CONSTITUTIONAL COURT OF SOUTH AFRICA

Cases CCT 27/19 and CCT 86/19

Case CCT 27/19

In the matter between:

ROAD TRAFFIC MANAGEMENT CORPORATION Applicant

and

TASIMA (PTY) LIMITED Respondent

Case CCT 86/19

In the matter between:

TASIMA (PTY) LIMITED Applicant

and

ROAD TRAFFIC MANAGEMENT CORPORATION Respondent

Neutral citation:	*Road Traffic Management Corporation v Tasima (Pty) Limited; Tasima (Pty) Limited v Road Traffic Management Corporation* [2020] ZACC 21
Coram:	Mogoeng CJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mathopo AJ, Theron J and Victor AJ
Judgments:	Theron J (majority): [1] to [137] Jafta J, Khampepe J and Mhlantla J (dissent): [138] to [192]
Heard on:	13 August 2019

Decided on: 4 August 2020

Summary: Labour Relations Act 66 of 1995 — section 197 transfer — transfer of employment contracts — effective date of transfer — effect of public or regulatory character of transferee

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ORDER

On appeal from the Labour Appeal Court (hearing an appeal from the Labour Court):

Under CCT 27/19 (*Road Traffic Management Corporation v Tasima (Pty) Limited*):

1. The Road Traffic Management Corporation's application for leave to appeal is granted.
2. The appeal is dismissed.
3. Tasima (Pty) Limited's application for leave to cross-appeal is granted.
4. The cross-appeal is upheld.
5. The order of the Labour Appeal Court in Case no.: JA77/2017 is set aside and substituted with the following:

   "The appeal in respect of paragraph 63.1 of the order of the Labour Court is dismissed with no order as to costs."
6. There is no order as to costs in this Court.

Under CCT 86/19 (*Tasima (Pty) Limited v Road Traffic Management Corporation*):

1. Tasima (Pty) Limited's application for leave to appeal is dismissed.
2. There is no order as to costs in this Court.

JUDGMENT

THERON J (Cameron J, Froneman J, Madlanga J, Mathopo AJ and Victor AJ concurring):

Introduction

[1] In the main application under CCT 27/19, the applicant, the Road Traffic Management Corporation (RTMC), seeks leave to appeal against the findings of two courts, both of which found that section 197 of the Labour Relations Act (LRA)[1] applies to the transfer of the electronic National Traffic Information System (eNaTIS) and related services from the respondent, Tasima (Pty) Limited (Tasima), to the RTMC (section 197 appeal). Both the Labour Court and the Labour Appeal Court held that section 197 was applicable, based on the jurisprudence of the Labour Court, the Labour Appeal Court and this Court.[2]

[2] The Labour Court held that this matter was on all fours with the legal principles enunciated by this Court in *City Power*[3] and concluded that the transfer of the eNaTIS and related services was a transfer as contemplated by section 197.[4] The Labour Appeal Court held that a holistic examination of the facts established that what was conducted by Tasima was a business, falling within the scope of section 197, and that it was this business that was transferred to the RTMC.[5]

[1] 66 of 1995.

[2] *Tasima (Pty) Ltd v Road Traffic Management Corporation* (2017) 38 ILJ 2385 (LC) (Labour Court section 197 judgment) at paras 35-7 and 58 and *Road Traffic Management Corporation v Tasima (Pty) Ltd* (2019) 40 ILJ 1036 (LAC) (Labour Appeal Court section 197 judgment) at para 34.

[3] *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd* [2015] ZACC 8; (2015) 36 ILJ 1423 (CC); [2015] 8 BLLR 757 (CC).

[4] Labour Court section 197 judgment above n 2 at para 37.

[5] Labour Appeal Court section 197 judgment above n 2 at para 27.

[3] After the RTMC approached this Court in respect of the section 197 appeal, Tasima filed a cross-appeal in relation to the Labour Appeal Court's findings about the effective date of the section 197 transfer. Additionally, there is an application for leave to appeal under CCT 86/19, which concerns an order issued by the Labour Appeal Court under section 18(3) of the Superior Courts Act,[6] setting aside the Labour Court's interim enforcement of the order in the Labour Appeal Court's section 197 judgment (section 18(3) appeal).

Factual background

[4] The factual background has been widely canvassed by this Court in *Tasima I*[7] and *Tasima II*,[8] and I traverse that background only to the extent necessary.

[5] The RTMC is an organ of state, established in terms of section 3 of the Road Traffic Management Corporation Act (RTMC Act),[9] and an entity listed in schedule 3A to the Public Finance Management Act (PFMA).[10] It is established as a partnership between national, provincial and local spheres of government with the statutory mandate "to enhance the overall quality of road traffic management and service provision".[11] Tasima is a private company.

[6] In July 2001, the Department of Transport (Department) awarded a tender to Tasima for the provision services in relation to the eNaTIS. The eNaTIS links the Department with various parties throughout South Africa, including all vehicle licensing institutions, manufacturers of vehicles, banks and the South African Police

[6] 10 of 2013.

[7] *Department of Transport v Tasima (Pty) Limited* [2016] ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC) (*Tasima I*).

[8] *Department of Transport v Tasima (Pty) Limited*; *Tasima (Pty) Limited v Road Traffic Management Corporation* [2018] ZACC 21; 2018 JDR 1122 (CC); 2018 (9) BCLR 1067 (CC) (*Tasima II*).

[9] 20 of 1999.

[10] 1 of 1999.

[11] Section 27 of the RTMC Act.

Service. It also enables the Department to regulate and administer the licensing of all vehicles, driving licenses, vehicle roadworthiness tests as well as the general implementation of road traffic legislation in South Africa.

[7] Pursuant to the award of the tender, the Department and Tasima concluded a Turnkey Agreement, in terms of which Tasima would redevelop the existing eNaTIS. In particular, Tasima undertook to develop, implement, support and operate the eNaTIS on behalf of the Department for a period of five years commencing on 1 June 2002. The Turnkey Agreement stipulated that, upon termination of the agreement, Tasima would hand over the system to the Department. However, upon termination of the Turnkey Agreement by effluxion of time in May 2007, it was ostensibly extended on a month-to-month basis until April 2010, during which time Tasima continued to operate the eNaTIS and provide related services.

[8] In May 2010, the Turnkey Agreement was purportedly extended for a further period of five years to 30 April 2015 (Extension Agreement), without the proper procurement processes having been followed. The Department initiated negotiations with Tasima in an attempt to terminate the Extension Agreement and arrange for the transfer of the eNaTIS to the Department. All payments to Tasima were stopped. Tasima launched urgent proceedings in the High Court to enforce the Extension Agreement. This led to further litigation between the parties, which is not relevant to the current proceedings. Suffice it to say that this litigation eventually culminated in the *Tasima I* judgment of this Court.

Litigation history

[9] In *Tasima I,* this Court reinstated the order of the High Court declaring the Extension Agreement invalid with effect from 23 June 2015.[12] Paragraph 4 of this

[12] *Tasima I* above n 7 at paras 200 and 208.

Court's order in *Tasima I* is of particular importance in these proceedings.[13] This Court ordered that the eNaTIS and related services be transferred from Tasima to the RTMC within a period of 30 days from 9 November 2016, the date of this Court's judgment and order in *Tasima I*. It further ordered that Tasima and the RTMC were to agree on how the transfer would be facilitated, failing which the transfer would take place in accordance with the Migration Plan (a default migration regime set out in the Turnkey Agreement).

[10] Tasima failed to hand over the eNaTIS and related services before the expiry of the 30-day period as stipulated by this Court's order in *Tasima I*. The RTMC instituted proceedings against Tasima, in which it sought an order evicting Tasima from the premises from which the eNaTIS was operated and the handover of the eNaTIS and related services to the RTMC. On 3 April 2017, the High Court held that, in terms of this Court's order in *Tasima I,* Tasima was required to hand over the eNaTIS and related services by 22 December 2016.[14] The High Court also granted the RTMC's eviction application.[15] On 5 April 2017, Tasima was evicted from the premises. The RTMC took over the eNaTIS and related services that same day.

[11] Tasima launched urgent proceedings in the Labour Court to compel the RTMC to comply with its obligations under section 197 of the LRA.[16] The RTMC disputed

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[13] Paragraph 4 of the order in *Tasima I* provides:

> "The order of the Supreme Court of Appeal is set aside and replaced with the following:
>
> (i) Within 30 days of this order, Tasima is to hand over the services and the electronic National Traffic Information System to the Road Traffic Management Corporation.
>
> (ii) Unless an alternative transfer management plan is agreed to by the parties within 10 days of this order, the hand over is to be conducted in terms of the Migration Plan set out in schedule 18 of the Turnkey Agreement."

[14] *Road Traffic Management Corporation v Tasima (Pty) Limited* [2017] ZAGPPHC 94 at para 25.

[15] Id.

[16] Sections 197(1) and (2) of the LRA provide:

> "(1) In this section and in section 197A—

that it was under any obligation to take transfer of Tasima's employees. Section 197 regulates the automatic consequences regarding the employees of a business that is transferred as a going concern. Tasima sought declaratory relief to the effect that the contracts of employment of certain of its employees were automatically transferred to the RTMC under section 197.

[12] The Labour Court, per Steenkamp J, declared that the contracts of employment of all of Tasima's employees had automatically transferred to the RTMC in terms of section 197 upon the transfer of the eNaTIS from Tasima to the RTMC.[17] The Labour Court concluded that the handover ordered by this Court in *Tasima I* was a transfer contemplated by section 197.[18] The factual bases for this finding included that:

(a) the RTMC had taken control of the premises previously occupied by Tasima;

(b) the RTMC employed the assets, information and property which had previously been used by Tasima to render the same services;

(*a*) 'business' includes the whole or a part of any business, trade, undertaking or service; and

(*b*) 'transfer' means the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern.

(2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6)—

(*a*) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;

(*b*) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;

(*c*) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and

(*d*) the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer."

[17] Labour Court section 197 judgment above n 2 at para 63.1.

[18] Id at para 37.

(c) the RTMC had liaised with the same service providers and made the same payments as Tasima; and

(d) the sole purpose of Tasima's business was the provision of eNaTIS services.[19]

[13] The Labour Court stated that it was—

> "satisfied that the handover of the services and the eNaTIS to the RTMC in terms of the order of the Constitutional Court of 9 November 2016 is a transfer of a business as contemplated by section 197 of the LRA. The consequence is that the new employer (the RTMC) is automatically substituted in the place of the old employer (Tasima) in respect of all contracts of employment in existence immediately before the transfer".[20]

The Labour Court further held that the effective date of transfer is 5 April 2017, because the actual transfer took place on that date, pursuant to the order of this Court.[21]

[14] On appeal, the Labour Appeal Court unanimously upheld the reasoning and findings of the Labour Court regarding the automatic transfer of the contracts of employment from Tasima to the RTMC in terms of section 197.[22] It agreed with the factual analysis of the Labour Court. It said:

> "In the present case it does not appear to be contested that [Tasima] was the entity responsible for rendering eNaTIS services to end users. It used its premises solely to operate the system. When any faults were logged, it was required to respond thereto. It was required to develop, test and implement any new functionalities required of the system, and to manage third party service providers, securing necessary services and equipment from such parties and paying them.

[19] Id at para 35.

[20] Id at para 58.

[21] Id at para 52.

[22] Labour Appeal Court section 197 judgment above n 2 at para 34.

> All of respondent's employees were employed for the sole purpose of providing these services. They worked from eNaTIS premises with assets which were those of eNaTIS, accessing the eNaTIS, code and infrastructure. The premises were suitably furnished and equipped to provide for the necessary infrastructure to conduct the system. It is said that at least 80 persons were employed exclusively to perform these necessary functions. All assets were purchased and used solely to perform these functions. [Tasima] negotiated and entered into contracts solely to perform these functions.
>
> Examining these facts holistically, it is clear that what was conducted by Tasima was a business, falling within the scope of s197 of the LRA."[23]

[15] The Labour Appeal Court, however, altered the effective date of the transfer to 23 June 2015 – the date on which the High Court declared the Extension Agreement invalid.[24] The Labour Appeal Court reasoned that this Court in *Tasima II* made it clear that, although it only confirmed the High Court's order in *Tasima I* on 9 November 2016, the confirmation had retrospective effect from 23 June 2015.[25] According to the Labour Appeal Court, 23 June 2015 is thus the date on which Tasima's employees' contracts of employment transferred to the RTMC.[26] The Labour Appeal Court's judgment is the subject of the section 197 appeal, as well as Tasima's cross-appeal against that Court's decision to alter the effective date of the transfer.

[16] The section 197 appeal by the RTMC to this Court suspended the operation and execution of the order in the Labour Appeal Court's section 197 judgment and, by implication, the obligations associated with the transfer of the employees. This suspension occurred by virtue of section 18(1) of the Superior Courts Act.[27] Tasima

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[23] Id at paras 25-7.

[24] Id at para 34.

[25] Id at para 33.

[26] Id at para 34.

[27] Section 18(1) of the Superior Courts Act provides:

launched an urgent application in the Labour Court, in terms of section 18(3) of the Superior Courts Act, seeking interim enforcement of the order in the Labour Appeal Court's section 197 judgment.[28] In addition, Tasima sought an order requiring the RTMC to take transfer of the employees, alternatively requiring the RTMC to pay the employees' salaries, pending finalisation of the section 197 appeal before this Court.

[17] The Labour Court, per Prinsloo J, ordered the operation and execution of the Labour Appeal Court's section 197 order pending finalisation of the section 197 appeal.[29] The Labour Court also ordered that the RTMC take transfer of the employees.[30] The RTMC exercised its automatic right of appeal to the Labour Appeal Court in terms of section 18(4) of the Superior Courts Act.[31]

[18] The Labour Appeal Court, per Murphy AJA, upheld the appeal, effectively reinstating the automatic suspension of the section 197 order pending the determination

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> "Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal."

[28] Section 18(3) of the Superior Courts Act provides:

> "A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders."

[29] *Tasima (Pty) Ltd v Road Traffic Management Corporation* [2019] ZALCJHB 27 (Labour Court section 18 judgment) at para 125.

[30] Id.

[31] Section 18(4) of the Superior Courts Act provides:

> "If a court orders otherwise, as contemplated in sub-section (1)—
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> (i) the court must immediately record its reasons for doing so;
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> (ii) the aggrieved party has an automatic right of appeal to the next highest court;
>
> (iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and
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> (iv) such order will be automatically suspended, pending the outcome of such appeal."

of the section 197 appeal by this Court.[32] The Labour Appeal Court held that the order requiring the RTMC to take transfer of the employees pending finalisation of the section 197 appeal went beyond a declaration of rights and constituted consequential relief.[33] The Labour Appeal Court held that the Labour Court had no jurisdiction or power under section 18(3) of the Superior Courts Act to grant consequential relief.[34] It reasoned:

> "The employees in this case may well have a claim for consequential relief compelling the RTMC to accept the tender of their services (*ad factum praestandum*) and to pay remuneration to them under the transferred contracts of employment (*ad pecuniam solvendam*). However, neither Steenkamp J nor this Court on appeal granted any consequential relief. As stated, the only order subject to the application for leave to appeal to the Constitutional Court is the declaratory order. It is the operation and execution of that order which has been suspended by virtue of section 18(1) of the [Superior Courts Act]. And, thus, it must follow logically that only that order can be made operational or executable in terms of section 18(3) of the [Superior Courts Act]."[35]

[19] The Labour Appeal Court further held that "the evidence does not disclose that Tasima and the employees will suffer harm if the suspension of the operation and execution of the declaratory order is not reversed pending an appeal to the Constitutional Court" and that the pre-requisites of section 18(3) of the Superior Courts Act had not been met.[36] The Labour Appeal Court's judgment is the subject of Tasima's application for leave to appeal in the section 18(3) appeal.

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[32] *Road Traffic Management Corporation v Tasima (Pty) Ltd* [2019] ZALAC 33; (2019) 40 ILJ 1785 (LAC) (Labour Appeal Court section 18 judgment) at paras 31-2.

[33] Id at para 16.

[34] Id at para 27.

[35] Id at para 23.

[36] Id at para 31.

Jurisdiction and leave to appeal

[20] The jurisdiction of this Court is engaged in matters that raise a constitutional issue or an arguable point of law of general public importance that ought to be considered by this Court.[37] It has repeatedly been held by this Court that the interpretation and application of the LRA raises a constitutional issue, as that Act was enacted to "give effect to and regulate the fundamental rights conferred by section 23 of the Constitution".[38]

[21] Determining whether there was a transfer of a business as a going concern from Tasima to the RTMC involves the interpretation and application of a provision of the LRA. The section 197 appeal therefore raises a constitutional issue which engages this Court's jurisdiction.

[22] In the cross-appeal, this Court is called upon to determine the effective date of the section 197 transfer, in the absence of a section 197(6) agreement specifying an effective date. In particular, the cross-appeal raises the question whether the effective date of transfer is determined with reference to the physical handover of a business or the legal *causa* (basis) for the transfer of a business. This similarly implicates the interpretation and application of section 197 of the LRA.

[23] The section 18(3) appeal concerns the effect of the Labour Appeal Court's order, which declared that the contracts of employment of Tasima's employees were transferred to the RTMC in accordance with section 197. The issue raised is whether it followed automatically upon the granting of the section 197 order that the RTMC, as the new employer, had to take transfer of the employees (and provide them with employment and pay their salaries), or whether further consequential relief to this effect had to be sought by Tasima or the employees.

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[37] Section 167(3)(b) of the Constitution.

[38] *National Education Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*NEHAWU*) at para 14 and *City Power* above n 3 at para 14.

[24] Tasima pleads that the effect of the Labour Appeal Court's findings in the section 18(3) appeal is that an order declaring a transfer of employment contracts in accordance with section 197 gives rise to no consequential relief and cannot be enforced. It further contends that the Labour Appeal Court has interpreted section 197 in a manner that prevents its enforcement. The case pleaded by Tasima also implicates the interpretation and application of section 197 and engages this Court's jurisdiction.

Interests of justice

[25] Whether it is in the interests of justice for this Court to adjudicate a matter requires the consideration of an open list of factors, including whether the matter bears reasonable prospects of success,[39] the importance of the issues raised and the public interest in determining those issues.[40]

[26] The interpretative issues raised in the section 197 appeal are relevant to services that are outsourced by the State to special purpose vehicles. The importance of this matter extends beyond the parties. It raises important questions of principle, the adjudication of which will clarify the scope of the application of section 197. It is thus in the interests of justice for this Court to adjudicate the section 197 appeal. Leave to appeal is accordingly granted.

[27] In respect of the cross-appeal, the adoption of different approaches by the Labour Court and the Labour Appeal Court indicates that the proper approach to determining the effective date of a section 197 transfer requires clarity from this Court. Moreover, the application bears reasonable prospects of success. The importance of the issue raised extends beyond the parties and transcends their narrow interests, as it is

[39] *SATAWU v Garvas* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) at para 33.

[40] *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at paras 3-4.

likely to arise in future section 197 transfers. This issue could have considerable consequences for employees as well as employers.

[28] In addition, this Court's findings will have a direct impact on which employees' contracts of employment have transferred, in accordance with section 197, from Tasima to the RTMC. It is only those employees whose contracts of employment were in existence immediately before the date of transfer that transfer to the new employer.[41] In addition, only the rights and obligations which existed between the employees and the old employer at the time of transfer are transferred to the new employer.[42] Tasima employed 23 employees between the date on which the extension was declared unlawful by the High Court and the date on which the RTMC took control of the eNaTIS and related services. If the effective date of transfer is found to be 23 June 2015, then the contracts of employment of those employees who were employed after that date will not transfer to the RTMC.

[29] Whether it is in the interests of justice to hear the section 18(3) appeal will be dealt with later.

Section 197 appeal

[30] The primary issue to be determined in the section 197 appeal is whether there was a transfer of a business as a going concern from Tasima to the RTMC as envisaged in section 197(1) of the LRA, which 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

[41] Section 197(2)(a) of the LRA.

[42] Section 197(2)(b) of the LRA.

(b) 'transfer' means the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern."

[31] Section 197 was included in the LRA as a legislative attempt to regulate the clash of interests between employers' interests in profitability and employees' interests in job security, which may often characterise the relationships between employees and employers at the time of a business transfer.[43]

[32] Section 197 seeks to strike a balance between the interests of employers and employees:

> "Section 197 strikes at the heart of this tension and relieves the employers and the workers of some of the consequences that the common law visited on them. Its purpose is to protect the employment of the workers and to facilitate the sale of businesses as going concerns by enabling the new employer to take over the workers as well as other assets in certain circumstances. The section aims at minimising the tension and the resultant labour disputes that often arise from the sales of a businesses and impact negatively on economic development and labour peace. In this sense, section 197 has a dual purpose, it facilitates the commercial transactions while at the same time protecting the workers against unfair job losses."[44]

[33] Section 197 applies where: (a) a business; (b) is transferred; (c) as a going concern. These jurisdictional requirements must be met in order for section 197 to apply.[45] Where there is a transfer of a business as a going concern, the consequences listed in section 197(2) automatically follow by operation of law.[46]

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[43] *NEHAWU* above n 38 at paras 52-3.

[44] Id at para 53.

[45] *Aviation Union of SA v SA Airways (Pty) Ltd* [2011] ZACC 31; (2011) 32 ILJ 2861 (CC); 2012 (2) BCLR 117 (CC) (*Aviation Union*) at paras 43-5.

[46] *Aviation Union* id at para 42. Section 197(2) of the LRA provides:

> "If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6)—

Legal causa

[34] The legal *causa* of a transfer is of critical importance in determining whether there was a transfer of a business as envisaged in section 197. Why?

[35] Whether the jurisdictional requirements for the operation of section 197 are present has been characterised as a factual enquiry. *NEHAWU* confirms this:

> "Whether [transfer of a business as a going concern] has occurred is a matter of fact which must be determined objectively in the light of the circumstances of each transaction."[47]

[36] Perhaps the emphasis on facts, at the expense of the legal *causa*, comes from the manner in which section 197 has been characterised as a factual enquiry. On my understanding, this simply means that section 197 involves the application of legal requirements to the particular facts of a case to establish whether they are met. The factual nature of the enquiry to be undertaken does not make section 197 a non-legal test, or allow facts to be tested against section 197 before the legal *causa* is identified. This would be to put the cart before the horse.

(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."

[47] *NEHAWU* above n 38 at para 56.

[37] *Aviation Union*[48] and *Rural Maintenance*[49] set out the relevance and role of the *causa* of the transfer for purposes of section 197. In *Aviation Union*, the majority judgment set out two questions to be considered when determining whether a transaction contemplates a transfer of a business as envisaged in section 197:

> "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 fall 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?"[50]

[38] In *Rural Maintenance*, Froneman J, writing for the majority, succinctly delineated the important role of the *causa* of a transfer of a business in the application of section 197:

> "This proves 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 enquiry are determined by the legal cause from which the transfer stems. 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 enquiry (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."[51]

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[48] *Aviation Union* above n 45.

[49] *Rural Maintenance (Pty) Ltd v Maluti-A-Phofung Local Municipality* [2016] ZACC 37; (2017) 38 ILJ 295 (CC); 2017 (1) BCLR 64 (CC) (*Rural Maintenance*).

[50] *Aviation Union* above n 45 at para 113.

[51] *Rural Maintenance* above n 49 at para 39.

[39] A legal *causa* is a prerequisite for the application of section 197. It follows that only once the source of the respective rights and obligations to effect and receive transfer has been identified, can it be determined whether the jurisdictional facts for the application of section 197 are present. Once the legal *causa* is identified, the factual enquiry outlined in *NEHAWU* can be conducted. Thus, an inquiry as to the *causa* must be conducted before applying the test in section 197 to the facts. Otherwise one is looking at facts without the legal parameters being in place.[52]

[40] Thus, the critical question in this matter is: what is the legal *causa* for the transfer of the eNaTIS and related services?

[41] According to the RTMC, the underlying legal *causa* of the transfer is the Turnkey Agreement. This Court's judgments in *Tasima I*[53] and *Tasima II*[54] both held that the extension of the Turnkey Agreement was unlawful, unconstitutional, and void *ab initio* (from the outset). The RTMC submits that, with the unlawful extension out of the way, the Turnkey Agreement is all that remains and so it must govern the transfer of the eNaTIS and related services. Tasima, on the other hand, contends that the Labour Court and the Labour Appeal Court correctly found that the legal *causa* for the transfer of the eNaTIS was this Court's order in *Tasima I*, in terms of which Tasima was required to hand over the eNaTIS to the RTMC.

[42] In *Tasima I*, this Court ordered that the eNaTIS and related services be transferred from Tasima to the RTMC within a period of 30 days from 9 November 2016.[55] This Court further ordered that Tasima and the RTMC were to agree within 10 days (from the date of the delivery of the judgment) on how the transfer would be facilitated. However, this Court put a default plan in place to ensure that the

[52] Id.

[53] *Tasima I* above n 7 at paras 131, 133 and 206.

[54] *Tasima II* above n 8 at para 26.

[55] *Tasima I* above n 7 at para 208.

transfer would still take place in the event that the parties failed to reach an agreement. In that event, the transfer would take place in accordance with the Migration Plan set out in the Turnkey Agreement.

[43] The Labour Appeal Court, when dealing with the RTMC's argument, concluded:

> "Unfortunately this argument is based on a misreading of the order of the Constitutional Court. This order clearly provided that the respondent was under an obligation, within 30 days of the granting of the order, to hand over the eNaTIS to the appellant. It provided for the possibility of an alternative transfer management plan to be agreed between the parties within ten days of the granting of the order. In the event that such an agreement could not be reached, provision was made for a default position namely that the mechanism for transfer would be the Migration Plan as set out in schedule 18 to the Turnkey Agreement. This alternative hardly constituted a resurrection of the Turnkey Agreement simply because the Court provided that, absent an agreement to the contrary, a mechanism as had been set out in the Turnkey Agreement was available to ensure that the court order could be properly implemented.
>
> It follows that the legal *causa* for the transfer was the order of the Constitutional Court in Tasima I."[56]

[44] I agree with the reasoning of the Labour Appeal Court. The Turnkey Agreement is not the underlying *causa* for the transfer; the *causa* is this Court's order in *Tasima I*. In *Tasima I*, this Court ordered Tasima to hand over the eNaTIS and related services to the RTMC. The order further provided that, unless an alternative transfer management plan was agreed to by the parties, the handover was to be conducted in terms of the Migration Plan. In this way, the Migration Plan may still give rise to rights and obligations which may be relevant to this factual enquiry.

[45] The expired Turnkey Agreement (with the exception of the Migration Plan) is incapable of giving rise to rights and obligations in relation to the transfer. Why not?

[56] Labour Appeal Court section 197 judgment above n 2 at paras 32-3.

[46] To accept the RTMC's contention that the Turnkey Agreement is the legal *causa* for the transfer of the eNaTIS, would be to hold that the subject matter of the transfer that this Court ordered in *Tasima I* was not of the eNaTIS and related services as they stood in 2016, but rather of the system and services as at 2007. This cannot be correct.

[47] It is apposite to refer to the following paragraph of the judgment of the Labour Court:

> "The RTMC appears to accept the following statement in Tasima's replying affidavit:
>
> > 'Tasima did not simply develop a system (with a staff complement focused only on development), which it is now returning, as an isolated, self-standing asset, to the State. Tasima did indeed develop the eNaTIS system, which went live in April 2007 (more than 10 years ago). Since April 2007, however, Tasima has operated, maintained, supported and managed the eNaTIS system and services as well as developing new functionalities and modules as well as amending the system to take account of legislative amendments as and when required by the State. It has employed the Tasima staff solely to discharge these functions and render the eNaTIS system and services to the Republic on behalf of the State and the DoT, and these functions comprise the entirety of Tasima's business. At all times relevant to this application, the State has paid for all Tasima staff employed.'"[57]

[48] The Labour Court recognised that, after the termination of the Turnkey Agreement, post-2007, the scope of the services rendered by Tasima expanded. It was also recognised that this expansion of the scope of services beyond the scope of the Turnkey Agreement had its origins in the Extension Agreement, which was declared void *ab initio* by this Court.[58] To accept the RTMC's contention that the

[57] Labour Court section 197 judgment above n 2 at para 42.

[58] Id at paras 43-5.

Turnkey Agreement is the legal *causa* for the transfer of the eNaTIS would entail a finding that the additional services performed by Tasima are extinguished. It would have to be accepted that everything has been "undone and set aside by the Constitutional Court".[59]

[49] The Turnkey Agreement terminated in 2007. That agreement envisaged that Tasima would develop the eNaTIS and provided an option for Tasima to hand it over as a work product to the State or a designated third party. No employees would transfer under that arrangement, as the scope of work was simply to develop a system. That is, however, only the beginning of this story. The Turnkey Agreement was amended and extended on several occasions after 2007. Under these amendments, Tasima conducted the business of operating, managing, supporting, further developing, maintaining and running the eNaTIS and rendering the related services. The various amendments and extensions were preserved by this Court in *Tasima I*.

[50] The RTMC's argument ignores almost a decade of the actual enhancement, operation, support, maintenance and management of the eNaTIS, which entailed the employment of many employees by Tasima, and which constituted Tasima's business. What was ordered to be transferred was not simply a developed system or product, as it stood in 2007, but the eNaTIS and related services as they stood after 9 November 2016.

[51] In *Tasima I,* this Court formulated a just and equitable remedy under section 172 of the Constitution.[60] It ordered the transfer of the eNaTIS and related services as they existed on 9 November 2016. *Tasima I* did not require the transfer of the eNaTIS and related services as they stood in 2007, 2010 or at some other point in time in the past. Rather, this Court ordered a forward-looking transfer regime. This Court specifically

[59] Id at para 43.

[60] *Tasima I* above n 7 at paras 201-7.

declined to make an order that had retrospective effect, awarding prospective relief to ensure that Tasima was not prejudiced:

> "In addition, the contract extension itself has already expired. Setting aside the extension at this point should not, therefore, impact negatively on Tasima going forward."[61]

[52] Jafta J, writing for the minority in *Tasima I*, recognised that Tasima was required to perform "new and additional services that were not part of the month-to-month arrangement".[62] Neither were these additional services part of the Turnkey Agreement. He accepted that the "purportedly extended agreement was implemented".[63] He went on to state that he would have declared that the extension of the agreement between the parties was void *ab initio*. In addition, in granting a just and equitable remedy, he would have "preserved what had already been done in terms of the invalid extension and [ordered] Tasima to transfer the eNaTIS systems to the Corporation within 30 calendar days".[64] This too supports the reasoning that the expansion of the contract to include additional services, albeit unlawfully, was preserved. This Court had not intended to make an order to transfer the eNaTIS and related services as they stood prior to the extension.

[53] As an aside, it is interesting to note that Jafta J was disapproving of the attempts made, somewhat successfully, to enforce the Turkey Agreement after its expiry, the financial gains made by Tasima in this process and the consequent loss suffered by the State:

> "The orders issued by the High Court before the launch of the present proceedings and the order granted by the Supreme Court of Appeal, here have enforced and continue to

[61] Id at para 170.

[62] Id at paras 21-7.

[63] Id at para 27.

[64] Id at para 131.

> enforce a fixed term contract of five years, more than nine years from the date on which it expired by effluxion of time. The continued operation of that contract costs the Department R50 million per month. And Tasima has to date earned more than R2.5 billion from a contract whose original price was R355 million. As the amount in excess of the original price was not budgeted for, the Department is forced to divert funds from approved projects to finance an allegedly unconstitutional and illegal agreement."[65]

[54] A further reason why the Migration Plan is not applicable is to be found in *Tasima II*. *Tasima II* reinforces the proposition that the legal *causa* for the transfer was this Court's order in *Tasima I* and not the Turnkey Agreement. It concludes that, from 9 November 2016, the parties' relationship had no contractual substratum save for the Migration Plan, the sole purpose of which was to regulate the handover of the eNaTIS to the RTMC. Petse AJ wrote:

> "It is necessary to emphasise that before 23 June 2015 the contractual relationship between the parties was regulated by the terms of the Turnkey Agreement. For the initial period the contract was lawful. When the initial agreement was unlawfully extended on 1 May 2010 for a five-year period the parties fulfilled their respective obligations in terms of the unlawful contract until it was declared invalid and set aside on 23 June 2015. After 23 June 2015, but before November 2016, the relationship between the parties had no contractual underpinning but was perpetuated by a series of court orders granted by the High Court. *After 9 November 2016, the parties' relationship had no contractual substratum save for the Migration Plan whose sole purpose was to regulate the handover of the eNaTIS to the [Department]*. As is apparent from paragraph four of the order in *Tasima I*, the handover of the system could be implemented in one of two ways: either in terms of a handover plan agreed to between the parties within 10 days or if no agreement was reached within 10 days, in terms of the Migration Plan under schedule 18 of the Turnkey Agreement. Whichever way was adopted, the handover had to be completed within 30 days from the date of the order of *Tasima I*."[66]

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[65] Id at para 64.

[66] *Tasima II* above n 8 at para 46.

[55] The RTMC relies, in part, on the order of this Court in *Tasima I* and its reference to the Migration Plan for its assertion that the Turnkey Agreement is the vehicle in terms of which the transfer must take place. I can do no better than the Labour Appeal Court in dismissing this argument:

> "In the event that . . . an agreement could not be reached, provision was made for a default position namely that the mechanism for transfer would be the migration plan as set out in schedule 18 to the Turnkey agreement. This alternative hardly constituted a resurrection of the Turnkey agreement simply because the Court provided that, absent an agreement to the contrary, a mechanism as had been set out in the Turnkey agreement was available to ensure that the court order could be properly implemented."[67]

[56] The rights and obligations concerning the transfer of the eNaTIS clearly arise out of this Court's order in *Tasima I*. It is this Court's order in *Tasima I* that must determine the proper parameters for the factual enquiry under section 197. This means that this Court must look at what was to be transferred in terms of the order in *Tasima I*.

[57] The logic of an approach that requires that the legal *causa* determine the parameters for the application of the test in section 197 is illustrated by the key dispute in this case. In light of my finding that this Court's order in *Tasima I* is the *causa* for the handover, the application of section 197 essentially turns on the interpretation of this Court's order in *Tasima I*. If the order in *Tasima I* intended to bring a belated end to the Turnkey Agreement, then the question becomes whether the transfer management provisions in the Turnkey Agreement amount to the transfer of a business as a going concern. It is not in dispute that, although the Turnkey Agreement expressly excludes the transfer of employees, it does not qualify as a section 197(6) exclusion agreement, because no unions or employees were party to it. Thus, the only way for the RTMC to

[67] Labour Appeal Court section 197 judgment above n 2 at para 32.

escape the application of section 197 is to establish that the Turnkey Agreement was merely a specific-works contract and that *Tasima I* sought to terminate the parties' relationship on those terms. If, however, *Tasima I* ordered a transfer of the eNaTIS and services in its 2016 form, and not in its 2007 form as it was when the Turnkey Agreement terminated, then the question becomes whether this handover qualifies as a section 197 transfer. I have no doubt that it was a transfer for the purposes of section 197, as I will demonstrate.

Was there a "business"?

[58] What was handed over by Tasima to the RTMC must be a business within the meaning of section 197 in order for the section's automatic consequences to follow. In this regard, courts must examine the factual matrix of each case to establish whether an entity can be identified as a business for the purposes of section 197. A "business" is defined expansively to include "the whole or a part of any business, trade, undertaking or service".[68] The Oxford English Dictionary defines "business" as "[t]rade and all activity relating to it, especially considered in terms of volume or profitability; commercial transactions, engagements, and undertakings regarded collectively."[69] The word "trade" is defined as "any regular occupation, profession, or business, especially when undertaken as a means of making one's living or earning money" and "undertaking" is defined as "[a]n action, work, etc., undertaken or attempted; an enterprise".[70]

[59] The associated words "undertaking" and "service" both indicate that section 197 is applicable to structures that fall outside of income-generating entities.[71] To this end,

[68] Section 197(1)(a) of the LRA.

[69] Oxford English Dictionary Online (OUP, Oxford 2020).

[70] Id.

[71] Todd et al *Business Transfers and Employment Rights in South Africa* (LexisNexis Butterworths, Durban 2004) at 32-3.

this Court held in *Aviation Union* that section 197 applies to "any business provided that the other requirements are met. The aim is to cast the net as wide as possible."[72]

[60] Courts have established what a business is by having regard to the constituent parts of the business and determining which parts are to be divested of by the transferor. A business can consist of a variety of components, including both tangible and intangible assets, goodwill, a management staff, a general workforce, premises, a name, contracts with particular clients, the activities it performs, and its operating methods.[73] These components were explored in *Schutte*, where the Labour Court concluded that they did not constitute a closed list, but must be sufficiently connected to one another so as to form an "economic entity" that is capable of being transferred.[74] This approach influenced the Labour Court in *Harsco Metals*,[75] where Van Niekerk J said:

> "The definition [of a business] is broad, but it requires the court to subject the entity that is the subject of a transfer to scrutiny. In doing so, the courts have . . . adopted the concept of an 'economic entity', defined as 'an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective."[76]

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[72] *Aviation Union* above n 45 at para 45.

[73] Id at para 48.

[74] *Schutte v Power Plus Performance (Pty) Limited* (1999) 20 ILJ 655 (LC) at paras 42 and 50-1. The decision in *Schutte* closely followed the guidelines that were set out by the European Court of Justice in *Spijkers v Gebroeders Benedik Abattoir CV* [1986] 2 CMLR 296 (ECJ) at paras 11-3. The legal conception for section 197 derives from the EU Council Directive 77/187/EEC that is applicable to members of the European Community. The decisions of the European Court of Justice and the English courts have regularly been used by our courts for guidance on how section 197 should be interpreted. In *NEHAWU* above n 38 at para 47, this Court stated that "while there are differences in the language and context in which these instruments are applied, they nevertheless provide some insight for the proper interpretation and application of section 197". See also *Horn v LA Health Medical Scheme* [2015] ZACC 13; 2015 JDR 0895 (CC); 2015 (7) BCLR 780 (CC) at paras 66-71 and *Rural Maintenance* above n 49 at para 141.

[75] *Harsco Metals SA (Pty) Limited v Arcelormittal SA Limited* (2012) 33 ILJ 901 (LC) (*Harsco Metals*).

[76] *Harsco Metals* id at para 25. See also *TMS Group Industrial Services (Pty) Limited t/a Vericon v Unitrans Supply Chain Solutions (Pty) Limited* [2014] ZALAC 39; (2015) 36 ILJ 197 (LAC) at paras 21-7; *Communication Workers Union v Mobile Telephone Networks (Pty) Limited* [2015] ZALAC 8; (2015) 36 ILJ 1819 (LAC) at para 13; *SA Transport and Allied Workers Union v Member of the Executive Committee: Gauteng Roads and Transport* (2015) 36 ILJ 3155 (LC) at paras 16-7; and *Unitrans Supply Chain Solutions (Pty) Limited v Nampak Glass (Pty) Limited* (2014) 35 ILJ 2888 (LC) at para 15.

[61] In this matter, it is common cause that Tasima was a special purpose vehicle, the main purpose of which was the development, operation, maintenance and management of the eNaTIS. Prior to handing over these functions to the RTMC on 3 April 2017, Tasima was responsible for:

(a) rendering eNaTIS services to end-users;

(b) supporting the eNaTIS when any faults were logged;

(c) developing, testing, and implementing any new functionalities required of the eNaTIS; and

(d) managing third party service providers to the eNaTIS, including ensuring that the necessary services and equipment were provided by such parties, and that they were paid.

[62] The RTMC has conceded that these functions comprised Tasima's sole business after it was awarded the contract for the provision of services in relation to eNaTIS. In these circumstances, the components of eNaTIS that were handed over by Tasima to the RTMC constituted a business for the purposes of section 197.

Did the transfer take place in terms of a specific-works contract?

[63] The RTMC attempts to escape the application of section 197 by claiming that the Turnkey Agreement was merely a specific-works contract and that the transfer was intended to take place on the terms set out in the Turnkey Agreement. The RTMC contends that the Turnkey Agreement demonstrates that the parties intended to enter into a specific-works contract, where Tasima's employees would not be transferred to the RTMC upon the delivery of the eNaTIS by Tasima to the RTMC. The RTMC submitted that Tasima was contracted to develop a specific product (being the eNaTIS), and that the delivery of the product accordingly does not constitute the transfer of a business within the meaning of section 197. The RTMC says there is nothing in the Turnkey Agreement about Tasima operating a business, nor about the transfer of Tasima's business to the government at the end of the contractual period.

[64] The RTMC contends that various clauses of the Turnkey Agreement support its argument that the contract is a specific-works contract. Schedule 15 to the Turnkey Agreement, titled "Transfer Management Provisions", makes provision for the orderly transfer of the eNaTIS and related services from Tasima to the Department or a third party provider, should the Turnkey Agreement terminate or expire for any reason. Clause 2.2 contemplates that Tasima and the Department will agree on a transfer management plan in order to facilitate the transfer of the eNaTIS and related services. Clause 2.4 provides that the transfer management plan shall be "substantially similar" to the Migration Plan. In addition, the plan is required to make provision for Tasima to provide consulting advice relating to the specific service management issues to the Department and "reasonable access" to any of Tasima's employees who have experience in providing the services relating to the eNaTIS. Further, clause 3.1 stipulates that Tasima take reasonable steps to effect the "orderly and uninterrupted transition" of all related services back to the Department or a third party provider, including providing access to Tasima's employees who were involved in the provision of services related to eNaTIS and who were still employed by Tasima.

[65] Although the definition of "business" in section 197(1) includes a service, where services are involved, what must be transferred is the business that supplies the services. *Aviation Union* makes clear that the mere termination of a service contract would not, without more, constitute a transfer within the contemplation of section 197.[77] There must be "other indicators", such as whether assets, employees or customers were taken over by the new owner.[78] These indicators serve to limit the application of section 197 so that it does not apply to specific-works contracts. If section 197 was over-inclusive so as to include within its ambit specific-works contracts, this might inhibit state agencies from using developers with the expertise to provide specialised services. However, the facts of this case clearly indicate the transfer of a business – not merely

[77] *Aviation Union* above n 45 at paras 47, 52 and 107-8.

[78] Id at para 53.

the delivery of a product. This is because, as explained, the legal *causa* for the transfer (this Court's order in *Tasima I*) sets the parameters for the factual enquiry.

[66] In my view, the dispositive answer to the RTMC's specific-works contract argument is that *Tasima I* ordered the transfer of the eNaTIS and services as they existed on 9 November 2016.

[67] This Court was, of course, well aware that the eNaTIS and services had, since 2007, been operated, managed, maintained, supported and further developed exclusively by Tasima. In this Court, the Department and the RTMC did not request that Tasima hand over some version of the system and related services as they stood in 2007. On the contrary, there was universal acceptance and understanding of the fact that the totality of the system and services were to be handed over, and that the handover would include the operation, management, support and maintenance of the system and not just the final product as it stood at the end of the Turnkey Agreement. With that in mind, this Court ordered a forward-looking transfer regime in *Tasima I*. It was not an order to restore the status quo prior to the 2010 extension and certainly not an order to restore the status quo prior to the 2007 to 2010 extension.

[68] As a matter of fact, on 5 April 2017, the RTMC took control and transfer of the entirety of the eNaTIS and related services, as they stood at that date. It is unsustainable and illogical for the RTMC to assert that, while it took over every aspect of the full, up-to-date system and services, the transfer must be treated as if it occurred ten years earlier, under the terms of the Turnkey Agreement as it existed then, and without regard to all that had factually and legally occurred after that date. That assertion is at odds with the plain meaning and effect of this Court's order in *Tasima I*, which was to order transfer of the entire operation as it existed in November 2016.

[69] In this Court, the RTMC concedes that Tasima's business developed from 2007 and after the Turnkey Agreement came to an end, to the point where it expanded to

include the operation, maintenance and management of the eNaTIS. The RTMC contends that the challenge with the expansion of the business is that this expansion occurred under the unlawfully and unconstitutionally extended agreement.

[70] It was common cause that Tasima's operation of its business from 2007 was unlawful. Nonetheless, in *Tasima I*, this Court ordered a transfer of what existed as at 9 November 2016 – this included the expansion of Tasima's business to include the operation, maintenance and management of the eNaTIS. The RTMC's case is based on the fallacy that the parties are to act as if only the 2007 work product transferred.

[71] The RTMC has conceded that a business was subsequently developed by Tasima. It is plainly *this* business which was transferred in terms of this Court's order in *Tasima I*. The fact that the expansion of Tasima's business occurred pursuant to unlawful extensions of the Turnkey Agreement is irrelevant in the section 197 enquiry. This Court must assess the nature of the business or service that was transferred, as a matter of fact. What was transferred from Tasima to the RTMC was not merely a product that it had developed under the Turnkey Agreement, but a business that consisted of further developing, managing, supporting, maintaining and operating the eNATIS and related services. As the Labour Court held, the RTMC's reliance on the transfer of a fictional, 2007-based system developed in terms of the five-year Turnkey Agreement is unsustainable.[79] The Labour Court correctly rejected this argument:

> "In this case the entire eNaTIS system and services (as they stood and were being operated and performed) were transferred on 5 April 2017. *The RTMC has itself effected, by force, this complete transfer. I agree with Tasima that it does not lie in its mouth now to say that for the purposes of section 197, this Court should create the*

[79] Labour Court section 197 judgment above n 2 at para 48.

fiction that what was transferred was something else, namely only the system and services as they existed at May 2007."[80]

[72] If the RTMC had established that the Turnkey Agreement was merely a specific-works contract and that the order in *Tasima I* aimed at terminating the relationship on those terms, then the RTMC could have succeeded. The challenge for the RTMC is that *Tasima I* clearly did not aim to terminate the relationship between the RTMC and Tasima on the terms of a specific-works contract as had existed under the Turnkey Agreement. Instead, *Tasima I* ordered a transfer of the eNaTIS and services as it stood in its 2016 form.

As a quasi-regulator, is the RTMC excluded from section 197's ambit?

[73] The RTMC further claims that it cannot, by virtue of its legal nature, take over an economic entity as envisaged by section 197. It contends that, if no economic entity is received, there can be no transfer of a "business" for the purposes of section 197. It further contends that since it performs a "regulatory function", it is distinguishable from other entities that are bound by the provisions of section 197.

[74] The RTMC submits that, even though Tasima may have surrendered its business, the RTMC was inherently incapable of receiving the business. The RTMC instead contends that it received a regulatory facility. Unlike Tasima, which operated its business for profit, the RTMC contends that it fulfils a regulatory function. According to the RTMC, the eNaTIS therefore did not retain its identity after the transfer and became something else entirely.

[75] The RTMC urges this Court to adopt the approach of the English Court of Appeal in *Institute of Chartered Accountants*,[81] which concerned the interpretation of a

[80] Id at para 50.

[81] *Institute of Chartered Accountants in England and Wales v Customs and Excise Commissioners* [1997] STC 115 5 (CA) (*Institute of Chartered Accountants*) at 1166c.

legislative provision that imposed Value Added Tax (VAT) on economic activity. In this context, the English Court of Appeal held that an institute that performed a regulatory function did not carry out economic activity. The institute in question was engaged in exercising public control over persons engaged in the financial services industry. In its judgment, the English Court of Appeal made these remarks in relation to the concept of economic activity:

> "From these cases I conclude that the concept of an economic activity is an activity which typically is performed for a consideration and is connected with economic life in some way or another. But it is not an essential characteristic that it should be carried on with a view to profit or for commercial reasons, but it must be an activity which is analogous to activities so carried on. An activity which consists in the performance of a public service to which the idea of commercial exploitation with a view to profit or gain is alien is not of an economic nature particularly where the activity is one typically of a public authority.
>
> Applying these criteria to the activities of the institute I find that they are not activities of an economic nature. They are activities which Parliament has decreed should be carried out for the protection of the public and are to be regarded as the exercise of public control over those who engage in financial services, auditing and insolvency practice. The fact that the institute generates revenue from the issue of licences, certificates or maintenance of the register to cover overheads does not of itself mean that it is an economic activity. In carrying out this activity the institute is performing public services to which the very idea of commercial exploitation with a view to profit is alien. Further they are typical of the activity of a public authority. Though connected with the activity of the profession of accountancy, the activity of the institute does not consist in the supply of such services for consideration but in ensuring that those in the profession who provide such services do so in accordance with the law's requirements."[82]

[76] It is largely on the strength of this authority that the RTMC submits that section 197 was not intended to apply to a regulatory statutory body such as itself. It

[82] Id at 1166c-f.

argues that, because eNaTIS, in the hands of the RTMC, is not an economic entity but rather an entity performing a regulatory function as required by the RTMC Act, a business was not transferred for the purposes of section 197.

[77] The English law principle on which the RTMC places reliance, however, has developed in an entirely different legal setting and statutory context. It concerned the definition of economic activity for the purposes of VAT requirements. The RTMC's resort to English law is misplaced. There is also no lacuna in our domestic law; instead it is clear that section 197 potentially applies to all transfers of business. This includes a business that consists of the development, operation, maintenance and management of the eNaTIS and related services.

[78] The RTMC accepted in the Labour Court that what Tasima had developed after 2007 was a "business".[83] Indeed, the very same activity which the RTMC alleges is regulatory was described by the RTMC as a trading activity for the purposes of profit generation. It is apparent from the facts of this case that the RTMC does not act solely as a regulator. It acts as a commercial enterprise, or at least in a manner analogous to that of a commercial enterprise, when it operates, manages, maintains and supports the eNaTIS.

[79] In addition, the RTMC has a number of characteristics that qualify it as an entity sufficiently connected with economic life to enable it to take transfer of a business for the purposes of section 197. It is overseen by a Chief Executive Officer, who reports to a Shareholders Committee.[84] It has a board, as well as salaried employees.[85] It is required to protect the financial soundness of the functional units within the RTMC.[86]

[83] Labour Court section 197 judgment above n 2 at para 42. See also [47].

[84] Sections 5(a), 5(b) and 15 of the RTMC Act.

[85] Sections 5(c) and 20 of the RTMC Act.

[86] Section 9(1)(c)(i) of the RTMC Act.

It has a governance and business plan.[87] It seeks to attract private sector investment, and is concerned with the rates of return of its operations.[88] It must establish functional units that must be managed on a commercial basis.[89] It must submit annual reports and it is audited.[90] It generates revenue through the sale of services and invests funds to receive interest.[91] It may make a profit.[92] It must open one or more bank accounts.[93] It may establish companies, acquire shares in project companies with private shareholdings, conclude investment contracts and trade in shares.[94]

[80] The RTMC's contention that the term business must be interpreted to exclude the RTMC because of its regulatory nature is divorced from its own reality.[95] Moreover, it runs contrary to all established principles of labour law.

[81] The Labour Appeal Court noted as much when it held:

> "[T]he fact that [Tasima's business] was transferred to a statutory authority cannot, on its own, convert that which was a business as defined in section 197 of the LRA to an enterprise that fell outside of the scope of section 197 of the LRA, simply because the system supported a regulatory function. In short, the facts of this case are distinguishable from the European authorities, cited by Mr Redding in support of the

[87] Sections 9(1)(f) and 14 of the RTMC Act.

[88] Section 14(7) of the RTMC Act.

[89] Section 18(3)(a) of the RTMC Act, which indicates that the functional units are overseen by managers who are "responsible for the day-to-day functioning of a functional unit, and must manage the unit *on a commercial basis* in accordance with the business and financial plan".

[90] Section 22 of the RTMC Act.

[91] Sections 24(1)(a) and (c) of the RTMC Act.

[92] Sections 24(3) and (4) of the RTMC Act.

[93] Section 24(5) of the RTMC Act.

[94] Sections 34 and 35 of the RTMC Act.

[95] At the outset, it is interesting to note that the RTMC has, within the last year or so, undergone three section 197 transfers and has received over 190 employees pursuant thereto. The RTMC's 2017/2018 annual report reflects this, and the Minister of Transport has confirmed this in Parliament. See Road Traffic Management Corporation *2017-2018 Annual Report* (March 2018) at 64 and 102, available at http://www.rtmc.co.za/images/rtmc/docs/annual_report/RTMC%202017_18%20Annual%20Report.pdf.

> appeal. The outcome of the mandated factual enquiry is that a business operated by [Tasima] was transferred to [the RTMC] in terms of an order of the Constitutional Court which it handed down in *Tasima I*."[96]

[82] In any event, the character of the entity receiving the business as a going concern is of no relevance to section 197. Instead, the only qualification is that it must be capable of being an employer. Section 20(1) of the RTMC Act provides for the appointment of employees that are necessary to enable the RTMC to properly carry out its functions.[97] It is thus clearly an employer for purposes of section 197(1)(b) of the LRA.

[83] Section 197 requires that there be a transfer of a business by one employer to another as a going concern. Once it is established that the transferor and transferee are employers, the remaining enquiry is a factual one whether there has been a transfer of a business as a going concern.[98] This enquiry should be informed by the subject matter of the transfer, and is independent of whether the transferee intends or is entitled to make a profit.

[84] It is incontestable that, if the eNaTIS and related services were to have been transferred by Tasima to a private company, this would have constituted the transfer of a business. It cannot be that, where it is transferred to the RTMC, the same system and services should somehow no longer be classified as a business for the purposes of section 197. This is because the RTMC's submissions are at odds with the LRA, which binds the State in all its manifestations.[99] Indeed, the LRA expressly recognises the

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[96] Labour Appeal Court section 197 judgment above n 2 at para 27.

[97] Section 20(1) of the RTMC Act reads:

> "The chief executive officer may, on such conditions as the Shareholders Committee determines, appoint the employees that are necessary to enable the Corporation to properly carry out its functions."

[98] *Aviation Union* above n 45 at paras 47 and 49. See also *Franmann Services (Pty) Ltd v Simba (Pty) Ltd* (2013) 34 ILJ 897 (LC) at para 7.

[99] Section 209 of the LRA.

position of the State as an employer for purposes of the Act.[100] That status does not change when it comes to section 197. The RTMC's argument, if accepted, would undermine the application of the LRA to the State. It would give rise to an unwarranted distinction between State entities that are subject to the LRA and those that are not, resulting in arbitrariness and legal uncertainty. The RTMC's attempt to exclude itself from the purview of section 197 on this basis is accordingly devoid of any merit in fact or law.

Was there a "transfer" of the eNaTIS and related services?

[85] Section 197 requires that there must be a transfer of the business. A transfer entails the movement of the business from one party to another, and is a concept that was intended to be widely construed.[101] A transfer under section 197 can take the form of a myriad of legal transactions, including mergers, takeovers, restructuring within companies, donations and exchanges of assets.[102] In *NEHAWU*, this Court held that the substance rather than the form of the transaction is relevant to the determination of whether a transfer has taken place.[103] The mode of transfer is irrelevant, and it is of no consequence whether there is a contractual link between the transferor and the transferee.[104]

[86] The test for determining whether there has been a transfer for the purpose of section 197 is whether the economic entity in question retained its identity after the transfer.[105] There is no dispute in this matter that, when the RTMC took over Tasima's business, it assumed full control of the premises from which Tasima had operated the eNaTIS, as well as the operational system and the extensive infrastructure installed

[100] Sections 27(2), 30(2)(a), 32(9)(a) and 36(2)(c) of the LRA.

[101] *Aviation Union* above n 45 at para 46.

[102] *Schutte* above n 74 at para 48.2.

[103] *NEHAWU* above n 38 at para 56.

[104] *COSAWU v Zikhethele Trade (Pty) Ltd* (2005) 26 ILJ 1056 (LC) at paras 34-5.

[105] *Rural Maintenance* above n 49 at paras 142-50 and *NEHAWU* above n 38 at para 56.

there. This included the assets, information and intellectual property previously used by Tasima to render the same services that were now rendered by the RTMC.[106] The eNaTIS and related services, in their entirety, transferred from Tasima to the RTMC. The RTMC itself recorded in correspondence that "since [the RTMC's] take-over . . . there has been no disruption to the eNaTIS". There has thus been no change in the identity of the undertaking – it is simply in different hands. What the employees were doing the day before the transfer continued to be done the day after, subject only now to RTMC's management and oversight. It follows that for the purposes of section 197, Tasima's business was *transferred* to the RTMC.

Is the RTMC a "non-business public entity"?

[87] The RTMC has a further string to its bow in its argument that its nature as a statute-created public entity shielded it from the application of section 197. The RTMC is listed as a "National Public Entity" under schedule 3A to the PFMA. This is in contrast to schedule 2 to the PFMA, which concerns "Major Public Entities". On the basis of the distinction between schedule 2 and schedule 3A entities, the RTMC avers that it is statutorily exempted from the scope of section 197's application.

[88] The RTMC's attempt to shield itself against section 197 on the basis of it being defined as a National Public Entity in the PFMA is unsustainable. Whether a business is transferred as a going concern for the purposes of section 197 must be determined with reference to the provisions of the LRA. The PFMA makes no provision for a statutory exemption from, or over-ride of, the LRA. There is also no basis in either Act for the statutory exemption sought by the RTMC.

[106] This included office equipment (personal computers, screens, laptops, printers, copiers, local area network, firewalls, file servers, domain controller, etc), a dedicated eNaTIS call centre, an automatic telephone switching system for the eNaTIS offices and personnel (a private automatic branch exchange system), access control systems, call logging systems, asset management systems, boardrooms, parking facilities, a canteen, eNaTIS servers and the data centre, storage systems, development systems, testing systems, computer servers, networks, source codes and eNaTIS data. See also Labour Court section 197 judgment above n 2 at paras 35-7 and Labour Appeal Court section 197 judgment above n 2 at paras 25-7.

[89] In any event, the nature of what is transferred from one entity to another for the purposes of section 197 does not change character depending on the identity of the recipient – once a business, always a business. Section 197 does not differentiate between the State and other employers. In *Chirwa*, this Court held:

> "The LRA does not differentiate between the State and its organs as an employer, and any other employer. Thus, it must be concluded that the State and other employers should be treated in similar fashion."[107]

[90] The RTMC sought to substantively justify the exclusion it sought from section 197 on the basis that schedule 2 public entities are different from schedule 3A entities (such as itself), as they charge VAT and make profit. The PFMA, however, expressly allows the RTMC to budget for surpluses, provided that the written approval of National Treasury is obtained.[108] The RTMC Act itself provides that surplus funds of the RTMC are to be reported, banked and, if necessary, utilised.[109] The RTMC's publicly available annual report echoes this, stating that "no profits or gains will be distributed to any person, the funds will be utilised solely for investment or object for which it was established."[110]

[91] The distinction sought to be drawn by the RTMC is not supported upon an analysis of its statutory nature and operation. It has also not enjoyed support in our

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[107] *Chirwa v Transnet Ltd* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC) at para 66.

[108] Section 53(3) of the PFMA provides:

> "A public entity which must submit a budget in terms of subsection (1), may not budget for a deficit and may not accumulate surpluses unless the prior written approval of the National Treasury has been obtained."

[109] Section 24(3) of the RTMC Act provides:

> "At the end of each financial year the chief executive officer must report to the Shareholders Committee on any surplus funds of the Corporation, as may be determined by the Minister and every MEC with the concurrence of the Minister of Finance and every MEC responsible for finance in each province."

[110] The Road Traffic Management Corporation *2017-2018 Annual Report* above n 95 at 90.

jurisprudence. The argument that the "public authority" nature of a recipient must inform the determination of whether a transfer has occurred for the purpose of section 197 has been rejected by this Court.[111] As recognised by Steenkamp J, no South African court has upheld the distinction advanced by the RTMC.[112]

[92] The LRA applies to the State in all its guises, including to all state-owned public entities. This Court has held that section 197 is applicable to statutory bodies such as a university,[113] a municipality[114] and a division of a municipality.[115] In *City Power*, this Court held that section 197 applies to a municipal entity or an entity that performs a public function similar to that of a municipality. It further cautioned that employers, including organs of state, should, when entering into contracts with service providers, make the necessary provision for a section 197 eventuality.[116]

[93] It follows that a business for the purposes of section 197 was transferred by Tasima to the RTMC.

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[111] *City Power* above n 3 at para 33.

[112] Labour Court section 197 judgment above n 2 at para 31.

[113] *NEHAWU* above n 38 at para 56.

[114] *Rural Maintenance* above n 49 at paras 64 and 108.

[115] *City Power* above n 3 at para 40.

[116] Id at para 33. See also *Khumalo v Member of the Executive Council for Education: KwaZulu Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 (CC) at para 30, where this Court, with reference to section 209 of the LRA, held:

> "Historically, public-sector employment and private employment were regulated by distinct legal regimes in South Africa. Since the adoption of the LRA, public sector employment has largely been synchronised with the legal regulation of employment in the private sector. Section 23(1) of the Constitution further provides that '[e]veryone has the right to fair labour practices.' There is thus no longer a general distinction in principle between the protections afforded to private and public sector employees."

Was the business transferred as a "going concern"?

[94] Section 197 requires that a business be transferred as a "going concern". In *NEHAWU*, this Court set out the test for determining whether a business is transferred as a going concern as follows:

> "Whether [transfer] 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."[117]

[95] In determining whether there has been a transfer as a going concern, a primary consideration is the nature of the business.[118] A distinction is generally drawn between labour intensive and asset-reliant services. This consideration arises because the transfer of employees alone, without the transfer of any assets, may not necessarily give rise to the transfer of a business as a going concern.[119]

[96] Where services are involved, this Court has held that what must be transferred is the business that supplies services – not the service itself.[120] That being so, the mere termination of a service contract would not, without more, constitute a transfer within

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[117] *NEHAWU* above n 38 at para 56. See also *Spijkers* above n 74; *Suzen v Zehnacker Gebaudereinigung GmbH Krankenhausservice* [1997] IRLR 225 and *Cheeseman v R Brewer Contracts Ltd* [2001] IRLR 144.

[118] *Harsco Metals* above n 75 para 32.

[119] Id.

[120] *Aviation Union* above n 45 at para 52.

the contemplation of section 197.[121] There must be "other indicators", such as whether assets and customers were transferred to the new owner and whether employees were taken over by the new owner.[122] In *Aviation Union*, this Court was confronted with the question of whether a clause in an outsourcing contract contemplated the transfer of a business or simply the outsourcing of a service.[123] This Court considered the fact that both the premises from which the business was conducted and the assets with which it was conducted were transferred as being indicative that there had been a transfer of a business which supplied services as a going concern, rather than a mere outsourcing of a service.[124] On this basis, it concluded that section 197 applied in that matter.[125]

[97] In *City Power,* City Power had taken over operation of the electricity services previously rendered by Grinpal in terms of a tender contract. It was agreed that there would be a "full handover of the entire infrastructure, software and databases" relating to the pre-paid electricity project from Grinpal to City Power.[126] However, City Power refused to take transfer of Grinpal's employees. The question was whether Grinpal's business was transferred to City Power as a going concern. This Court found that there had been a transfer of a business as a going concern, as Grinpal's business had continued, albeit in the hands of another entity (City Power).[127] This Court stressed that where there has been a transfer of a business "as is", with all of the complex network infrastructure, assets, know-how, and technology required to operate the business and continue rendering services, a transfer of a business as a going concern has taken place for the purposes of section 197.[128]

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[121] Id at paras 47, 52 and 107-8.

[122] Id at para 53.

[123] Id at para 120.

[124] Id at paras 121-4.

[125] Id at paras 124-5.

[126] *City Power* above n 3 at para 6.

[127] Id at paras 39-40.

[128] Id.

[98] Has Tasima demonstrated that the eNaTIS and related services comprised its business? The well-crafted and eloquent judgment penned by my colleagues (Jafta J, Khampepe J and Mhlantla J) accepts that the eNaTIS is a business for the purposes of section 197.[129] However, it finds that the eNaTIS system was not Tasima's business. Instead, it finds that Tasima's business was the design, development and maintenance of information systems and the eNaTIS was a product of this business.[130] It refers in this regard to other services that Tasima was engaged in providing. However, the services to which the second judgment refers were part of the extended services provided to the Department by Tasima and were linked to its operation of the eNaTIS.[131]

[99] It is clear from the evidence that, for a significant period of time prior to the eNaTIS being handed over to the RTMC, the operation, maintenance and management of eNaTIS comprised Tasima's sole business. This has been conceded, on oath, by the RTMC on numerous occasions. This is thus a common cause fact between the parties, which this Court must accept.

[100] As mentioned, the Labour Court stated that the RTMC appeared to accept that Tasima had employed staff solely to operate, maintain, support and manage the eNaTIS and related services, and these functions comprise the entirety of Tasima's business.[132] The Labour Court made a factual finding to the effect that the sole purpose of Tasima's business was the provision of the eNaTIS and related services and that it performed no other business.[133] In the absence of any suggestion by the RTMC that the Labour

[129] Second judgment at [184].

[130] Second judgment at [184] to [185].

[131] *Tasima I* above n 7 at paras 20-2. The Deputy Director-General used Tasima's provision of these new services as motivation for extending the Turnkey Agreement.

[132] Labour Court section 197 judgment above n 2 at para 42.

[133] Id at para 35.

Court's finding in this regard is wrong or based on a material misdirection, this Court is bound by that finding.[134]

[101] Tasima's business comprised *all* aspects that involved the development, management, operation, support and maintenance of the eNaTIS. Tasima's business operated as a self-contained entity that was labour-intensive and asset dependent. Both of these aspects were key to the conducting of the business. Tasima was structured only to perform functions in relation to the eNaTIS and related services; it employed at least 80 employees to perform these functions; all assets were used solely to perform these functions;[135] it negotiated and entered into agreements, on behalf of the State, solely to perform these functions; it used the premises solely to operate, manage, maintain and support the eNaTIS; and it made payments to third parties solely to exercise these functions. All these aspects were interlinked and necessary to allow Tasima to perform its sole business. It is that business that has transferred in its entirety to the RTMC.

[102] An essential question under section 197 is whether, after the transfer, the undertaking has retained its identity. This question was addressed by the United Kingdom's Employment Appeal Tribunal in *Kelman,* where, unlike the *Institute of Chartered Accountants*, the statutory setting is entirely germane.[136] What is crucial is the transfer of responsibility for the operation of the undertaking.[137] There needs to be a comparison between the actual activities and actual employment situation in the undertaking before and after the transfer. The test set out by Mummery J in *Kelman* offers salutary guidance:

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[134] *Mashongwa v PRASA* [2015] ZACC 36; 2016 (3) SA 528 (CC); 2016 (2) BCLR 204 (CC). I must hasten to add that this principle is more strictly adhered to in trial proceedings as opposed to motion proceedings, because in the latter, the appellate court is in as good a position as the lower court to make the decision.

[135] Although in this case most assets were owned by the RTMC, they were still purchased and used by Tasima in connection with the eNaTIS.

[136] *Kelman v Care Contract Services Ltd* [1995] ICR 260 (EAT).

[137] Id.

> "The crucial question is whether, taking a realistic view of the activities in which the employees are employed, there exists an economic entity which, despite changes, remains identifiable, though not necessarily identical, after the alleged transfer."[138]

[103] The facts of this case are comparable to *City Power*, where this Court concluded:

> "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 business is identifiable and it is discrete. Ultimately a business of providing a system of prepaid electricity to residents of Alexandra Township continued, save that it was now conducted by a different entity."[139]

[104] From 5 April 2017, the RTMC ran the entire undertaking that Tasima had previously performed. Applying the well-established section 197 test set out in *NEHAWU* to the facts of this case, it is clear that the business carried on by Tasima was, immediately after the transfer, carried on by the RTMC on the same premises, using the same assets, and performing an identical function. The RTMC took over all of Tasima's operations using the same information, source code, applications and intellectual property that were used by Tasima. The RTMC is rendering the same services that were provided by Tasima; is liaising with the service providers that Tasima used to liaise with; and is making the payments that Tasima used to make. In my view, the RTMC took over the full business "as is" per *Grinpal*. No relevant factors for the purposes of section 197 changed before and after the transfer. The RTMC conceded that the same function was performed.

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[138] *Kelman* above n 136 at 268.

[139] *City Power* above n 3 at para 39.

[105] In my view, there is no basis to disturb the findings by the Labour Court and the Labour Appeal Court that all criteria necessary for a section 197 transfer are present in this case. For the reasons advanced, and on the facts of this matter, it is clear that there was a transfer of a business from Tasima to the RTMC as envisaged in section 197 of the LRA. It follows that the section 197 appeal stands to be dismissed.

[106] A contrary result would undermine the purpose of section 197 identified by this Court in *NEHAWU* – being the protection of workers against the loss of employment in the event of a transfer of a business.[140] It is cold comfort to say to employees that their employer will have to follow the retrenchment processes in section 189 of the LRA or that they may have an unfair dismissal claim when their jobs continue – just under the oversight and management of a different entity.

Cross-appeal

[107] While upholding the Labour Court's order that the employees' contracts of employment transferred to the RTMC in accordance with section 197, the Labour Appeal Court altered the effective date of transfer. The Labour Court held that the transfer of the employees occurred when the RTMC physically took transfer of the eNaTIS and services from Tasima on 5 April 2017. The Labour Appeal Court, on the other hand, held that the employees transferred to the RTMC with effect from 23 June 2015, the date on which the High Court declared the Extension Agreement unlawful. The cross-appeal raises a narrow question: when is the effective date of transfer?

[108] The cross-appeal is linked to the key question whether a "transfer" as envisaged in section 197 is triggered by a legal event (the underlying legal *causa* for the transfer) or a factual event (the actual handing over of the business). There are three possible

[140] *NEHAWU* above n 38 at para 52.

dates on which the transfer under section 197 of the LRA can be said to have taken place:

(a) 23 June 2015, the date on which the High Court declared the Extension Agreement unlawful;

(b) 22 December 2016, the date upon which the handover was ordered to take place by this Court in *Tasima I*; or

(c) 5 April 2017, the date on which the RTMC took actual control of the eNaTIS and services.

[109] The Labour Appeal Court found that the effective date of transfer must be determined with reference to the legal *causa* for the transfer of the business – which it found to be the order of this Court in *Tasima I*.[141] Tasima argues that the determination of the effective date of transfer is a factual question. Tasima submits that the Labour Court was correct in finding that the effective date of transfer is the date of physical transfer of the business, namely 5 April 2017, when the eNaTIS was handed over to the RTMC. Alternatively, Tasima says the effective date of transfer is 22 December 2016, the date upon which the handover was ordered to take place by this Court in *Tasima I*. The RTMC, on the other hand, supports the finding of the Labour Appeal Court that 23 June 2015 is the effective date of transfer.

[110] This Court's order in *Tasima I* is the *causa* for the transfer. The order created rights and obligations that required Tasima to hand over the eNaTIS and services to RTMC. As explained, the legal *causa* for the transfer is an essential prerequisite for the application of section 197.[142] This means that a transfer of a business as a going concern must take place within the parameters of the legal *causa*.

[141] Labour Appeal Court section 197 judgment above n 2 at paras 33-4.

[142] See [37] to [39].

[111] What is the relevance of the legal *causa* in the determination of the effective date of transfer? The legal *causa* determines the date on which the *obligation to transfer* arises. This date should, and will ordinarily be, the effective date of transfer. It may however be necessary to draw a distinction, in exceptional instances, between the date on which the obligation to transfer arises in terms of the legal *causa* and the effective date of transfer. An exceptional circumstance may arise where a schism exists between the date determined by the legal *causa* and the date on which the transfer is, in fact, effected, and where adherence to the general approach would give rise to inequitable results, as in this instance.

[112] The legal *causa* remains the underlying source of the obligation to transfer and establishes what is to be transferred and, generally, the date of transfer. However, inequities and absurdities may result if a transfer is deemed to occur, for the purposes of section 197, on the date determined by the legal *causa*, even though the transferor had not, as at that date, given the transferee control of the business. The transferee would be required to step into the shoes of the transferor with respect to all employment contracts and employer obligations, in circumstances where she does not yet have control of the business. It may be impossible, in these circumstances, for the transferee to effectively fulfil the required obligations. To require the transferee to discharge these obligations, in circumstances where it has been unable to assume control of the business, as a result of the wilful non-compliance of the transferor, may be inequitable. In the present instance, if this Court were to find that the effective date was 22 December 2016, responsibility for, amongst other things, employee taxes owed by the business would be imputed to the RTMC, notwithstanding the fact that it had not acquired any control over the business, nor benefitted from any of its fruits. While legal avenues would be open to the RTMC to recoup these monies from Tasima, it would, judging from the parties' litigation history, be a time-consuming and litigious process, to bring the matter to finality. For the RTMC to be saddled with this burden, as a result of

Tasima's flagrant non-compliance with this Court's order,[143] would be an inequitable result.

[113] It follows that, as held by the Labour Court, the effective date of transfer in this matter must be 5 April 2017 – the date on which the RTMC physically took control of the eNaTIS and services.

[114] In addition, the Labour Appeal Court erred in its interpretation of this Court's judgments in *Tasima I* and *Tasima II* with respect to the date on which Tasima became obliged to transfer the eNaTIS and services. Based on its reading of these judgments the Labour Appeal Court found that Tasima was obliged to transfer the eNaTIS and services on 23 June 2015. In arriving at this date, the Labour Appeal Court reasoned:

> "It follows that the legal *causa* for the transfer was the order of the Constitutional Court in *Tasima I*. However, in a further judgment of the Constitutional Court in [*Tasima II*], the Court was required to deal with further applications which were launched pursuant to its earlier order. In *Tasima II* the Constitutional Court made it clear that, although the declaration of invalidity of the extension to the Turnkey Agreement which had been made by the High Court on 23 June 2015 was only confirmed by the Constitutional Court in *Tasima I* on 9 November 2016, this confirmation had retrospective effect from 23 June 2015. See para 59 of *Tasima II*. It follows that, as at 23 June 2015, [Tasima] had a clear obligation to transfer the entire business constituting the eNaTIS to the [RTMC] in terms of section 197 of the LRA."[144]

[115] This Court in *Tasima I* confirmed the order of the High Court declaring the Extension Agreement void *ab initio* and setting it aside from the date of its order – 23 June 2015.[145] It held that the extension "no longer had legal effect" from 23 June

[143] The importance of having regard for the moral authority of the judicial process was emphasised by this Court in *Fakie N.O. v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at para 8, where it was held that disregard for court orders "sullies the authority of the courts and detracts from the rule of law."

[144] Id at para 33.

[145] *Tasima I* above n 7 at para 200.

2015.[146] It therefore expressly held that the relationship between Tasima and the RTMC came to an end with effect from 23 June 2015.

[116] This Court's order in *Tasima I* stipulated a clear timeline for transfer. It ordered Tasima to hand over the eNaTIS and related services to the RTMC within 30 days of its order. The parties were given 10 days within which to agree on a transfer management plan, failing which, the default position would be that the handover would take place in accordance with the Migration Plan in the Turnkey Agreement. This Court, while empowered to order a transfer in terms of the transfer management provisions of the Turnkey Agreement, declined to do so and instead crafted this remedy in order to achieve a just and equitable outcome.[147]

[117] *Tasima II* decided two issues, neither of which has a bearing on the date on which Tasima was obliged to effect transfer for the purposes of section 197.[148] The Labour Appeal Court, however, relied on *Tasima II*'s finding that the declaration of invalidity had retrospective effect from 23 June 2015 to inform its decision that Tasima had an obligation to transfer the eNaTIS and services from 23 June 2015.[149] It was on this basis that it concluded that the effective date of transfer was 23 June 2015.[150]

[118] This appears to be based on an incorrect interpretation of *Tasima I* and *Tasima II*. *Tasima II* did not amend or vary *Tasima I*. The dicta relied on by the Labour Appeal Court from *Tasima II* merely confirms that the declaration of invalidity had effect from 23 June 2015. It is clear from the order in *Tasima I* that the obligation

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[146] Id.

[147] Id at paras 200-7. This was reiterated in *Tasima II* above n 8 at para 45.

[148] *Tasima II* decided firstly that Tasima could not rely on an interim order of the High Court, which was to operate until *Tasima I* was handed down, to claim a payment due in terms of that interim order, after the date when *Tasima I* was handed down (that is after 9 November 2016); and secondly that Tasima's application for leave to appeal against the order of Tuchten J was moot. See *Tasima II* above n 8 at paras 57-61 and 78.

[149] Labour Appeal Court section 197 judgment above n 2 at para 33.

[150] Id at para 34.

to transfer the eNaTIS and services only arose 30 days after this Court's order in *Tasima I* in accordance with the just and equitable remedy crafted by this Court in terms of section 172 of the Constitution.

[119] It is important to separate the declaration of invalidity of the Extension Agreement from this Court's just and equitable order that required the transfer of the eNaTIS and related services. Tasima's obligation to transfer the business flowed from the latter. While the declaration of invalidity had retrospective effect from 23 June 2015, it had no bearing on the transfer ordered by this Court, which was to take place on a future date. The prospective transfer was clearly distinct from the retrospective setting aside of the Extension Agreement.

[120] This Court in *Tasima I* did not grant retrospective relief pertaining to the transfer. On the contrary, as mentioned, this Court crafted relief that envisaged a prospective transfer of all facets of the eNaTIS and related services as they stood at 22 December 2016.

[121] *Tasima I* ordered a forward-looking transfer regime. It was not, as the RTMC suggests, an order to restore the status quo prior to the 2010 extension, or an order to restore the status quo as at 23 June 2015. Conversely, this is exactly what this Court declined to do, as it expressly awarded prospective relief to ensure that Tasima was not prejudiced.[151]

[122] Tasima's obligation to transfer the eNaTIS and services arose on 22 December 2016. However, because of Tasima's non-compliance with this Court's order in *Tasima I*, the effective date of transfer is 5 April 2017, the date on which the RTMC took control of the eNaTIS and services.

[151] See [51].

Section 18(3) appeal

[123] The Labour Appeal Court held that a court hearing proceedings in terms of section 18(3) of the Superior Courts Act does not have the power to grant relief that goes beyond that granted in the order which forms the subject of those proceedings.[152] It held that a court's power is, in effect, limited to reversing the suspension of the relief granted. It found that the only order in issue in the section 18(3) proceedings was the declaratory relief granted by the Labour Court, and confirmed on appeal by the Labour Appeal Court, that the contracts of employment of Tasima's employees transferred automatically from Tasima to the RTMC in accordance with section 197 of the LRA.[153] There was no other extant relief. In this regard, the Labour Appeal Court stated:

> "[T]he only order subject to the application for leave to appeal to the Constitutional Court is the declaratory order. It is the operation and execution of that order which has been suspended by virtue of section 18(1) of the Act. And, thus, it must follow logically that only that order can be made operational or executable in terms of section 18(3) of the Act."[154]

[124] The Labour Appeal Court found that the relief granted by the Labour Court – requiring the RTMC to take transfer of Tasima's employees within 24 hours of the granting of the order – constituted "consequential relief" which went beyond the declaratory relief granted in the section 197 order.[155] According to the Labour Appeal Court, the Labour Court did not have the jurisdiction to grant this consequential relief.[156]

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[152] Labour Appeal Court section 18 judgment above n 32 at para 23.

[153] Id at paras 9 and 22.

[154] Id at para 23.

[155] Id at para 16.

[156] Id at para 30.

[125] The Labour Appeal Court further found that Tasima had not proved that it or the employees would suffer irreparable harm if the suspension of the operation and execution of the Labour Appeal Court's section 197 order was not reversed pending finalisation of the appeal to this Court.[157] It held that Tasima had failed to meet the jurisdictional requirements for the reversal of the suspension of an order set out in section 18(3). In this regard, it said:

> "[T]he evidence does not disclose that Tasima and the employees will suffer any harm if the suspension of the operation and execution of the declaratory order is not reversed pending any appeal to the Constitutional Court. In the premises, the prerequisites of [section] 18(3) have not been met."[158]

[126] This Court's decision to consolidate the applications for leave to appeal and deliver judgment in the applications at the same time has rendered the section 18(3) appeal moot as between the parties. This matter no longer presents any live controversy, since there is no longer any interim period during which the Labour Appeal Court's section 197 order could be enforced. At the hearing, Tasima rightly accepted that this matter would be rendered moot if it is decided at the same time as the section 197 appeal.

[127] This Court may nevertheless exercise its discretion to hear a matter even if the issue is moot when it is in the interests of justice to do so.[159] In *Langeberg,*[160] this Court exposited the factors relevant to this enquiry:

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[157] Id at para 31.

[158] Id at para 31.

[159] *President of the Republic of South Africa v Democratic Alliance* [2019] ZACC 35; 2020 (1) SA 428 (CC); 2019 (11) BCLR 1403 (CC) at para 17; *MEC for Education: Kwazulu-Natal v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) at para 32; and *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) (*Langeberg*) at para 11.

[160] *Langeberg* id.

> "A prerequisite for the exercise of the discretion is that any order which this Court may make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity, and the fullness or otherwise of the argument advanced."[161]

[128] Tasima contends that it is in the interest of justice to hear this matter, as it raises an important legal question concerning the effect of a declaratory order that there has been a transfer of a business in terms of section 197. It submits that this issue is of public importance, as it will apply to future section 197 transfers and that it is in the public interest for this Court to provide certainty on this issue. The RTMC submits that, properly understood, this application raises a purely factual dispute. It concerns factual findings regarding whether Tasima met the jurisdictional requirements of section 18(3).

[129] In my view, it is not in the interests of justice to grant leave to appeal, despite the fact that the section 18(3) appeal is moot. As a starting point, an order by this Court will have no practical effect. This is because the issue concerning who is responsible for the employees has now been finally determined in the section 197 appeal. No party will receive any benefit or advantage as a result of an order on the merits of the section 18(3) appeal by this Court.

[130] The Labour Appeal Court found that Tasima had not made out a proper case by laying out sufficient facts and evidence to demonstrate that it met the jurisdictional requirements of section 18(3). Tasima failed on the facts and not on the law. This is because, as correctly found by the Labour Appeal Court, Tasima failed to show that it or the employees would suffer irreparable harm if the suspension of the operation and execution of the section 197 order was not reversed pending finalisation of the appeal

[161] Id at para 11. See also *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 42 (CC) at para 30 and *Mohamed v President of the Republic of South Africa (Society for the abolition of the death penalty in South Africa intervening)* [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC).

by this Court. Tasima had not shown that it was unable to pay the employees' salaries in the interim pending finalisation of the section 197 appeal. Tasima therefore failed to make out a proper case for the interim enforcement of the order.

[131] In any event, the non-payment of wages or salaries pending finalisation of an appeal cannot constitute exceptional circumstances for the purposes of section 18(3) without bringing almost every labour matter within the ambit of the section. It is impossible to find that Tasima's employees' position pending appeal must be protected, without finding that this must be the case in almost every labour dispute. Differently put, the exceptional circumstances that section 18(3) requires, ordinarily should not be located purely in the non-payment of wages or salaries pending appeal.

[132] In these circumstances, it is unnecessary and inadvisable for this Court to consider whether the Labour Court's order requiring the RTMC to take transfer of Tasima's employees constituted consequential relief falling outside of the court's jurisdiction in the section 18(3) proceedings.

[133] For these reasons, leave to appeal is refused in the section 18(3) application.

Costs

[134] Each party has been partially successful in this Court. Both parties have dealt less than admirably with the employees. The parties have engaged in a protracted legal skirmish in order to avoid their obligations to the employees. This has ultimately been at the expense of the employees.

[135] Tasima's hands are not entirely clean. After taking over the eNaTIS, the RTMC repeatedly asked for all the employees' contracts of employment. Tasima failed to provide the RTMC with the contracts. It was only on 20 April 2017, after lodging its section 197 application in the Labour Court, that Tasima finally delivered the contracts. In addition, in the section 18(3) proceedings in the Labour Court and Labour Appeal

Court, Tasima refused to disclose its financial position despite repeated invitations to do so. These courts were therefore unable to properly assess Tasima's assertion that it was unable to pay its employees' wages pending the final determination of the section 197 appeal by this Court.

[136] It is just and equitable, in these circumstances, for each party to pay its own costs in this Court.

Order

[137] The following order is made:

In CCT 27/19:

1. The Road Traffic Management Corporation's application for leave to appeal is granted.
2. The appeal is dismissed.
3. Tasima (Pty) Limited's application for leave to cross-appeal is granted.
4. The cross-appeal is upheld.
5. The order of the Labour Appeal Court in Case no: JA77/2017 is set aside and substituted with the following:

   "The appeal in respect of paragraph 63.1 of the order of the Labour Court is dismissed with no order as to costs."
6. There is no order as to costs in this Court.

In CCT 86/19:

1. Tasima (Pty) Limited's application for leave to appeal is dismissed.
2. There is no order as to costs in this Court.

JAFTA J, KHAMPEPE J and MHLANTLA J (Mogoeng CJ concurring):

Introduction

[138] We have read the strongly reasoned judgment written by our colleague, Theron J (first judgment). While we agree with the outcome in CCT 87/19, we regrettably disagree with the reasoning and outcome proffered in the main application in CCT 27/19, which deals with the interpretation and application of section 197 of the LRA. In our view, section 197 of the LRA was not triggered and does not find application on these facts. We explicate our reasons for concluding so below.

[139] Briefly, our disagreement lies in the fact that the first judgment finds that, on the prevailing facts of this matter, there was a transfer of a business as envisaged by section 197 of the LRA and that this transfer was of a going concern. However, upon a proper appreciation of the facts of the case, the relevant contract and the judgment of this Court in *Tasima I*, it is perspicuous that the section was not activated here.

[140] As a preliminary issue, we agree that we have jurisdiction to adjudicate this matter.

Historical background of section 197

[141] Prior to 1995, there was no general legislative or statutory protection for employees in the event that a business was transferred from one company or employer to another. Thus, the transfer of business was governed by the common law.[162] Under the common law, the transfer of business effectively terminated the employment contracts of that business. This was because an employee can choose her employer, and equally the employer had the right to employ whomever she wished to employ.[163] This is in line with the contractual principle that parties in a contract may not assign their contractual obligations and rights to a third party without that third party's consent.

[162] *NEHAWU* above n 38 at para 52. See also Wallis "Section 197 is the Medium: What is the message?" (2000) 21 *ILJ* at 2.

[163] *NEHAWU* id.

Evidently, this had an adverse effect on the employees' continuity of employment, as there was no automatic transfer of the employees to the new employer. Basson summarised this position as follows:

> "When a business is sold, the position of employees in terms of common law is deceptively simple: No employee may be forced to continue his or her contract of employment with the new employer. This, of course, is cold comfort to most of employees who would like to stay on (especially in a country with high unemployment) because the common law also provides that the new employer is not obliged to employ them. A transfer of a business could well mean the termination of existing employment contracts. As far as insolvency is concerned the rule is that insolvency of the employer terminates existing contracts of employment. Despite this, it is a fact of economic life that an insolvent business does not necessarily cease to operate as it may still be bought by another concern and given a life-line, or some arrangement with creditors may ensure its survival."[164]

[142] Thus, unless offered new employment by the new employer, employees often found themselves in a precarious position without a job. In the circumstances where the employee was offered new employment under the new employer, the terms of the new contract tended to be less favourable than those of their previous employment. The introduction of section 197 of the LRA, as amended, had significant impact in remedying this predicament and provided certainty to business transfers.

[143] Section 197 of the LRA has a dual purpose in that it is there to facilitate commercial transactions while providing employees with security of employment after the completion of the process. In *NEHAWU*, this Court spoke to the dual purpose in the following terms:

> "Section 197 strikes at the heart of this tension and relieves the employers and the workers of some of the consequences that the common law visited on them. Its purpose is to protect the employment of the workers and to facilitate the sale of businesses as

[164] Basson et al *Essential Labour Law* (Labour Law Publications, Centurion 2005) at 171.

> going concerns by enabling the new employer to take over the workers as well as other assets in certain circumstances. The section aims at minimising the tension and the resultant labour disputes that often arise from the sale of a businesses and impact negatively on economic development and labour peace. In this sense, section 197 has a dual purpose, it facilitates the commercial transactions while at the same time protecting the workers against unfair job losses."[165]

[144] As is evident from this statement, section 197 of the LRA aims to remedy and vitiate the undesirable position that existed at the common law, by ensuring security of employment while advancing the sale of a business as a going concern. The effect of section 197 of the LRA is that on the transfer of a business as a going concern, the employees will automatically transfer from the old employer to the new employer. This means that the new employer will automatically step into the contractual shoes of the old employer in that all the rights and obligations that governed the contractual relationship between the employees and the old employer will automatically transfer to the new employer. We now turn to section 197 of the LRA.

Section 197 of the LRA

[145] Section 197(1) of the LRA is crucial in this matter as it sets out the two central requirements that must be present in order for this provision to apply. It provides that:

> "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."

[146] It is thus trite that for section 197 to apply, there must be an identifiable business that is transferred (by the old employer to the new employer) as a going concern.

[165] *NEHAWU* above n 38 at para 53.

[147] Without there being a business or a transfer of that business as a going concern, the provisions of section 197 of the LRA plainly do not find application. This is where we differ with the first judgment, in that we are of the opinion that, in light of the facts of this matter, there was no transfer of a business as a going concern as envisaged by section 197 of the LRA. The LRA is silent on what "transfer as a going concern" means and therefore it has been left to the courts to give substance and meaning to that phrase. This has led to courts being seized with interpreting section 197 and applying it to the facts of a particular case.

[148] It must be borne in mind that section 197(1) outlines the types of business to which this section may potentially apply and sets out the act that would trigger the application of section 197 of the LRA.[166] Once these requirements are satisfied, the legal consequences of section 197 of the LRA apply automatically. These consequences are set out in section 197(2) of the LRA.[167] The consequences flowing from the application of section 197 of the LRA are not in dispute in this matter and thus no further discussion is warranted.

[149] As a starting point, courts have warned that when applying section 197 of the LRA to a given set of facts, form should not trump substance. This is to say that it is the substance of the transaction, not the form, which is paramount. Unavoidably, the

[166] *Aviation Union* above n 45 at para 41.

[167] Section 197(2) of the LRA 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."

application of section 197 is a factual question and there are no hard requirements or boxes that a court can tick before arriving at the conclusion that a business has been transferred as a going concern in terms of section 197 of the LRA. In *Schutte*, Seady AJ stated that whether what is transferred is the whole or part of a business or undertaking as a going concern–

> "requires an examination of substance and not form, weighing factors that are indicative of a section 197 transfer against those that are not; treating previous cases as useful indicators, but not precedent and in this way deciding what is ultimately a question of fact or degree."[168]

[150] What follows is a discussion of the three components that underpin section 197 of the LRA, namely: transfer, business and going concern.

Transfer

[151] In terms of section 197(1)(b) of the LRA, transfer is defined as "the transfer of a business by one employer (old employer) to another employer (new employer) as a going concern." To this end, Wallis has remarked that transfer in this sense means that there must be "two positive actors in the process, namely the old employer and the new employer; and there must be an identifiable business which includes a part of the business that must be the subject of the transfer by the old employer to the new employer."[169]

[152] Essentially, transfer can take place through various forms. Seady AJ recognised that although a sale of business is the ordinary means of transferring a business, it is certainly not the only way.[170] Accordingly, a business may be transferred in terms of section 197 of the LRA as a result of a merger, a takeover, a donation, an exchange of

[168] *Schutte* above n 74 at para 50.

[169] Wallis "Is outsourcing in? An ongoing concern" (2006) 27 *Industrial Law Journal* 1 at 10.

[170] *Schutte* above n 74 at para 48.2.

assets or a restructuring.[171] The type of transaction is thus not determinative of the question of whether there was in fact a transaction.[172] To this end, a court should have regard to the relevant objective facts and determine if there was a transfer. Again, the substance and not the form of the transaction is instructive.[173] This Court in *Aviation Union* reaffirmed this principle and noted that in determining whether there has been a transfer, a court must determine this with reference to the objective facts of the case.[174] Transfer is a factual question.[175]

[153] While it may be accepted that how a transfer is effected, be it through a sale or donation, is not of any real significance, courts should be circumspect to unduly overburden a new employer with existing employees in circumstances where the facts of the case do not amount to a transfer of a business as a going concern in terms of section 197. Collier put it aptly: "to constitute a section 197 transfer, the effect of the transaction must be that a business (a discrete economic entity) is transferred as a going concern (in essence it retains its identity)".[176] Naturally, this leads us to the next requirement as to what constitutes "a going concern".

As a going concern

[154] This Court in *NEHAWU* 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'."[177]

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[171] Id.

[172] Id.

[173] Id at para 50.

[174] *Aviation Union* above n 45 at paras 44-7.

[175] Id at para 47.

[176] Collier et al *Labour Law in South Africa* (Oxford University Press, Cape Town 2018) at 265.

[177] *NEHAWU* above n 38 at para 56.

[155] The question whether the transfer is of a going concern is fact-dependent. The reason for this approach is to prevent and prohibit employers from concocting schemes to avoid the application of section 197 of the LRA and its legal consequences and thus deprive employees of the intended protection.

[156] No single factor is determinative of this issue, and the factors, that have been developed through cases, do not constitute a closed list. These factors were itemised in *NEHAWU* where this Court said:

> "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."[178]

[157] However, it is important to note that these factors have given rise to what is referred to as the "snapshot" test, which requires a comparison between the business under the old employer / transferor and the business under the new employer / transferee.[179] Essentially, in terms of this test, a business is said to be transferred as a going concern if it remains the same, just in different hands.[180] Therefore, the business must retain its identity following the transfer.

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[178] Id.

[179] Du Toit et al *Business Transfers and Employment Rights in South Africa* (LexisNexis Butterworths, Durban 2004) at 49.

[180] *Chemical Energy Paper Printing Wood & Allied Workers Union on behalf of Members v Hydro Colour (Pty) Ltd* (2011) 32 ILJ 1677 (LC) at para 8.

Business

[158] The term "business" is defined broadly because the aim is to cast the net as wide as possible.[181] To this end—

> "'[b]usiness' and 'trade' could be taken to indicate a commercial enterprise aimed at the generation of profit. But 'undertaking' and 'service' could also refer to entities of a non-commercial nature. The fact that section 197 is not limited in its scope to commercial ventures is reinforced by the fact that it applies to both private and public sector transfers. The scope of the definition of 'business' is extended by the fact that what might constitute business for purposes of section 197 is not limited to the entities listed in section 197(1)(a). That much is apparent from the fact that for the purposes of section 197 a 'business' includes, but is by implication not limited to, the entities specifically mentioned. The ambit of section 197 is further extended by the fact that it will not only apply to the transfer of the whole of a business, trade, undertaking or service, but also any part thereof. Business is a rather chameleon-like word, 'notorious for taking its colour and its content from its surroundings.' What will constitute a business for the purposes of the application of section 197 necessarily relate to the particular facts of each case."[182]

[159] A business as envisaged by section 197 of the LRA has a variety of components, including, *inter alia*, tangible or intangible assets, goodwill, management staff, a workforce premises, its name, contracts with particular clients and its operating methods. The term business is said to include "the whole or part of any business, trade or undertaking or service; . . . every conceivable form of activity in which employers engage, whether for profit or otherwise, and whether in the private or public sector."[183] The definition of business therefore should not be unduly narrowed. What is crucial instead is that what is transferred is a "discrete economic entity".[184]

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[181] *Aviation Union* above n 45 at para 45.

[182] Du Toit above n 180 at 33.

[183] Grogan *Workplace Law* 10 ed (Juta, Cape Town 2009) at 295.

[184] See Collier above n 177 at 264.

[160] It must be borne in mind that although the definition of business in section 197(1) of the LRA includes a service, what is capable of transfer is the business that supplies the service and not the service itself.[185]

[161] In light of the above, we turn to the facts of this matter. The facts, as will be shown below, do not satisfy two of the three components in that there is no transfer of a going concern. The objective facts, carefully construed and contextualised, illustrate the opposite – that is, there was a handover of the eNaTIS system to the RTMC, which did not activate the legal consequences of section 197 of the LRA.

Background facts

[162] The facts and the litigation history of this matter are largely common cause and have been fully canvassed in the first judgment and the two other *Tasima* judgments. We gracefully adopt them here and only mention the relevant facts where salient.

[163] In July 2001,[186] Tasima was awarded a tender by the Department to provide services relating to a road traffic management system known as the eNaTIS system.[187] The eNaTIS system links the Department with all licensing institutions in the Republic, manufacturers of vehicles and various institutions, including banks and the South African Police Service. Furthermore, it enables the Department to regulate and administer the licensing of all vehicles in this country, learners' and drivers' licenses,

[185] *Aviation Union* above n 45 at para 52.

[186] *Tasima 1* above n 7 at para 6.

[187] The eNaTIS system was described as a system which is–

> "responsible for, amongst other functions, the management of all licensing requirements and traffic systems. It allows the DoT to administer, across all nine provinces, *inter alia,* the licensing of all motor vehicles, drivers' tests, learner licence tests, contraventions of road traffic legislation and the roadworthiness of vehicles. The eNaTIS system represents the realisation of the requirements under the National Road Traffic Act, 93 of 1996 to record, administer and maintain a variety of information and perform functions pertaining to road traffic in South Africa. The eNatis system is a critical national system, an asset and has been recognised as such. It has been designated as a national key point under the National Key Points Act, 102 of 1980. Accordingly, its integrity is essential to the nation and of great strategic importance."

vehicle roadworthiness tests as well as the general implementation of the road traffic legislation.[188] Subsequently, the parties entered into a Turnkey Agreement.[189]

[164] The services that were to be rendered by Tasima to the Department can be found under Schedule 4 of the Turnkey Agreement. However, a crucial fact is that before the awarding of this tender RTMC had an existing system known as the "National Traffic Information System", which was operational for eight years, in terms of contract #P5023SA.[190] After the conclusion of the Turnkey Agreement, Tasima was contracted, as an independent contractor,[191] to maintain the existing system and phase it out in terms of the Migration Plan, which is under Schedule 18 of the Turnkey Agreement.[192] Thus, what was given to Tasima was an existing software (the National Traffic Information System) for it to develop into the eNaTIS system.

Was there a transfer?

[165] We interpose at this juncture to summarise the salient features of the Turnkey Agreement. The Department contracted Tasima for a single specific work project which encompassed the development and maintenance of the eNaTIS system for a period of five years.[193] It was agreed that the Department would pay Tasima

[188] *Tasima I* above n 7 at para 6.

[189] Id at para 7.

[190] Paragraph 1.2.29 of the Turnkey Agreement is headed "Existing System" and provides that–

> "National Traffic Information System that has been running for eight years in terms of Contract #P5023SA and which will be maintained and phased out in terms of the Migration Plan."

[191] In terms of the Turnkey Agreement, "Contractor means Dataforce Trading 79 (Proprietary) Limited Registration Number 2001/019599/07, trading as TASIMA."

[192] Paragraph 3 of the Turnkey Agreement which is headed "Appointment" provides that– "the State hereby appoints the Contractor, who accepts such appointment, to provide the NaTIS in terms of this Agreement."

[193] The Turnkey Agreement at paragraph 4.1 which is headed "Duration" provides that–

> "[t]his agreement shall commence on the Effective Date and shall continue for an initial period of 5 (five) years ("Initial Period"), whereafter the Agreement shall, expire, provided that should the Project be extended due to Excusable Delay or pursuant to the Change Control Procedure: . . .".

R354 751 000 for its services in the project. Upon completion of the project,[194] Tasima would deliver the product to RTMC as set out in the Turnkey Agreement. In this regard, the terms were that the contractor would effect delivery of the eNaTIS to the State by delivering (a) a copy of the source code, object code, software listing and all other information (on whatever media) relating to the Bespoke Software after acceptance thereof by the State in terms of the Acceptance Procedure; and (b) deposit into escrow an Escrow Package in respect of the contractor software.[195]

[166] The Department provided office space for Tasima from which Tasima was required to work.[196] It must be noted that the RTMC owned all the assets that Tasima used during the period when the eNaTIS system was being developed. Furthermore, Tasima employed its own workforce to help it develop the eNaTIS system to the specifications of the Turnkey Agreement.[197] Tasima was at all times responsible for

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[194] Id. Paragraph 5.1 is headed "Completion" and provides that–

> "The NaTIS shall be completed, implemented and delivered by the Contractor to the State strictly in accordance with the Project Plan, the Migration Plan, the Acceptance Procedures and in accordance with the Functional Specifications, as amended by the parties in writing from time to time in accordance with the Change Control Procedure."

[195] The Turnkey Agreement defines "Bespoke Software" as the "software applications, manuals and other documentation, to be written by the Contractor for the State which shall fulfil the State's Requirements and be wholly compatible with the eNaTIS."

[196] The Turnkey Agreement defines "Premises" as "the premises located at Waterfall Park, Midrand and which is made available by the State to the Contractor in respect of the Performance of the Project in terms of the provisions of Schedule 6 – Facilities Agreement."

[197] Clause 9.1 of the Turnkey Agreement which has the heading "Suitably Qualified Staff*"* and provides that–

> "The Contractor shall employ suitably qualified, experienced and trained Staff to provide the NaTIS to the State in terms of this Agreement, provided that the Contractor shall be entitled, in its discretion, to allocate Staff resources in accordance with the technical or other skills and knowledge required, provided further that any exercise of such discretion by the Contractor shall not negatively impact upon the provision of the Services by the Contractor to the State."

Clause 9.2.1 is headed "Key Personnel" and provides that–

> "The Contractor undertakes to make available the skill and expertise of certain key personnel referred to in the BID and set out in Schedule 5 – Key & Sensitive Personnel. The Contractor undertakes that, for a minimum of 36 (thirty six) months from the Effective Date, such Key Personnel shall (for so long as they are employed, whether directly or indirectly, by the Contractor or any Associated Company) be materially involved in the Project in terms of this Agreement, unless otherwise agreed by the State, which agreement shall not be unreasonably withheld."

these employees.[198] And it is common cause that the affected employees were, at all material times, employed and remunerated by Tasima and conducted business for Tasima.[199]

[167] Our understanding of Tasima's business was that it comprised the designing and developing of information systems – in this particular case the eNaTIS. The fact that Tasima had to operate the eNaTIS system for the period of five years does not change the nature of Tasima's business. This is because turnkey agreements by their very nature are agreements in which a contractor or builder agrees to design, build and complete a facility so that it is ready for use when delivered to the other contracting party. In essence, a turnkey agreement is a contract under which, when a project is complete and handed over to the user, the user only has to "turn a key" to operate the project. To domesticate this example in the field of information systems, a turnkey agreement is a contract under which, when a computer system is delivered to the user, the user only has to "turn a key" to have a fully operable computer system. The fact that Tasima had to operate the eNaTIS system for a period of time is thus not novel and is standard industry practice. It does not alter the nature of Tasima's business. Plainly put, Tasima's business was not the eNaTIS system or the operation of it – it was its development and maintenance. It was not in the business of supplying services through the eNaTIS system. As mentioned, the eNaTIS system was a product produced by Tasima specifically to enable the Department to provide various services to the public.

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[198] Clause 27.2 of the Turnkey Agreement has the heading "Liability for acts of staff" and provides that–

> "The Contractor shall be liable for all liability arising out of the acts and omissions of its Staff whilst executing its obligations in terms of this Agreement."

[199] Clause 30.2 has the heading "No temporary employment service" and provides that–

> "The Contractor warrants that it is conversant with section 198(4) of the LRA and warrants further that any contractor supplied by the Contractor shall be an independent contractor as defined in the LRA and Occupational Health and Safety Act 85 of 1993 and will render the Services as such. The Contractor hereby indemnifies and holds the State harmless against any claim or action whatsoever in terms of section 198(4) of the LRA, instituted against the State by a contractor of the Contractor."

[168] On 31 May 2007, the Turnkey Agreement ended by the effluxion of time. The eNaTIS system and the associated services were not handed back to RTMC[200] but, instead, the parties concluded an arrangement, which ran on a month-to-month basis during which time Tasima continued to operate the eNaTIS system and to provide associated services in relation to it.[201] In May 2010, the agreement was extended for a further period of five years from 1 May 2010 to 30 April 2015.[202] Much of these factors are set out in detail in *Tasima I* and *Tasima II* and need not be repeated here save for the following. *Tasima 1* ordered Tasima to hand over the eNaTIS system to RTMC within 30 days of the order. Furthermore, this Court also ordered that unless an alternative transfer management plan was agreed to by the parties, the hand over was to be conducted in terms of the Migration Plan, as set out in schedule 18 of the Turnkey Agreement. This did not happen. Tasima held on to the eNaTIS system by approaching various courts. Again, this Court in *Tasima II* intervened and stated that:

> "It is necessary to emphasise that before 23 June 2015 the contractual relationship between the parties was regulated by the terms of the Turnkey Agreement. For the initial period the contract was lawful. When the initial agreement was unlawfully extended on 1 May 2010 for a five-year period the parties fulfilled their respective obligations in terms of the unlawful contract until it was declared invalid and set aside on 23 June 2015. After 23 June 2015, but before November 2016, the relationship between the parties had no contractual underpinning but was perpetuated by a series of court orders granted by the High Court. After 9 November 2016, the parties' relationship had no contractual substratum save for the migration plan whose sole purpose was to regulate the handover of the eNaTIS system to the DoT. As is apparent

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[200] Schedule 15 to the Turnkey Agreement – Transfer Management Provisions – at paragraph 2.1 which has the heading "Transfer of Services" and provides that–

> "Upon expiry or termination of this Agreement, Contractor shall take all reasonable steps necessary to effect the transfer of:-
>
> 2.1.1 the Services; and
>
> 2.1.2 the NaTIS;
>
> to the State or designated provider as the case may be."

[201] *Tasima I* above n 7 at para 11.

[202] Id at para 23.

> from paragraph four of the order in *Tasima I*, the handover of the system could be implemented in one of two ways: either in terms of a handover plan agreed to between the parties within 10 days or if no agreement was reached within 10 days, in terms of the migration plan under schedule 18 of the Turnkey Agreement. Whichever way was adopted, the handover had to be completed within 30 days from the date of the order of *Tasima I*."[203]

[169] It is evident from *Tasima II* that in terms of the Turnkey Agreement there was never a transfer as envisaged in terms of section 197 that took place. At this juncture, let us say that the Turnkey Agreement had not been illegally extended: from the facts of the matter, could there have been a transfer in terms of section 197? Surely not. Contrary to the first judgment, *Tasima I*, properly interpreted, is not a legal causa giving rise to new set of obligations and rights between the parties. In *Eke*, this Court held that:

> "Once a settlement agreement has been made an order of court, it is an order like any other. It will be interpreted like all court orders. Here is the well-established test on the interpretation of court orders:
>
> > 'The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention.'"[204]

[203] *Tasima II* above n 8 at para 46.

[204] *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC) at para 29 quoting *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd* [2012] ZASCA 49; 2013 (2) SA 204 (SCA) at para 13 and *Administrator, Cape v Ntshwaqela* 1990 (1) SA 705 (A) at 715F-H.

[170] This Court in *Tasima I* plainly reinstated the order of the High Court,[205] which declared the extension agreement invalid from 23 June 2015 and held that from 23 June 2015 "the extension no longer had legal effect, and the interim interdicts issued by the High Court fell away".[206] In relation to the interim orders concerning the extended agreement that directed the Department to oblige with the terms thereof, this Court said:

> "The interim orders requiring compliance with the contract extended by the decision of Mr Mahlalela are of legal effect for the period before the counter-application succeeded. Moreover, the various findings of contempt and suspended committal made prior to the High Court judgment are enforceable. By contrast, the finding of contempt and committal made by the [Supreme Court of Appeal] and challenged in this Court stands to be set aside. This is because once the High Court orders lapsed as a result of the Department's successful reactive challenge of the extension, the interim interdicts could no longer be enforced. This deduction does not, however, affect the period before the reactive challenge was successfully brought."[207]

[171] In our view, the judgment in *Tasima I* merely gave effect to the logical consequence of the Turnkey Agreement. The Turnkey Agreement is what set out the contractual underpinnings between Tasima and the RTMC and provides the relevant context from which to interpret the import and effect of the Migration Plan. The effect of *Tasima I* was to set aside the invalid extensions of the Turnkey Agreement and to give effect to what was envisaged by the parties through the Turnkey Agreement – hence the order requiring the handover of the eNaTIS system to the RTMC by Tasima.

[172] The order in *Tasima I* did not create new rights and obligations between the litigating parties – it simply vindicated the Turnkey Agreement (and its consequences,

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[205] *Tasima (Pty) Ltd v The Department of Transport*, unreported judgment of the North Gauteng High Court, Pretoria, Case No 44095/2012 (17 October 2012).

[206] *Tasima I* above n 7 at para 200.

[207] *Tasima I* above n 7 at para 176.

like the activation of the Migration Plan) and pronounced on the invalidity of the subsequent extensions.

[173] The Migration Plan is Schedule 18 to the Turnkey Agreement. This is not without significance. Black's Law Dictionary defines a schedule as a "written list or inventory; especially, a statement that is attached to a document and that gives a detailed showing of the matters referred to in the document." With that definition in mind, a schedule cannot act or be taken as an independent agreement, which exists outside of the main agreement. Whatever rights or obligations that are housed under the Migration Plan flow from the Turnkey Agreement. One cannot simply isolate the Migration Plan, disregard the Turnkey Agreement and then examine the Migration Plan without sight of the Turnkey Agreement and its underlying nature. In other words, the Migration Plan gives effect to and provides details of the contents of the Turnkey Agreement. This is supported by *Tasima I*'s finding that the extension no longer had effect and the interim orders of the High Court fell away.[208]

[174] We do not understand the order of *Tasima I* as rendering the Turnkey Agreement irrelevant. The import of the order has to be understood in context. To this end, it is common cause that the five-year period set out in the Turnkey Agreement had elapsed and that certain subsequent extensions were invalid. The Turnkey Agreement clearly provides that once the five-year period expires, the handing over of the eNaTIS system would be regulated by the Migration Plan. Therefore, there was no need to explicitly set out that the Turnkey Agreement is still relevant because implementation of the Migration Plan was a logical denouement after the effluxion of five years. The effect was that the parties were placed in the positions they would have been in had the unlawful extensions not taken place. Again, we underscore that the Migration Plan was a schedule to the Turnkey Agreement.

[208] *Tasima I* above n 7 at para 200.

[175] Accordingly, the RTMC is correct in its submissions that in terms of the Turnkey Agreement, Tasima was obliged to develop and then implement an information system that the State would use as part of its statutory functions bound-up with regulating road traffic management across the country. Once it had completed the development of the information system and ensured that it was functional, Tasima was obliged to deliver the information system to the government. There is nothing in the Turnkey Agreement about Tasima operating a business, nor is there anything about Tasima transferring its business to the government at the end of the contractual period. On the contrary, the intention was that Tasima would not transfer any business as a going concern to the government. It was expressly envisaged that Tasima would retain its business of developing and implementing information systems and merely offer support to the government after handing the system back.

[176] That there was no transfer is buttressed by the fact that Tasima's business was a service that comprised the design, development and maintenance of information systems. Tasima's business was not the operation of the eNaTIS system; this was a by-product of its illegal conduct. With that being said, it is perspicuous that the RTMC did not acquire the business of designing, developing and maintaining information systems. Accordingly, it would be incorrect to conclude that the RTMC acquired Tasima's business.

Of a going concern?

[177] Turning to the factors of whether or not there was a transfer of a going concern, one should bear in mind that the RTMC had an existing road traffic management system. This is a crucial starting point. For the purposes of this section, we reiterate the factors to be considered. Relevant factors include 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.

[178] Here are the relevant facts. The road users were customers of the RTMC and the Department before Tasima was awarded the tender. This is because the Department already had an existing operational road traffic management system for eight years prior to the tender to the RTMC. Those customers remained the beneficiaries of the public services which were supplied by Tasima under the agreement between it and the Department. The services in question did not change in character, even when they were supplied by Tasima. They continued to be public services supplied by Tasima on behalf of the Department in the same way that payments of social grants were effected by Cash Paymaster Services (CPS) on behalf of the South African Social Security Agency in *Allpay*.[209] There CPS was considered to be performing a public function, following the award of tender to it. But the payment of social grants was never considered to be CPS's business.

[179] Therefore, with regard to the business of supplying services to the public, there has never been a transfer from the Department to Tasima and back. Tasima supplied those services for a fee on behalf of the Department.

[180] Regarding workers, as there was no transfer of the supply of services from the Department to Tasima, the workers who operated the road traffic management system in the Department were not transferred to Tasima. Evidently, the parties understood that once the eNaTIS system was up and running, the Department would take it over and use its own workforce to operate it. Likewise, Tasima had its own workforce which was employed to develop the system and operated it in order to supply services on behalf of the Department.

[181] Moreover, the premises from which Tasima operated to develop the eNaTIS system and supply services, belonged to the State. The assets it used in the performance

[209] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC).

of its functions also belonged to the State. This is the reason why Tasima could not successfully resist ejectment from those premises.

[182] Almost all factors that are taken into account in determining whether there was transfer of business as a going concern do not support that conclusion. As just illustrated, there was no transfer of assets, customers and employees, from Tasima to the State. Nor was there transfer of the supply of services. Although Tasima supplied those services, it did so as an agent of the State. The only thing that exchanged hands was the eNaTIS system itself, a product that was produced by Tasima for the State in terms of the tender that was awarded to Tasima. Accordingly, on the present facts there can be no basis for concluding that there was a transfer of business.

[183] The "snapshot" test does not assist Tasima in this matter. Tasima argued that the eNaTIS system was their only business. This does not appear to be true because in *Tasima I*, the Court noted that Tasima was also engaged in other services. This Court said:

> "In the memorandum, the Deputy Director-General motivated his recommendation by making reference to constraints that the interim arrangement caused on Tasima's human resources. He also referred to Tasima's then recent release of two software programs to extend the validity of learner drivers' licenses to 24 months. He mentioned the other services which Tasima was planning to launch for use during the FIFA World Cup soccer tournament that was to be held in this country in June-July 2010. These included software on commuter portals, a Geospatial Management System and the Find Your Way 2010 website."[210]

[184] Therefore, the argument that Tasima only had one project or service – the eNaTIS – is incorrect. This reinforces the finding that Tasima is in the business of designing, developing and maintaining information systems. The RTMC did not

[210] *Tasima I* above n 7 at para 21.

acquire that business in any sense and it is not involved in the designing, developing and maintaining of information systems.

A business?

[185] We now turn to the question whether the eNaTIS system is a business for the purposes of section 197 of the LRA. While we may accept the finding by the first judgment in this regard, which answers the question in the affirmative, this does not take the matter any further. Importantly, the question here is what was Tasima's business. Again, Tasima's business was the design, development and maintenance of information systems and the upgraded eNaTIS system was a product of that business. It is important to not lose sight of the fact that what is capable of being transferred is the business that supplies the service and not the service itself.

[186] The business that supplies the service of design, development and maintenance was never transferred. It was the eNaTIS system (a service) which was handed over to the RTMC. To conflate the two would lead to undesirable results, which will have a broader impact, extending the parties before us in this matter.

[187] Tasima places heavy reliance on the fact that the RTMC at some point conceded that section 197 of the LRA applied in this matter. The remarks of Ngcobo J in *Matatiele Municipality* are apposite. The following was said articulating this principle:

> "Here, we are concerned with a legal concession. It is trite law that this Court is not bound by a legal concession if it considers the concession to be wrong in law . . .. [T]his Court firmly rejected the proposition that it is bound by an incorrect legal concession, holding that, 'if that concession was wrong in law [it], would have no hesitation whatsoever in rejecting it.'"[211]

[211] *Matatiele Municipality v President of the Republic of South Africa* [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC) at para 67.

[188] Therefore, we are not bound by legal concessions that are wrong. The concession by the RTMC about the application of section 197 of the LRA is wrong as section 197 of the LRA does not apply in this matter.

[189] Where does this leave the employees? On this score, Froneman J said in *Rural Maintenance*:

> "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. The choice here is which employer should be responsible for the workers affected by the change in circumstance."[212]

[190] These employees are not left without recourse as they can file an unfair dismissal claim against Tasima. If they are successful in this regard, they will have remedies available to them as prescribed under the LRA. The claims by Tasima that it does not have money are unsubstantiated as it has refused to disclose its financial records.

[191] As we see it, there was no transfer of the employees as contemplated in section 197 of the LRA. Tasima geared its whole business around this project and was thus unlawfully enriched at the expense of the taxpayer. Tasima cannot now cry foul and request this Court to absolve it from paying its employees. This to our understanding would not be just and fair to either of the two parties, and especially not for the employees. In our view, the employees were and remain those of Tasima.

[212] *Rural Maintenance* above n 49 at para 36.

Conclusion

[192] We would grant leave to appeal and uphold the appeal in the main application under CCT 27/19.

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