Rural had not been transferred to the Municipality. The transfer of components did not result in a seamless transfer of the business.

Rural approached the ConCourt and presented three main arguments in support of its application for leave to appeal the LAC judgment.

The first was that the LAC adopted a new and thus “wrong” test to determine if there had been a transfer of the business. It argued that the LAC when referring to a transfer that must be “seamless” thereby introduced a new test, that of a seamless transfer.

The ConCourt rejected this argument stating that it was clear that the LAC applied the test enumerated previously by the LAC and the Constitutional Court. The test is that the court must make an overall assessment of the business to determine whether it transferred as a going concern. The ConCourt held that the reference to a seamless transfer was within the context of the LAC applying the correct test.

The second argument was that the LAC made a wrong finding on the facts when finding that the components withheld were vital for the business to transfer. The Constitutional Court was unimpressed with the argument and held that the LAC correctly interpreted the facts.

The third argument was that “local and international developments in relation to so-called ‘service provision changes’ as opposed to standard transfer of business, necessitated the reformulation or development of our law”.

The LAC was referred to these developments in the UK law known as the TUPE Regulations in terms of which a distinction was drawn between a business and a service. The ConCourt was urged to have regard to those developments to develop South African law. It firmly rejected this argument for the following reasons:

- Some concepts used in TUPE are foreign to the wording of s197 of the LRA and s197 already refers to a “service”. There is no need to look any further.
- While it is useful to refer to comparative foreign law instruments and judgments it must be with due regard to differences in language and concepts.
- The TUPE amendments introducing special considerations relating to the transfer of a service had already been introduced before and not after the amendment to s197 to make provision in s197 for the transfer of a service. Section 197 thus adequately caters for transfers of a service. The Constitutional Court again emphasised that it was the business rendering the service that must be the subject of the transfer.

It was ruled that Rural did not transfer enough of its business to constitute a transfer of a business as a going concern. Rural’s application for leave to appeal was refused by the ConCourt with costs.

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