CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 133/14

In the matter between:

CITY POWER (PTY) LTD Applicant

and

GRINPAL ENERGY MANAGEMENT SERVICES (PTY) LTD First Respondent

NATIONAL UNION OF MINEWORKERS Second Respondent

EMPLOYEES LISTED IN ANNEXURE "A" OF THE NOTICE OF MOTION Further Respondents

Neutral citation: *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and Others* [2015] ZACC 9

Coram: Mogoeng CJ, Moseneke DCJ, Froneman J, Khampepe J, Leeuw AJ, Madlanga J, Nkabinde J, Tshiqi AJ, Van der Westhuizen J and Zondo J.

Judgments: Tshiqi AJ (unanimous)

Heard on: 18 November 2014

Decided on: 20 April 2015

Summary: Labour Relations Act 66 of 1995 – section 197 — applicability on municipal entities regulated by Local Government: Municipal Systems Act 32 of 2000 and Local Government: Municipal Finance Management Act 56 of 2003

Relationship between Labour Relations Act 66 of 1995 and Local Government: Municipal Systems Act 32 of 2000 in employment matters — Labour Relations Act – section 210 — Labour Relations Act prevails

Labour Relations Act 66 of 1995 — section 197 not in conflict with sections 152 and 160 of the Constitution — section 197 applicable to municipal entities unless specifically excluded in terms of section 197(6) of the Labour Relations Act — On the facts, there was transfer of business as a going concern in terms of section 197(2)

ORDER

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

1. Condonation is granted.
2 Leave to appeal is granted.
3. Save for paragraph 4 below, the appeal is dismissed.
4. The order of the Labour Appeal Court dismissing the appeal from the Labour Court is upheld but paragraph 2 of the order of the Labour Court is amended to read:

   "The first respondent [City Power] is ordered to give effect to the provisions of section 197 of the Labour Relations Act 66 of 1995 in relation to the employees."
5. The applicant is ordered to pay costs of the application for leave and the appeal, including costs of three counsel where employed.

JUDGMENT

TSHIQI AJ (Mogoeng CJ, Moseneke DCJ, Froneman J, Khampepe J, Leeuw AJ, Madlanga J, Nkabinde J, Van der Westhuizen J and Zondo J concurring):

Introduction

[1] This is an application for leave to appeal against the decision of the Labour Appeal Court in terms of which an appeal by the applicant, City Power (Pty) Ltd (City Power), from the Labour Court, was dismissed. City Power had awarded a tender to the first respondent, Grinpal Energy Management Services (Pty) Ltd (Grinpal). The key question is whether, upon termination of service level agreements between them, there was a transfer of business as a going concern as contemplated in section 197 of the Labour Relations Act[1] (LRA). Grinpal argues that the continued performance of the services, either by City Power or a third party after the contract was terminated, amounts to a transfer of business as a going concern as envisaged in section 197 of the LRA. City Power on the other hand contends that the provisions of section 197 were not triggered.

The parties

[2] The applicant is City Power, a state owned entity established in terms of the Local Government: Municipal Systems Act[2] (Municipal Systems Act) and is effectively controlled by the City of Johannesburg Metropolitan Municipality (Johannesburg Municipality). It is a municipal entity as defined in the Municipal Systems Act and is governed by legislative prescripts governing municipalities.[3] Its

[1] 66 of 1995. Section 197(2)(a) of the LRA provides that—

> "[i]f a transfer of a business takes place, unless otherwise agreed in terms of subsection (6), 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".

[2] 32 of 2000. Section 86C(1) provides:

> "A municipality may, subject to subsection (2)—
>
> (a) establish or participate in the establishment of a private company in accordance with the Companies Act 1973 (Act No. 61 of 1973); or
>
> (b) acquire or hold an interest in a private company in accordance with the Companies Act 1973 (Act No. 61 of 1973)."

[3] Section 86D(1)(a) provides:

> "(1) A private company referred to in section 86C(1)—

principal mandate is to distribute electricity within the area of the Johannesburg Municipality. In execution of its mandate, it does not render the services directly. Instead, it enters into service delivery contracts with relevant institutions, entities or persons legally competent to operate a business activity, in accordance with the Municipal Systems Act.[4]

[3] The first respondent, Grinpal is a private company incorporated in terms of the laws of the Republic of South Africa. It manufactures, supplies, installs, operates, and maintains smart metering systems and electrical infrastructure which it supplies primarily to municipalities and power utility companies. The business that formed the substance of the service level agreements and which became the subject of the dispute was only the unit within Grinpal that rendered the above services on behalf of City Power.

[4] The second respondent is the National Union of Mineworkers (NUM), a trade union registered in terms of the LRA. The further respondents are 41 individuals who were employed by Grinpal to perform the services in terms of the service level agreements concluded between City Power and Grinpal. The second and further respondents were not represented in this Court.

Factual Background

[5] In 2003, following a tender process for the renewed electrification of Alexandra Township, Gauteng, known as the Alexandra Renewal Project (the Project), City Power awarded a tender to Grinpal for the supply of prepaid

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(a) is a municipal entity if a municipality, or two or more municipalities collectively, have effective control of the private company."

[4] Section 76 provides in relevant part:

"A municipality may provide a municipal service in its area or a part of its area through—

(b) an external mechanism by entering into a service delivery agreement with—

(i) a municipal entity; [or]

(v) any other institution, entity or person legally competent to operate a business activity."

metering systems. City Power and Grinpal entered into contracts which came to an end in 2010. Additional contracts were concluded late in 2010 for a further period of three years. These further contracts were for the installation of more prepaid meters and for maintenance of the meters previously installed. These were termed the installation and maintenance agreements (service level agreements).

[6] On 14 March 2012, City Power informed Grinpal in writing that it was terminating the contracts with immediate effect, alleging that Grinpal had submitted a fraudulent tax certificate. Grinpal initially disputed the validity of the cancellation but, after several meetings and correspondence, the parties agreed in a meeting held on 16 July 2012, to terminate the agreements. The parties also agreed that since no new service provider had been appointed at the time, there would be a full handover of the entire infrastructure, software and databases relating to the project from Grinpal to City Power. It was further agreed that City Power would, in the interim, conduct the business until a new service provider had been appointed. The handover process took place. City Power continued to run the business but denied that the Grinpal employees, who had performed the functions of the business before the handover, were transferred to City Power together with the business in terms of section 197.

In the Labour Court

[7] On 6 August 2012, Grinpal brought an urgent application to the Labour Court for the following order:

> "(a) declaring that with effect from 1 August 2012, the employment contracts of the employees listed in annexure 'A' [to the Notice of Motion] were transferred to [City Power], alternatively the service provider appointed by [City Power], in terms of section 197(2) of the [LRA];
>
> (b) directing [City Power] and/or any new service provider appointed by it to comply with the provisions of section 197 in relation to the transfer of the listed employees listed in Annexure "A" from [Grinpal] to [City Power] and/or the new service provider appointed by [City Power]."

[8] The Labour Court considered the case by Grinpal to be that there was never any doubt that the Project would continue after termination of the service level agreements, as the continued supply of electricity to Alexandra Township depended on it. There was a clear intention by City Power, as from the moment of its purported cancellation of the agreements during March 2012, to take over all the services rendered by Grinpal in terms of the service level agreements.

[9] Regarding City Power, the Labour Court understood its case to be that there was no handover process but simply an introduction of interim measures until a new contractor had been appointed. The agreements informed the consequences of the termination and it was envisaged that on termination, the old contactor would retain its employees and equipment, and a new contactor would begin rendering its services with its own employees and equipment.

[10] The Labour Court upheld the application. It held that the facts show that the infrastructure for conducting the business in question did not remain in the hands of Grinpal, the outsourcee, but in the hands of City Power, albeit temporarily. It further held that, notwithstanding the reasons for the cancellation, the "holding operation" – alleged by City Power until a new contractor had been appointed – could not be immune to the operation of section 197. The Labour Court concluded that a transfer in terms of section 197 had taken place with effect from 1 August 2012, and that the employees had been transferred to City Power in accordance with the provisions of section 197.

[11] After reaching the conclusion that section 197 had been triggered, the Labour Court also noted that it was urged, by counsel on behalf of City Power, to deal with the impact of the declaratory order sought by Grinpal, on organs of state that are subject to a myriad of regulations in respect of, among other things, tendering for services. On that issue the Labour Court held that organs of state, as employers, cannot be exempted from the operation of section 197. It found that these entities

must make the necessary provision for the legal eventualities of section 197, as other employers do, when entering into contracts with service providers. City Power appealed to the Labour Appeal Court.

In the Labour Appeal Court

[12] In that Court Davis JA also rejected the submission by City Power that transfer did not take place and stated:

> "The uncontested facts in this case are that the assets, both tangible and intangible, were required to operate the Project, that is, for the installation and maintenance of a prepaid metering system for electricity in Alexandra. This entire operation was transferred to appellant in terms of the handover process between appellant and first respondent described in this judgment. It is clear from the evidence that the business of providing prepaid electrical services to residents of Alexandra was handed over by first respondent to appellant, upon termination of the contracts which they had previously concluded and the arrangements agreed upon as set out in the subsequent correspondence and meetings which took place to effect termination. The business is identifiable and it is discrete. It involves equipment and expertise which is required to continue the Project of providing electricity. According to the uncontested version of Mr Dlamini, training was to be provided by first respondent to appellant specifically to ensure that appellant would have the necessary expertise and know-how 'to be able to run the project'.
>
> Ultimately what occurred was that a business of providing a system of prepaid electricity to residents of Alexandra continued, save that it was now conducted by a different entity. In similar fashion to the decision of the majority in *Aviation Union*, the only debate concerned whether the business, as a going concern, was transferred to first appellant or ultimately to a third party. When the court a quo referred to appellant acting in a 'holding operation', it clearly meant that appellant would run the business in the interim, until such time as a new contract was concluded with a third party."[5] (Citation omitted).

[5] *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and Others* [2014] ZALAC 22; [2014] 10 BLLR 945 (LAC); (2014) 35 ILJ 2757 (LAC) at paras 25-6 (Labour Appeal Court judgment).

[13] Having made the above finding against City Power, the Labour Appeal Court concluded:

> "I reach this decision with some anxiety. The implication of the jurisprudence of the Constitutional Court in *Aviation Union*, means that where an organ of state such as the municipality enters into outsourcing agreements for a defined period, it runs the risk, upon termination of that contract, that the municipality is required to assume the obligation of financing the ongoing employment contracts of those who had previously been employed by the initial service provider. This concern is raised within the specific context of a second generation transfer as applied both in *Aviation* [*Union*], and in this case. The consequences of the application of section 197 of the LRA to second generation transfers may be to impose significant financial burdens on municipalities which are already constrained by limited available public resources to fulfil their important obligations of providing services to all residents who fall within their jurisdiction.
>
> It may be that consideration should be given by the legislature as to whether section 197, viewed within the specific context of a second generation transfer, should be applicable to such contracts. For this reason, a copy of this judgment will be delivered to the Minister of Labour for her consideration."[6] (Citations omitted).

The Labour Appeal Court dismissed City Power's appeal.

In this Court

Jurisdiction

[14] This matter concerns section 197 of the LRA and its relationship with the Municipal Systems Act. The interpretation and application of the LRA usually raises a constitutional issue because the statute seeks to give effect to section 23 of the Constitution.[7] Moreover, the obligations borne by municipalities and municipal

[6] Id at paras 27-8.

[7] Section 23(1) of the Constitution provides: "Everyone has the right to fair labour practices." Furthermore it has been stated by this Court that the interpretation and application of the LRA is a constitutional issue. (See *National Education Health and Allied Workers Union v University of Cape Town and Others* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*NEHAWU*) at paras 14-5).

entities are sourced from sections 152[8] and 153[9] of the Constitution. This case raises constitutional issues and this Court has jurisdiction to deal with the issues.

Condonation

[15] The application was served on Grinpal and filed some 30 days outside the 15-day limit set in terms of rule 19(2) of the Rules of this Court. City Power places the blame at the door of its legal representatives. Although the explanation given is insufficient, City Power never displayed disinterest in the outcome of the case. At the hearing of the application, the application for condonation was not strenuously opposed. Condonation is granted.

Leave to appeal

[16] On whether to grant leave to appeal, regard must be had to the issue raised by Davis J regarding the applicability of section 197 to municipalities and municipal entities like City Power. Although this Court has consistently interpreted and settled the general approach relating to section 197 in *NEHAWU* and in *Aviation Union*,[10] the concern raised by the Labour Appeal Court is more nuanced than what has previously been interpreted in this Court. It pertains to whether municipal entities like City Power, tasked with public functions, funded from public resources and regulated through the Municipal Systems Act and Local Government: Municipal Finance

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[8] Section 152 in relevant part provides:

> "(1) The objects of local government are—
>
> (b) to ensure the provision of services to communities in a sustainable manner.
>
> (2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1)."

[9] Section 153 provides:

> "A municipality must—
>
> (a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and
>
> (b) participate in national and provincial development programmes."

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

Management Act,[11] are immune from the financial consequences of a transfer in terms of section 197. The provision of basic municipal services is the most important function of every municipal government. As noted by the Labour Appeal Court, municipalities are constrained by limited available public resources to fulfil their important obligations of providing services to all residents who fall within their jurisdiction. I am satisfied that it is in the interests of justice to grant leave to appeal in terms of rule 19(2).

Issues

[17] City Power contends that the provisions of section 197 are not applicable to it because it is a municipal entity and has, as required in terms of section 66 of the Municipal Systems Act,[12] its own Recruitment and Selection Policy and Procedure (employment policies) governing employment of the staff. Section 93A of the Municipal Systems Act obliges it to follow its provisions, the Municipal Finance Management Act and any other applicable legislation.[13] City Power further submits that whenever it is necessary to effect any change to its head-count, it must be planned

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[11] 56 of 2003 (Municipal Finance Management Act).

[12] Section 66 provides:

> "(1) A municipal manager, within a policy framework determined by the municipal council and subject to any applicable legislation, must—
>
> (a) develop a staff establishment for the municipality and submit the staff establishment to the municipal council for approval;
>
> (b) provide a job description for each post on the staff establishment;
>
> (c) attach to those posts the remuneration and other conditions of service as may be determined in accordance with any applicable labour legislation; and
>
> (d) establish a process or mechanism to regularly evaluate the staff establishment and, if necessary, review the staff establishment and the remuneration and conditions of service.
>
> (2) Subsection (1)(c) and (d) do not apply to remuneration and conditions of service regulated by employment contracts referred to in section 57."

[13] Section 93A(a)(i) provides:

> "The parent municipality of a municipal entity—
>
> (a) must exercise any shareholder, statutory, contractual or other rights and powers it may have in respect of the municipal entity to ensure that—
>
> (i) both the municipality and the municipal entity is managed responsibly and transparently and meets its statutory, contractual and other obligations."

and approved at the time of the annual budget. It cannot ignore its budgetary constraints and simply embark on employment of personnel that are not necessary for effective performance of municipal functions as required by section 160(1)(d) of the Constitution.[14] To do so, the argument goes, will offend section 152(1)(b) and (2) of the Constitution, as a bloated or unnecessary staff complement will put strain on its budget and thereby negatively affect the provision of services to communities. City Power further argues that, should the interpretation placed by the Labour Court and the Labour Appeal Court be upheld by this Court, it would simply mean that all the service providers currently contracted by City Power on fixed term contracts can obtain the same declaratory orders obtained by Grinpal.

[18] Grinpal submits that City Power is not a municipality, or a sphere of local government, but a private company established as an external service provider used by the Johannesburg Municipality in the exercise of its statutory obligation to supply electricity to its population. Grinpal concedes that City Power is wholly owned by the Johannesburg Muncipality, has the status of a municipal entity, and operates under certain constraints; but argues that it is not itself a municipality and consequently the Municipal Systems Act is not applicable to it.

Is the Municipal Systems Act applicable to municipal entities like City Power?

[19] For its contention that the Municipal Systems Act is not applicable to City Power as a municipal entity, Grinpal relies on *Joseph* where this Court described City Power as a parastatal that is wholly owned by the Johannesburg Municipality.[15] Grinpal also places reliance on sections 1, 86B, 86C and 86D of the Municipal Systems Act. Section 1 defines a municipal entity as a private company referred to in section 86B(1)(a). A private company referred to in section 86B(1)(a) may be established by one or more municipalities or it may be a private company in which

[14] Section 160(1)(d) states that a Municipal Council—

> "(d) may employ personnel that are necessary for the effective performance of its functions."

[15] *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30; 2010 (4) SA 55 (CC); 2010 (3) BCLR 212 (CC) (*Joseph*) at para 4.

one or more municipalities have acquired or hold an interest in the establishment and acquisition of such private companies. In establishing or acquiring a private company, the municipality must comply with the Companies Act[16] in terms of section 86C(3). Section 86D(2) provides: a private company which is a municipal entity (a) must restrict its activities to the purpose for which it is used by its parent municipality in terms of section 86E(1)(a); and (b) has no competence to perform any activity which falls outside the functions and powers of its parent municipality contemplated by section 8.

[20] A mere reliance on the fact that City Power is a private company does not take into account the fact that these entities are usually established for the sole purpose of performing public functions as required in terms of section 86E. In terms of section 86E(1) a municipality may establish a municipal entity only for the "purpose of utilising the company as a mechanism to assist it in the performance of any of its functions or powers" and where the functions of such a municipal entity would benefit the local community. The public nature of the functions performed by City Power and the restrictions imposed on such municipal entities by the Municipal Systems Act distinguish them from other private entities.

[21] Grinpal's reliance on *Joseph* to support the contention that the Municipal Systems Act is not applicable to City Power also ignores the fact that in that case this Court also characterised City Power through its functions as follows:

> "In my view therefore, when City Power supplied electricity to Ennerdale Mansions, *it did so in fulfillment of the constitutional and statutory duties of local government to provide basic municipal services to all persons living in its jurisdiction. When the applicants received electricity, they did so by virtue of their corresponding public law right to receive this basic municipal service*. In depriving them of a service which they were already receiving as a matter of right, City Power was obliged to afford

[16] Act 61 of 1973. This Act has been subsequently repealed by the Companies Act 71 of 2008.

> them procedural fairness before taking a decision which would materially and adversely affect that right."[17] (Emphasis added.)

[22] Recently in *AllPay 2*,[18] the South African Social Security Agency (SASSA), an organ of state established in terms of the South African Social Security Agency Act (Agency Act),[19] issued a tender outsourcing its obligations to pay social grants to millions of qualifying South Africans to Cash Paymaster, a private company. The Court held that Cash Paymaster was also an organ of state for the purposes of the provision of the outsourced services. The Court stated:

> "That SASSA is an organ of state is clear. But, for the purposes of the impugned contract, so too is Cash Paymaster.
>
> . . .
>
> In *AAA Investments* Yacoob J, writing for the majority of this Court, stated:
>
>> 'Our Constitution ensures . . . that government cannot be released from its human rights and rule of law obligations simply because it employs the strategy of delegating its functions to another entity.
>>
>> It does so by a relatively broad definition of an organ of state. . . . An organ of state is, among other things, an entity that performs a public function in terms of national legislation. If [an entity] performs its functions in terms of national legislation, and these functions are public in character, it is subject to the legality principle and the privacy protection. In our constitutional structure, [the entity] does not have to be part of government or the government itself to be bound by the Constitution as a whole.'
>
> . . .
>
> In terms of the agreement between SASSA and Cash Paymaster the latter administers the payment of social grants on SASSA's behalf. In doing so, Cash Paymaster

[17] *Joseph* above n 15 at para 47.

[18] *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) (*AllPay 2).*

[19] 9 of 2004.

> exercises a public power and performs a public function in terms the Agency Act, enacted to give effect to the right to social security.
>
> . . .
>
> SASSA does not, by the conclusion of the contract, divest itself of its constitutional responsibility and public accountability for rendering the public services. It remains accountable to the people of South Africa for the performance of those functions by Cash Paymaster. . . . When Cash Paymaster concluded the contract for the rendering of public services, it too became accountable to the people of South Africa in relation to the public power it acquired and the public function it performs. This does not mean that its entire commercial operation suddenly becomes open to public scrutiny. But the commercial part dependent on, or derived from, the performance of public functions is subject to public scrutiny, both in its operational and financial aspects."[20] (Footnotes omitted).

[23] Similarly, City Power, like SASSA, is a private company performing a public function. The fact that it performs a public function bears relevance in its classification and cannot be ignored. As in *AllPay 2*, once City Power concluded the service level agreements, it delegated some of its functions to Grinpal which, as a result, also became a municipal entity for the purposes of those functions and only in so far as that section of its business was concerned. For the purposes of the present dispute, Grinpal and City Power are organs of state that perform public functions akin to those of a municipality. The Johannesburg Municipality cannot avoid its constitutional obligations and public accountability for the rendering of public services by forming a municipal entity like City Power. It remains accountable to the people of South Africa for the performance of those functions by City Power. Likewise, City Power cannot avoid its constitutional obligations and public accountability by delegating its functions to Grinpal.

[20] *AllPay 2* above n 18 at paras 52-9.

[24] Having found that City Power is a municipal entity governed by the Municipal Systems Act and that Grinpal is an organ of state, the next question is whether section 197 of the LRA is applicable to both entities.

[25] Section 197 provides that where there is a transfer of a business as a going concern, there is an automatic transfer of employees to the new employer. On the other hand section 66 of the Municipal Systems Act prescribes the manner in which a municipal manager must develop a staff establishment for the municipality. The section requires the manager to provide a job description for each post on the staff establishment and attach to each post the remuneration and other conditions of service, as may be determined in accordance with any applicable labour legislation.

[26] In terms of section 93A(a)(i), municipalities and municipal entities are obliged to comply with the Municipal Systems Act, the Municipal Finance Management Act and any other applicable legislation. Sections 66 and 93A of the Municipal Systems Act give effect to the provisions of the Constitution. Section 152(1)(b) of the Constitution provides that municipalities should ensure the provision of services in a sustainable manner. Section 152(2) states that a municipality must strive, within its financial and administrative capacity, to achieve the objects of local government set out in section 152(1). Section 160(1)(d) provides that a Municipal Council may employ personnel that are necessary for the effective performance of its functions.

[27] The implications of sections 66 and 93 of the Municipal Systems Act read with sections 152 and 160 of the Constitution are that municipalities are obliged to conduct all matters affecting their employees in terms of the Municipal Systems Act. A reading of those provisions alone would suggest that section 197 of the LRA is not applicable to employees of a municipal entity even if those employees are eligible for automatic transfer. The consequence would be that all municipal entities would be immune from section 197 of the LRA. That was not the purpose of the legislation. A reading of both Acts shows that the LRA supersedes the Municipal Systems Act.

[28] Section 66 is contained in Chapter 7 of the Municipal Systems Act. Section 52 is also contained in the same Chapter and provides:

> "In the event of any inconsistency between a provision of this Chapter, including the Code of Conduct referred to in section 69, or a regulation made for the purposes of this Chapter, and any applicable labour legislation, the labour legislation prevails."

[29] Other sections of the Municipal Systems Act also make it apparent that it is subservient to labour legislation. Section 81(2)(c) provides that a municipality through a service delivery agreement, may in accordance with the applicable labour legislation, transfer or second any of its staff members to the service provider, with the concurrence of the staff member concerned. Section 86K(2)(b) provides for the disestablishment of service utilities and states that the staff of the service utility must be dealt with in accordance with applicable labour legislation. Section 89(f)(ii) states that the appointment of staff by a multi-jurisdictional service utility, or transfer or secondment of staff to the multi-jurisdictional service utility must be in accordance with applicable labour legislation.

[30] The LRA states that it should prevail—

> "[i]f any conflict, relating to the matters dealt with in *this Act* , arises between *this Act* and the provisions of any other law save the Constitution or any other Act expressly amending *this Act*, the provisions of *this Act* will prevail."[21]

What it means in this context is that the provisions of the LRA prevail over the Municipal Systems Act in employment matters.

[31] The only question that remains is whether section 197 is in conflict with sections 152 and 160 of the Constitution. The answer is in the negative. As stated previously, section 152(1)(b) of the Constitution provides that municipalities should ensure provision of services in a sustainable manner. Section 152(2) states that a

[21] Section 210 of the LRA.

municipality must strive, within its financial and administrative capacity, to achieve the objects of local government set out in subsection (1). Section 160(1)(d) provides that a Municipal Council may employ personnel that are necessary for the effective performance of its functions.

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

[33] No case has been made for the preferential treatment of a municipal entity, or other entity that performs a public function akin to that of a municipality, from the application of section 197. There are numerous instances where labour legislation will have budgetary or procedural consequences for all entities, including organs of state. As the Labour Court stated, all employers, including organs of state must, when entering into contracts with service providers, make the necessary provisions or arrangements for legal eventualities like section 197. To the extent that such entities wish to avoid the provisions of section 197(2), they could seek to reach an agreement in terms of section 197(6). Section 197(6) caters for instances where the employer seeks to "contract out" of the provisions of section 197(2). In terms of section 197(2) the specified legal consequences follow if a transfer of business as a going concern takes place, unless otherwise agreed upon in terms of section 197(6). The agreement contemplated should in terms of section 197(6), be in writing and concluded between the old employer, the new employer or the old and new employers acting jointly, on the one hand, and any person or body with whom the old employer and new employer are obliged to consult in terms of section 189 of the LRA.[22] No such agreement was concluded between City Power and Grinpal.

[22] Section 189 obliges employers who contemplate dismissing one or more employees for reasons based on operational requirements to engage in consultation with employees likely to be affected or with their trade unions or work place forum.

[34] For all those reasons, there are adequate safeguards for municipalities to allay the concerns expressed by the Labour Appeal Court about the potentially serious consequences it raised. Section 197 is thus applicable to City Power and other municipal entities, unless such entities have specifically made provision for its exclusion in the form prescribed by section 197(6).

Was there a transfer of a business as a going concern in terms of section 197?

[35] What is required to trigger the provisions of section 197[23] is—

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[23] Section 197 of the Labour Relations Act provides:

> "(1) In this section and in section 197A—
>
> (a) 'business' includes the whole or a part of any business, trade, undertaking or service; and
>
> (b) 'transfer' means the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern.
>
> (2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6)—
>
> (a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;
>
> (b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;
>
> . . .
>
> (d) the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer.
>
> (3)
>
> (a) The new employer complies with subsection (2) if that employer employs transferred employees on terms and conditions that are on the whole not less favourable to the employees than those on which they were employed by the old employer.
>
> . . .
>
> (6)
>
> (a) An agreement contemplated in subsection (2) must be in writing and concluded between—
>
> (i) either the old employer, the new employer, or the old and new employers acting jointly, on the one hand: and
>
> (ii) the appropriate person or body referred to in section 189(1) on the other."
>
> (b) In any negotiations to conclude an agreement contemplated by paragraph (a), the employer or employers contemplated in subparagraph (i), must disclose to the person or body contemplated in subparagraph (ii), all relevant information that will allow it to engage effectively in the negotiations.

(a) a transfer;

(b) of a business (or part of a business, or a service); and

(c) as a going concern.

[36] The test for determining whether a business was transferred as a going concern was laid down in *NEHAWU*. There this Court stated:

> "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 the workers are taken over by the new employer, whether customers are 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."[24] (Footnote omitted.)

[37] Once a transfer of the kind identified by section 197(1)[25] occurs, it automatically carries with it all contracts of employment that existed immediately before the transfer took place. The employment contracts are automatically transferred together with the business. This happens by operation of law. The person to whom the business is transferred replaces the employer in terms of the contracts of employment and assumes all obligations of the previous employer. The new

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> (c) Section 16(4) to (14) applies, read with the changes required by the context, to the disclosure of information in terms of paragraph (b)."

[24] *NEHAWU* above n 7 at para 56.

[25] Section 197(1) states:

> "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."

employer also acquires the contractual rights of the previous employer.[26] The question has to be determined with reference to the objective facts of each case.[27]

[38] In the Labour Court, Mr Mbuso Dlamini, Grinpal's managing director, listed several factors in his founding affidavit to support the contention that the handover was a transfer in terms of section 197:

> "(a) the entire business relating to all aspects of the Project is being transferred to City Power in terms of the handover process;
>
> (b) the bulk of the steps in the handover process have already taken place;
>
> (c) the Project will continue after the termination of the Service Agreements and completion of the handover process;
>
> (d) all of the assets, both tangible and intangible, required to operate the project, have already been transferred to City Power, with the only exceptions being the outstanding "communications'' issues and the confirmation by City Power of the transfer of the affected employees;
>
> (e) City Power cannot operate the Project without using all or most of the employees – they have the necessary expertise, built up over the years, to implement, maintain and operate the Project. City Power does not have this expertise available in its pool of employees. The training provided by Grinpal to City Power employees is by no means intended to replace the services of any of the affected employees – rather it is required in order for City Power to better understand the Project, so that in due course, after a full handover (including the affected employees), City Power will be able to run the Project with the minimum continued support from Grinpal;
>
> . . .
>
> (g) the entire customer base of approximately 38 000 households in Alexandra (as well as the master plan and designs for the remainder of the network (i.e. all projected 65 000) have been transferred to City Power. Grinpal no longer

[26] *Aviation Union* above n 11 at para 43.

[27] Id at para 47.

has any involvement in the Project (save for the offer of further limited technical support in an effort to ensure that service to the customers is not disrupted during the handover process);

(h) all existing infrastructure, including unfinished installations and materials for installation, maintenance and repair of the network and systems have been handed over to City Power."

In reply to these averments, City Power in its answering affidavit simply made a bald denial which does not create a genuine dispute of fact. It follows that the matter must be decided on the basis that those averments are true.

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

[40] It follows that there was a transfer of business from Grinpal to City Power as a going concern; which means that the contracts of employment of Grinpal's employees were automatically transferred to City Power. The appeal must fail.

Order

[41] The following order is made:

1. Condonation is granted.
2 Leave to appeal is granted.
3. Save for paragraph 4 below, the appeal is dismissed.

4. The order of the Labour Appeal Court dismissing the appeal from the Labour Court is upheld but paragraph 2 of the order of the Labour Court is amended to read:

> "The first respondent [City Power] is ordered to give effect to the provisions of section 197 of the Labour Relations Act 66 of 1995 in relation to the employees."

5. The applicant is ordered to pay costs of the application for leave and the appeal, including costs of three counsel where employed.

For the Applicant:	M Mphaga SC, J A Motepe and E M Baloyi Mere instructed by Hewu Attorneys.
For the First Respondent:	A I S Redding SC and G A Fourie instructed by Webber Wentzel.