

The Protection of the Rights of Employees amid Business Transfers: A South African Perspective

L.L.M. candidate **Daisy Van RENSBURG**¹
Professor **Kola O. ODEKU**²

Abstract

In South Africa, section 197 of the Labour Relations Act 66 of 1995 (LRA) plays a crucial role in safeguarding the rights of employees during business transfers. This provision aims to ensure job security and protect the terms and conditions of employment for employees affected by such transfers. Section 197 imposes an obligation on the new employer to retain the existing employees' contracts of employment, preserving their rights and benefits. It mandates that the new employer step into the shoes of the previous employer concerning all employment-related matters. The intricacies of Section 197 extend to various aspects, including continuity of service, preservation of benefits, and protection against unfair dismissal. Employees are shielded from arbitrary termination or detrimental changes to their working conditions due to a transfer of business ownership. Despite its protective intent, challenges arise in interpreting and applying section 197. Issues such as defining a 'transfer,' determining who qualifies as an employee covered by the provision, and addressing disputes over compliance can complicate its implementation. Section 197 of the LRA serves as a vital mechanism for upholding employee rights in the context of business transfers. Understanding its nuances is essential for both employers and employees to navigate these transitions while ensuring fairness and adherence to legal requirements.

Keywords: business transfers, employee's rights, new business owners, job losses, working conditions.

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1. Introduction

Section 197 of the “Labour Relations Act” (LRA) plays a pivotal role in the regulation of employment contracts during the transfer of businesses or services.³ This section, intended to protect employees' rights in such transitions, has become a source of significant legal controversy. It is often debated whether Section 197 prioritizes labour protection or provides employers with a mechanism to contract out of existing provisions, leading to conflicting interpretations. Furthermore, the undefined terms within the section complicate its application, making it a challenging area of labour law.⁴

In the dynamic landscape of business in South Africa, the concept of business transfer plays a pivotal role in shaping economic transactions and nurturing economic growth.⁵ Business transfers, often referred to as the process of transferring ownership or control of a business entity from one party to another, encapsulates a complex journey encompassing legal, financial, and strategic considerations. As businesses navigate through transitions in ownership, they encounter a myriad of challenges and opportunities that define their future trajectory within the South African market.⁶

¹ Daisy Van Rensburg - Faculty of Management and Law, University of Limpopo, South Africa, 9243767@keyaka.ul.ac.za.

² Kola O. Odeku - Faculty of Management and Law, University of Limpopo, South Africa, Kolawole.odeku@ul.ac.za, <https://orcid.org/0000-0003-3132-4545>.

³ Benjamin, P. (2005). „A Matter of Ongoing Concern: Judicial Interpretation and Misinterpretation of Section 197 of the Labour Relations Act”. *African Journal*, Vol. 9, p.169-180.

⁴ Grogan, J.A. (2002). „Twist on Transfer: LAC Reinterpret Section 197”. *Employment Law*. p. 9.

⁵ Awonuga, K. F., Mhlongo, N. Z., Olatoye, F. O., Ibeh, C. V., Elufioye, O. A., & Asuzu, O. F. (2024). „Business incubators and their impact on startup success: A review in the USA”. *International Journal of Science and Research Archive*. Vol. 11, pp. 1418-1432.

⁶ Ansell, N., Hajdu, F., van Blerk, L., & Robson, E. (2014). „Reconceptualising temporality in young lives: exploring young people's current and future livelihoods in AIDS-affected southern Africa”. *Transactions of the Institute of British Geographers*, Vol. 39, pp.387-

Understanding the tones of business transfers is essential for local entrepreneurs, state organs and international investors seeking to engage in the vibrant business culture of South Africa.

In terms of the LRA, the business includes the whole or a part of any business, trade, undertaking, or service. The definition of business in Section 197(1)(a) is tautological, and its main purpose seems to be to emphasise that section 197 applies not only to the transfer of entire businesses but also to parts of businesses.⁷ In addition to material and immaterial assets, intellectual property assets are also included in the term business.⁸

A transfer is defined in section 197(1)(b) to mean the transfer of a business by one employer (the old employer) to another employer (the new employer). This term clarifies the types of transactions that might be covered under section 197. Two distinct enquiries should occur. Firstly, was there a transfer within the meaning of section 197? If yes, was an undertaking transferred as a going concern based on the facts? Thus, the process of a business's transfer is related to the notion of a transfer. Business transfers occur because of a sale of the business, but the grasp of section 197 extends beyond the transfer effected under these circumstances.⁹

In South Africa, when a business is transferred, the new employer takes over the employees' contracts of employment from the old employer. Unless there is an agreement to the contrary between the employers and the employee representatives, the continuity of the employee's employment will not be interrupted by the transfer of the business. The new employer must employ the old employees on the terms and conditions which are overall not less favourable than those which employees enjoyed with the old employer.

Furthermore, when a business is transferred the employment contracts of the employees are assumed by the new employer, from the previous one.¹⁰ Unless the employer and the employee representatives have an agreement stating otherwise. The business transfer will not result in the termination of the employee's employment. The terms and conditions under which the employees will work for the new company must, for the most part, be comparable to those they received from their previous employer.

2. The constitutional imperative

The Republic of South Africa is a Constitutional democracy. Fundamentally, the South African Constitution 1996 (Constitution), enshrines section 23-the Bill of Rights to specifically place entitlements of employees on matters relating to sound labour laws and primarily guide the way the provisions of the LRA must be interpreted in terms of section 18 of the LRA. It is vital to understand the application of fundamental rights as provided for by the Constitution, in terms of section 8.

The notion of 'rights' has since grown from being a basic connotation to an entitlement with merit, in the context that the employer no longer holds the right to have the final say in matters of employment but that employees have as many rights and responsibilities as employers if not more. It is important to note that the rights contained in the Bill of Rights are interrelated. In South Africa, when there's a transfer of a business that affects employees' benefits, it generally falls under the ambit of the LRA and the Basic Conditions of Employment Act (BCEA). These laws provide certain protections to employees in cases of business transfers, such as mergers or acquisitions.

The Transfer of Business Provisions in the LRA states that:

1. Employees' contracts are automatically transferred to the new employer.
2. Employee rights and benefits are retained post-transfer.

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⁷ Biggs, L. (2008). „The application of Section 197 of the Labour Relations Act in an outsourcing context” (part 2). *Obiter*, Vol. 29, pp. 425-452.

⁸ Koiranean M (2011). „Intellectual Capital and Property Rights (IPR) as the Key Asset of a Family Firm: A Case Study with an Evaluation Approach”. *Electronic Journal of Family Business Studies*, Vol. 5, 45-54.

⁹ Biggs, L. (2008). „The application of Section 197 of the Labour Relations Act in an outsourcing context” (part 2). *Obiter*, Vol. 29, pp. 425-452.

¹⁰ Du Toit, D. (2004). „The Transfer of Enterprises and the Protection of Employment Benefits”. *International Labour Journal*, Vol. 8, pp. 85-118.

3. Collective agreements remain in force.
4. Employees can't be retrenched due to the transfer itself.

These laws help protect employees' rights and benefits which align with the principles of fair labour practices and social justice outlined in the Constitution. If these protections were not in place, there could be violations of constitutional rights related to labour and equality. However, any direct constitutional implications would likely depend on how the specific business transfer and its effects on employees' benefits were handled. In South Africa, employees' benefits are often intertwined with constitutional principles.

The Constitution guarantees the right to fair labour practices, which includes fair treatment in the workplace, protection against unfair discrimination, and the right to just and favourable conditions of work. This can encompass aspects of employees' benefits, such as wages, leave, and working hours. The Constitution prohibits unfair discrimination on various grounds, including race, gender, religion, and more. This principle extends to employees' benefits, ensuring that all employees are entitled to equal treatment and benefits regardless of their background.¹¹

3. Critical analysis of the intricacies of protecting the rights of employees amid business transfers

South Africa is governed by the Constitution, in which all individual rights are enshrined in terms of Chapter 2 of the Bill of Rights. Employment rights are contained in section 23 as a fundamental human right worthy of protection, and the state is required to take all reasonable measures to achieve protection of the right. This section states that everyone has the right to fair labour practices. So, if the transfer of a business is affecting certain labour practices or is affecting the employees negatively then the section is also affected. In terms of section 27 of the LRA, employees have the right and their trade unions to collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest. In the recent, ground-breaking judgment in the matter of *City Power Ltd v. Grinpal Energy Management Services* [2015] ZACC 8 (SVA), the provisions of section 197 dictate that the employment contracts equally be transferred upon the transfer of a business. Briefly, Grinpal was appointed by City Power as a third-party contractor to supply and install prepaid electricity meters. The services of Grinpal were later terminated by City Power after they had established that Grinpal had provided them with a fraudulent tax certificate. The entire business database, infrastructure and software were handed over to City Power by Grinpal, but City Power refused to take over Grinpal employees' employment contracts as provided for in terms of section 197(2). Of interest, is the argument by City Power that the provisions of section 197 of the LRA did not apply as it was an organ of state by virtue of it being a municipal entity. The Constitutional Court held that the provisions of the LRA superseded that of the Municipal Act to the extent of every employment matter. The provisions of section 210 of the LRA gave special credence to this provision that in any contrasting provision of any laws, apart from those of the Constitution or any other Act specifically amending the LRA, the provisions of the LRA will maintain prevalence.

Against the backdrop of (*City Power Ltd v Grinpal Energy Management Services (Pty) Ltd*, is the case of *SVA Security (Pty) Ltd v Makro Ltd, a Division of Massmart LC* wherein Fidelity had won a tender for the provision of security services at Makro outlets that had previously been awarded to SVA Services. Fidelity invited former SVA employees who had previously worked at Makro stores to apply for vacancies within the new contract space. SVA contended that the contract between Makro and Fidelity constituted a transfer in terms of section 197 of the LRA thereby inferring that the transfer ought to have been automatic and no necessity of applying for positions anew. The LC held that the following elements needed to be present for the presence of section 197 transfer:

- A transfer.
- Of a business, whole or partially; and

¹¹ Freedman S. (2017). „Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm”. *Disability and Equality Law*, pp. 123-142.

- As a going concern. (The LRA does not define the concept of a 'going concern' a function that has largely been left to the courts to determine).

While *SVA* contended that Fidelity would be conducting the very same service to Makro, by providing security services and the management of staff. This line of argument was rejected by the LC stating that *SVA* had failed to prove that there was an actual transfer of equipment, intellectual property and assets that would enable Fidelity to provide the service to Makro, citing that Fidelity had taken over the service and not the business. This dynamic, therefore, did not necessarily translate into a section 197 transfer.

Section 197 of the LRA mandates the protection of employees' rights and job security during business transfers, mergers, acquisitions, or outsourcing. So, section 197 of the LRA attempts to resolve what should happen to workers when a business, as opposed to a corporate entity owing a business, changes owners.¹² The LRA in South Africa serves as a fundamental pillar for the protection of employees' rights within the workplace. Section 197 of the LRA specifically addresses the transfer of employment following the sale or transfer of a business.

To understand Section 197, it must be noted that it establishes that 'when a business, or a part thereof, is sold or transferred to another entity, all employees associated with that specific business or part are transferred to the new owner on the same terms and conditions of employment. This section ensures that employees' rights are maintained during such transactions, preventing unfair terminations, and safeguarding their employment. While the intention behind this provision is positive, its implementation and subsequent impact on employees vary. Such as the following implications:

Positive implications on job security. Section 197 provides employees with a level of reassurance regarding their job security during business transfers. Employees can continue to work without fear of sudden terminations or drastic changes to their employment conditions. This provision promotes stability and mitigates the negative effects that such transitions may have on workers' economic well-being.

Preservation of employment conditions. Another important aspect of Section 197 is the preservation of employment conditions. This section mandates that the new employer is obliged to honour and maintain employees' existing terms and conditions of employment, including salaries, benefits, leave entitlements, and other workplace entitlements. This guarantees that employees' rights and benefits are not compromised due to a change in ownership, ensuring a seamless transition while maintaining employee satisfaction and welfare.

Continuation of collective bargaining rights and exclusion of bargaining forums. Section 197 also safeguards the collective bargaining rights of employees. It stipulates that any collective agreements and recognized trade unions will continue to be valid and binding even after the transfer of ownership. This provision ensures that employees can still collectively negotiate their working conditions, allowing them to voice their concerns and demands under the new employer, ultimately contributing to greater employee empowerment and participation. In our case, the employees of SASSA do not have bargaining forums this affects section 18 of the Constitution of the Republic of South Africa, because it limits the freedom of association upon the SASSA employees. Section 23(2)(a) and (b) of the Constitution are going to be affected as bargaining forums are not included due to ministerial determination on SASSA employees.

Impact on job satisfaction and employee relations. By providing job security and preserving employment conditions, Section 197 contributes to enhanced job satisfaction among employees. Employees who feel secure in their positions are more likely to be more productive and equally committed to their work. Additionally, when employees' rights are protected during ownership transfers, it fosters positive employee relations, leading to a cooperative and harmonious work environment.

Uncertainty during the transfer process. During the transfer process, employees may

¹² Todd, C., Du Toit, D., Bosch, C., Jaspers, T., Waas, B., & Tong, L. A. (2004). *Business Transfers and Employment Rights in South Africa*. LexisNexis Butterworths, p. 78.

experience a sense of uncertainty due to the lack of clarity or knowledge regarding their future employment prospects. This uncertainty can lead to anxiety, stress, and decreased productivity.¹³ Employers must ensure effective communication and transparency to minimize these negative effects.

Restriction on career advancement. Employees might face challenges in terms of their career advancement due to the new employer's policies, culture, or different business requirements compared to the previous employer. These factors can limit personal growth and development opportunities within the new working environment.

Salary structure. The new entity did not have unique salary structures built for it as it remained subject to being regulated by the PSA and thus incompatible with other entities that subscribed to their own salary structures, policies and provisions. This impacted their quality of life and their ability to provide for their families. Additionally, it also affected the overall morale and motivation of employees as they felt unfairly treated by the government. This caused tension between levels of staff, especially since it was not based on qualification, experience, or output, but rather on a pre-determined job grading system.

Medical aid. In terms of section 197 of the LRA, provides for the transfer of a business when from one employer to another, all rights and responsibilities of the transferring employer are transferred to a new employer. This includes the rights and obligations related to medical aid and pension funds. The impact of Section 197 on employees on medical aid and pension is as follows:

- continuity of medical aid coverage: the new employer is obliged to continue providing medical aid coverage to transferred employees, including any pre-existing medical conditions. This ensures that employees do not experience a break in their medical aid coverage and can continue receiving necessary healthcare services.

- continuity of pension funds: The new employer is also responsible for ensuring the continuity of employee funds. This means that transferred employees can continue contributing their pension funds and accrue benefits without interruption. In the matter of *Telkom Ltd & others v Blom & others* [2003] 3 All SA 130 (SCA), the SCA was subjected to the daunting question pertaining to whether pension funds of employment contracts of employees who were transferred in terms of section 197, were equally transferred to a new employer too. Section 197 aims to protect employee's rights and benefits during a business transfer, including their access to medical aid and pension funds. It ensures continuity of coverage and benefits as well as the preservation of accrued benefits. The Pension Fund Act's purpose is to ensure that the transfer of pension benefits is reasonable and equitable and that it gives full recognition to the rights and reasonable benefits expectations of members in terms of the fund rules.

Potential job losses. While one of the main purposes of Section 197 is to protect employee rights, there may be instances where certain positions become redundant after the transfer. Despite best practices to limit job losses outlined in the LRA, some employees may still face the risk of unemployment. In terms of section 197 of the LRA, the employee has the right to decline or refuse to be transferred but this could lead to loss of job. Employers must adhere to the provisions outlined in the LRA to minimize the negative impacts on employees in such cases. However, SASSA employees have not, until now, experienced any job losses.

Section 197 of the LRA plays a vital role in safeguarding the rights and interests of employees during business transfers. The provision helps ensure job security, preserve employment conditions, and uphold collective bargaining rights, ultimately fostering job satisfaction among workers. However, challenges and negative implications such as uncertainty during the transfer process, restrictions on career advancement, and potential job losses still exist. Employers, employees, and relevant stakeholders must collaborate to address these challenges and find ways to provide a seamless transition while prioritizing employees' welfare and rights.

¹³ Bordia, P., Hobman, E., Jones, E., Gallois, C., & Callan, V. J. (2004). „Uncertainty during organizational change: Types, consequences, and management strategies”. *Journal of business and psychology*. Vol, 18, pp. 507-532.

4. The significance of section 197 of the LRA

The examination of section 197 implies a reference to the purpose behind its enactment. This section delves into the rationale behind section 197, as clarified by South African courts in more detail. The objective of the LRA is outlined in section 1 of the LRA. The primary goal of the Act is to promote economic development, social justice, labour harmony, and the democratisation of workplaces. To achieve this aim, the Act first aims to uphold and regulate the fundamental rights granted by section 23 of the Constitution. Additionally, it must fulfil its obligations arising from its International Labour Organization (ILO) membership.¹⁴

The LRA must include provisions for collective bargaining to facilitate employee involvement in workplace decision-making and the effective resolution of labour disputes. The LRA in South Africa plays a crucial role in upholding the constitutional right to fair labour practices as enshrined in section 23(1) of the Constitution. While the constitution outlines this general right, it is the responsibility of national laws like the LRA to define and implement the specifics of fair labour practices. Therefore, the LRA was established to protect this fundamental right.

Section 23(1) of the Constitution affords “everyone” the right to fair labour practices, which means that employers and employees alike enjoy the protection of this right under the provisions of section 23 and the LRA. Consequently, the purpose of the LRA is to maintain a healthy balance between the inherent conflicts of interests that characterise the labour relations sector. The apparent incompatibility of employers’ and employees’ interests is only exacerbated in the business transfer context. Therefore, the purpose of section 197 needs to be deduced from this angle.

A contradiction regarding the purpose of section 197 arose before the Constitutional Court in the case of *{NEHAWU v University of Cape Town 2003 (2) BCLR 154 (CC)}*. One group “argued that the main purpose of the section is to facilitate business transfers. The second group argued that the purpose of the section is to protect employment security in the event of a transfer. Consequently, the CC recognised that the core of business transfer disputes is a conflict between an employer’s interest in the profitability, or efficient disposal of the business, and the employee’s interest in job security. Therefore, the purpose of section 197 “lies somewhere in between” the two opposing interests. The Court identified the dual purpose of section 197 as the medium that seeks to both facilitate sales of businesses as going concerns and protect the employment of the workers concerned.”

The provisions of the ILO seek to provide and equally regulate social justice.¹⁵ Equally, section 1 of the LRA cites the purpose of the LRA as that of advancing economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objectives of the LRA. These primary objects of the LRA entail the protection of the rights of employees who are being transferred from one employer to another by not merely having set regulations in place but rather by also ensuring that international standards are adhered to by employers as well as trade unions. This is achieved by ensuring that the applicable legislation is backed up by efficient workplace policy, covering all avenues that should advance the transfer of employee contracts of employment in a manner that is mindful of the mental health of the employees being transferred from one employer to another as the transition is likely to be stressful because of uncertainties. It continues to lay emphasis on collective bargaining as a cornerstone of the process of transferring employment and in ensuring that the extent of fairness is well cushioned in that regard.

Section 3 of the LRA stipulates that interpretation of the Act be done in compliance with the Constitution as the root of the provisions of the Labour Relations Act.¹⁶ Wallis continues to lament that the authors of section 197 of the Act, did not realise the upheaval in meaning and effect of the word ‘by’ in the provisions would come. Prior to the enactment of Section 197 of the LRA, which

¹⁴ Rombouts, S. J. (2018). „The International Diffusion of Fundamental Labour Standards: Contemporary Content, Scope, Supervision and Proliferation of Core Workers’ Rights Under Public, Private, Binding, and Voluntary Regulatory Regimes”. *Columbia Human Rights Law Review*. Retrieved from <https://heinonline.org/HOL/LandingPage?handle=hein.journals/colhr50&div=23&id=&page=>.

¹⁵ Maupain F. (2009). „New Foundation or new Facade? The ILO and the 2008 Declaration on Social Justice for a Fair Globalization”. *European Journal of International Law*. Vol. 20, pp. 832-852.

¹⁶ Du Toit, D. (2004). „The Transfer of Enterprises and the Protection of Employment Benefits”. *International Labour Journal*, Vol. 8, pp. 85-118.

specifically addresses the transfer of a business as a going concern and the protection of employees' rights in such situations, there was no comprehensive legal framework in South Africa that directly governed the transfer of businesses and the rights of employees affected by such transfers. However, some legal principles and precedents were established through common law and case law that laid the foundation for the protection of employees during business transfers.

Prior to the LRA, the transfer of a business was primarily governed by common law principles. This meant that employees' rights and employment conditions were not automatically protected during business transfers, and the new employer was not necessarily obliged to maintain the same terms of employment. Employee rights and terms of employment were largely governed by individual employment contracts.¹⁷ The common law deemed a contract of employment as a personal concept that existed only between an employer and an employee. If these contracts were not transferred to the new employer or if the new employer chose not to honour them, employees could potentially face changes to their working conditions, benefits, and terms of employment.¹⁸

Over time, South African courts recognised the need to protect employees during business transfers. Court decisions started to establish certain precedents that leaned towards protecting employees' continuity of employment and existing terms and conditions in the event of a business transfer. While not codified in law, certain employee protections were implied based on principles of fairness and equity.¹⁹ This could involve considerations related to the transfer of pension funds, leave balances, and other benefits.

It is important to note that these protections were not as comprehensive or consistent as those provided by Section 197 of the LRA. The introduction of Section 197 in the LRA in 1995 marked a significant shift by explicitly outlining the rights and obligations of employees and employers during business transfers. This section provides a clear legal framework that ensures the automatic transfer of employees' contracts and protects their rights, benefits, and working conditions when a business is transferred as a going concern.

The enactment of Section 197 aimed to provide more certainty and consistency in dealing with business transfers, promoting the interests of both employers and employees in such situations. Section 197 of the LRA also covers the transfer of a business as a going concern. This section outlines the rights and obligations of employees when a business or part of a business is transferred from one employer to another. In such cases, the employees' employment contracts are automatically transferred to the new employer, along with their rights, benefits, and obligations.

When a transfer of a business takes place, employees' employment contracts are transferred automatically to the new employer, lock, stock, and barrel. This kind of transfer includes all terms and conditions of employment. The continuity of the employees' service is maintained, meaning their previous service with the old employer counts towards benefits such as leave, pension, and severance pay with the new employer. Employees' rights, benefits, and working conditions must be preserved after the transfer. This includes matters such as remuneration, working hours, and any other terms of employment. Both the old and new employers are required to consult with affected employees and their trade unions or representatives before the transfer takes place.

Employees have the right to object to the transfer, but these objections need to be based on reasonable grounds such as changes to their working conditions or concerns about the new employer's ability to fulfil their obligations. The new employer assumes responsibility for all the liabilities and obligations associated with the transferred employees, including any legal claims that may have arisen from their employment before the transfer took place.

¹⁷ Todd, C., Du Toit, D., Bosch, C., Jaspers, T., Waas, B., & Tong, L. A. (2004). *Business Transfers and Employment Rights in South Africa*. LexisNexis Butterworths, p. 136.

¹⁸ Barr, N., & Diamond, P. (2009). „Reforming pensions: Principles, analytical errors and policy directions”. *International social security review*, Vol. 62, pp. 5-29.

¹⁹ Cohen, T. (2009). „Implying Fairness into the Employment Contract”. *Industrial Law Journal*, Vol. 30. p. 2271.

5. Analysis of case laws dealing with business transfers in South Africa

According to Le Roux,²⁰ from a commercial perspective, there are two generic ways in which a business may be controlled: through the acquisition of majority shares, subject to the provisions of the Companies Act and upon the instance of the assets of a subsidiary company being sold. Before the amendment of the Companies Act, there was a broad understanding that the provisions of section 197 merely regulated business transfers as going concerns. The automatic nature of employee transfers is said to have been the major reasoning behind the 2002 amendment, after much litigation in that regard. Section 197 is aimed at not only protecting employees but also ensuring that their rights and responsibilities are equally maintained: a responsibility that primarily lies with the transferring employer.²¹

In the case of *Schutte v Power Plus Performance* (1999) 20 ILJ 655 (LC), it was concluded that ‘transfer’, in this context, goes beyond the act of just a ‘sale’ but instead carries a much broader meaning. The decision amplified the notion that mergers, takeovers, large-scale restructuring processes may constitute ‘transfers. The Labour Court held that: “A business or part of a business may be transferred in circumstances other than a sale. These may arise in the case of a merger, takeover or as part of a broader process of restructuring within a company or group of companies. Transfer can take place by virtue of an exchange of assets or a donation, given the range of circumstances under which a transfer can take place, the need for an agreed price or valuation may not arise. Consideration may take some other form. The outsourcing in this matter was part of a broader process of restructuring and must be seen against the backdrop of the [old employer’s] acquisition of 50% stake in the [new employer]” *Schutte v Power Plus Performance* (1999) 20 ILJ 655 (LC).

The court highlighted the various circumstances under which a business or part of a business can be transferred, emphasizing that such transfers can occur not only through sales but also through mergers, takeovers, or as part of broader restructuring processes within a company or group of companies. It mentions that transfers can happen through an exchange of assets or even as a donation, indicating that the need for an agreed price or valuation may not always be necessary. Consideration for the transfer can also take other forms beyond monetary transactions.

The court further discussed outsourcing as part of a larger restructuring process and linked it to the acquisition of a 50% stake in the new employer by the old employer. This connection implies that the outsourcing decision was influenced by the broader corporate strategy and ownership changes within the companies involved.

In practical terms, this statement accentuates the flexibility and complexity of business transfers beyond traditional sales transactions. When businesses engage in mergers, takeovers, or restructurings, they may opt to transfer parts of their operations to align with strategic objectives to elevate efficiencies. The mention of outsourcing within a restructuring context suggests that companies may choose to outsource certain functions or activities to external parties as part of their overall realignment efforts.

The reference to the acquisition of a 50% stake in the new employer by the old employer indicates a significant ownership change that likely influenced decisions related to outsourcing. This scenario highlights how ownership structures can impact strategic choices regarding business transfers and operational changes within organizations.

According to Bosch,²² the LRA has for the longest time been seen as the foundation of confusion and concern. His subjective view stems from an article presented by Benjamin, at the 19th Annual Labour Law Conference, wherein he lamented that “there is perhaps no other section of the

²⁰ Le Roux P.A.K. (2012). „Outsourcing and S197 of the LRA, Going Concerns, Employment Contracts and the Transfer of a Business or Service”. *Contemporary Labour Law*, Vol. 24, pp. 61-70.

²¹ Tshoose. C.I. (2022). „Appraisal of Selected Themes on the Impact of International Standards on Labour and Social Security Law in South Africa”. *Potchefstroom Electronic Law Journal*, Vol. 23, pp. 1-29.

²² Bosch. C. (2018). „Aluta Continua, or Closing the Generation Gap: Section 197 of the LRA and its Application to Outsourcing”. *International Labour Journal*, Vol. 84, pp.84-100.

Act that has given rise to such widely divergent interpretations.²³ At this point one wonders if this section is a virtue or a vice.

In the case of *Nehawu v University of Cape Town and Others* the Constitutional Court held that, when articulating the provisions of section 197 considering the right to fair labour practices, it comprises dual purposes: these purposes are essentially two-pronged as they seek to effect balance on both sides of the coin- the employer as well as the employee in the sense that the objective on the part of the employer, of realising profit remains and the security of employment in respect of the employee remains important. A tight balance needs to be maintained in both roles, to the best of stakeholders' abilities to eliminate unfair job losses. To this end, business is defined as a broad definition wherein a 'service' is necessitated and that such service constitutes the entire operation or any part thereof.

In the matter of *Numsa obo Members and AIH Logistics and Another* 2003 (3) SA 1 (CC), the Labour Court stated that cognisance be taken of the view that the main objective of section 197 is the protection of employees' rights, particularly their right to seamless continuity of employment. In this case, the applicants had alleged that the first respondent 'transferred' the business to get rid of them and that essentially there was no actual transfer as the previous employer was still predominantly in charge of what seemed to be a brokerage (the second respondent). The applicants based their allegations of a transfer not having taken place, based on:

- The agreement between the first and second respondents did not relate to a transfer.
- Selected employees were omitted from the transfer process.
- There was no exchange of bills of exchange between the respondents.
- The second respondent uses the premises of the first, free of rental payments.
- There was no sale or lease of resources between the respondents.
- The first respondent remained under obligation with the client (Mahindra) who provided the parts which are assembled by the second respondent.
- The first respondent continues to conduct skills training to transferred employees and solely retains the certification in respect of such training; and
- The control of the operations lies with the first respondent.

The outcome was that the activity undertaken by the respondents in this regard fell short of being construed as a transfer in terms of the provisions of section 197 of the LRA. Effectively, the Labour Court ordered that the applicants be placed in the very same position (as the first respondent) prior to the occurrence of the purported transfer, as a going concern.

6. The effect of business transfer on the contracts of employment in terms of section 197 of the LRA

Section 197 guarantees continuity of employment on the transfer of a business and also provides for the maintenance of the terms and conditions of the contract of employment subject to any changes brought about by the agreement. Compared to the common law position, which demanded a difficult procedure of novation and negotiation to assure any continuity of employment, this is a significant shift. It is plausible that such requirements should exist, but Section 197 itself does not specifically provide for such agreements or even disclosure of the transfer. The fact that section 197 gives employees more job security in a changing corporate environment may be its most significant outcome. The relationship between dismissals and section 197 will also be covered in this context.

Unfair dismissal during a business transfer can occur if an employee is dismissed without a fair reason or if the dismissal is procedurally unfair. Fair reasons for dismissal include misconduct, incapacity, operational requirements, and redundancy. Procedural unfairness can occur if proper notice is not given if there is no opportunity to respond to allegations, or if there is bias in the decision-

²³ Benjamin, P. (2005). „A Matter of Ongoing Concern: Judicial Interpretation and Misinterpretation of Section 197 of the Labour Relations Act”. *African Journal*, Vol. 9, p.169-180.

making process.²⁴ Section 197 also provides for protection against retrenchment due to operational requirements during a business transfer. If an employee's position becomes redundant as a result of the transfer, they must be offered alternative employment within reasonable commuting distance and on substantially similar terms and conditions. If alternative employment is not available or if it is unreasonably refused by the employee, then severance pay may be payable.²⁵

In terms of contracts of employment, Section 197 protects employees by ensuring that their terms and conditions of employment remain intact after the business transfer.²⁶ The new employer is required to honour all existing contracts, including benefits, seniority, and any other entitlements that were enjoyed by the employees under the previous employer. This provision aims to safeguard employees from unfair treatment or dismissal due to a change in ownership. Section 197 also safeguards employees' rights by prohibiting dismissals solely based on the transfer of a business. The new employer cannot terminate an employee's contract because of the transfer unless there are valid operational reasons for doing so. Employees are entitled to continue their employment under similar conditions as before the transfer, ensuring continuity and stability in their working environment.²⁷

7. Transfer of employees as an outsourcing in South Africa

Outsourcing typically involves contracting out specific services to a third-party provider for a fee. The service provider assumes responsibility for delivering the outsourced services, and in return, the customer pays for these services. When a function is outsourced, the service provider takes over the entire function and is accountable for delivering the final product. The customer does not have control over how the work is carried out. The service provider hires employees to perform the outsourced function, retaining control over them, handling their compensation, and having the authority to manage them.²⁸ By outsourcing a function, the customer transfers the employment-related risks associated with that function to the service provider as they no longer directly employ those individuals performing the task.

The transfer of a business as a going concern is governed by LRA Section 197. All employment contracts that were in effect at the time of the business transfer are transferred to the new employer along with the business if section 197 applies to the particular transaction.²⁹ It has been determined that section 197 applies to transfers that take place when an employer chooses to outsource a portion of its operations to a service provider, provided that the principles about the definition of a transfer as a continuing concern and a business are duly considered.

Not every outsourcing transaction will automatically fall within section 197.³⁰ However, very little is required for its application. For example, if the service performed by the old and new service providers is the same, and some employees are taken over by the new service provider and the business can seamlessly continue to be conducted by the new employer as a distinct economic entity that would be sufficient to trigger the application of section 197.

²⁴ Narcisse, S., & Harcourt, M. (2008). „Employee fairness perceptions of performance appraisal: a Saint Lucian case study”. *The International Journal of Human Resource Management*, Vol. 19, pp. 1152-1169.

²⁵ Biggs, L. (2008). „The application of Section 197 of the Labour Relations Act in an outsourcing context” (part 2). *Obiter*, Vol. 29, pp. 425-452.

²⁶ Clemons, E. K., & Chen, Y. (2011). „Making the decision to contract for cloud services: Managing the risk of an extreme form of IT outsourcing”. In *2011 44th Hawaii International Conference on System Sciences*, pp. 1-10.

²⁷ Kumar, S., & Eickhoff, J. H. (2006). „Outsourcing: When and how should it be done?” *Information knowledge systems management*, Vol. 5, pp. 245-259.

²⁸ Greer, C. R., Youngblood, S. A., & Gray, D. A. (1999). „Human resource management outsourcing: The make or buy decision”. *Academy of Management Perspectives*, Vol. 13, pp. 85-96.

²⁹ Smit, N. (2000). „South African Regulation (or Non-Regulation) of a Transfer of a Business, Trade or Undertaking”. *International Journal of Comparative Labour Law*, Vol.16, pp. 277-297.

³⁰ Khumalo, B. (2019). „The Application of Section 197 of the Labour Relations Act to Second-generation Outsourcing”. *Southern African Public Law*, Vol. 34. Retrieved from <https://journals.co.za/doi/epdf/10.25159/2522-6800/5038>.

8. Dismissals

Under section 197 of the LRA, dismissals for operational reasons (such as redundancies or retrenchments) may be carried out if they are unrelated to the business transfer; in other words, for the proposed dismissal to be justified and not be deemed null and void, it must be based on an operational requirement distinct from the transfer itself. However, dismissals for misconduct and incapacity (such as below-standard performance) may be carried out normally before or after the transfer, given that this is the real cause of the dismissal.

8.1. What liability could arise for the transferor or the transferee for any dismissals before the transfer?

If section 197 of the LRA applies, the liability for the dismissal will transfer to the employees, unless the parties have agreed otherwise in their agreement.³¹ In most cases, the parties will agree for the transferor to retain responsibility for any dismissals implemented before the transfer date (and consequently the transferee for dismissals following the transfer date.

8.2. What liability could arise for the transferor or the transferee for any dismissals after the transfer?

Regarding transfers under section 197 of the LRA, the previous employer (transferor) will share liability with the new employer (transferee) for any employee-related payments or terminations due to operational requirements for 12 months after the transfer, unless the previous employer can demonstrate full compliance with section 197.³² Mere compliance with section 197 also falls short in this context and for it to fully meet the criteria of what would be construed as a justifiable dismissal is that it be read combining both sections 186(1)(f) and 187(1)(g) of the LRA. Whereas section 186(1)(f) outlines that the conditions that the employee is transferred under, when substantially less favourable to the employee are unfair, section 187(1)(g) renders a dismissal in relation to a business transfer automatically unfair. Consequently, dismissals that are aligned to the transfer of a business are prohibited. The extent of the parties' liability for such matters is usually negotiated between the parties and provided for in the terms of their agreement.

9. Consultation and the right to object to business transfer

Under Section 197, an employee's position in a company transfer is inextricably linked to their right to knowledge. Employees are entitled to get complete information about the transfer, including the reasons for it, how it will affect their job security, and any potential changes to their terms and conditions of employment.³³ Employees are better equipped to comprehend the circumstances and make wise decisions about their futures, thanks to this information.

Moreover, one of the most important parts of the transfer procedure is the right to consultation.³⁴ Before completing the transfer, employers must hold meaningful dialogues with workers or their representatives. The impact of the transfer on employees, prospective modifications to employment terms, and other steps that can lessen unfavourable effects on employees should all be covered in these negotiations.³⁵ Employee concerns and opinions about the move can be voiced

³¹ Bosch, C. (2002). „Operational Requirements Dismissals and Section 197 of the Labour Relations Act: Problems and Possibilities”. *Industrial Law Journal*, Vol. 23, p. 641.

³² Germishuys, W., & McGregor, M. (2014). „The legal obligation to provide for employee-related contingent liabilities when an enterprise is sold as a going concern”. *SA Mercantile Law Journal*, Vol. 26, pp. 436-449.

³³ Workman-Davies, B. (2007). „The Right of Employers to Dismiss Employees in the Context of Business Transfers-Analysis of the Automatically Unfair Dismissal Provision of the Labour Relations Act 65 of 1995”. *Industrial Law Journal*, Vol. 28, pp. 2133-2139.

³⁴ Lorber, P. (2018). „Information and Consultation”. In Colin Bourn (ed.), *The Transfer of Undertakings in the Public Sector*. Routledge, pp. 215-250.

³⁵ Milliken, F. J., Morrison, E. W., & Hewlin, P. F. (2003). „An exploratory study of employee silence: Issues that employees don't

during this conversation, which promotes transparency.

Employees also have the option to protest the business transfer if they are of the view that it will negatively affect their job or working circumstances.³⁶ The LRA stipulates that if employees choose to object, they must do so in writing and within a certain amount of time. Employers must take these arguments into honest consideration and investigate reasonable concessions or alternatives to allay employees' worries.

If employees express objections to the business transfer, employers are expected to engage in further consultations to address the issues raised.³⁷ This process may involve negotiating with employees or their representatives to find mutually acceptable solutions that safeguard employees' rights and interests. Employers must demonstrate a willingness to listen to employees' perspectives and engage in constructive dialogue to resolve any conflicts or challenges related to the transfer.³⁸

Communication plays a vital role in ensuring a smooth and fair business transfer process. Employers should provide regular updates to employees throughout the transfer process, keeping them informed of any developments, decisions, or changes that may affect their employment. Open and transparent communication builds trust and minimises uncertainties among employees, fostering a more positive transition experience.

Employees have the right to seek clarification or additional information from their employers regarding the business transfer.³⁹ Employers are obligated to respond promptly to employees' inquiries and address any uncertainties or ambiguities regarding the transfer. This transparency promotes a more transparent and equitable transfer process, instilling confidence in employees about the company's commitment to their employment well-being.⁴⁰

The right to information and consultation before a business transfer is essential for protecting employees' rights and ensuring fair treatment during times of organisational change.⁴¹ These rights provide employees with the opportunity to voice their concerns, raise objections, and actively participate in the decision-making process. By upholding these rights, employers can demonstrate their commitment to respecting and valuing their employees' contributions and well-being.

The rights to information, consultation, and objection in the context of business transfers under section 197 of the LRA are critical components of ensuring a just and transparent transfer process. By upholding these rights, employers can harness trust, promote open communication, and address employees' concerns effectively, ultimately contributing to a smoother transition for all parties involved.

10. Conclusion

The business transfer process in South Africa is governed by Section 197 of the LRA and plays a crucial role in protecting employees' rights during a change in ownership. This section ensures that employees are not unfairly affected by the transfer of a business from one employer to another. The legislation provides continuity of employment for workers, safeguarding their existing terms and conditions of employment. Employers involved in a business transfer must adhere to the provisions outlined in Section 197 to ensure a smooth transition that respects the rights of employees.

Essentially, the effect of business transfers on contracts of employment is significant. When a business is transferred under Section 197, all employment contracts are automatically transferred to

communicate upward and why". *Journal of Management Studies*, Vol. 40, pp. 1453-1476.

³⁶ Sparkes, J. R., & Miyake, M. (2000). „Knowledge transfer and human resource development practices: Japanese firms in Brazil and Mexico". *International Business Review*, Vol. 9, pp. 599-612.

³⁷ Forman, J., & Argenti, P. A. (2005). „How corporate communication influences strategy implementation, reputation and the corporate brand: an exploratory qualitative study". *Corporate reputation review*, Vol. 8, pp. 245-264.

³⁸ Martin, G., Gollan, P. J., & Grigg, K. (2011). „Is there a bigger and better future for employer branding? Facing up to innovation, corporate reputations and wicked problems in SHRM". *The International Journal of Human Resource Management*, Vol. 22, pp. 3618-3637.

³⁹ McMullen, J. (2006). „An Analysis of the Transfer of Undertakings (Protection of Employment) Regulations". *Industrial Law Journal*, Vol. 35, pp. 113-139.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

the new employer. This means that employees retain their existing terms and conditions of employment, including benefits, seniority, and other entitlements. The new employer steps into the shoes of the previous employer regarding these contractual obligations, ensuring that employees are not disadvantaged due to the change in ownership.

Furthermore, Section 197 also imposes obligations on both the old and new employers to inform and consult with employee representatives regarding the transfer. This consultation process aims to ensure transparency and fairness throughout the transfer process. By involving employee representatives, both employers can address any concerns or issues that may arise because of the business transfer, fostering better communication and cooperation between all parties involved.

Additionally, employers need to understand their responsibilities under Section 197 when engaging in a business transfer. Failure to comply with the requirements set out in this legislation can lead to legal consequences and potential disputes with employees. Therefore, employers must seek legal advice and guidance to navigate the complexities of business transfers effectively while upholding the rights of their employees.

In essence, section 197 of the LRA serves as a vital mechanism for protecting employees' rights during business transfers in South Africa. By ensuring continuity of employment and preserving existing contractual terms and conditions, this legislation promotes fairness and stability for workers impacted by changes in ownership. Employers must proactively engage with the provisions outlined in Section 197 to facilitate a seamless transition that upholds the interests of both employees and businesses involved.

11. Recommendations

There is a need for enhanced awareness and education programs aimed at both employers and employees regarding their rights and obligations under section 197 of the LRA. This can help in ensuring that all parties involved in a business transfer are well informed about the legal framework governing such transfers, thereby reducing misunderstandings and potential disputes. The role of labour inspectors is relegated to obscurity when it comes to government departments and other state entities. They should be more visible and enforce the observation of labour laws, across the board.

Another important recommendation is the regular review and updating of legislation related to business transfers, particularly section 197 of the LRA. Given the dynamic nature of business environments and employment practices, legislative frameworks must evolve in line with changing circumstances to provide adequate protection to employees during business transfers. Regular reviews can help identify gaps or areas for improvement in existing laws, ensuring that they remain effective in safeguarding the rights of employees.

These recommendations aim to enhance the protection of employees during business transfers by promoting awareness, education, and legislative updates that align with best practices in South Africa, Namibia, and the United Kingdom.

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