THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

Case no: C349/2020

In the matter between:

MICHELE SCANLON AND 13 OTHERS	First to Fourteenth Applicants
and	
ECHO INTERNATIONAL MANAGEMENT SERVICES (PTY) LTD (IN LIQUIDATION)	First Respondent
ANGELENE POOLE N.O.	Second Respondent
MARLENE ELIZABETH RETIEF N.O.	Third Respondent
AFRICA ONLINE OPERATIONS (MAURITIUS) LIMITED	Fourth Respondent
ECHOTEL PROPRIETARY LIMITED	Fifth Respondent
ECHOTEL INTERNATIONAL PROPRIETARY LIMITED	Sixth Respondent
ECHOTEL SP SA PROPRIETARY LIMITED	Seventh Respondent

Heard: 24, 25 and 26 November 2021; 2 and 3 March 2022

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 22 July 2022

Summary: Application in terms of Section 197A(2) – whether business was transferred as a going concern in terms of section 197A(2) – found that substance rather than form important in determining whether there was a transfer of a business as a going concern – that there is no requirement for the whole of a business to be transferred and that if a part of a business is transferred, that would still constitute a business – that those services that transferred to the new employer, albeit not based on the same contractual provisions as those that existed before the transfer, still constituted a transfer of a business as a going concern.

JUDGMENT

DE KOCK, AJ

Introduction

[1] This matter first came before me as an interlocutory application in terms of which the Applicants were seeking condonation for the late filing of their replying affidavit in the main application[1], as well as an order for the referral of a portion of the dispute between the parties, in the main application, to oral evidence in terms of Rule 7(7)(b) of the Labour Court Rules. Both applications were granted, and the matter was referred for oral evidence, which was heard on 24, 25 and 26 November 2021 and on 2 and 3 March 2022. The parties submitted written heads of argument and argued the matter on 28 April 2022.

[2] The issue that this Court is required to determine is whether there was a transfer of a business as a going concern from the First Respondent (hereinafter referred to as "EIMS") to the Fourth Respondent (hereinafter referred to as "AOOML") in terms of section 197A (2) of the Labour

[1] The main application referring to the Notice of Motion filed by the Applicants, supported by founding and confirmatory affidavits, in which they sought relief.

Relations Act (hereinafter referred to as "the LRA")[2]. It is to be noted that, at the time that the respective heads of arguments were filed, no relief was sought by the Thirteenth and Fourteenth Applicants and that no relief was sought against the Second, Third, Fifth, Sixth and Seventh Respondents.

Section 197A (2) of the LRA

[3] Before I deal with the evidence presented by both parties, it is necessary to set out the relevant provisions of section 197 and 197A (2) of the LRA, which read as follows:

"197. Transfer of contract of employment

(1) In this section and in section 197A –

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

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

"197A Transfer of contract of employment in circumstances of insolvency

(1) This section applies to the transfer of a business –

(a) if the old employer is insolvent; or

(b) if a scheme of arrangement or compromise is being entered into to avoid winding up sequestration for reasons of insolvency.

(2) Despite the Insolvency Act, 1936 (Act No. 24 of 1936), if a transfer of a business takes place in the circumstances

[2] No 66 of 1995 as amended

contemplated in subsection (1), unless otherwise agreed in terms of section 197(6) –

(a) the new employer is automatically substituted in the place of the old employer in all contracts of employment in existence immediately before the old employer's provisional winding up or sequestration;

(b) all the rights and obligations between the old employer and each employee at the time of the transfer remain rights and obligations between the old employer and each employee;

(c) anything done before the transfer by the old employer in respect of each employee is considered to have been done by the old employer;

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

(3) Section 197(3), (4), (5) and (10) applies to a transfer in terms of this section any reference to an agreement in that section must be read as a reference to an agreement contemplated in section 197(6).

(4) Section 197(5) applies to a collective agreement or arbitration binding on the employer immediately before the employer's provisional winding up or sequestration.

(5) Section 197(7), (8) and (9) does not apply to a transfer in accordance with this section."

[4] In order for the Applicants to succeed in their claim that there was a transfer of a business as a going concern, they must firstly prove that there was a transfer from one employer to another employer, i.e. from EIMS to AOOML; that what was transferred was a business, as defined

in section 197(1)(a); and that the transfer of the said business from EIMS to AOOML was as a going concern.

[5] The fact that EIMS was placed under provisional liquidation, and was subsequently liquidated, is not in dispute and neither is it in dispute that the provisions of section 197A (2) (a) must be considered in this matter. It is also not in dispute that EIMS and AOOML are both employers in terms of the provisions of section 197.

Was there a transfer envisaged by section 197?

[6] The Applicants contend that there was a transfer. In support of their contention, reliance was placed on *Aviation Union of SA v SA Airways* (hereinafter referred to as *SAA*)[3] where it was held that:

> "For the section to apply the business must have changed hands, whether through a sale or other transaction that places the business in question in different hands. Thus the business must have moved from one person to the other. The breadth of the transfer contemplated in the section is consistent with the wide scope it is intended to cover."

[7] The Applicants also relied on *Road Traffic Management Corporation v Tasima (Pty) Ltd* (hereinafter referred to as *Tasima*)[4] where it was held:

> "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

[3] (2011) 32 ILJ 2861 (CC) para 38 – an extract of the minority judgment penned by Jafta J, summarising the court's pronouncements in *NEHAWU v UCT* 2003 (3) SA 1 (CC) para 62

[4] (2020) 41 ILJ 2349 (CC) para 85

widely construed. A transfer under s 197 can take the form of a myriad of legal transactions, including mergers, takeovers, restructuring within companies, donations and exchanges of assets. 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. The mode of transfer is irrelevant, and it is of no consequence whether there is a contractual link between the transferor and the transferee."

[8] The Applicants, based on the case law relied on, contend that the transfer was brought about by the cessation of the business of EIMS, which was placed in liquidation in March 2020, and the seamless continuation of the relevant parts of its business by AOOML.

[9] The Respondents (being AOOML, Sixth and Seventh Respondents) on the other hand, dispute that there was a transfer. The Respondents referred to *SAA*[5] where it was held that:

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

[5] Supra at para 6

> transferee is the new employer and the transferor the old. The transaction attracts the section and the workers will enjoy its protection."

[10] The Respondents further rely on *Tasima*[6] where the Constitutional Court emphasized that establishing 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 enquiry as to the *causa* must be conducted before applying the test in section 197 to the facts."

[11] The Respondents therefore argue that these authorities contemplate that, whatever form it takes, a "transfer" involves rights and obligations on, or between, the transferor and transferee where the transferor has the obligation to effect a transfer or allow a transfer to happen, and the transferee will receive the transfer. The Respondents further argue that there must be some action, some deliberate handing over or shifting of a business in order for a s197 'transfer' to take place and that a transfer cannot happen by coincidence. There must be 'two positive actors in the process.'[7]

[12] The Respondents argue further that, in this case, no action was taken to move the business of EIMS to any entity in the Echotel Group. No rights and obligations were created in respect in respect of EIMS (the alleged

---

[6] Supra at para 7

[7] Wallis "Is outsourcing in? An ongoing concern" (2006) 27 ILJ 1 at 10

transferor), or between, EIMS and any transferee where EIMS had the obligation to effect a transfer or allow a transfer to happen, and the transferee would receive the transfer. The Respondents argue that, for example, in the usual case of a transfer in terms of the LRA where the provision of a service (in this case the "shared service") is provided to a client (here the operational companies hereinafter referred to as "the OPCOS") it would be expected that the same service is carried on for the same client but by a different service provider, which is clearly not the case in this case.

[13] The Respondents argue further that it will be observed that the LRA deals with transfers from insolvent employers in a separate section (s 197A), which recognizes that different legal issues may arise where the employer is insolvent and contracts of employment are suspended or terminated as a consequence of the application of the Insolvency Act and Companies Act.[8] The provisions of s 197A differ from s 197 in that in the latter section all rights and obligations between the old employer and its employees continue in in force after the transfer but as between the new employer and the employees; while in the former, under s 197A(2)(b), such rights and obligations between the old employer and the new remain binding between them after transfer and are not transferred. This, the Respondents argue, indicate a rationale that the legislature encourages the purchasers of or investors in a struggling business by not encumbering them with the obligations of the old employer.

[14] According to the Respondents this demonstrates that the legislature contemplated that a transfer in the circumstances of insolvency occurs where an asset (such as a business) is bought out of the insolvent estate of the former employer and the business continues in the hands of the purchaser or a new employer. There must be a *causa* which occasions the transfer, such as a sale. The existence of similar functions in another

[8] See generally Todd et al *Business Transfers and Employment Rights in South Africa* p123-155

entity is not enough to constitute or evidence a transfer. The Respondents lastly argue that there is no sale of business agreement or some similar instrument after EIMS' liquidation facilitating a shift of anything from EIMS to anyone else. Without that, there cannot be a 'transfer' for purposes of s197 and that is the end of the matter.

[15] The Applicants, in their replying note on argument, dispute that there was no transfer because EIMS was not under any obligation to effect a transfer or allow it to happen. The Applicants argue that the quandary that faced the court in *SAA* was that, in the context of the cancellation of an outsourcing agreement by the customer, the service provider is merely passive and that its role in the alleged transfer is limited to receiving a cancellation notice. This, so it is argued, creates a problem because the word "by" the old employer, as used in section 197, denotes some active involvement in the transfer of a business, or some agency.

[16] The Applicants argue that the majority, per Yacoob J, resolved this problem by holding that, as long as there is some form of obligation on the part of the transferor, to effect or allow the transfer to happen, the transfer will be "by" it.[9] This "obligation" or "agency" requirement is what distinguishes a section 197 transfer from a case where a contract for services is merely terminated, without more.[10]

[17] The Applicants argue that it is artificial, and quite wrong, to submit that there is no transfer by the old employer in circumstances where both the old employer and the new employer are group companies controlled by

[9] The minority judgment, per Jafta J, effectively agreed with the LAC that "by" should be read to include "from" the old employer (para 46). Yacoob J did not find it necessary to go as far as that but arrived at "*a permissible meaning of the word "by"* (para 81), namely, through the requirement of some obligation or agency on the part of the old employer.

[10] In particular, the court was concerned that if the outsourced service provider was under no obligation to hand back the means necessary to run the business to its principle, it would be in a position to continue its business. In those circumstances, there would not be a s 197 transfer (paras 121-123).

the same directors. They therefore argue that this problem does not arise in the present matter.

[18] The Applicants again refer to the *Tasima* judgment where the court expressly held that a transfer could take a myriad of forms, including *"restructuring within companies".* This, according to the Applicants, is clearly a reference to transfers within a group of companies, such as in the present matter. The court, in the same dictum, expressly held that the mode of transfer was irrelevant and that *"it is of no consequence whether there is a contractual link between the transferor and the transferee."* The obligation on the old employer to surrender its business need not flow from contract.

[19] The Applicants argue that in this case we are dealing with an intra-group restructuring, as envisaged in *Tasima*. What is more, in this case, the transferor and transferee share the same directors. The Applicants argue that this was not disputed in the answering affidavit (save perhaps for a bald denial which does not give rise to a genuine dispute of fact). These directors (Rautenbach and Rama) are the controlling minds of both EIMS and AOOML and they decided, in March 2020, on behalf of both entities, that:

a) EIMS cease providing services (having procured this through its voluntary liquidation);
b) AOOML would simultaneously commence with the services provided by EIMS; and
c) The means to provide the services would be made available to AOOML (for example, through the substitution of AOOML for EIMS in the SOLID license contract, the continuation of the services themselves by AOOML and the contracting of former personnel of EIMS with AOOML.

[20] The Applicants argue that, in these circumstances the requirements of "obligation" and "agency" denoted by the word "by" are clearly met. EIMS was obliged, by its group directors, to permit AOOML to take over the services rendered by EIMS uninterrupted. The problem of passivity, which troubled the court in *SAA*, does not arise. The Applicants argue that nothing could be further from the case:

a) EIMS is an active participant in the transfer of business. Its directors are the very persons who have made the decision to transfer the business to AOOML as a going concern (assuming the other requirements of section 197 are met).
b) EIMS's obligations flow from a single decision taken at group level. The common directors of the group required EIMS to cease its services and to simultaneously permit AOOML to commence them. The outcome was that EIMS was not able to continue with its business[11], but AOOML was.
c) It does not matter that there is no contractual nexus between EIMS and AOOML (for example, no cession of the SOLID contract or transfer of employment contracts) – the court must have regard to the substance of what has transpired and not its form.
d) To hold otherwise would undermine the purpose and effectiveness of section 197, since a group's directors are entirely at liberty to choose how to structure a business transfer. They can opt to formally require the old employer to directly transfer components of its business to the new employer, or they can opt not to. The obligation on the old employer to surrender its business remains precisely the same in either event.

[21] The Applicants argue that, under these circumstances, it is absurd to suggest that there is no transfer "by" EIMS to AOOML and in illustrating this point, the Applicants refer to a couple of illustrative examples not

[11] This was a factor that weighed heavily with the court in *SAA* (para 123) in determining that the requirements of a transfer were met.

dissimilar to the present matter. I will not repeat the examples for purposes of this judgment, save to find that the examples were quite apposite to the facts in this matter before me.

[22] The Applicants argue that the examples, as well as the facts in the present matter, illustrate the danger of placing form over substance, something which our courts have been at pains to warn against. In each instance, the substance of the transaction is that the group dictates that there will be a transfer of business by one group company to another. The fact that, in the course of achieving this outcome, the employer is not *contractually* required to transfer anything to the new employer is neither here nor there. The effect in substance is the same. The obligation on the old employer to surrender its business to the new employer does not emanate from contract, and there is no requirement that it must. The obligation on the old employer arises because it is subject to the direction and control of the group directors.

[23] The Applicants lastly argue, in respect of whether there was a transfer, that the Respondents' reliance on the Wallis quote to the effect that there must be two positive actors is misplaced, as Wallis was dealing with the question of outsourcing, not intra-group restructuring where the two entities in question share the same directors.

[24] In analysing the submissions in respect of whether there was a transfer, I am of the view that the Applicants' submissions demonstrates that there was indeed a transfer, as envisaged by section 197 and assuming that what was transferred constituted a business, which I will address as the second issue for determination and that such a transfer was as a going concern, which I will address as the third issue for determination.

[25] The matter before me is one firstly involving a company that was placed in voluntary liquidation and secondly relating to what the Applicants refer

to as an intra-group restructuring. The decision to apply for voluntary liquidation was made by the board of EIMS and the very same directors that served on the board of the First Respondent, or at least some of them, are also directors on the board of AOOML. Given this scenario, I am of the view that the reference to "through a sale or other transaction that places the business in different hands", as found by the court in *SAA*, was complied with in this case. There was obviously not a sale given that EIMS was voluntary placed in liquidation. There was however a transaction that placed the business in different hands, the transaction being the decision taken to place EIMS in voluntary liquidation and the decision taken that at least some of the "shared services" rendered by EIMS be continued with, or honoured by, AOOML. This decision taken that allowed some of the "shared services" to be continued with or communicating to the MD's that it will be business as usual, and specifically that EIMS's obligations towards them would be honoured, which will be further expanded on later in this judgment, resulted in at least some of the shared services moving from one person to the other.

[26] In *Tasima* the court held that a transfer entails the movement of the business from one party to another and is a concept that was intended to be widely construed. The court further held that a transfer under s 197 can take the form of a myriad of legal transactions, including *inter alia* restructuring within companies. I have no doubts that the Respondents, in deciding to apply for the voluntary liquidation of EIMS, was engaged in restructuring within companies. The court further held that the mode of transfer is irrelevant, and that it is of no consequence whether there is a contractual link between the transferor and the transferee. I therefore agree that the transfer was brought about by the cessation of the business of EIMS, which was placed in liquidation in March 2020, and the seamless continuation of the relevant parts of its business by AOOML.

[27] I am also of the view that the Respondents reliance on *SAA* insofar as the question was asked "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", must be viewed in the context that the transfer in this case relates to a company that was placed in voluntary liquidation and as part of an intra-group restructuring. Insofar as the same directors were involved in the decision to apply for EIMS to be voluntary liquidated and were also involved in the business of AOOML, their decision to do so amounts to a transaction which created rights and obligations that required EIMS to transfer or at the very least undertake to honour any such obligations, of at least part of their "shared services" in favour of AOOML. This is also then the very action that the Respondents argued must have in place for a s 197 transfer to take place, that is, some deliberate handing over or shifting of a business. The transfer did not happen by coincidence, as argued by the Respondents, and did not have to arise from the purchase of an insolvent business. There were indeed two positive actors in this transfer, being the directors of EIMS and the directors of AOOML, who happen to also have been directors of EIMS.

[28] I am also of the view that this transaction was the legal *causa* of the transfer, as per the decision in *Tasima*.

[29] I further agree with the Applicants' argument that, should the Respondents' argument be accepted, this will result in an absurdity and in the intention of s 197 to be undermined. If I was to find that what the Respondents did in this matter does not amount to a transfer, all intra-group restructurings will avoid the implication of a s 197 transfer by simply deciding to liquidate one of their companies and then to incorporate that liquidated company's business into another company within the group and to decide, with no repercussions, which part of the liquidated business and more specifically which employees to take over. This is not what was intended by the legislature in terms of s 197. Any

such transaction must be held to constitute a transaction that invokes the provisions of s 197, and the court should therefore consider whether what was transferred was a "business" and whether the said transfer of the business was as "a going concern".

[30] It is therefore my finding that there was indeed a transfer of at least a part of the shared services rendered by EIMS to AOOML, as well as a clearly expressed obligation to honour any such contractual services, as from the liquidation of EIMS, by AOOML. The next issue to be determined therefore is whether what was transferred constitutes a business as envisaged in s 197.

Was a business transferred?

[31] The Applicants argue that the term "business" is broadly defined in the LRA to include "the whole or a part of any business, trade, undertaking or service". In *SAA*[12] the court noted that "It is apparent from this definition that the section is designed to cover every conceivable business" and that the legislature's aim had been "to cast the net as wide as possible".[13] Establishing the identity of the "business" in question is a fact-dependent enquiry that must be undertaken on a case-by-case basis. The court must essentially take a "snapshot" of the business before the alleged transfer (which will then be compared to the snapshot of the prevailing state of affairs after the alleged transfer). The Applicants rely on *Tasima*[14] to argue that the words 'undertaking' and 'service' "both indicate that s 197 is applicable to structures that fall outside of income-generating entities".[15]

[12] Supra at para 40

[13] Para 45

[14] Supra at para 59

[15] Citing with approval Todd et al *Business Transfers and Employment Rights in SA* (LexisNexis Butterworths Durban 2004 at 32-3

[32] The Applicants argue that the business in the present matter is comprised of the specific services that were provided by EIMS, as part of a centralised business model, to the Echotel Group and its operating companies. This was not a profit-generating business, and prior to the date of liquidation, EIMS had ceased invoicing its "customers" (that is, the OPCOS) for its services. EIMS, so it was argued, was effectively a cost centre whose services were aimed at enabling the group and its OPCOS to increase profits.

[33] The Respondents argue that there was no 'business' transferred. In order for s 197 to apply the transfer must relate to something that is capable of being transferred, a "business" as defined, which is particularly pertinent when it comes to the transfer of services. The Respondents rely on *SAA*[16] where the constitutional court had held that:

> "Although the definition of business in section 197(1) includes a service, it must be emphasised that what is capable of being transferred is the business that supplies the service and not the service itself."

[34] The Respondents argue further that the EIMS's business did not transfer to AOOML or any other entity and that, if anything has transferred from EIMS to any other entity in the Echo group it does not constitute a "business" in the sense intended. At best for the Applicants, so the Respondents argue, some functions carried out by the EIMS are carried out in some instances by some contractors to AOOML but those are not part of any business that supplies those services. They are thus not a 'business' unit capable of being transferred in terms of s 197, which precludes the application of s197A.

---

[16] Supra at paras 47-48.

[35] The Applicants, in its replying note on argument and in response to the Respondents' submission that no 'business' was transferred, refer to *Harsco Metals SA (Pty) Ltd v Arcelormittal SA Ltd*[17] where Van Niekerk J held as follows:

> "In that case, the court concluded that the outsourcing of gardening and security functions at an airport management by the employer were businesses capable of being transferred in terms of section 197, despite the fact that it did not appear that any assets, goodwill, operational resources or workforce were to be transferred. No distinction was drawn between a business that is largely employee-reliant, as opposed to an asset-reliant business. Nor was it suggested that in the former, greater weight ought to be attached to the number of employees transferring as opposed to the latter instance, in which the number of assets transferring might attract greater weight. If, as in that case, a grouping of relatively unskilled employees and the work they perform, with no assets appearing to be the subject of any transfer, comprises a "business" for the purposes of section 197, then it is difficult to conceive, in the context of an outsourcing transaction, of an economic entity that would not be capable of transfer in terms of the section."

[36] The Applicants therefore argue that there can be no serious question that the definition of "business" is met, as set out in their main heads.

[37] The Applicants' submissions that what was transferred constituted a "business" as envisaged by section 197 is supported by the case law quoted by them. The Respondents conceded, although at a best-case

[17] [2012] 4 BLLR 385 (LC), referring to *SAMWU v Rand Airport Management Co (Pty) Ltd* [2005] 3 BLLR 241 (LAC)

scenario for the Applicants, that some functions carried out by EIMS are carried out in some instances by some contractors to the AOOML, but that are not part of any business that supplies those services.

[38] I simply cannot agree with the Respondents' submissions in this regard. The Applicants have shown, in their affidavits and during oral evidence, that a large part of the shared services rendered by EIMS continued to be rendered by AOOML and that AOOML has expressly advised the OPCOS that it will be business as usual after EIMS's liquidation and in some instances, that AOOML will honour the obligations that EIMS may have had with the OPCOS. The submission made that these services are rendered by some contractors to AOOML does not make any difference. In applying substance over form, it is immaterial who renders the services. What is important is whether the services are rendered, and if so, by whom or on whose behalf these services are rendered.

[39] The answer to this question, based on the oral evidence presented, is that AOOML indeed continued to render a large part of the services and further undertook to stand in the shoes of EIMS in terms of any contractual obligations with the OPCOS following EIMS's liquidation. It matters not in what form the services were rendered, as it is substance rather than form that will determine whether what was transferred was a business as envisaged in s 197.

[40] The requirement in terms of s 197 is not that that the whole of a business, prior to the transfer, had to be transferred to establish that what was transferred was indeed a business. S 197 makes it clear that 'business' refers to 'the whole or a part of any business, trade, undertaking or service". In this case before me, the Respondents conceded that some part of the shared services continued to be rendered by AOOML and the evidence reveals that AOOML advised the OPCOS, where required, they would honour EIMS' contractual obligations. This concession was well made given the oral evidence

presented. In fact, under the question whether there was a transfer as a going concern as per the Respondents' heads of argument, the Respondents acknowledged that a few of the functions fulfilled by the employees of EIMS may have continued after liquidation but added that this does not save the Applicants. The Respondents argue that there is no coherent economic entity left, and even if there was, the functions that might remain are insufficient to render what is left any semblance of what was a clearly identifiable business in the shape of the EIMS.

[41] I can simply not agree with the Respondents' submission in this regard. The employees of and/or the contractors of AOOML continued to render a substantial part of the services rendered by EIMS. Whether these functions constituted a transfer of a business as a going concern will be addressed hereunder as the third issue to be determined. For purposes of the question whether what was transferred was a business as envisaged by s 197, I have no hesitation to find that the functions rendered by AOOML post EIMS's liquidation, which were previously rendered by the employees of EIMS, indeed constituted a business and as such that there was a transfer of a business from EIMS to AOOML. I will, in more detail, survey and analyse the evidence presented regarding the services that were transferred and the undertaking given by AOOML hereinafter.

[42] This then brings me to the last question, which is whether the business was transferred "as a going concern".

Was there a transfer of a business as a going concern?

[43] The Applicants argued that the question of whether the business has been transferred "as a going concern" depends on the facts of each case, as held in *NEHAWU v UCT (referred to as NEHAWU)*[18]:

> "Whether [transfer] has occurred is a matter of fact which must be determined objectively in 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."

[44] Among the factors identified by the court that will ordinarily be relevant in this regard are the following:

> "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 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."[19]

[45] The Applicants, in respect of a business that comprises the provision of services, referred to *Tasima*[20] where the constitutional court has held that:

---

[18] 2003 (3) SA 1 (CC) para 56

[19] Supra at para 56

[20] Supra at para 96; SAA supra at 52

> "what must be referred is the business that supplies the services – not the service itself."

[46] Thus, where a contract for the provision of services is merely terminated, without a concomitant transfer of the means necessary to continue the services, s 197 is not triggered.[21] As held in *Tasima*[22]:

> "… the mere termination of a service contract would not, without more, constitute a transfer within the contemplation of s 197. 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."

[47] Ultimately, regardless of its form, "the vital consideration is whether the effect of the transaction was to put the transferee in possession of a going concern, the activities of which he could carry on without interruption."[23] Applied in this case, the Applicants argue that the question is whether AOOML was placed in a position, in March 2020, that enabled it to continue to provide the services rendered by EIMS, as outlined in their heads. I will revert to these services identified by the Applicants.

[48] The Applicants also referred to *Schutte*[24] where the court noted that:

> "what comprises a business has changed over the past 30 years. The growth in the service sector has given prominence to

[21] As was the case in *Rural Maintenance (Pty) Ltd v Maluti-A-Phofung Local Municipality* (2017) 38 ILJ 295 (CC) para 36

[22] Supra para 96

[23] Lord Widgery in *KenmirLtd v Frizzel* (1968) 1 All ER 414 (HL), cited with approval in *Schutte v Powerplus Performance (Pty) Ltd* [1999] 2 BLLR 169 (LC) para 39

[24] Supra

businesses that comprise only intellectual property and intangible assets. Restructuring in response to recession and technological developments is on the increase. In determining whether there has been a transfer of a business as a going concern, the courts must adopt an approach that is cognitive of these changes."

[49] The Respondents also referred to *NEHAWU*[25] in respect of the test for the transfer of a business as a going concern. The Respondents therefore argue that the business must remain essentially the same, but in different hands. The Respondents argue that the economic entity must, after the transfer, retain its identity.

[50] The Respondents also referred to *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd & Others*[26] where Davis JA, in referring to the factors from the *NEHAWU* judgment, expressed the position as follows:

"All of these factors indicate that a court is required to examine the substance of the agreement to terminate the outsourcing, in this case between appellant and first respondent. In essence, the approach adopted in NEHAWU follows that of the European Court of Justice in the application of the Business Transfers Directive (2001/23/EC) which is applicable in the European Union, and dictates that a transfer must relate to an autonomous economic entity (defined to mean an organized group of persons and assets facilitating the pursuit of an economic activity that promotes a specific objective). In turn this involves a determination whether that entity retains its identity after the transfer; that is, the transferor must carry on the same or similar activities with the personnel and/or the business assets without substantial

[25] Supra at para 56

[26] (2014) 35 ILJ 2757 (LAC) at para 23

interruption. See in this connection *Spijkers v Gebroeders Benedik Abattoir CV* [1986] 2 CMLR 296 (ECJ) and the instructive judgment of Van Niekerk J in *Unitrans Supply Chain Solutions (Pty) Ltd & others v Nampak Glass (Pty) Ltd & others* [2014] ZALCJHB 61 at para 15 [reported at (2014) 35 ILJ 2888 (LC).”

[51] The Respondents continue to argue that, if one has regard to the evidence, by no stretch of the imagination can it be said that the business of EIMS has retained its identity after the alleged transfer. Quite simply, so it was argued, there is no longer an entity like it, which has contracted with the various operating companies to, for a fee, provide them all with services on a one-to-many basis. There is no entity that mirrors the identity of EIMS carrying out the same activities.

[52] As already referred to above, the Respondents then argue that the fact that a few of the functions fulfilled by the employees of EIMS may have continued after liquidation does not save the Applicants. There is no coherent economic entity left, and even if there was, the functions that might remain are insufficient to render what is left any semblance of what was a clearly identifiable business in the shape of EIMS.

[53] The Respondents argue further that it is important to recall that EIMS comprised not only of shared services and that it also had customers in the direct telecoms part of the business. Those customers no longer reside in the Echo group, which placed another significant obstacle in the way of a finding that the business of EIMS remains somewhere in the Echo group, albeit now in different hands.

[54] The Respondents lastly argue that it bears emphasis that the Applicants cannot come anywhere near demonstrating the factors referred to in *NEHAWU* indicating a potential transfer are present: “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." No assets either tangible or intangible transferred from EIMS to AOOML, nor have any employees of EIMS so transferred. AOOML has not taken over the OPCOS as customers for shared services. None of this, so it was argued, is surprising because the shared services model does not operate in the Echo group and the business approach of EIMS has been rejected.

[55] The Applicants, in their replying note to argument and on the question of what is sufficient to establish the "going concern" requirement, referred to *COSAWU v Zikhethele Trade (Pty) Ltd*[27] (cited with approval by Van Niekerk J in *Harsco Metals* (supra), where Murphy J elaborated on the test for a "going concern". After holding that the overarching question is whether the undertaking retains its identity after the transfer, the learned judge gave contents to this requirement as follows:[28]

> "In order to determine whether there has been a retention of identity it is necessary to examine all the facts relating both to the identity of the undertaking and the relevant transaction and assess their cumulative effect, looking at the substance, not at the form, of the arrangements. The mode or method of transfer is immaterial. The emphasis is on a comparison between the actual activities of and actual employment situation in an undertaking before and after the alleged transfer (*Kelman v Care Contract Services Ltd* [1995] ICR 260 (EAT)). What seems to be critical is the transfer of the responsibility for the operation of the undertaking. Mummery J's conclusion in *Kelman* offers a salutary guideline. He said:

[27] [2005] 9 BLLR 924 (LC)

[28] Para 34

> "The theme running through all the recent cases is the necessity of viewing the situation from an employment perspective, not from the perspective conditioned by principles of property, company or insolvency law. The crucial questions 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."
>
> [35] Our own law, I believe, is not much different."

[56] The Applicants argue further that, in *Harsco Metals* (supra)[29] the court accepted that this enquiry was fact dependent and held that, depending on the nature of the business, the absence of a transfer of assets did not preclude the existence of a transfer. The court also accepted that the transfer of the use of assets (as opposed to ownership of them) was a relevant consideration.[30]

[57] The Applicants also referred to the following observations and suggestions made by the learned authors in Todd et al:[31]

a) The business need only remain substantially the same in the hands of the transferee;[32] and
b) The question of performing the same activity "should be assessed in broad perspective without examining the minutiae of the transferee's

[29] Para 32

[30] Following *Abler v Sodhexho MM Catering GmbH [2004] IRLR 168*

[31] *Business Transfers and Employment Rights in South Africa* (LexisNexis Butterworths, Durban) 2004

[32] Page 49

business to ascertain changes in the manner in which the business is run."[33]

[58] The Applicants conclude therefore that the part of the business which the Applicants are concerned with in this application clearly remained an identifiable entity in the hands of AOOML.

[59] Before I analyse the submissions made in respect of the third issue, that is, whether there was a transfer of a business as a going concern, I will briefly analyse the alleged services that the Applicants claim transferred from EIMS to AOOML, as well as refer to various parts of the Respondents' witness, Mr Rautenbach, which are directly relevant to this issue that I am required to determine.

[60] It will be appropriate to first refer to what the core business of EIMS was and what the services were that was rendered by EIMS. The core business of the EIMS was to provide centralised management and support services on behalf of the Echotel group and its OPCOS (which included AOOML). EIMS also provided certain direct telecoms services to end-users in South Africa. I agree with the Applicants' submissions that these direct services are not relevant for purposes of the issues that I am required to determine, especially given that a "business" as envisaged in s 197 includes any part of a business. The OPCOS are based in Kenya, Uganda, Zambia, Ghana, Tanzania, and Mauritius.

[61] The services provided by EIMS, prior to its voluntary liquidation, included SOLID management and support (which was the main software system used throughout the group); technical support services, including technical leadership support; finance management support; programme / project management, including product development support; marketing;

[33] Page 50

and centralised management services. It is not in dispute that the Applicants performed these duties for and on behalf of EIMS.

[62] The evidence supports the Applicants' contention that given the nature of EIMS' business, it was not an asset-heavy entity but was services-based. EIMS' most significant "asset" arose from its right under the SOLID license agreement, which had been ceded to EIMS from 1 November 2019, following a previous transfer of a business as a going concern to EIMS. The previous transfer to EIMS is not relevant to the determination whether there was a transfer of a business as a going concern from EIMS to AOOML other than to serve as some background information. It is undisputed that AOOML became the holder of the rights under the SOLID license agreement as from 1 April 2020, albeit is not by cession but by AOOML entering into a contractual agreement to effectively be able to administer the SOLID platform on behalf of the Group, which includes the OPCOS by allowing each entity access to the rights (referred to as instances) that AOOML holds.

[63] It does not matter, in my view, whether AOOML became the holder of these rights by cession or by entering into a new agreement with the service provider. EIMS's business was largely based on the use of the SOLID platform, which as stated above was the main software system used throughout the group. The SOLID platform was centrally managed by EIMS. The rights under the SOLID license agreement were ceded to EIMS and were as such a crucial part of EIMS's business to offer management and support to the OPCOS within the Echotel group. AOOML, following the voluntary liquidation of EIMS and through such liquidation, was placed in a position to enter in a new contractual arrangement with the service provider to allow the OPCOS, which include AOOML, to continue making use of the SOLID platform.

[64] There can be no doubts therefore that the use of the SOLID platform within the group continued uninterrupted despite the liquidation of EIMS

and that the basis upon which the group was able to do so, was due to the decision taken to apply for the voluntary liquidation of EIMS, who was the holder of these rights until the date of its liquidation.

[65] AOOML's decision to enter into a new contractual agreement with the service provider, as the sole group contracting party, in effect meant that they took over one of the most crucial functions and/or services that were rendered by EIMS. It does not matter in what form these functions were taken over. What matters is the substance of the transaction, that is, what the effect was of AOOML becoming the new holder of these rights and the effect was clearly that AOOML took over an essential part of the business of EIMS. This acquiring of the rights to the SOLID platform clearly shows that there was a transfer of a part of the business conducted by EIMS to AOOML and that this transfer was as a going concern, given that the services that were previously rendered by and/or on behalf of EIMS continued to be rendered by AOOML uninterrupted.

[66] It is also undisputed that, as at February 2020, the organogram of EIMS comprised the Applicants as well as six more recent recruits, namely Jacques Rautenbach (CEO), Dharmesh Rama (CFO), Graeme O'Driscoll (CIO), Nicki Fenthum (HR, Marketing and Sales Operations Executive), Chris Booth (Programme Manager) and Johann Du Toit (BDM Wholesale). Rudi Cloete (Pre-sales and technical consultant) signed his contract with AOOML on 17 March 2020. These six employees/contractors, with Mr Cloete added as from 17 March 2020, all appeared on the payroll of EIMS and was in fact paid by EIMS.

[67] The Applicants were advised on 12 March 2020 that their contracts of employment were suspended with immediate effect. On the very same day, 12 March 2020, the CEO, Mr Rautenbach in a letter to the MD's of all OPCOS, confirmed that six of these employees (excluding Cloete who was not contracted yet) were now contracted to AOOML and that the OPCOS will have access to them.

[68] The sudden contracting of the said six employees/contractors by AOOML, on the same day that the Applicants' contracts of employment were suspended, is indicative of the fact that there was a transfer of the business as a going concern. Why was there this sudden requirement to contract with six employees/contractors that were on the payroll of EIMS? The answer can only be that this was done to ensure that, despite EIMS's liquidation, it will be business as usual for the OPCOS, albeit it with a reduced team than what was in place before EIMS's liquidation.

[69] AOOML then also entered into a contractual agreement with Mr Cloete on 17 March 2020, just a few days later. AOOML also subsequently attempted to recruit Mr Sedeya, the Fifth Applicant, to do precisely the same work as he had done for EIMS and when that failed, AOOML attempted to recruit Ms Adams, the Seventh Applicant.

[70] AOOML's attempt to selectively try and recruit the said two Applicants is yet another indication that AOOML wanted to ensure that it was business as usual, meaning that the services rendered by the EIMS as part of its business model would continue uninterrupted after EIMS's liquidation. This is yet another indication that there was indeed a transfer of a business as a going concern.

[71] The Applicants referred to AOOML having been the owner of the hub at Hartebeeshoek, which was used by EIMS' employees in provision of their services and that nothing changed post-liquidation. I do not think a lot turns to this issue in determining whether there was a business as a going concern from EIMS to AOOML, save to find that some of the services previously rendered by EIMS continued to be rendered after EIMS' liquidation and that such services were facilitated by and/or on behalf of AOOML.

[72] The Applicants allege that there was a transfer of services in that the services rendered by EIMS continued to be provided by AOOML from March 2020 (following the liquidation of EIMS). The Respondents denied that this was the case and presented evidence that, from the date of liquidation, a new business model was in place, which they referred to as "decentralised", "federated" or "siloed".

[73] The Respondents' version in this regard is rejected, as it was simply impossible for such a new business model to be in place in such a short period of time. I accept the Applicants' version that the centralised model, which depended fundamentally on the EIMS's services, was well-entrenched and that it formed part of the group's "DNA". I also accept that, as late as 20 January 2020, the centralised model was being promoted as a key strategy for the group going forward by its CTO, Mr Roy Blatch.

[74] The decision to change to a decentralised model, according to Mr Rautenbach, was made simultaneously with the decision to wind up EIMS, that is, early March 2020. I agree that such a fundamental change to the group's operating model of this magnitude could not be implemented overnight and this was conceded by Mr Rautenbach. I also agree with the Applicants' submissions that the intention to move to a decentralised model is not relevant to the issue that requires to be determined, that is whether there was a transfer of a business as a going concern. What must be looked at is what the situation was immediately pre-liquidation and immediately post-liquidation. The evidence reveals that the move to a new decentralised model in fact did not take place overnight and in fact took months and even longer than a year to implement various aspects of such a decentralised model.

[75] The evidence shows that there was an interim period during which the centralised model would have to continue. Mr Rautenbach admitted as much with reference to the services rendered by EIMS associated with the SOLID system.

[76] This then brings me back to Mr Rautenbach having informed the MD's of the OPCOS, on 12 March 2020, that EIMS' liquidation would not affect the OPCOS and that it would be business as usual for them. They were also informed that they would have access to a management team (comprising of the six employees referred to above who were termed as consultants of AOOML).

[77] In a letter signed by Mr Rautenbach, the Namibian MD was informed that the interim services agreement with EIMS would be honoured by AOOML going forward. This letter is damning to the Respondents' case that there was no transfer of a business as a going concern and one can thus understand Mr Rautenbach's attempt to distance himself form the contents of the letter. The fact that he signed the letter cannot however be wished away and I have no hesitation to find that the letter is a clear indication that AOOML took over the business of EIMS, or at the very least a large part thereof, as a going concern.

[78] The Applicants' submission was further that none of the OPCOS were informed that they were now "on their own" and that they would be required to operate independently going forward but was instead advised it will be business as usual, demonstrates that there was a transfer of a business as a going concern. I have considered Mr Rautenbach's evidence in this regard, but I am unable to find, in the absence of clear communications other than stating that it will be business as usual, that he had discussions with the MD's of the OPCOS. One would further have expected these discussions to feature in some way to the correspondences to the OPCOS, but instead the OPCOS were advised that it will be business as usual and that any contractual obligations that

they had with EIMS would be honoured by what could only have been AOOML.

[79] This finding is further strengthened by the sudden need by AOOML, at the same time as the liquidation of EIMS, to contract with the six employees/contractors previously on EIMS' payroll, the subsequent appointment of Mr Cloete, the attempts made by or on behalf of AOOML to obtain the services of first Mr Sedeya and then Ms Adams to continue to render the same services that they did whilst in the employ of EIMS, the acquisition of the licensing rights in respect of the SOLID system and Mr Rautenbach's communications to the MD's of the OPCOS that they will have access to "these management resources", referring to the newly contracted employees/contractors. This all was clearly done to ensure that, whilst there might have been the intention to move from a centralised to a decentralised model, services previously rendered would continue to be rendered, or at least that the services will be available, albeit in some other form that was previously done. Again the issue of substance over form is relevant, as the substance of what AOOML did was that of taking over at least some of the services rendered by or on behalf of EIMS, but also more importantly giving assurance to the OPCOS that it will be business as usual and in certain cases that AOOML will honour EIMS's contractual obligations post-liquidation of EIMS.

[80] Insofar as Mr Rautenbach testified that the contracting of the consultants was confined to providing services to AOOML only, I reject his evidence as being clearly false given his own communications that the OPCOS will have access to these consultants and more specifically if one takes into consideration what the duties and responsibilities of these consultants were in terms of their contractual agreements. I do not see the need to rehash the evidence presented in this regard, save to find that I accept the Applicants' submissions in this regard. The attempt to argue this away by blaming Mr O' Driscoll and arguing that whether it is contained

in the contracts is irrelevant, as these services were never rendered, is rejected. What these contracts clearly shows that there was a clear intention that AOOML would continue to render a large part of the services rendered by EIMS and that this is indicative of the fact that there was a transfer of a business as a going concern. As I have stated above, it was simply not possible to move from a well-entrenched decentralised model to a decentralised model from late February 2020 to 11 March 2020. It is also important to note that the Applicants were advised that the services rendered by the EIMS Board would not be rendered by the liquidators and this then begs the question, if not by the liquidators, who else would continue to render the services. The evidence clearly reveals that these services, where it may be required, would be rendered by or on behalf of AOOML to the OPCOS.

[81] I similarly will not burden this judgment with a whole analysis as to the specifics of what services were transferred from EIMS to AOOML, save to find that, based on the evidence presented, the only reasonable conclusion I can reach is that there was indeed a transfer of a business as a going concern, that EIMS's business transferred to AOOML, and that the provisions of s 197A (2) applies. The Applicants have therefore clearly discharged the onus that rest with them, and they are entitled to the relief that they are seeking, subject to a change in the date on which the transfer took place. Insofar as time was required to move from a centralised to a decentralised model, this interim period cannot be used to escape the reality that the business of EIMS was transferred to AOOML as a going concern. Until such time that the model was formally implemented and operational, the EIMS services continued, and it continued in the hands of AOOML.

[82] I have no doubts that, was it not for the fact that the retrenchment exercise was abandoned due to a lack of money to pay the retrenchment packages, not all the Applicants would have or could have been retrenched given the fact that the services they rendered, or at least a

part thereof, were still required in moving from a centralised to a decentralised model. Nothing would have stopped AOOML, after the transfer of the EIMS business to AOOML, to engage in a proper restructuring exercise in respect of whose services were still required after the interim period and to engage with such identified employees in a section 189 consultation process. The decision taken instead to abandon the retrenchment exercise and to go the route of liquidating EIMS, and to selectively engage with certain employees/contractors to carry on the duties and obligations of EIMS and to suspend the Applicants, simply cannot be accepted as fair. This is exactly what s 197 and a 197A were meant to avoid by providing for a transfer of a business as a going concern and to protect employees from unfairly losing their employment.

Relief

[83] The Applicants seek an order that this court must declare that, with effect from 1 March 2020, the contracts of employment of the First to Twelfth Applicants transferred, under section 197A (2) of the LRA, to AOOML. I am satisfied that the Applicants are entitled to such an order, but the date of 1 March 2020 cannot be regarded as the date on which the transfer took place. Since the legal *causa* of the transfer was EIMS's application to be liquidated, the date of transfer cannot have been before the actual date that such voluntary application was made, and the Applicants having been informed thereof and their suspension.

[84] The evidence shows that the Applicants were advised that their contracts of employment with EIMS were suspended as from 12 March 2020 and that services that EIMS's clients received from EIMS will remain working until the liquidation process is complete. The Applicants, by their suspension, could no longer render the services required and it must therefore be accepted that the transfer of the business to AOOML was with effect from 12 March 2020.

[85] The Applicants seek the further order that AOOML must be directed to instate the First to Twelfth Applicants, with full backpay and without loss of benefits, from 1 March 2020, together with interest thereon at the prescribed rate. I agree that the Applicants are entitled to such an order, but from 12 March 2020 for the reasons I gave above. Insofar as the Applicants are seeking instatement rather than reinstatement, I do not believe much turns on the wording used. AOOML never accepted that there was a transfer of a business as a going concern and as such never took over the Applicants' contracts of employment, even though they were required to do so in terms of section 197A (2). The Applicants were therefore never dismissed by AOOML and neither did they lodge a dismissal claim. As such I believe the use of the word "instate" as part of the relief is the appropriate relief. The Respondents did not in any way challenge the relief sought insofar as "instatement" is concerned and I therefore accept that instatement is the correct terminology to be used in this matter.

Costs

[86] Both parties sought costs in the event of a finding being made in their favour. I see no reason both in law and fairness why costs should not follow the result.

Order

[87] I therefore make the following order:

a) It is hereby declared that, with effect from 12 March 2020, the contracts of employment of the First to Twelfth Applicants transferred, under s 197A (2) of the LRA, to AOOML.

b) AOOML is herewith directed to instate the First to Twelfth Applicants, with full backpay and without loss of benefits, from 12 March 2020, together with interest thereon at the prescribed rate. The First to Twelfth Applicants are to report for duty at AOOML by no later than 1 August 2022.

c) AOOML is ordered to pay the Applicants' costs, which costs are to include the costs incurred in the interlocutory application.

C de Kock

Acting Judge of the Labour Court of South Africa

Representatives:

For the Applicant:	Adv. GA Leslie (SC)
Instructed by:	Fairbridges Wertheim Becker
For the Third Respondent:	Adv A Redding SC
	Adv. CS Bosch
Instructed by:	Wilken Inc.