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**COLLECTIVE BARGAINING AND SECTION 197
TRANSFERS**

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DECLARATION

I, Tamsanqa Mila, declare that this work is original and that all the sources I have used or quoted have been indicated and acknowledged by means of complete references.

Sign..... Date.....

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CHAPTER 1: INTRODUCTION AND CONTEXT OF THE RESEARCH

1.1 Background

In terms of section 197(2) of the Labour Relations Act 66 of 1995,¹ if a business is transferred as a going concern, certain legal consequences automatically occur. The effect of a transfer of a business as a going concern is that the transferee employer automatically becomes the new employer of the employees of the transferor employer.² The transferee steps into the shoes of the transferor as the latter's employee contracts are automatically transferred to the former.³ Furthermore, all rights and obligations between the transferor and the employees at the time of transfer continue to be in force as rights of the transferee and the new employees.⁴ These consequences are highly beneficial and assist the security of employment and the smooth transition of the business.

Section 197 of the Labour Relations Act (LRA) altered common law relating to the contractual relationship between an employer and employee at the time of sale of a business. The common law made no provision for the transfer of contract of employment between the employer and employee at the time of the sale of the business.⁵

The essence of disputes regarding section 197 of the LRA has been summarised as follows:

‘... If all the employees involved in the transferred business were indeed transferred to the new employer, the s 197 enquiry would become irrelevant. It is only applicable where, on a proper construction of the transaction in issue, the business is transferred as a going concern without the concomitant transfer of employees... the evaluation whether s 197 applies to a particular transaction will ordinarily arise if it is contended that a business has been transferred as a going concern but that, contrary to the provisions of s 197, the employees involved in the business have not been transferred [or that they are being employed on less favourable terms and conditions of employment]’⁶

¹ S 197(2) of the Labour Relations Act 66 of 1995. Hereafter referred to as the LRA.

² S 197(2) (a) of the LRA.

³ J Grogan *Workplace Law* 9th ed (2007) at 299.

⁴ S 197(2)(b) of the LRA.

⁵ J Grogan *Workplace Law* 9th ed (2007) at 294.

⁶ *Aviation Union of SA and another v SA Airways (Pty) Ltd and others* (2011) 32 ILJ 2861 (CC) at 112. The part in brackets has been added.

It is thus a matter of interest to trade unions to enquire about the substance of a commercial transaction in which a business is transferred. The arena of collective bargaining on section 197 issues is open to trade unions. Collective bargaining is given primary status in the objects of the LRA, and numerous provisions deal with facilitating this process. The nature of the provisions indicate that in general, collective bargaining is meant to be the primary method for creating employment norms and standards, and for resolving disputes.

There are a number of ways in which trade unions can influence transfers of businesses through collective bargaining. In the process of a commercial transaction, a trade union may impose negotiating for the inclusion of the term ‘business transferred as a going concern’. This inclusion will provide sufficient proof that a transaction is a section 197 transfer in terms of the LRA.⁷ Where an employer refuses such negotiations the trade union may refer an interest dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) CCMA in terms of section 64(2) of the LRA.⁸ Despite the provision in section 197(2) that all rights and obligations continue to remain in force as against the new employer, the new employer need not apply identical terms and conditions of employment to those of the previous employer after the date of the transfer. Section 193(3) provides that it is sufficient for the new employer to employ the transferred employees on terms and conditions that are ‘on the whole not less favourable’ to them than those on which they were employed by the old employer.⁹ However, in terms of section 197 of the LRA,¹⁰ trade unions may bargain for more favourable terms and conditions of employment, or to retain the same terms and conditions of employment after the transfer of the business has been effected. Thus Trade Unions may negotiate the terms and conditions of the transfer of employment contracts. Here again, if the employers refuse to bargain or the bargaining fails, the unions may attempt to impose their will via an interest dispute and industrial action. Collective agreements concluded with the former employer also impact on the legal consequences of a transfer of a business that falls within the parameters of section 197. Collective agreements restrict the new employer’s ability to change terms and conditions of employment.¹¹ Employers may even negotiate for a variation of all of the legal consequences of a transfer.

⁷ *Ibid* at para 49.

⁸ Section 64(2) of the LRA.

⁹ Van Niekerk et al *Law@Work* 1st ed (2008) 314.

¹⁰ Section 197 of the LRA.

¹¹ See section 197(3).

1.2 Problem Statement

The ability of trade unions to subject business transactions to power play and industrial action can have a major influence on transfers of businesses, including the terms of the transfer, security of employment and the terms and conditions of employment of the affected employees. The purpose of this dissertation is to examine this dynamic in section 197.

The primary objective of trade unions is to regulate relations between employees and employers.¹² Trade unions, especially those with majority union status, have become a powerful force for influencing matters in the workplace. The LRA entitles registered trade unions to various organisational rights, the right to engage in collective bargaining,¹³ the right to engage its members in industrial action, to enforce work related demands,¹⁴ and the right to enforce collective agreements concluded with employers.¹⁵ These rights are improved if the trade union has the status of a majority union in the workplace.

Collective bargaining may be defined as a power play between trade unions and employers, where the parties negotiate terms and conditions of employment and other matters of mutual interest for the purpose of concluding a collective agreement.¹⁶ The right to collective bargaining may be limited however.¹⁷ The principle of majoritarianism entails that the majority trade union has the authority to limit the bargaining power of minority unions and workers who do not belong to such unions, and to limit the right to be admitted into a bargaining council.¹⁸ Thus, majority trade unions are arguably the trade unions with the power to influence section 197 transfers of a business as a going concern. The right may also be limited by the absence of a duty to bargain. However, this is offset by the union members' right to industrial action in this regard.

The principal objective of section 197 is to balance employer and employee interests when transfer of a business takes place. It contains important protections for employees affected by transfer by ensuring continuity of employment on the same, or more favourable terms and

¹² Section 213 of the LRA.

¹³ Section 27 of the LRA.

¹⁴ Section 62 of the LRA.

¹⁵ Section 28(1)(b) of the LRA.

¹⁶ Grogan (note 3 above) at 343.

¹⁷ Section 18 of the LRA.

¹⁸ C Tshoose 'DETERMINING THE THRESHOLD FOR ORGANIZATIONAL RIGHTS: THE LEGAL QUAGMIRE FACING MINORITY UNIONS RESOLVED – South African Post Office v Commissioner Nowosenetz No (2013) 2 BLLR 216 (LC)' 2013 Obiter 66.

conditions of employment. This is the dual purpose of the provision.¹⁹ Basically, section 197 plays a potentially important role in enabling South African companies to restructure and to adapt to a globally competitive environment, achieving economies of scale through merger and acquisition, or through outsourcing which is likely to play an important role in the process.

The purpose of Section 197 of the LRA is to balance the employment security concerns of the employees against the commercial needs of employers who seek to efficiently conclude business transactions.²⁰ The effect of section 197 is such that contracts of employment are transferred by operation of law from the transferor to the transferee.²¹ Frequently however, the terms and conditions of employment which employees may have enjoyed with their previous employer may not necessarily be in the best interest of the new employer, and as such, he or she might seek to change them. In the converse, employees might wish to negotiate for better terms and conditions with the new employer. Section 197 (6) of the Labour Relations Act offers both parties a platform to negotiate these matters of mutual interest.

The concept of reasonable demands with regard to collective bargaining topics has been deferred by the courts to the collective bargaining process. Judges agree that the collective bargaining process should be left entirely to the economic power of the parties on the bargaining table. Considering the status and potential power of trade unions in the South African labour market, the main question that will be explored in this dissertation is whether, and in what respects, unions can affect the status and process of a transfer. Furthermore, this dissertation will analyse the collective bargaining framework that is regulated by section 197.

1.3 Research Methodology

This research paper will be based on desktop research. It will look at journal articles and authors such as Grogan, Brassey, Bosch, Van Niekerk, T Cohen, A Rycroft and B Witcher. It will further look at leading cases that discuss the area of section 197 transfers and the influence of trade unions on transfers.

¹⁹ *NEHAWU v UCT and others* 2003 (2) BCLR 154 (CC).

²⁰ *Ibid.*

²¹ Note 6 above.

1.4 Literature Review

The literature will include the following cases and articles:

The Constitutional Court judgment in *Aviation Union of South Africa and another v South African Airways*²² settled the debate regarding the proper interpretation of section 197 of the Labour Relations Act and the prerequisites for a transaction to be declared as a transfer of a business as a going concern. A further issue was whether section 197 applied to second-generation outsourcing. The court found that the ambit of section 197 applied to any transaction that transfers a business as a going concern. This approach took into account the purpose of section 197. The court also concluded that section 197 applies to second-generation outsourcing.

The Constitutional Court held that:

‘For the section to apply the business must have changed hands, whether through a sale or other transaction that places the business in question in different hands. Thus, the business must have moved from one person to the other. The breadth of the transfer contemplated in the section is consistent with the wide scope it is intended to cover. Therefore confining transfers to those effected by the old employer is at odds with the clear scheme of the section.’²³

But whether a transfer as contemplated in section 197 has occurred or will occur is a factual question. It must be determined with reference to the objective facts of each case...

For a transfer to be established there must be components of the original business which are passed on to the third party. These may be in the form of assets or the taking over of workers who were assigned to provide the service. The taking over of workers may be occasioned by the fact that the transferred workers possess particular skills and expertise necessary for providing the service, or the new owner may require the workers simply because it did not have the workforce to do the work. Without the protection afforded by section 197, the new owner with no workforce may be

²²*Ibid.*

²³ The transfer need not have been effected by the old employer.

exposed to catastrophic consequences, in the event of the workers declining its offer of employment.

Although the definition of business includes a service, it must be emphasized that what is capable of being transferred is the business that supplies the service and not the service itself.²⁴

The CC essentially confirmed the approach of the Labour Court in *COSAWU v Zikhethele Trade (Pty) Ltd and another*.²⁵ The Labour Court in *Zikhethele* considered foreign law and relied on *Dines v Initial Services* [1994] IRLR 336 (EAT). The court also relied on European law for its wide interpretation of s 197. It held:

‘In short, the European courts tell us this in relation to second generation contracting-out: The absence of a contractual link between the old and the new employer is not decisive, hence a two-phased transaction can indeed constitute a transfer. Secondly, the decisive criterion for determining whether there has been a transfer of an undertaking [read “business”] is whether, after the alleged transfer, the undertaking has retained its identity, so that the employment in the undertaking is continued or resumed in different hands of the transferee... The mode or method of transfer is immaterial. The emphasis is on a comparison between the actual activities of and actual employment situation in an undertaking before and after the alleged transfer (*Kelman v Care Contract Services Ltd* [1995] ICR 260 [EAT]). What seems to be critical is the transfer of responsibility for the operation of the undertaking. Mummery J’s conclusion in *Kelman* offers a salutary guideline. He said: “The theme running through all the recent cases is the necessity of viewing the situation from an employment perspective, not from a perspective conditioned by principles of property, company or insolvency law. The crucial question is whether, taking a realistic view of the activities in which the employees are employed, there exists an economic entity which, despite changes, remains identical, though not necessarily identical. I accept that the two-phase transaction intrinsic to second generation contracting out does indeed constitute a transfer as contemplated by section 197 of the LRA. As in

²⁴ Note 6 above at paras 46 – 48 & 52.

²⁵ *COSAWU v Zikhethele Trade (Pty) Ltd and another* [2005] 9 BLLR 924 (LC).

European law, the mode or method of transfer is less important. The crux of the determination is whether what is transferred is a 'business in operation so that the business remains the same but in different hands.'²⁶

The article by N Coetzer and R Harper 'Interpreting Section 197 after *Aviation Union of SA v SA Airways* — An Analysis of Recent Case Law Relating to Transfers of Undertakings' (2013) 34 ILJ 2506 looks at case law subsequent to the Constitutional Court judgment in *Aviation Union of SA v SA Airways*, and proposes that there are still outstanding issues to be settled and commercial insecurity and that disputes regarding s 197 have affected the feasibility of transactions between business entities.

In *Unitrans Supply Chain Solutions (Pty) Ltd & others v Nampak Glass (Pty) Ltd and others*,²⁷ the court held that a transfer must relate to an economic entity and a determination of whether that entity retains its identity after the transfer.²⁸

The issue of service providers was further clarified in cases after the CC decision. In *Unitrans Supply Chain Solutions (Pty) Ltd & others v Nampak Glass (Pty) Ltd and others*,²⁹ the issue concerned the application of section 197 where there was a change in service providers even though assets had not been transferred to the transferee. The transferee however accepted control over the assets which were provided by the client, and which it required to perform the services it was contracted to perform. The court held that the right of use of the assets was a compelling factor in concluding that there was a transfer of a business as a going concern. *In casu*, the court held that the assumption of the right of use of the infrastructural assets by TMS [the new service provider] in circumstances where it would provide the same services from the same premises, without interruption, constituted a transfer as a going concern. In these circumstances, s 197 applied and the affected employees were employed, by operation of law on the same terms and conditions, by TMS. The courts thus seem to be expanding the scope and ambit of section 197.

²⁶ *Ibid* at paras 34 – 35.

²⁷ *Unitrans Supply Chain Solutions (Pty) Ltd & another v Nampak Glass (Pty) Ltd and others* (J195/14) [2014] ZALCJHB 61.

²⁸ *Ibid* at para 15.

²⁹ *Ibid*.

In *Carlito Abler v Sodhexo MM Catering Gesellschaft GmbH* [2004] IRLR 168 [referred to by the Labour Court in *Unitrans Supply Chain Solutions (Pty) Ltd & others v Nampak Glass (Pty) Ltd and others*³⁰ and *Franmann Services (Pty) Ltd v Simba (Pty) Ltd* (unreported Case No J 1978/12, August 2012)], a case that concerned a change in service providers contracted to provide catering at a hospital. The court held that there was a relevant transfer in circumstances where the new contractor utilised substantial parts of the assets (the hospital kitchen and equipment) previously used by the outgoing contractor, but owned by the client. In effect, there was the transfer of a licence to use the client's facilities.

In *Grinpal Energy Management Services (Pty) Ltd v City Power Johannesburg (Pty) Ltd & others* (at 905), in which the respondent had entered into a service agreement with the applicant for the installation and maintenance of a pre-paid electricity system to certain areas of Johannesburg, and had subsequently cancelled that agreement and appointed a new provider, the court held that a transfer of a business had taken place.

The case of *SA Municipal Workers Union & another v SA Local Government Association & others*³¹ illustrates the point that there may not be a variation of the legal consequences of a transfer that falls under the ambit of section 197 in the absence of an agreement with the trade union stipulated as the consulting parties by section 189 of the LRA. The court held that the hierarchy of consulting bodies stipulated in 189(1) must be strictly followed. It further held that where section 197(6) is not followed [where there is no collective agreement to the contrary], section 197(2) must be applied as the default position. Thus, the variation of employment terms between the employer and the employees was held to be invalid.

*Aunde South Africa (Pty) Ltd v National Union of Mineworkers of South Africa*³² illustrates the power of majority unions in collective bargaining. The court held that where an employer consults a majority union in terms of a collective agreement, the employer was not obliged to consult any other union.

³⁰ *Ibid.*

³¹ *SA Municipal Workers Union & another v SA Local Government Association & others* (2010) 31 ILJ 2178 (LC).

³² *Aunde South Africa (Pty) Ltd v National Union of Mineworkers of South Africa* (2011) 10 BLLR 945 LAC.

In the case of *SA Post Office v Commissioner Nowosenetz* the court had to decide whether or not a minority trade union was bound by a collective agreement which sought to change the threshold for representativeness as set by the previous collective agreement.³³ It was held that where a collective agreement changes the threshold of representativeness, the party to whom the previous threshold applied is bound by the novation.³⁴ In the case of *SA Medical Association on behalf of Meyer-Van den Heever & another v University of Limpopo* the court confirmed that non-parties to a collective agreement must be identified in a collective agreement in order to be bound by it.³⁵

Martin Brassey in his article ‘Fixing the laws that govern the labour market’ (2012) 33 ILJ 1, argues that South Africa’s collective bargaining system is tantamount to cartel activity through which trade unions protect their interests by excluding non-party members of the workplace by depriving them of recognition as bargaining agents and organisational rights.³⁶

A number of cases however have entrenched the collective bargaining system practiced in South Africa. In the case of *POPCRU v Ledwaba*,³⁷ the court held that collective agreements between majority unions and the employer could legally preclude minority unions from the collective bargaining process.³⁸

In *National Union of Mineworkers of SA and others v Bader Bop*, the court held that minority unions could acquire organisational rights through collective bargaining and ultimately, strikes.³⁹ In the case of *Transnet v National Transport Movement and others* Van Niekerk J held that section 18 of the LRA didn’t bar a minority union’s right to strike and where there was no collective agreement which limited the right, minority unions were entitled to strike in support of their demand for organisational rights.⁴⁰

Stella Vettori in her article ‘The Labour Relations Act of South Africa 66 of 1995 and the Protection of Trade Unions’ (2005) 17 S. Afr. Mercantile L.J. 295, argues that the South African labour law dispensation has afforded trade unions much more power than other

³³ *SA Post Office v Commissioner Nowosenetz* [2013] 2 BLLR 216 (LC) at 2 – 16.

³⁴ *Ibid* at paras 28 – 30.

³⁵ *SA Medical Association on behalf of Meyer-Van den Heever & another v University of Limpopo* (2012) 33 ILJ 2954 (LC) at para 29.

³⁶ M Brassey ‘Fixing the laws that govern the labour market’ (2012) 33 ILJ 1 at page 7.

³⁷ *POPCRU v Ledwaba and others* [2012] 11 BLLR 1137 (LC).

³⁸ *Ibid* at para 47.

³⁹ *National Union of Mineworkers of SA and others v Bader Bop* 2003 24 ILJ 305 (CC).

⁴⁰ *Transnet Soc Ltd v National Transport v National Transport Movement and others* [2014] 1 BLLR (LC) at paras 14 – 19.

countries. She compares South Africa to European countries. The argument is that unlike the trend throughout the world, South Africa has afforded trade unions rights such as closed shop agreement rights whereas the rest of the world questions their validity.⁴¹

In a majority judgment, the Labour Appeal Court in *PE Rack 4100 CC v Sanders & others*⁴² has overruled the previous decision of the Labour Court⁴³ and has held that the termination of a franchise agreement permitting the franchisee to sell certain goods, and the appointment of a different franchisee to sell the same goods, does not satisfy the requirements of a sale of a business as a going concern within the meaning of s 197 of the LRA. The court reasoned that the franchisor continued to control the principal assets of the business both before and after the conclusion of the franchise agreements, which was effectively a shared business venture between franchisor and franchisee. However in a dissenting judgment Landman AJA held that the economic entity that was the business had in fact changed hands when it returned to the franchisor and then to the new franchisee, which was in line with the purposes of s 197 to guard job security and to enable the transfer of businesses.

The European law on transfers will be discussed. Of particular interest is that Van Niekerk points out that in the European Union, first generation and second generation contracting out are treated differently. In the event of first generation contracting the decisive criterion seems to be the actual continuance of the same or similar activities by the new contractor. In second generation contracting out, additional requirements are set. These relate to the transfer of some tangible or intangible assets and the transfer of a major part of the staff (in terms of numbers and skills). In *Oy Likenne AB v Liskojarvi and Juntunen*⁴⁴ the European Court of Justice (ECJ) held that the mere fact that the new contractor carried on a similar service to the previous contractor would not give rise to an automatic conclusion that there had been a relevant transfer of an economic entity. The ECJ conceded that in certain sectors in which activities are based essentially on manpower, a group of workers engaged in a joint activity on a permanent basis could constitute an economic entity. In *casu*, however, bus transport required substantial plant and equipment, according to the court. The fact that D did not take over any of C's assets was thus a significant factor leading the court to the conclusion that no

⁴¹ S Vettori 'The Labour Relations Act of South Africa 66 of 1995 and the Protection of Trade Unions' (2005) 17 S. Afr. Mercantile L.J. 295 at 296.

⁴² *PE Rack 4100 CC v Sanders & others* (2013) 34 ILJ 1477 (LAC) at 1477.

⁴³ *Ibid* reported at (2010) 31 ILJ 2722 (LC).

⁴⁴ *Oy Likenne AB v Liskojarvi and Juntunen* [2001] IRLR 171 (EC).

economic entity had been transferred. According to the authors, it thus seems as if the ECJ elevated this one factor above the others. In their view, the fact that no tangible business assets (the buses) were transferred (in spite of the fact that D continued the same activity as C, presumably serviced the same customers on the same bus routes and engaged 73% of C's employees to perform the contract), was thus sufficient to preclude the transfer from falling within the scope of the Acquired Rights Directive.⁴⁵ There is vast input from academia and case law analysing collective bargaining. The textbooks by John Grogan and Van Niekerk et al will be relied upon to a large extent. The Labour Relations Act has conferred substantial power on trade unions through collective bargaining. As indicated earlier, these powers will be critically examined in the context of section 197 and certain recommendations will be proposed.

1.5 Conceptual Framework

The social justice theoretical perspective focuses on the role of labour law in setting the distribution of wealth and power in the workplace.⁴⁶ This perspective regards trade unions as a primary vehicle through which to achieve social justice and to counteract the inequality of bargaining power between employers and employees. It also however emphasises outcomes achieved through voluntary collective bargaining. It acknowledges collective bargaining as an important medium to promote the interests of workers and thus that legislation must facilitate this process. The tension between the commercial interests of the employer and the statutory power afforded to employees and their union representatives by the LRA is at the centre of the issue in this dissertation– the interest to secure the most economically viable transfer terms versus the LRA backed power of trade unions to secure the most beneficial terms and conditions of employment in the transfer process.

1.6 Research Questions

1. What is the law on collective bargaining in South Africa?
2. Is there a duty to bargain, and if not, how do the unions enforce such a process?
3. How does the law make trade unions powerful in the collective bargaining process?
4. When does a transaction amount to a transfer of a business as a going concern in terms of section 197?

⁴⁵ Van Niekerk et al *Law@Work* (1st ed) 309 to 310 (Fn 37).

⁴⁶ Davies *Perspectives on Labour Law* (2004) at 17.

5. To what extent does section 197 provide for collective bargaining and how does it regulate it?
6. To what extent would a refusal to bargain by the employer affect a transaction in terms of which a business is transferred?
7. In what respect can trade unions influence section 197 transactions?
8. Compared to the United Kingdom, to what extent does South Africa's law on transfer of undertakings differ in terms of employee participation regarding the terms and conditions of transfer?

1.7 Focus of Research

The subject of section 197 and transfers of businesses is dominated by questions such as when a transfer falls within the ambit of section 197, and whether it covers second generation outsourcing, transfers of service agreements and franchise arrangements. These issues will be examined. However, this research will focus on the relationship between collective bargaining and section 197 with particular focus on the potential power of trade unions to influence commercial transactions.

1.8 Research outline

The purpose of Chapter 1 is to provide the context for the research by considering a brief analysis of the intertwined relationship between the stakeholders in the labour market. Particularly, it is focused on the power of trade unions within the workplace to influence commercial transactions such as transfers of businesses as going concerns.

Chapter 2 examines the legislation framework of collective bargaining. It defines collective bargaining and the rights and duties of the stakeholders in this process in the context of the LRA. Lastly, it analyses the concept of a powerful trade union by providing a contemporary example within the South African labour market.

Chapter 3 critically examines the provisions of section 197 of the LRA in order to provide an understanding of section 197. It looks at the purpose of the legislative provision and discusses the requirements and legal effect of the provision. There is particular focus on the terms and conditions of employment that may transfer, and those which may not, as a background to the discussion on collective bargaining within the context of the section.

Chapter 4 provides the core discussion of the dissertation with analysis of the enabling legislative provisions within the Labour Relations Act. It articulates the implications of a decision to embark on collective bargaining in terms of section 197 of the Labour Relations Act. The potential of the exertion of economic power from either party which might affect the process of the commercial transaction is also discussed.

Chapter 5 discusses European legislation with particular focus on the United Kingdom in order to draw similarities and differences between the two. As a source of the section 197 legislative provision, it was prudent to analyse whether the South African deviations are justified and practical, given the South African labour climate. The comparison also allows for a discussion of how comparatively, collective bargaining within the context of transfer undertakings must be regulated.

Chapter 6 concludes the dissertation and proposes alternatives to the current legislative provisions in the LRA.

CHAPTER 2: UNDERSTANDING COLLECTIVE BARGAINING

2.1 Introduction

This chapter will examine the legislation which regulates collective bargaining in South Africa and analyse the interpretation and application of the legislative principles by the courts. Particular focus is given to bargaining topics, the duty to bargain, and collective agreements. In the context of section 197, this chapter lays the foundational understanding of how powerful trade unions can potentially influence the process of a transfer of a business as a going concern through collective bargaining.

2.2 What is collective bargaining and what's the purpose of collective bargaining?

Prior to the enactment of the LRA collective bargaining had already been entrenched in the South African labour market through the auspices of the Industrial Conciliation Act 11 of 1924 (ICA).⁴⁷ It was first introduced as a means to deter the threat of unrest from white unskilled workers in the 1920s, and then secondly, following the recommendations of the Wiehahn Commission of Inquiry into Labour Legislation,⁴⁸ the ICA was amended to recognise black workers in statutory collective bargaining structures.⁴⁹ In the backdrop of this history, it is no surprise that the LRA aims to democratise the workplace by promoting and providing a framework through which collective bargaining may take place.⁵⁰

Collective bargaining may be defined as a process of negotiation between employers or employer's organisations and trade unions on the terms and conditions of employment and other matters of mutual interest with the purpose of reaching an agreement.⁵¹ There is a distinction and substantial difference between consultation and negotiation. To consult means to take counsel or seek information or advice from someone, and does not imply any kind of agreement, whereas to bargain means to haggle or wrangle so as to arrive at some agreement on terms of give and take. The term negotiate is akin to bargaining, and means to confer with a view to compromise and agreement.

As a species of collective labour law, collective bargaining is concerned with the creation of a forum in which trade unions, employers or employer's organisations may negotiate their

⁴⁷ A Steenkamp, S Stelzner, N Badenhorst 'The Right to Bargain Collectively' (2004) 25 *ILJ* 948.

⁴⁸ *Ibid* at 948.

⁴⁹ *Ibid* at 947 - 950.

⁵⁰ Section 1(c)(i) & (d) of the LRA.

⁵¹ J Grogan *Workplace Law* 10th ed (2009) 343.

respective interests. The LRA encourages employees to form or join trade unions⁵² which in turn may acquire organisational rights in their capacity as trade unions,⁵³ and from a position of collective strength, trade unions take part in collective bargaining. In *SAPU & another v National Commissioner of the South African Police Service & another*, the court held that:

‘The very purpose of collective bargaining is to bring equality to the relationship. Collective bargaining organises and distributes contractual power by means of the power play inherent in the process.’⁵⁴

The LRA also allows either party to exert economic power in the form of strikes or lockouts to ensure that collective bargaining is not a begging process but a meaningful process of negotiation.⁵⁵

The primary objective of collective bargaining is the regulation of terms and conditions of employment and other matters of mutual interest.⁵⁶ The LRA confers primacy to the collective bargaining process as a means of regulating labour relations policy in a workplace.⁵⁷ In terms of section 16 of the LRA, trade unions that enjoy majority status in the workplace may force the employer to provide information that will enable them to bargain effectively.⁵⁸ With the aid of this right and other organisational rights stipulated in Chapter 3 of the LRA, for example the size of its membership, its relationship with its members, and its organisational and negotiating skills, trade unions are in a position to force or persuade the employer to participate in collective bargaining on matters such as wages and employee benefits, amongst other terms and conditions of employment.

2.3 What can the subject of collective bargaining be?

The topics that may come under collective bargaining are encapsulated by the phrase ‘terms and conditions of employment and other matters of mutual interest’. The content of the above-mentioned phrase speaks to the dilemma of deciding what qualifies as managerial prerogative and what the core term of employment is. In her thesis ‘The Duty to Collective Bargaining and Collective Bargaining in South Africa, Lesotho and Canada: Comparative

⁵² Sections 4 & 5 of the LRA.

⁵³ Chapter 3 of the LRA.

⁵⁴ *SAPU & another v National Commissioner of the South African Police Service & another* 2006] 1 BLLR 42 (LC) at para 53.

⁵⁵ Grogan (note 47 above) .

⁵⁶ Steenkamp, Stelzner, Badenhorst (note 43 above) at 945.

⁵⁷ Note 50 above at para 76.

⁵⁸ Section 16 of the LRA.

perspectives' Ndumo argues that the LRA provisions have the effect of prescribing certain bargaining topics such as: picketing conduct, retrenchments, organisational rights and the establishment of workplace forums.⁵⁹ However Ndumo does concede that the LRA does not prescribe bargaining on topics such as wages, employment benefits and other working conditions.⁶⁰ Largely, the LRA has left the bargaining arena free to any topic of mutual interest.⁶¹ The LRA provides mechanisms through which trade unions may apply economic power in a bid to persuade an employer to collectively bargain on a particular subject.

There is no legal duty to bargain. A refusal to bargain can however be the subject of a dispute on which the union can call a strike. In terms of section 64(2) of the LRA, a trade union must obtain an advisory award before it can engage in industrial action over a refusal to bargain dispute.⁶² A refusal to bargain includes a refusal to bargain and a dispute about bargaining subjects.⁶³ However, section 65 of the LRA limits issues on which a union may force an employer to bargain, by limiting disputes over which trade unions may strike. In terms of section 65, workers may not strike when they are bound by a collective agreement, and that collective agreement already regulates the issue in dispute. They may also not strike over disputes of right, disputes that may be referred to arbitration or the Labour Court, or if they are engaged in essential services.⁶⁴

A dispute of rights concerns the failure to apply rights that already exist, or a breach of a statutory or contractual right that already exists.⁶⁵ These rights may be embodied in the LRA and other labour legislation, or they may be the terms of collective agreements which have already been concluded as well as employment contracts.⁶⁶ For instance, in terms of section 65, a trade union is prohibited from participating in industrial action over subjects which have been regulated by collective agreements.⁶⁷ Trade unions may however participate in industrial action over interest disputes.

⁵⁹ M Ndumo 'The Duty to Collective Bargaining and Collective Bargaining in South Africa, Lesotho and Canada: Comparative perspectives' (LLM Thesis, University of Cape Town, 2005) at 60.

⁶⁰ *Ibid.*

⁶¹ Grogan (note 47 above) at 351.

⁶² Section 64(2) of the LRA.

⁶³ Section 64(2)(d)(iii) of the LRA.

⁶⁴ Section 65 of the LRA.

⁶⁵ T Cohen, A Rycroft, B Whitcher *Trade Unions Law and the Law in South Africa* at 35.

⁶⁶ *Ibid.*

⁶⁷ J Grogan *Collective Labour Law* (2010) at 101.

In the case of *Entertainment Commercial Catering & Allied Workers Union & others v Southern Sun Hotel Interests (Pty) Ltd*⁶⁸ the employer requested that the employees change their provident fund. When the trade union refused to oblige after several meetings, the parties reached a deadlock. The trade union argued that the employer was bound to bargain with it because the parties had concluded a collective agreement. Francis AJ held that the LRA did not give rise to a duty to bargain in good faith.⁶⁹ Furthermore it was also held that it was not within the court's powers to declare demands fair or unfair.⁷⁰ Lastly, where there is a 'refusal to bargain dispute' the courts were not authorised to grant an order instructing bargaining agents to suspend certain bargaining topics. To do so would threaten the very fibre of collective bargaining.⁷¹ The essence of the judgment is encapsulated by this statement:

'In the absence of any indication in an agreement as to what subjects are to be regarded as legitimate bargaining subjects, the content of an undertaking to negotiate must be simply on whatever subject the parties choose to negotiate regarding the terms and conditions of employment, they shall attempt to reach agreement.'⁷²

2.4 What are collective agreements and who is bound by collective agreements?

In terms of section 213 of the LRA, a collective agreement is a written agreement concerning the terms and conditions of employment, or any other matter of mutual interest concluded between on the one hand, a trade union, and on the other hand, an employer or employer's organisation.⁷³ The phrase 'terms and conditions of employment and other matters of mutual interest' includes both substantive matters such as wages as well as procedural issues such as disciplinary codes, grievance structures and industrial action procedures. It is a fundamental requirement for the validity of a collective agreement that it should be in written form.⁷⁴

Section 23 regulates the legal effect of a collective agreement. In terms of section 23 of the LRA, a collective agreement binds:

- '(1) A collective agreement binds –
- a) the parties to the collective agreement;

⁶⁸ *Entertainment Commercial Catering & Allied Workers Union & others v Southern Sun Hotel Interests (Pty) Ltd* (2000) 21 ILJ 1090 (LC).

⁶⁹ *Ibid* at para 25 – 28.

⁷⁰ *Ibid* at para 32.

⁷¹ *Ibid* at para 28.

⁷² *Ibid* at para 29.

⁷³ Section 213 of the LRA.

⁷⁴ Cohen, Rycroft, Whitcher (note 61 above) at 30.

- b) each party to the collective agreement and the members of every other party to the collective agreement, in so far as the provisions are applicable between them;
- c) the members of a registered trade union and the employers who are members of a registered employers' organisation that are party to the collective agreement if the collective agreement regulates :
 - i) terms and conditions of employment; or
 - ii) the conduct of the employers in relation to their employees, or the conduct of the employees in relation to their employers;
- c) employees who are not members of the registered trade union or trade unions party to the agreement if:
 - i) the employees are identified in the agreement;
 - ii) the agreement expressly binds the employees; and
 - iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.⁷⁵

Collective agreements enjoy a unique status in the South African labour law dispensation, and they should be given superiority over provisions of the LRA.⁷⁶ Collective agreements take precedence over individual contracts of employment.⁷⁷ In terms of section 199 of the LRA, individual contracts of employment may not set less than favourable wages and employment benefits when compared to a collective agreement that is operational in a workplace.⁷⁸ Collective agreements may also vary the rights conferred on employees by legislation. Some of the rights conferred by the LRA and the Basic Conditions of Employment Act 75 of 1997 (BCEA) may be amended by collective agreements,⁷⁹ as long as the collective agreement does not provide for less favourable terms than those set out in the BCEA. In a series of judgments, the courts have reinforced the special status of collective agreements. In the case of *SA Post Office v Commissioner Nowosenetz* the court held that where a collective agreement changes the threshold of representativeness, the party to whom the previous threshold applied to is bound by the novation.⁸⁰ In the case of *SA Medical Association obo Meyer-Van den Heever & another v University of Limpopo* the court confirmed that non-parties to a collective agreement must be identified in the collective

⁷⁵ Section 23(1) of the LRA.

⁷⁶ *Minister of Safety & Security v Safety & Security Sectoral Bargaining Council & others* (2001) 22 ILJ 2684 (LC) at para 13.

⁷⁷ A van Niekerk et al 2nd ed *Law@Work* (2012) at 386.

⁷⁸ Section 199 of the LRA.

⁷⁹ Grogran (note 47 above) at 359.

⁸⁰ Note 31 above at paras 28 – 30.

agreement in order to be bound by it.⁸¹ However, collective agreements do not yield untrammelled power.

Labour legislation and case law restricts the power of collective agreements. In terms of the BCEA, the Act enjoys primacy except to the extent that it permits collective agreements to amend it.⁸² Furthermore, in the case of *Janse van Vuuren v South African Airways (Pty) Ltd and Another*, the court held that a collective agreement is subject to the Constitution and parties may not contract out of the fundamental rights in the Bill of Rights.⁸³ Thus, except to the extent that the LRA accepts closed shop clauses, collective agreements may not limit the right to freedom of association.⁸⁴

2.5 Is there a duty to bargain?

In terms of section 23(5) of the Constitution, trade unions have a right to engage in collective bargaining⁸⁵, however, the constitutional court has left the interpretation of the content of this right open.⁸⁶ In the case of *SANDU v Minister of Defence* the Constitutional Court affirmed the principle that in order to avoid a dual system of legal rules, where legislation has been passed in order to give effect to a right in the Bill of Rights, such legislation is the starting point for interpretation.⁸⁷ The true enquiry therefore is whether or not the LRA creates a duty to collective bargaining. Despite the precedent set by the Industrial Court, the LRA does not create a duty to collective bargaining.⁸⁸ The Constitutional Court left the question of whether the constitution creates a justiciable duty to bargain open.⁸⁹ The court decided case on the Defence Act and not the LRA. The effect of the decision is that the dicta in *SANDU v Minister of Defence & others* held by the Supreme Court of Appeal (SCA) becomes the authoritative decision on this matter. At the SCA, the court held that a justiciable duty to collective bargaining was not recognised and neither did neither the LRA⁹⁰ nor the Constitution.⁹¹

⁸¹ Note 33 above at at para 29.

⁸² Section 49 of the Basic Conditions of Employment Act 77 of 1997.

⁸³ *Janse van Vuuren v South African Airways (Pty) Ltd and Another* (2013) 34 ILJ 1749 (LC).

⁸⁴ Grogan (note 47 above) at 359.

⁸⁵ Section 23(5) of the Constitution of the Republic of South Africa 108 Of 1996.

⁸⁶ *SANDU v Minister of Defence* (2007) 9 BLLR 785 (CC) at para 56.

⁸⁷ *Ibid* at paras 50 – 55.

⁸⁸ S Godfrey et al *Collective Bargaining in SA past, present and future* (2010) page 21.

⁸⁹ Note 82 above at para 56.

⁹⁰ *SA National Defence Union v Minister of Defence & others* (2006) 27 ILJ 2276 (SCA) at para 18 – 20.

⁹¹ *Ibid* at para 25.

In the case of *National Police Services Union & others v National Negotiating Forum & others* the court held:

‘The LRA adopts an unashamedly voluntarist approach - it does not prescribe to parties who they should bargain with, what they should bargain about or whether they should bargain at all. In this regime, the courts have no right to intervene and influence collectively bargained outcomes. Those outcomes must depend on the relative power of each party to the bargaining process.’⁹²

In the case of *TAWUSA & Alliance comprising of STEMCWU v Anglo Platinum Ltd*, Van Niekerk J confirmed the principle when he held that a court is not authorised to compel an employer to engage in collective bargaining, and trade unions do not have the right to compel employers to collective bargaining.⁹³ Although the courts refuse to enter the terrain of collective bargaining, the Constitutional Court has held that where a trade union wishes to acquire rights in the workplace, it may embark on industrial action as a means to force the employer to oblige its requests.⁹⁴

In the absence of a duty to bargain, trade unions depend on collective strength to coerce the employer to the bargaining table. As stated above, courts have no authority to interfere with the collective bargaining process. Industrial action as a bargaining tool is the only recourse for trade unions. The right to strike is not an end in itself but the instrument that drives the collective bargaining process. The right to strike is a constitutionally protected right. In terms of section 23 of the Constitution, every worker has the right to strike. The LRA has safeguarded the right to strike by providing legal safeguard through the automatically unfair dismissals provision.⁹⁵ In terms of section 187(1)(a), when an employee is dismissed for participating in a strike that complies with the requirements of the Act, such a dismissal is regarded as automatically unfair.⁹⁶ Industrial action is a potent negotiating tool; generally, it is the threat of the impact of a large strike that serves as a bargaining tool for trade unions. It is therefore important for a trade union to garner a large membership in order to embark on an effective strike.

⁹² *National Police Services Union & others v National Negotiating Forum & others* (1999) 20 ILJ 1081 (LC) at para 52.

⁹³ *TAWUSA & Alliance comprising of STEMCWU v Anglo Platinum Ltd* (J109/09) [2009] ZALC 1 (LC) at page 4.

⁹⁴ Note 37 above.

⁹⁵ Section 187(1)(a) of the LRA.

⁹⁶ *Ibid.*

2.6 Practical case study: The rise of the Association of Mineworkers and Construction Union (AMCU) in the Platinum Sector

The argument presented above has suggested characteristics that are fundamental for the success of a trade union to effectively bargain with an employer. A powerful trade union is most likely to impact decisively on an employer's willingness to compromise during the bargaining process. Such a trade union would be required to possess a large, if not the majority membership of the workforce. It would also need organisational rights which enable it to authoritatively bargain with an employer whether exclusively or otherwise. Lastly, a powerful trade union should possess sufficient negotiation skills and tactics in order to effectively advocate for its demand. In order to illustrate this point clearly, the rise of the Association of Mineworkers and Construction Union (AMCU) as a powerful trade union in the platinum sector will be discussed.

With regard to the first element, in the second half of 2012, AMCU's membership rose exponentially. It is reported that by September 2012, AMCU had 6 000 members in Lonmin whilst the National Union of Mineworkers (NUM), its rival, enjoyed 13 500 members.⁹⁷ However, by the end of October 2012, AMCU's membership had increased to just less than 14 000 causing NUM's membership to decline to approximately 6 500 members.⁹⁸ Owing to this change in the positions of the trade unions in the workplace, Lonmin entered into a collective agreement recognising AMCU as the official majority union.⁹⁹

AMCU has since become a majority trade union. In June 2013, Lonmin plc released a statement confirming AMCU's status as a majority union.¹⁰⁰ The statement details the demands made by AMCU:

‘What exactly was AMCU seeking and what has Lonmin offered?’

‘AMCU wants:

Union recognition thresholds of 35% for basic organisational rights, 45% for collective bargaining and 50%+1 for the majority union. This means:

⁹⁷ *National Union of Mineworkers v Lonmin Platinum and Another* (2014) 35 ILJ 486 (LC) at para 8.

⁹⁸ *Ibid.*

⁹⁹ https://www.lonmin.com/downloads/media_centre/news/press/2013/Fact_Sheet_-_Industrial_Relations_06_June_2012_FINAL.pdf accessed on 24 May 2014.

¹⁰⁰ *Ibid.*

- 35% for basic organisational rights of access and deduction of union membership fees.
- 45% for basic organisational rights as above, and collective bargaining, fulltime shop-stewards, office facilities and transport.
- 50%+1 for all rights as above, including rights to set thresholds with Lonmin.
- That there be a single bargaining structure for category 4-9 employees and those in grades B-C. This is problematic as three other unions, Solidarity, NUM and UASA, have binding recognition agreements with Lonmin to represent workers in Collective Bargaining Forum 2, as noted above. AMCU effectively demands the right to collectively bargain for all employees, including those in CBF2 where AMCU does not enjoy significant support.
- To bring forward the implementation date of the next round of wage agreements from 1 October 2013 to 1 July 2013.’

These demands illustrate an attempt by AMCU to entrench itself as a powerful trade union by proposing high thresholds for the acquisition of rights at Lonmin. On 14 August 2013, Lonmin concluded a recognition agreement with AMCU acknowledging its status as a majority union. It is unclear whether or not the demands made by AMCU were acceded to by Lonmin. In 2014 AMCU led an 18 week strike (as of 24 May 2014) for the demand of wage increases at Lonmin.¹⁰¹ From a position of power, AMCU has led one of the country’s longest strikes and Lonmin is said to have lost (as at 24 May 2014) R1.8 Billion.¹⁰²

The case study of AMCU illustrates the connection between organisational rights, trade union membership, bargaining power and negotiation skills. In later chapters, it will be argued that a trade union that possesses these characteristics has the ability to influence the outcome and process of section 197 through the collective bargaining process by exercising its power in the workplace in order to satisfy its demands.

2.7 Conclusion

The LRA is facilitative rather than prescriptive, while unequivocally promoting collective bargaining as the primary mechanism to establish terms and conditions of employment, and

¹⁰¹ <http://www.bdlive.co.za/national/labour/2014/05/22/secrecy-surrounds-talks-between-amcu-and-producers> accessed 24 May 2014.

¹⁰² <http://m.news24.com/fin24/Companies/Mining/Lonmin-bleeding-because-pf-strike-20140519> accessed on 24 May 2014.

avoid industrial conflict. The Constitutional Court accepts that the Constitution contemplates that collective bargaining is key to a fair industrial relations environment. The importance of the right to strike, in this context, is also stressed by the courts.¹⁰³ With regard to section 197, even though there is no duty to collective bargaining, section 197 of the LRA creates the opportunity for trade unions to engage in collective bargaining with the new employer. The nature of collective bargaining as regulated by the LRA exposes commercial transactions, such as transfers of a business as a going concern, to potential threats such as industrial action. All this could hamper the success of the transaction. It is inescapable that for a trade union to be regarded as powerful in the workplace, it needs a strong membership. It is thus reasonable to conclude that only majority trade unions have the power to influence section 197 transfers of a business as a going concern.

¹⁰³ Note 7 above at 344.

CHAPTER 3: UNDERSTANDING SECTION 197

3.1 Introduction

In order to understand the scope of collective bargaining within the context of transfers of businesses as a going concern, it is important to analyse the provisions of the section. This chapter intends to critically examine the provisions of section 197 of the LRA.

3.2 Work security and the common law

When there is a pending disposal of a business, the primary concerns for employees are the continuity of employment and job security rather than the freedom to contract.¹⁰⁴ However, prior to the enactment of the 1995 LRA, employees did not enjoy protection of job security from either the LRA 28 of 1956, or in the common law. The LRA 28 of 1956 deemed a dismissal due to the transfer of business as a going concern as a dismissal for operational reasons.¹⁰⁵ As a result, the only protection employees received was with regard to their severance pay. The 1956 LRA obligated employers to grant employees their severance pay if they had been dismissed pending a transfer of a business as a going concern.¹⁰⁶ In the absence of legislative protection, employees had to rely on the common law; however the common law position was no different. Based on the principle of privity of contract, under the common law, employees were required to consent to a transfer of employment contract from employer A to employer B.¹⁰⁷ This rule was articulated in the English case of *Nokes v Doncaster Amalgamated Collieries*.¹⁰⁸

In *Nokes* a miner had been transferred without his consent into the employment of the acquiring company. The worker was opposed to the transfer and refused to join the new employer. The court endorsed the principle that every employee should be allowed to choose who his or her master was. It was held that the automatic transfer of an employment contract infringed on the employee's right to choose who his or her employer would be.¹⁰⁹ This principle was approved by various South African Industrial Court cases.¹¹⁰ However, parallel

¹⁰⁴ Note 73 above at at 325.

¹⁰⁵ Note 3 above at (2007) at 294.

¹⁰⁶ *Ibid.*

¹⁰⁷ W Blackie, F Horwitz 'Transfer of Contracts of Employment as a result of mergers and acquisitions: a study of section 197 of the Labour relations Act 66 of 1995.' (1999) 20 ILJ 1378 at 1390.

¹⁰⁸ *Nokes v Doncaster Amalgamated Collieries* 140 AC 1014.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ntuli v Hazelmere t/a Musgrave Homes* (1988) 9 ILJ 709 (IC) and *NUMSA v Metkor Industries* (1990) 11 ILJ 1116 (IC).

to these developments was a growing need to protect employees at the time of a transfer of a business such that the Industrial Court began to develop guidelines to protect employees.¹¹¹

As illustrated by the ground-breaking case of *Kebeni & others v Cementile Products (Ciskei) (Pty) Ltd*¹¹², as early as the 1980s, the judiciary had foregone the move towards the protection of employment security in the instance of a transfer of a business as a going concern. The Industrial Court developed the common law through the imposition of unfair labour practice principles in order to protect employees from the inevitable prospects of job loss.¹¹³ Although it was lawful to discontinue employment, the court ascribed to the principle that lawful actions do not always result in fair and equitable consequences.¹¹⁴ In *Kebeni* the employer retrenched employees who were aligned to a trade union in the workplace, under the pretext that the company would be taken over by an entity which was incorporated in the Ciskei where trade unions were outlawed. In applying the principles of fairness, equity and just treatment, *Bulbulia M* held that where there was a contemplated takeover:

‘Safeguards should be incorporated into the agreement between the parties to ensure that the interests of the work-force are adequately protected. One of the safeguard clauses could for example be that all existing contracts of employment would be deemed to have been transferred to the new employer who would be obliged to retain all the existing employees without discrimination, save that an individual employee may have the option not to continue his employment relationship with the transferee’¹¹⁵

Despite the progressive guidelines set by *Bulbulia M*, the protection of employment security through legislative provisions was only enacted in the 1995 LRA through section 197.

3.3 The purpose of section 197

In essence, section 197 varies the common law position by creating a ‘right’ to the continuity of employment in the instance where a business is transferred as a going concern. Briefly, the purpose of section 197 is to preserve job security and facilitate the smooth transfer of a

¹¹¹ Blackie, Horwitz (note 103 above) at 1390.

¹¹² *Kebeni & others v Cementile Products (Ciskei) (Pty) Ltd* (1987) 8 ILJ 442 (IC).

¹¹³ M McGregor ‘Transfer of an employment contract when a business is transferred’ (2000) 8 *Juta’s Bus. Law* 172 at 174.

¹¹⁴ *National Union of Metalworkers of SA v Metkor Industries (Pty) Ltd* (1990) 11 ILJ 1116 (IC) at 1119 F – H.

¹¹⁵ Note 108 above at 450 A – D.

business. As a result, in terms of section 197(2), employment contracts are automatically transferred by operation of law from the old employer to the new employer.¹¹⁶

3.4 The qualifying provisions of section 197

Section 197(1) is the threshold clause. Once a commercial transaction satisfies the requirements of section 197(1), the application of section 197 is automatic regardless of the form of the commercial transaction. The applicability of section 197 is determined by the nature of the transaction, and not the intention of the parties.¹¹⁷ Section 197(1) states that:

‘197. Transfer of contract of employment

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

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

(b) ‘transfer’ means the transfer of a business by one employer (‘the old employer’) to another employer (‘the new employer’) as a going concern.’¹¹⁸

Section 197 is silent on the categories of commercial transaction to which it applies; the application of section 197 is dependent on the fulfilment of three requirements.¹¹⁹ First, there must be an identifiable business, second; the business must be the subject of a transfer and lastly, the business must be transferred as a going concern.¹²⁰ Only two of the three preliminary triggers are defined by the LRA. The interpretation of the definitions provided for in section 197(1) is well debated in academia, however the on the face of things, the Constitutional Court in *Aviation Union of SA and Another v SA Airways (Pty) Ltd and others*¹²¹ has settled the matter.

In *Aviation Union of SA* the court had to decide whether upon the termination of an outsourcing agreement between SAA and LGM South Africa Facility Managers & Engineering (LGM), the employees of LGM were transferred together with the business to

¹¹⁶ Note 6 above.

¹¹⁷ *Fourie & another v Iscor Ltd* (2000) BLLR 1269 (LC) at para 8.

¹¹⁸ Section 197 (1) of the LRA.

¹¹⁹ Note 6 above at 44.

¹²⁰ M Wallis ‘It’s not bye-bye to ‘by’: Some reflections on Section 197 of LRA’ (2013) 34 ILJ 779 at 785.

¹²¹ Note 6 above.

the employer. SAA entered into an outsourcing agreement in terms of which the tenure of the agreement was to be ten years. LGM was to provide its services for a fee, assets and inventory were sold to LGM which upon the termination of the contract SAA would be entitled to repurchase them. LGM was allowed to use, amongst other things, SAA's office space, networks and upon the termination of the contract, these facilities would be transferred back to SAA. The agreement was terminated prior to the fulfilment of its duration, and the question the court had to ask was whether the purported change of ownership of the outsourced business, either back to SAA or a prospective tenderer, would constitute a transfer of a business as a going concern. Thus the court had to define and interpret the ambit of section 197(1) of the LRA.

3.5 Is there a transfer of a business?

In terms of section 197(1) a business consists of the whole or part of a business, trade, undertaking or service.¹²² The definition of business is not only limited to profit-making commercial activities. In order to give full effect to the purpose of section 197, the term 'business' is applicable to a wide range of transactions including: exchange of assets; donations; mergers; takeovers transfers and sales.¹²³ What constitutes a business for the purposes of the provision will be objectively determined on a case by case basis. The theme running through the recent cases is that the transfer should relate to an economic activity. In *Unitrans Supply Chain Solution (Pty) and Another v Nampak Glass (Pty) Ltd and Others* the court held that:

'A transfer must relate to an economic entity, defined by the European Court of Justice to mean an organised grouping of persons and assets facilitating the exercise of an economic activity that pursues a specific objective, and a determination of whether that entity retains its identity after the transfer.'¹²⁴

The important question is whether taking an objective assessment of circumstances in which the employees are employed, there exists an economic entity which, regardless of the changes, remains identifiable but not necessarily indistinguishable following the alleged transfer.¹²⁵ An economic entity may be defined as "an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues an economic

¹²² Section 197(1)(a) of the LRA.

¹²³ van Niekerk (note 73 above) at 329.

¹²⁴ Note 25 above at para 15.

¹²⁵ "HARSCO Metals v Arcelomittal SA and Others (2012) 33 ILJ 901 (LC) at para 31."

objective”.¹²⁶ A variety of components might be said to comprise a business, including goodwill, operational resources and a workforce, amongst other things. For instance, in the case of *Unitrans Supply Chain Solution (Pty) and another v Nampak Glass (Pty) Ltd and others*, the court held that Unitrans comprised an organised group of resources which included the right to perform services,¹²⁷ the ownership of assets¹²⁸ and the performance of specific activities as an economic entity, and in particular, a service in terms of the definition.¹²⁹

3.6 Is there transfer as a going concern?

In terms of section 197(1)(b) ‘transfer’ is defined as the transfer of a business by one employer (the old employer) to another employer (the new employer) as a going concern’.¹³⁰

In *Aviation Union of SA* the court held that confining the application of transfer to ‘old employer’ defeated the purpose of the section.¹³¹ It held that the essential enquiry was whether or not the business had changed hands.

The real question with regard to transfer as a going concern is not the identity of the parties who affect the transfer, but rather the identity of the commercial transaction which is being transferred.¹³² The court held that:

‘... the word by must be given its ordinary meaning. We must ask ourselves... does the transaction create rights and obligations that require an entity to transfer something in favour, or for the benefit of, another? If so, does the obligation imposed within a transaction, fairly read, contemplate a transferor who has the obligation to effect a transfer to happen, and a transferee who receives the transfer? If the answer to both these questions is in the affirmative, then the transaction contemplates transfer by the transferor to the transferee.’¹³³

In other words, the court entrenched the principles that the identity of the parties who transfer are not rigid. Furthermore, the purpose of the section is to protect employment security,

¹²⁶ “*Schatz v Elliot International (Pty) Ltd & another* (2008) 29 ILJ 2286 (LC) at 53.”

¹²⁷ “*Ibid.*”

¹²⁸ “*Ibid.*”

¹²⁹ “*Ibid.*”

¹³⁰ Section 197(1)(b) of the LRA.

¹³¹ Note 6 above at para 46.

¹³² *Ibid* at para 102.

¹³³ *Ibid* at para 113.

therefore in order to serve this purpose, scrutiny of the rights and obligations created by the commercial transaction are of paramount importance, rather than who effects these commercial transactions. Put differently, the question is whether the economic entity that is being transferred retains its status, as well as its operations, even after it has been transferred.

The term ‘going concern’ is not defined by the provision. Be that as it may, it is important to note that the application of section 197 is automated by the satisfaction of these three requirements.¹³⁴ It is sufficient to declare a transaction as ‘transfer of a business as a going concern’ to fulfil the third requirement.¹³⁵ However, where the court needs to conduct a factual enquiry into whether or not the third requirement has been fulfilled, it is required to satisfy that ‘a business is transferred as a going concern when the economic entity that comprises the business retains its identity after the transfer’.¹³⁶ The test for determining whether a business was transferred as a going concern was laid down in *National Health and Allied Workers v University of Cape Town* in which the court held:

‘What is transferred must be a business in operation ‘so that the business remains the same but in different hands’. Whether that has occurred is a matter of fact which must be determined objectively in the light of the circumstances of each transaction. In deciding whether a business has been transferred as a going concern, regard must be given to the sustenance and not the form of the transaction. A number of factors will be relevant to the question whether a transfer of a business as a going concern has occurred, such as the transfer or otherwise of assets both tangible and intangible, whether or not workers are taken over by the new employer, whether customers are transferred, and whether or not the same business is being carried on by the new employer. What must be stressed is that this list of factors is not exhaustive, and that none of them is decisive individually’.¹³⁷

Once a commercial transaction fulfils all three requirements, the provisions of section 197 are activated.

¹³⁴ Note 25 above .

¹³⁵ Note 6 above at para 49.

¹³⁶ Van Niekerk (Note 73 above) at 332.

¹³⁷ *National Health and Allied Workers v University of Cape Town* (2003) 2 BCLR (CC) at para 45.

3.7 The effect of the transfer: section 197(2)

The Labour Relations Amendment Act, No 12 of 2002 clarified a longstanding debate regarding the automatic transferability of employees when a business is transferred as a going concern.¹³⁸ The principle of automatic transfer first introduced in *Kebeni* was read into the old section 197 by the case of *Schutte v Powerplus Performance (Pty) Ltd* in which the court endorsed without hesitation the automatic transfer approach.¹³⁹ In *Foodgro, A Division of Leisurennet Ltd v Keil* the court held that the purpose of the old section 197 was to protect the employees.¹⁴⁰ Froneman DJP stated that automatic transfer of employment together with continuity of employment were safeguards which employees did not previously hold under common law.¹⁴¹ By juxtaposing the purpose of the old section 197 with the position of the common law, he concluded that it was inconceivable that the section did not intend an automatic transfer because such an understanding of the provision would reverse the status of transfers of businesses back to the common law principles, and thus leave the employee vulnerable. He stated that:

‘ if the purpose was to make it as easy as possible for purchasers to acquire a business from another without incurring obligations to existing employees, the introduction of s 197 would have been unnecessary. The common law would have created adequately for that situation; the provisions relating to automatic transfers of contracts of employment (s 197(1) and (2)) and the non-interruption of an employee's 'continuity of employment' (s 197(4)) secure advantages not previously enjoyed by employees;’¹⁴²

The new section 197 explicitly states under section 197(2)(a) that employment contracts shall be transferred automatically. The court in *Aviation Union of SA* clarified the term ‘automatic transfer’ when it held that employment contracts are transferred without a declaration by a court.¹⁴³ Thus irrespective of the employee’s consent, employment contracts are transferred by operation of law.¹⁴⁴ Although automatic transfer denotes that employees are obliged to

¹³⁸ N Smit ‘Automatic transfer of employment contracts and the power to object’ (2003) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 465 at 470.

¹³⁹ *Schutte v Powerplus Performance (Pty) Ltd* 1999 20 ILJ 655 (LC).

¹⁴⁰ *Foodgro, A Division of Leisurennet Ltd v Keil* (1999) 20 ILJ 2521 (LAC) at para 14.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ Note 6 above at para 43.

¹⁴⁴ *Franmann Services (Pty) Ltd v Simba (Pty) Ltd & another* (2013) 34 ILJ 897 (LC), at para 7.

accept the new employer, it is open to an employee to resign if he or she is displeased with the new employer.¹⁴⁵

The provisions of the new section 197(2) regulate the default legal consequences of a transfer of a business as a going concern. The effect of a transfer of a business as a going concern is that the transferee employer automatically becomes the new employer of the employees of the transferor employer.¹⁴⁶ The transferee steps into the shoes of the transferor as the latter's employee contracts are automatically transferred to the former.¹⁴⁷ All rights and obligations between the transferor and the employees at the time of transfer continue to be in force as rights of the transferee and the new employees.¹⁴⁸ In essence, section 197 transfers an employment relationship between the employees and the new employer.¹⁴⁹ All actions performed by the old employer before the transfer, such as dismissals of workers, or the commission of unfair labour practices, amongst other things, are considered to have been concluded by the new employer.¹⁵⁰ Lastly, the transfer of a business does not interrupt the continuity of employment.¹⁵¹ Put differently, where section 197 is applicable, an employee's contract of employment automatically continues with the new employer.

3.8 Which terms and conditions transfer?

The terms and conditions under which the employees are transferred need not be exactly the same as the terms and conditions enjoyed by the employees in their previous employment.¹⁵² Even though the automatic consequences provided for in section 197(2) are applicable by operation of law, in terms of section 197(3) it would be regarded as sufficient for the purposes of section 197 if the transfer was made 'on the whole not less than favourable' terms and conditions as the previous employer.¹⁵³ Employers are also at liberty to transfer employees to different retirement, provident or pension funds, provided that the requirements set out in section 14(1)(c) of the Pension Fund Act¹⁵⁴ are met.¹⁵⁵

¹⁴⁵ van Niekerk (note 73 above).

¹⁴⁶ S 197(2) (a) of the LRA.

¹⁴⁷ Grogan (note 3 above) at 299.

¹⁴⁸ S 197(2)(b) of the Labour Relations Act 66 of 1995.

¹⁴⁹ C Bosch 'Reincarnating the vibrant horse? The 2002 amendments and transfers of undertakings' (2002) 6 Law Democracy & Dev. 84 at 89.

¹⁵⁰ S 197(2)(c) of the LRA.

¹⁵¹ S 197(2)(d) of the LRA.

¹⁵² van Niekerk (note 73 above) at 342.

¹⁵³ *Ibid.*

¹⁵⁴ Section 14(1)(c) of the Pension Fund Act 24 of 1956.

¹⁵⁵ Section 197(4) of the LRA; A van Niekerk et al *Law@Work* 2 ed (2012) at 314.

3.9 A qualification of the automatic consequences through collective agreements and collective bargaining

However, section 197(3) imposes an internal limitation on the application of the section. Section 197(3) does not apply where a term, even if it is a single term and condition is regulated by a collective agreement.¹⁵⁶ In other words, in terms of section 197(3), it is sufficient for the new employer to employ the transferred employees on terms and conditions that are ‘on the whole not less favourable’ to them, than those on which they were employed by the old employer. However, this provision does not apply to employees if any of their conditions of employment are established by a collective agreement. Van Niekerk et al write that the wording of section 197(3) suggests that even if a single term and condition of employment is regulated by a collective agreement, the ‘on the whole not less favourable’ qualification does not apply.¹⁵⁷ This qualification shows the importance of collective bargaining and the effect it can have on transfers.

3.10 Other agreed variation of consequences

Section 197 does not oblige the old or new employer to consult employees, or their representatives, affected by the transfer.¹⁵⁸ No provision is made for consultation regarding a proposed transfer, its timing, effect or consequences. There is only a limited duty to disclose relevant information, found in section 197(5)(b), namely in those instances where the old or new employer wishes to negotiate an agreement as contemplated by section 197(2) discussed below. The absence of a general duty to consult and disclose information, is a significant difference between the South African and international regulation of transfer of business.¹⁵⁹

Section 197 is not however inflexible, and specifically provides for the agreed variation of some or all of its automatic consequences.¹⁶⁰ The new employer might have different interests which it needs to regulate; section 197(6) provides the employer with a limited level of flexibility.¹⁶¹ This type of agreement is called a ‘contracting out’ agreement. The agreement must be in writing, and must be concluded between the old employer, the new employer or both of them acting jointly on the one hand, and a consulting party defined by

¹⁵⁶ van Niekerk (note 73 above) at 342.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid* at 343.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ C Bosch ‘Balancing the Act: Fairness and Transfer of Business’ (2004) 25 ILJ 923 at 935.

section 189(1) on the other hand. Section 189 establishes the following consulting parties: (i) any person whom the employer is required to consult in terms of a collective agreement; (ii) if there is no such collective agreement, any registered trade union whose members are likely to be affected; (iii) or the employees likely to be affected or their representatives nominated for that purpose. In terms of section 197(6), employers may contract out of two legislated consequences of a transfer of a business as a going concern. Section 197(6) may vary the default legal consequences as regulated by section 197(2)¹⁶² as well as the binding nature of all collective agreements in terms of section 197(5)(b).¹⁶³ The provisions of section 197(3) and 197(6) show that the process and outcome of a transfer of a business may be influenced by collective bargaining. This will be discussed in detail in the next chapter.

3.11 Conclusion

The fulfilment of the threshold requirements of section 197 is necessary for the automatic application of the section. Once the requirements are met, the legislation provides the parties to the agreement with default terms and conditions which they may elect to use in order to regulate the relationship with the transferred employees. This is evidenced by the rights and obligations created by the LRA which apply by operation of law. However, the extent of the reach of section 197 is limited in various instances. Where collective agreements regulate terms and conditions of employment, the qualification of ‘not less favourable’ arguably does not apply, and in terms of section 197(6), employees may initiate a collective bargaining process in order to advance interests which they feel might be of interest under the new employer.

¹⁶² Section 197(2) of the LRA.

¹⁶³ Section 197(5)(b) of the LRA.

CHAPTER 4: COLLECTIVE BARGAINING AND SECTION 197

The issue of how workers and their unions, through collective bargaining, can affect transfers is examined in this chapter.

4.1 Agreement that a transaction constitutes a section 197 transfer

If the transaction in terms of which a business is transferred specifies that it is or will be transferred as a going concern, this term would constitute sufficient proof that the transfer is a section 197 transfer.

This means the unions can intercede and negotiate for the transfer agreement/ transaction to include such a specific term, namely that the transaction is a ‘transfer of a business as a going concern’.

If this is done and a dispute arises as to whether the transfer constitutes a section 197 transfer, the above term in the transaction would be sufficient proof that the transfer is a section 197 transfer. If the outgoing employer refuses to agree to negotiate such a term with the transferee, the union can refer an interest dispute concerning a ‘refusal to bargain’ to the CCMA or relevant bargaining council, obtain a certificate, and issue a strike notice.

4.2 The automatic consequences of a transfer of a business as a going concern

As explained previously, if a business is transferred as a going concern, the following consequences apply in terms of section 197(2):

- The new employer is automatically substituted for the old employer in respect of all contracts of employment in existence immediately before the date of the transfer;
- All rights and obligations between the old employer and an employee at the time of the transfer continue in force as rights and obligations between the new employer and the employee;
- The transfer does not interrupt an employees’ continuity of employment, and the employee’s contract of employment continues with the new employer as if with the old employer;
- Anything done before the transfer by, or in relation to the old employer, is considered to have been done by, or in relation to the new employer. This includes the dismissal

of an employee, the commission of an unfair labour practice, and the commission of an act of discrimination.¹⁶⁴

The new employer need not apply identical terms and conditions of employment to those of the previous employer. Section 197(3) provides that it is sufficient for the new employer to apply terms and conditions that are ‘on the whole not less favourable’ to them. However, the wording of section 197(3) suggests that even if a single term and condition of employment of the transferred employees is regulated by a collective agreement concluded between the old employer and the employees, the ‘on the whole not less favourable’ qualification does not apply. The new employer is bound by the collective agreement, and must provide the same terms as those set out in the collective agreement.

4.3 Variation of the consequences of a transfer: section 197(6) agreements

Section 197(2) specifically provides for the agreed variation of some or all of the automatic legal consequences of a transfer, described earlier on. There are two types of agreements envisaged by section 197. The first type of agreement is regulated by section 197(6). The second type of agreement is regulated by section 197(7). In terms of section 197(6), employers may contract out of the default legal consequences of a transfer of a business as a going concern. This is called a contracting out agreement.¹⁶⁵ Even though the application of section 197 is unavoidable, the effect of section 197(6) is such that the employer is put in a position to tailor the terms and conditions of the transfer with regard to employee rights and obligations to suit his or her circumstances. However, section 197(6) only affords the employers limited flexibility.¹⁶⁶

In terms of section 197(6), there are two peremptory requirements that must be satisfied in order for the contracting out agreement to negate the application of section 197(2). Firstly, the contracting out agreement must be in writing.¹⁶⁷ Secondly, the LRA prescribes a limited set of bodies that may be parties to the agreement. In terms of section 197(6)(a), the parties to the contracting out agreement are limited to either the new employer, or old employer independently, or both employers on the one hand, and any party or body listed in section

¹⁶⁴ Van Niekerk (note 73 above) 328.

¹⁶⁵ *SAMWU & another v SALGA & others* (2010) 8 BLLR (LC).

¹⁶⁶ *Ibid* at para 14.

¹⁶⁷ Section 197(6) of the LRA.

189(1) on the other hand.¹⁶⁸ In terms of section 197(6)(a)(ii), ‘the agreement is concluded between the old employer on the one hand ... and the appropriate person or body referred to in section 189(1) on the other’.¹⁶⁹ Section 197(6)(a)(ii) cross-references a hierarchy of parties who must be consulted when there is a purported dismissal of employees based on operational requirements.¹⁷⁰

4.4 The bargaining parties

Section 189(1) ranks the hierarchy of parties to be consulted in this order: a person required to be consulted in terms of a collective agreement; a workplace forum if the employees affected are employed in a workplace where there is a workplace forum; a registered trade union whose members are likely to be affected by the proposed dismissals, and the employees likely to be so affected where they do not enjoy trade union representation in a particular workplace.¹⁷¹

The hierarchy of bargaining parties set out in section 189(1) entrenches the principle of majoritarianism. In a number of cases, the courts have declared that a majority trade union can conclude binding collective agreements on behalf of all employees regardless of their membership. In the case of *Chamber of Mines of SA obo Harmony Gold Mining Company LTD v AMCU*, the court found that in line with the principles of democracy in the workplace, the principle of majoritarianism should prevail.¹⁷² However, a collective agreement concluded between a majority trade union and an employer binds non-parties if the non-parties to the agreement are specifically mentioned in the collective agreement.¹⁷³

Strict compliance within the hierarchy of bargaining parties is required. In practical terms, when an employer seeks to change certain terms and conditions of employment for its new employees, it is bound to negotiate with a party or body listed in section 189(1) in the descending order, and not in the alternative. This principle has been clearly established by the labour courts and it will be discussed below. In terms of section 197(6) read with 189(1), an employer must refer to the collective agreements which currently exist in the workplace. If a

¹⁶⁸ Section 197(6) (a)(i) – (ii) of the LRA.

¹⁶⁹ Section 197(6) (a)(i) – (ii) of the LRA.

¹⁷⁰ Section 189 of the LRA.

¹⁷¹ Note 161 above) at para 6.

¹⁷² *Ibid* at para 21.

¹⁷³ Note 33 above at para 29.

collective agreement exclusively nominates a majority trade union, that trade union has the exclusive right to negotiate with the employer on behalf of all employees.

4.5 Non-compliance with section 197(6)

In the event that a contracting out agreement fails to meet the peremptory requirements set out above, the agreement will be regarded as invalid. The failure to conclude a contracting out agreement does not dissolve the whole transaction. Section 197(6) is a voluntary bargaining process. In the instance where a purported agreement is defectively concluded, the transfer will be deemed to have transferred in terms of section 197(2).¹⁷⁴

Douglas & others v Gauteng MEC for Health [2008] JOL 21397 (LC)

In the case of *Douglas & others v Gauteng MEC for Health* [2008] JOL 21397 (LC) the applicants were hospital managers in the employ of the Gauteng Anti-Tuberculosis Association (GATBA). GATBA was a section 21 company managing three hospitals which had been established to treat patients with tuberculosis. The Gauteng Department of Health (GDOH) initiated negotiations and concluded an agreement with GATBA in 2006. The effect of this agreement was that the GDOH would take over the management of three centres which were managed by GATBA. The applicants argued that the agreement between the two parties was tantamount to a transfer of a business as a going concern, and that it was agreed that they would be transferred on largely similar terms and conditions of employment as they had previously enjoyed. However, the GDOH presented the applicants with substantially different terms. The GDOH offered the applicants a third of their salary immediately before the transfer with less employment security.

The court had to look at two issues. The first issue was whether or not the agreement constituted a transfer of a business as a going concern in terms of section 197. The consequence of this would be that section 197(2) automatically applied. The second issue was whether or not the agreement transferring the GATBA to the GDOH was a valid document empowered to legally vary the automatic consequences of section 197.

The court held that the terms of the transfer agreement stipulated that the hospitals would be transferred as a going concern. Thus, it concluded that GATBA's business was transferred to

¹⁷⁴ F Coetzee, A Patel, R Beerman 'Section 197 of the Labour Relations Act – Some Comments on Practical Considerations when drafting agreements' (2013) 25 ILJ 1685 at 1669.

GDOH as a going concern and section 197 was applicable. The court subsequently dealt with the question whether the agreement between GATBA and GDOH was in compliance with section 197(6). A failure to do so would invalidate the agreement, and the business in question would be deemed to transfer in terms of section 197(2) instead. The case entrenched the importance of respecting the hierarchy of parties which need to be consulted with respect to a 'contracting out' agreement as envisaged by section 197(6). The court held that where parties wished to alter the terms and conditions of employment, they needed to adhere to the strict requirements of section 197(6). In interpreting the meaning of section 197(6) of the LRA, Van Niekerk AJ held that the provision should be understood by its ordinary meaning. Section 197(6) set two requirements: firstly it prescribed the parties to the contract, and secondly the format of the contract. He concluded that that because the employers changed the terms and conditions of employment without including the employees as consulting parties in any capacity as required by section 197(6), the agreement was ineffective. The Judge stressed that the consequence of this was that section 197 governed the transfer without any alteration, and, furthermore, the GDOH was obliged to transfer the applicant's contracts on the same terms and conditions they had previously enjoyed with GATBA.

Douglas was confirmed in *Van Zyl/ Asanti Safari Trading CC t/a The Hill Kwikspar & another*.¹⁷⁵ In the *Van Zyl* case the Commissioner confirmed the principle set in *Douglas* that any variation of the automatic application of section 197 was regulated by section 197(6). It was held that a contract of sale of a business entered into by two employers to the effect that it circumvented the application of section 197(2) was not a valid contracting out agreement in the absence of the consultation and negotiation process set out in section 197(6) of the LRA.

SAMWU and another v SALGA and others (2010) 8 BLLR 882 (LC)

In the case of *SAMWU and another v SALGA and others*, the responsibility over primary health was taken over by the Western Cape Department of Health (the Department) from the municipalities. The agreement between the two parties was declared a transfer of a business as a going concern in terms of section 197 of the LRA. The department sought to change the terms and conditions of employment for the employees. In essence, it sought to vary the automatic consequences set by section 197(2) to more favourable terms and conditions. The Department initiated consultations and negotiations as required by section 197(6). These

¹⁷⁵ *Van Zyl/ Asanti Safari Trading CC t/a The Hill Kwikspar & another* (2009) 2 BALR 206 (CCMA).

negotiations were not successful. The Department and municipalities alleged that the trade unions refused to negotiate. After two years of failed negotiations, there was a deadlock. The Department subsequently concluded a transfer agreement with South African Local Government Association (SALGA). In terms of the agreement, operational control of the primary health services was transferred to the Department. With regard to the terms and conditions on which the employees would be transferred, it was held that they would be transferred either in terms of section 197(6) or any applicable legislation. Subsequent to this agreement, the transfer of employees was negotiated with the employees on an individual basis in terms of section 197(6). The applicants (the unions) sought to invalidate these agreements by contending that they were in violation of section 197(6).

Van Niekerk J explained the purpose of section 197(6). He held that the purpose of the section was to allow the employer to vary the consequence of the replacement of the old employer as well as stipulate how the terms and conditions of the employees would be different. The first requirement of a contracting out agreement was clear; the agreement must be in writing. Van Niekerk J also explained the second requirement. In terms of section 197(6)(a)(ii) ‘an agreement contemplated in subsection (2) must be in writing, and concluded between either of the employers and the appropriate person or body referred to in section 189(1), on the other’.¹⁷⁶ Section 198(1) lists a hierarchy of parties who must be consulted when there is a purported dismissal for operation reasons. Put differently, when a category of persons is ranked first, the employer must negotiate with that category failing which he or she should resort to a transfer in terms of section 197(2). Thus, an employer is not at liberty to change the negotiating parties when he or she is faced with a deadlock or an impasse. Thus, higher ranked parties enjoy an exclusive right to negotiate with the employer without the threat of being undercut by the employer.

Although section 189(1) speaks of consultation, in the context of section 197, Van Niekerk J explained that section 189(1) sets a hierarchy of bargaining parties.¹⁷⁷ Strict compliance with the hierarchy serves to ensure that the parties with whom the employer negotiates have the authority to bargain on behalf of the employees, and ultimately to vary their current terms and conditions of employment.¹⁷⁸ In applying the law to the facts, the court held that the unions

¹⁷⁶ Section 197(6)(a) of the LRA.

¹⁷⁷ Note 29 above at para 7.

¹⁷⁸ *Ibid* at para 14.

were the only parties stipulated in collective agreements as the parties the municipalities were entitled to consult in the instance of a dismissal. Therefore, the Department and SALGA were bound by the operation of section 197(6) to exclusively bargain with the unions. The court concluded that in the absence of a valid contracting out agreement, the employees should be transferred in terms of the default consequences of a transfer of a business as a going concern. It finally noted that there were two options available to an employer where there was a deadlock in bargaining: firstly, the employer may choose to refuse to proceed with the transfer and secondly, the employer would be forced to transfer the employment contracts on the same or similar terms and conditions as were enjoyed by the employees prior to the transfer.

SAMWU and another was applied in *Maphongwana and Others v KSD Municipality and Others*.¹⁷⁹ Judge Lallie confirmed that when parties reach a deadlock in the collective bargaining process regulated by section 197(6), the transfer of a business is not invalidated by the failure to reach consensus.¹⁸⁰ Instead, the legal consequences envisaged in section 197(2) are applicable by operation of law.¹⁸¹ In this case, the court held that the failure of the Department of Health and the KSD Municipality to reach a compromise with the applicant's representatives at the collective bargaining stages did not preclude the application of section 197 and as such, although the agreements were not reached, the primary health care services along with the employees were accordingly transferred.¹⁸²

4.6 The interests of the parties

In *SAMWU and another*, the court explained that section 197(6) regulates a collective bargaining framework within which employers and employees may vary the automatic consequences of section 197 in order to accommodate each other's interests and conclude a mutually beneficial transaction. Section 197(6) was designed to create a collective bargaining framework within which the employers could negotiate terms and conditions of transfer with legitimately authorised bodies who would negotiate in the best interest of the employees. Besides the requirements discussed above, section 197(6) also places a duty on the employer to provide the employees or their representatives with information related to the terms and

¹⁷⁹ *Maphongwana and Others v KSD Municipality and Others (P412/12) [2012] ZALCPE 10* (12 November 2012).

¹⁸⁰ *Ibid* at para 6 -7.

¹⁸¹ *Ibid* at para 8.

¹⁸² *Ibid* at para 8.

conditions they wish to negotiate.¹⁸³ It is important to reiterate that a section 197(6) agreement is not mandatory. Thus, section 197(6) does not create a right to collective bargaining or consultation, nor is there a correlative duty on the employer to engage in section 197(6) negotiations.¹⁸⁴

Before one looks at the intricacies of the collective bargaining relationship between the parties stipulated in section 197(6), it is prudent to understand the potential interests of all of the parties involved.

4.7 Trade Union Interests

Section 197 is instructive; the primary purpose of the provision is the protection of employment. Section 197(6) presents trade unions and employees with the opportunity to initiate collective bargaining with the employer. The LRA does not create a duty to collective bargaining.¹⁸⁵ Although in terms of section 197(5), collective agreements transfer from the old employer to the new employer, save for an alteration in accordance with section 197(6), such collective agreements are only limited to the interests of the employees and not the trade unions themselves.¹⁸⁶ The effect of this provision is that agreements that regulated the organisational rights and recognition agreements are not transferred.¹⁸⁷ In essence, trade unions must embark on collective bargaining afresh with the new employer, in order to conclude collective agreements which recognise their organisational rights. This collective bargaining process is permissible in terms of section 197(6). The issue of trade union specific interests has manifested itself in the context of mergers and acquisitions.

It is trite in labour law studies that section 197 of the LRA is applicable to mergers and acquisitions. The dilemma faced by trade unions has presented itself in the mergers and acquisitions context.¹⁸⁸ As stated above, section 197(5) is limited to collective agreements which relate to employee interests only. Through section 197(6), trade unions are presented with an opportunity to enter into a collective bargaining process on both topics that concern employees specifically as well as trade union interests. Organisational rights form the

¹⁸³ Section 197(6)(b) of the LRA; A van Niekerk *Law@Work* 2 ed (2012) at 343.

¹⁸⁴ *SACCAWU Western Province Sports Club t/a Kelvin Grove Club* (2008) JOL 22010 (LC) at para 22.

¹⁸⁵ Godfrey et al (note 84 above) at page 21.

¹⁸⁶ Bosch (note 145 above) at 935.

¹⁸⁷ *Ibid.*

¹⁸⁸ J Staples 'Taking public interest too far: Walmart stores inc v Massmart Holdings Ltd' (2013) 25 SA Merc LJ 94. Her discussion of the conflation of competition law and labour law is an example of this notion.

backbone of trade union activism in the workplace. Briefly, the power and influence of a trade union in the workplace depends on the size of its membership, its organisational rights in the particular workplace, and its relationship with its members and its organisational and negotiating skills. Trade unions can acquire rights themselves which are separate from the rights of its members. These rights are integral to the power and influence of the union in the workplace. In line with the rule that there is no legal duty to collective bargaining,¹⁸⁹ the power of a trade union to force the employer to bargain hinges on the extent of the organisational rights they have acquired in the workplace, and the size and nature of their membership, especially whether they are a minority or majority trade union as defined in a collective agreement.

Essentially, the argument put by trade unions is that trade union representation is an essential component of employment security, especially in instances where the transferee is a large business entity. Although this paper does not suggest that trade union specific interests should be equated to employee interests for the purposes of section 197, the argument asserts that trade union organisational rights are a legitimate collective bargaining topic in terms of section 197(6).

In her article, 'Taking public interest too far: Walmart Stores Inc v Massmart Holdings Ltd',¹⁹⁰ J Staples argued that the imposition of the condition that Walmart should recognise SACCAWU as a representative union for three years when it did not meet the threshold requirements within Massmart, transgressed into matters which should have been remitted to labour law to regulate.¹⁹¹ In this matter,¹⁹² the trade unions applied to the Competition Appeal Court with regard to the public interest concerns that had arisen as a result of the proposed merger. Walmart stores Inc had a history of 'non-unionisation' and SACCAWU was concerned that employee representation through trade unions would diminish over the years under Walmart's ownership. The court granted SACCAWU three years unquestionable status as a majority union, a status which ordinarily, trade unions should bargain for.

¹⁸⁹ Note 86 above.

¹⁹⁰ Staples (note 184 above).

¹⁹¹ *Ibid* at 98 – 101.

¹⁹² *Minister of Economic Development and Others v Competition Tribunal and Others; South African Commercial, Catering and Allied Workers Union v Walmart Stores Inc and Another* (2012) 1 CPLR 6 (CAC).

J Staples argues that competition law jurisprudence prior to the Walmart case had settled the murky line between labour issues and public interest issues in the competition law context. In the case of *Unilever Plc v Competition Commission & CEPPWAWU*¹⁹³ the Competition Tribunal stated that employment-related issues relating to mergers should be addressed through collective bargaining and the LRA. The tribunal also encouraged the interacting between trade unions and employers in the case of mergers. This circumvention of the LRA and collective bargaining is a symptom of a problematic set up of section 197. Section 197(6) is written such that the employer is given more power. The success of a commercial transaction is not dependent on the conclusion of collective agreements. Businesses are transferrable regardless because section 197(2) applies by operation of law. This might compel trade unions to use strike action in order to realise their demands.

The *Walmart Inc* case serves to illustrate the importance of trade union rights to trade unions. Mergers may be defined as the acquisition and control of one firm by another whether directly or indirectly.¹⁹⁴ The effect of mergers is that they concentrate the competition in an industry by decreasing the number of competitors. This fact incentivises powerful trade unions to seek organisational rights with the new employer so that they may intensify their presence in a particular sector. Walmart Inc. is an American company notorious for its reluctance to recognise trade unions.¹⁹⁵ Its stake in Massmart gives it control over one of the country's leading general merchandise dealers. This means that it has control over thousands of employees. Trade unions have an interest in representing these workers. The *Walmart* case shows the extent to which trade unions attempt to secure these rights. It is important to understand that this is not 'merger and acquisitions' specific, but applicable to most transfers of a business as a going concern.

4.8 Employee Interests

The transfer of employment provisions of the LRA are a clear example of the legislation's paternalistic nature. In terms of section 187, the dismissal of an employee based on a transfer or a reason related to a transfer of a business in terms of section 197 is regarded as automatically unfair.¹⁹⁶ The legislature seeks to preserve the security of employment. For instance, courts have held that pursuant to the acceptance of an employee into the new

¹⁹³ *Unilever Plc v Competition Commission & CEPPWAWU* [2001–2002] CPLR 336 (CT).

¹⁹⁴ Section 12 of the Competition Act 89 of 1998.

¹⁹⁵ Note 188 above.

¹⁹⁶ Section 187(1)(g) of the LRA.

employer's workforce, an employee may not forfeit his or her years of service.¹⁹⁷ This is an attempt to protect the continuity of employment of an employee as well as the benefits that may accrue to the employee by virtue of his or her service.

A number of statistical indicators are used to track the employment opportunities of a country.¹⁹⁸ The first one is the 'employment to population ratio indicator' which measures the working age population between 15 and 64 who are employed.¹⁹⁹ In terms of the Quarterly Labour Force Survey, the employment to population ratio of the South African workforce was sitting at 41.9%. The second indicator is the 'unemployment rate' which measures the number of unemployed citizens as a percentage of the labour force. By the third quarter of 2013, South Africa's unemployment rate was sitting at 24.7%.²⁰⁰ There is an unmistakable job deficit in the country. Given this background, it is no surprise that employment security is an interest of employees.

4.9 Employer's Interests

The purpose of section 197 is to facilitate commercial transactions.²⁰¹ It is in the employer's interests to fulfil his or her desire to conclude a favourable agreement. Under the common law dispensation, it was in the new employer's discretion to offer employment to the retrenched employees. The LRA relinquishes this 'right' by automatically transferring the employees to the new employer. The LRA offers an employer the opportunity to alter the terms and conditions of employment in two other provisions besides section 197(6): in terms of section 197(3), the employer is permitted to transfer the employees on different terms provided that they are not 'on the whole not less favourable to the employees than those on which they were employed by the old employer'.²⁰² Furthermore, in terms of section 197(4), the employer may unilaterally change the pension, provident or retirement fund of the employees.²⁰³ However as can be seen in *Douglas, SAMWU, Maphongwana* and *Van Zyl*, employees express a keen interest in changing this automatic consequence from time to time. This interest might be influenced by the employer's concern to maximise profitability, efficiency or survival of the business.

¹⁹⁷ *AST Holdings (Pty) Ltd v Ross* (2007) 28 ILJ 1988 (LAC).

¹⁹⁸ T Cohen & L Moodley 'Achieving "decent work" in South Africa?' (2012) 25(2) PELJ at 325.

¹⁹⁹ <http://www.statssa.gov.za/publications/p0211/p02113rdquarter2013.pdf> accessed 27 Oct. 14.

²⁰⁰ http://beta2.statssa.gov.za/?page_id=737&id=1 accessed on 27 Oct. 14.

²⁰¹ Note 19 above) at para 45.

²⁰² Section 197(3) of the LRA.

²⁰³ Section 197(4) of the LRA.

4.10 Analysis: Collective Bargaining in terms of 197(6)

Section 197 applies by operation of law. In the instance where a transaction fulfils the requirements of a transfer of a business as a going concern, trade unions can apply to a court of law to have the transaction declared as such.²⁰⁴ Trade unions can however affect the nature of the transaction and the consequences of a transfer through collective bargaining.

It could be argued that section 197 is designed to favour employers. Normally, the collective bargaining process is designed such that the parties are reliant completely on their own devices. Section 197 of the LRA changes this. In terms of *Douglas* and *SAMWU and another*; the failure to conclude a contracting out agreement has no unfavourable consequence to the employer besides the said failure. There is no obligation to bargain in good faith in the South African labour law dispensation. One could argue that section 197(2) provides opportunities for employers to test the water and engage in collective bargaining with employees without real intention of compromise.

Trade Unions are not prohibited by section 197 to initiate bargaining with the employer in terms of section 197(6). On the other hand, an employer is not obliged to bargain. This might give rise to refuse a bargain dispute which is a legitimate cause for industrial action as a means to force an employer to bargain. As stated in chapter 2, once the requirements of section 64 of the LRA have been fulfilled and the strike is not prohibited by section 65, a trade union has the authority to strike.

The bargaining playing field is levelled by the use of industrial action as a bargaining tool available to trade unions. In the case of *SATAWU v Moloto* the court held that once a strike complies with the procedural requirements and the strike is not prohibited by section 65 of the LRA, workers are free to embark on the strike.²⁰⁵ Thus when an employer refuses to bargain on the terms and conditions of employment as envisioned by section 197, trade unions would only be required to comply with the requirements of the LRA in order to embark on a strike in matters pertaining to the transfer of a business as a going concern. Section 197 is thus vulnerable to industrial action.

²⁰⁴ Note 25 above.

²⁰⁵ *SATAWU v Moloto* (2012) 6 SA 249 (CC).

4.11 Conclusion

Read as a whole, section 197 opens a door for collective bargaining through section 197(6). However, it cannot be disputed that there is a comfort zone created by the interpretation of the courts with regard to failures in section 197(6) facilitated bargaining processes. In essence, regardless of the outcome of the collective bargaining process, the commercial transaction remains protected. This could be argued to be biased towards the employer. It is thus emphasised that it is potentially only powerful trade unions with the power to force the hand of the employer through strikes that can effectively influence the process of a transfer of a business as a going concern.

CHAPTER 5: THE EUROPEAN EXAMPLE

5.1 Unpacking the European Union's Transfer of Undertakings Directive

Section 197 of the LRA was modelled on the European Union's Transfers of a Business Directive (the Directive),²⁰⁶ and the United Kingdom's Transfer of Undertakings (Protection of Employment) Regulations.²⁰⁷ As a result, the South African version is also employment security orientated.²⁰⁸ In terms of the Directive, member states may adapt the principles of the Directive either exactly as stated in the Directive, or by providing employees with more favourable terms and conditions.²⁰⁹ Article 3 of the Directive is titled 'Safeguarding employees' rights'. In terms of Article 3, existing employee rights which are embodied in collective agreements or otherwise, transfer to the transferee until such time as the collective agreements expire or new collective agreements are entered into.²¹⁰ However, Article 3 has an internal limitation. In terms of Article 3(4)(a) survivors' benefits and pension schemes do not automatically transfer. Furthermore, in terms of Article 4, the Directive protects employment security by prohibiting the dismissal of employees pursuant to a transfer of undertakings unless there are economical, technical or organisational reasons demanding changes in the workforce.²¹¹

The Directive specifically regulates trade union and employee representation. The Directive differentiates between two transfers. The first transfer type is one where the autonomy of a business is preserved despite the transfer. Article 6 of the Directive provides that 'the status and function of the representative or of the representation of the employees affected by the transfer shall be preserved on the same terms, and subject to the same conditions as existed before the date of the transfer by virtue of law, provided that the conditions necessary for the constitution of the employee's representation are fulfilled'.²¹² The second type of transfer is one where the autonomy of a business is not preserved. In this instance, the Directive provides that

'Member States shall take the necessary measures to ensure that employees transferred, who were represented before the transfer, continue to be properly

²⁰⁶ Transfers of a Business Directive 2001/23/EC. Hereafter referred to as the Directive.

²⁰⁷ The Transfer of Undertakings (Protection of Employment) Regulations 2006 No246.

²⁰⁸ Blackie & Horwitz (note 103 above) at 1393 – 1394.

²⁰⁹ Transfers of a Business Directive 2001/23/EC.

²¹⁰ Article 3(1) – (3) of the Directive.

²¹¹ Article 4(1) of the Directive.

²¹² Article 6(1) of the Directive.

represented during the period necessary for the reconstitution or reappointment of the representation of the employees in accordance with the national law'.²¹³

The definition of autonomy was defined by the European Court Justice in the case of *Federacion de Servicios Publicos de la UGT v Aynntamiento de la Linea* as:

‘Applied to an economic entity, the term means the powers, granted to those in charge of that entity, to organise, relatively freely and independently, the work within that entity in the pursuit of its specific economic activity and, more particularly, the powers to give orders and instructions, to allocate tasks to employees of the entity concerned and to determine the use of assets available to the entity, all without direct intervention from other organisational structures of the employer (‘the organisational powers’).²¹⁴

Thus, the guiding factor is whether or not the business or undertaking being transferred has retained its organisational powers despite the change in ownership.

In terms of Article 7 of the Directive, employees’ representatives or the employees themselves are entitled to information regarding the date, reasons, legal, economic or social implications, and any other measures envisaged in relation to the employees.

The ability to change the terms and conditions of employment from those of the transferor is restricted within the limits of the precedence set by the pivotal case of *Foreningen af Arbejdsledere Danmark v Daddy’s Dance Hall*.²¹⁵ This case concerned Mr Tellerup who had been employed by Irma Catering A/S as a restaurant manager at Palads Teatret (the Palace Theatre). Irma Catering A/S had taken a lease of the restaurants and bars in that theatre, A/S Palads Teatret. Under that contract, the lessee was not entitled to transfer its rights under the lease to third parties. As regards the recruitment of personnel it was agreed, inter alia, that the first three months were to be considered as a trial period during which either side could terminate the employment on 14 days’ notice. The lease was conditional on Irma Catering’s obtaining a licence to sell alcoholic beverages. The company failed to obtain the necessary licence and was therefore obliged to give up the lease; consequently it dismissed its staff, including Mr Tellerup, who, in accordance with the applicable Danish law, was dismissed

²¹³ Article 6(1) of the Directive.

²¹⁴ *Federacion de Servicios Publicos de la UGT v Aynntamiento de la Linea* ECJ C-151/09 at para 40 – 43.

²¹⁵ J McMullen ‘An Analysis of the Transfer of Undertakings (Protection of Employment) Regulations 2006’ (2006) 35(2) *Industrial Law Journal* 113 at page 125.

with three months' notice. However, Irma Catering continued to run the restaurants and bars until they were taken over by the new lessee. Without any intervention on the part of Irma Catering, Palads Teatret concluded a new lease with Daddy's Dance Hall A/S for the lease of the restaurants and bars in question. Daddy's Dance Hall concluded a management contract with Mr Tellerup pursuant to which Mr Tellerup was once again engaged as restaurant manager with effect from the date of the transfer of the lease. The contract stipulated a trial period of three months during which either party could give 14 days' notice. The clause concerning the trial period was inserted in the contract at Mr Tellerup's request. The issue lay in the change of notice periods albeit with the consent of Mr Tellerup. The court held that if the Directive was passed in order to protect employees, it thus embodied a set of obligations on member states rather than a voluntary code.²¹⁶ The court furthermore held that the obligations set by the Code precluded employees from waiving terms and conditions of employment even where the transferee had made other arrangements which on the whole might be more favourable for him or her.²¹⁷

5.2 Analysing Transfer of Undertakings (Protection of Employment) Regulations (TUPE)

Member States of the European Union, guided by the Directive, establish that the rights and protections that accrue to employees must be framed within the structure of the Directive. It is from this perspective that the United Kingdom's Transfer of Undertakings (Protection of Employment) Regulations must be understood. Historically, the common law rules on transfers of businesses as going concerns are rooted in English law. As discussed in previous chapters, the case of *Nokes v Doncaster Amalgamated Collieries Ltd* gave authority to the jurisprudence in labour law which divorced employment security as a legitimate concern during transfer undertakings. In *Nokes* it was held that automatic transfers infringe an employee's freedom to choose his or her employer, and thus he or she could not be compelled to serve a master.²¹⁸ Section 197 of the Labour Relations Act has since revoked the principles set in *Nokes*.

²¹⁶ *Foreningen af Arbejdsledere Danmark v Daddy's Dance Hall* Case 324 / 86 at page 743.

²¹⁷ *Ibid.*

²¹⁸ Note 104 above.

5.3 Scope and Application of TUPE

The new Transfer of Undertakings (Protection of Employment) Regulations (the Regulations) was enacted in 2006. TUPE replaces the previous 1981 Regulations in their entirety subject to the transitional provisions and savings as regulated by Article 21 of the Regulations.²¹⁹ The Regulations apply to Great Britain and Northern Ireland.²²⁰ The Regulations apply to transfers of undertakings that fit the requirements set out in Article 1. The Regulations are triggered where there has been a transfer of an undertaking or business²²¹ to another person or where there is a service provision change²²² in terms of which the undertaking or business being transferred must amount to an economic entity;²²³ secondly, the business or undertaking is situated in the United Kingdom immediately before the transfer;²²⁴ and the undertaking or business retains its identity after the transfer.²²⁵

5.4 Variation of terms and conditions

The effect of the transfer of undertakings is regulated by Article 4. In terms of Article 4, all contracts of employment entered into before the transfer shall be transferred with the legal effect such that they were concluded between the employees and the transferee.²²⁶ The transferee also steps into the shoes of the transferor with regard to all the rights, powers, duties and obligations that the transferor had with regard to the employment contracts which have been transferred.²²⁷ Lastly, unless it is for purposes other than reasons unrelated to the transfer, or it is for the purposes of economic, technological and organisational reasons, any variation of contracts subject to Article 9 of the Regulations are void.²²⁸

Despite the clear Directive from the *Daddy's Dance Hall case*, the Regulations have made room for the variation of terms and conditions of contract. As stated above, these variations are limited to the economic, technological and organisational (ETO) reasons as well as for reasons other than those related to the transfer.²²⁹ Regarding the latter requirement, it has

²¹⁹ Article 20 of The Transfer of Undertakings (Protection of Employment) Regulations 2006 No246. Hereafter referred to as the TUPE.

²²⁰ McMullen (note 211 above) at page 125.

²²¹ Article 3(1)(a) of the TUPE.

²²² Article 3(1)(b) of the TUPE.

²²³ Article 3(2) of the TUPE.

²²⁴ Article 3(1)(a) of the TUPE.

²²⁵ Article 3 of the TUPE.

²²⁶ Article 4(1) of the TUPE.

²²⁷ Article 4(2)(a) of the TUPE.

²²⁸ Article 4(4) & (5) of the TUPE.

²²⁹ 'The Ongoing Saga of TUPE and Contractual Variations' (2007) 36 Industrial Law Journal at 481.

been held that the test for the requirement stipulated in Article 4(4)(a) is considered to be whether the transfer was the sole cause of the change.²³⁰ Whereas the requirement for an ETO requires an employer to prove that there was a change in the workforce such as reductions in staff that necessitated changes in employee roles.²³¹ These provisions were included in the new 2006 Regulations as an attempt to create flexibility for the employer and employee to vary the terms and conditions of employment. However, these provisions could be problematic. It could be argued that the TUPE is in direct conflict with the principle set in *Daddy's Dance Hall* as in that case, the court made no exception for economic, technological or organisational reasons for the variation of contracts.²³²

The case of *Regent Security Services Ltd v Power*²³³ in confirmation of the Employment Appeal Tribunal's decision, the Court of Appeal clarified the issue of post-transfer variations contractual terms and conditions. The facts of the case were: The employee's employment contract provided for a retirement age of 60 years. However, there was a transfer of undertakings and after the relevant transfer for the purposes of what was then TUPE 1981, the employee agreed to a contractual retirement age of 65 years. Whether this was a valid amendment was pertinent to the dispute about whether the employee was able, when compelled to retire at 60, to claim unfair dismissal on the basis that he had not reached the normal retirement age in accordance with the new contract. Lord Justice Mummery held that:

‘As already explained the agreed variation of his retiring age to 65 could not deprive him of the transferred acquired right to retire at age 60. Regulation 12 is unavailable to Regent. Mr Power has not contracted out of his acquired right as to his retiring age i.e. the right to retire at 60. Rather than contracting out of, excluding or limiting his transferred acquired right, he has contracted into and obtained a right which he did not previously have i.e. he has obtained from Regent the right to continue working, if he so wishes, after the age of 60 and up to the age of 65. There simply is no contracting out of or exclusion or limitation of Mr Power's right to retire at 60, which can be rendered void by the Regulation, or disentitle him from relying on the varied retiring age, let alone release Regent from the variation offered by and agreed to by it.’

²³⁰ *Ralton v Havering College of Further Education* [2001] IRLR 738, EAT.

²³¹ *Berriman v Delabole Slate* [1985] IRLR 305, CA

²³² Note 225 above at 481.

²³³ *Regent Security Services Ltd v Power* [2007] EWCA Civ 1188.

Thus when employees sign contracts that change the terms and conditions of employment, they do not lose their rights as contained in the previous employer's contracts; rather, they obtain a new right. Thus transferred employees can therefore choose between enforcing either their acquired right, or the newly obtained right, on the basis of whichever they consider to be most favourable position. This interpretation is supported by the DTI's guidance to TUPE which provides that 'the underlying purpose of the Regulations is to ensure that employees are not penalised when a transfer takes place. Changes to terms and conditions agreed by the parties which are entirely positive are not prevented by the Regulations'.²³⁴

5.5 Trade Union Organisational Rights and Rights to Represent

TUPE recognises the connection between trade union interests in transfer of undertakings as well as the primary concern of employment. In terms of Article 6(1) of the Regulations, when the employees maintain a distinct identity from the remainder of the new employer's business, or where the business itself which has been transferred retains an independent identity, the trade union which was recognised by the old employer must be recognised by the new employer by operation of law.²³⁵ The trade union shall enjoy the same rights as it did with the previous employer subject to any variations that the new employer wants to make.²³⁶ In practical terms, this provision gives protection to commercial transactions such as, although not limited to, outsourcing.

5.6 Duty to inform and consult representatives

In terms of regulation 13 of TUPE, the employer has a duty to inform and consult representatives of the employees.

'Duty to inform and consult representatives

13. (1) In this regulation and regulations 14 and 15 references to affected employees, in relation to a relevant transfer, are to any employees of the transferor or the transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer) who may be affected by the transfer or may be affected by measures taken in connection with it; and references to the employer shall be construed accordingly.

²³⁴ The DTI 'EMPLOYMENT RIGHTS ON THE TRANSFER OF AN UNDERTAKING A GUIDE TO THE 2006 TUPE REGULATIONS FOR EMPLOYEES, EMPLOYERS AND REPRESENTATIVES' <http://webarchive.nationalarchives.gov.uk/20070603164510/http://www.dti.gov.uk/files/file20761.pdf> accessed on 21 November 2014.

²³⁵ Article 6 of the TUPE

²³⁶ Article 6(2) of the TUPE.

(2) Long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives of—

(a) the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;

(b) the legal, economic and social implications of the transfer for any affected employees;

(c) the measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and

(d) if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact.

(3) For the purposes of this regulation the appropriate representatives of any affected employees are—

(a) if the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union; or

(b) in any other case, whichever of the following employee representatives the employer chooses—

(i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this regulation, who (having regard to the purposes for, and the method by which they were appointed or elected) have authority from those employees to receive information and to be consulted about the transfer on their behalf;

(ii) employee representatives elected by any affected employees, for the purposes of this regulation, in an election satisfying the requirements of regulation 14(1).'

The definition of affected employees includes both those who might get transferred, pending the finalisation of the transfer undertaking, as well as those who have applied to the company being transferred.²³⁷ Case law has held that the employer has an obligation to provide

²³⁷ *Unison v Somerset County Council, Taunton Deane Borough Council and South West One Ltd* [2010] IRLR 207.

information to employees who readily have representatives, as well as encourage those who do not, to elect representatives in order to fulfil the employer's regulation 13 requirements.²³⁸ However, there is currently uncertainty regarding the time period required by the Directives for the furnishing of information to the representatives.²³⁹ Regulation merely states that 'long enough before a relevant transfer to enable the employer or any affected employees to consult'.

In terms of the Regulations, a failure by the employer to inform and consult is a justiciable right which the employee representatives may institute with the Employment Tribunal.²⁴⁰ The regulations provide four grounds through which representatives may bring claims to the tribunal namely: first, in the case of a failure relating to the election of employee representatives,²⁴¹ by any of his employees who are affected employees; second, in the case of any failure relating to employee representatives;²⁴² third', in the case of a failure relating to representatives of a trade union;²⁴³ lastly, in any other case by any of his employees who are affected employees.²⁴⁴ The employer may provide reasonably practicable justifications for the failure to perform the duties required, such as bringing evidence to the tribunal that will be the basis of their special circumstances claim that necessitated the employer not to comply.²⁴⁵ The tribunal has the powers to award compensation to the appropriate bodies and parties.²⁴⁶ However, said failure does not affect the validity of the transfer undertaking. In the case of *Marcroft v Heartland (Midlands) Ltd*, the Court of Appeal 'The remedy for breach of the regulation 13 duty is a claim in the employment tribunal under regulations 15 and 16, not an avoidance of the transfer that has taken place'.²⁴⁷

²³⁸ *Howard v Millrise Ltd t/a Colourflow* [2005] IRLR 84 as it was applied in *Hickling (t/a Imperial Day Nursery) and others v Marshall* UKEAT/0217/10.

²³⁹ *Baxter v Marks and Spencers* UKEAT/0162/05 at para 38.

²⁴⁰ Regulation 15(1) of the TUPE.

²⁴¹ Article 15(1)(a) of the TUPE.

²⁴² Article 15(1)(b) of the TUPE.

²⁴³ Article 15(1)(c) of the TUPE.

²⁴⁴ Article 15(1)(d) of the TUPE.

²⁴⁵ Regulation 15(2) of the TUPE.

²⁴⁶ Regulation 15(6) & (7) of the TUPE.

²⁴⁷ *Marcroft v Heartland (Midlands) Ltd* [2011] EWCA Civ 438 At paragraph 40.

5.7 The European Union and first and second generation contracting

Van Niekerk points out that in the European Union, first generation and second generation contracting out are treated differently. In the event of first generation contracting, the decisive criterion seems to be the actual continuance of the same or similar activities by the new contractor. In second generation contracting out, additional requirements are set. These relate to the transfer of some tangible or intangible assets and the transfer of a major part of the staff (in terms of numbers and skills). In *Oy Likenne AB v Liskojarvi and Juntunen*²⁴⁸ the ECJ held that the mere fact that the new contractor carried on a similar service to the previous contractor would not give rise to an automatic conclusion that there had been a relevant transfer of an economic entity. The ECJ conceded that in certain sectors in which activities are based essentially on manpower, a group of workers engaged in a joint activity on a permanent basis could constitute an economic entity. In *casu*, however, bus transport required substantial plant and equipment, according to the court. The fact that D did not take over any of C's assets was thus a significant factor leading the court to the conclusion that no economic entity had been transferred. According to the authors, it thus seems as if the ECJ elevated this one factor above the others. In their view, the fact that no tangible business assets (the buses) were transferred (in spite of the fact that D continued the same activity as C, presumably serviced the same customers on the same bus routes and engaged 73% of C's employees to perform the contract), was thus sufficient to preclude the transfer from falling within the scope of the Acquired Rights Directive.²⁴⁹

5.8 The relevance of foreign law in the LRA

Section 3 of the LRA stipulates that the LRA must be interpreted give effect to its primary objects, in agreement with the Constitution and in compliance with the public international law obligations of the Republic. Section 233 of the Constitution dictates that: 'when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'.²⁵⁰ Accordingly, courts, tribunals or fora must consider international law and may consider foreign law.²⁵¹ Despite this, E Weber, in his dissertation

²⁴⁸ *Oy Likenne AB v Liskojarvi and Juntunen* [2001] IRLR 171 (EC).

²⁴⁹ Van Niekerk et al *Law@Work* (1st ed) 309 to 310 (Fn 37).

²⁵⁰ Section 233 of the Constitution of the Republic of South Africa 108 of 1996.

²⁵¹ *SANDU v Minister of Defence and others; Minister of Defence and other v SANDU and others* 2007 (1) SA 402 (SCA) at para 6.

titled ‘Transfer of Undertakings - The Protection of Employment in South Africa. From adopting European law to present problems of Section 197 of the Labour Relations Act’ has cautioned against a blanket application of International laws and foreign laws particularly with regard to transfers of a business as going concern because the European Court of Justice has applied and interpreted its transfer of undertaking codes to much criticism.²⁵²

The Labour Court has relied on foreign law in section 197 matters. *Unitrans Supply Chain Solutions (Pty) Ltd & others v Nampak Glass (Pty) Ltd and others*,²⁵³ and *Franmann Services (Pty) Ltd v Simba (Pty) Ltd* (unreported Case No J 1978/12, August 2012)] relied on *Carlito Abler v Sodhexo MM Catering Gesellschaft GmbH* [2004] IRLR 168, a case that concerned a change in service providers contracted to provide catering at a hospital. The court held that there was a relevant transfer in circumstances where the new contractor utilised substantial parts of the assets (the hospital kitchen and equipment) previously used by the outgoing contractor, but owned by the client. In effect, there was the transfer of a licence to use the client’s facilities.

In *COSAWU v Zikhethale Trade (Pty) Ltd and another*,²⁵⁴ the court considered foreign law and relied on *Dines v Initial Services* [1994] IRLR 336 (EAT). The court also relied on European law for its wide interpretation of s 197. It held:

‘In short, the European courts tell us this in relation to second generation contracting-out: The absence of a contractual link between the old and the new employer is not decisive, hence a two-phased transaction can indeed constitute a transfer. Secondly, the decisive criterion for determining whether there has been a transfer of an undertaking [read “business”] is whether, after the alleged transfer, the undertaking has retained its identity, so that the employment in the undertaking is continued or resumed in different hands of the transferee...The mode or method of transfer is immaterial. The emphasis is on a comparison between the actual activities of, and actual employment situation in an undertaking before and after the alleged transfer (*Kelman v Care Contract Services Ltd* [1995] ICR 260 [EAT]). What seems to be critical

²⁵² E Weber *Transfer of Undertakings - The Protection of Employment in South Africa. From adopting European law to present problems of Section 197 of the Labour Relations Act* (LLM thesis University of Cape Town, 2012) at 51.

²⁵³ Note 25 above.

²⁵⁴ Note 24 above.

is the transfer of responsibility for the operation of the undertaking. Mummery J's conclusion in *Kelman* offers a salutary guideline. He said: "The theme running through all the recent cases is the necessity of viewing the situation from an employment perspective, not from a perspective conditioned by principles of property, company or insolvency law. The crucial question is whether, taking a realistic view of the activities in which the employees are employed, there exists an economic entity which, despite changes, remains identical, though not necessarily identical ... I accept that the two-phase transaction intrinsic to second generation contracting out does indeed constitute a transfer as contemplated by section 197 of the LRA. As in European law, the mode or method of transfer is less important. The crux of the determination is whether what is transferred is a "business in operation so that the business remains the same but in different hands" (at paras 34-35).

5.9 Conclusion

There are stark differences between TUPE and section 197 of the LRA. TUPE provides a legislated justiciable right for the duty to consult and provide information to employee representatives pursuant to a transfer of undertakings. Trade union representatives have the right to consultations and information; they have the power to litigate against the employers for a failure to discharge the said duties. Lastly, trade unions have the right to a transfer of organisational rights along with the transfer of employees and employee rights. TUPE thus provides a wider scope of rights in contrast to section 197 of the LRA.

CHAPTER 6: CONCLUSION

South Africa's employment legislation promotes a voluntary basis system of collective bargaining. The legislation does not impose a duty to bargain on any party. However, the LRA facilitates the process of collective bargaining by giving workers the right to form and join unions and employers the right to form and join employer organisations. The LRA makes provision for unions to obtain recognition and other organisational rights to strengthen their collective bargaining power, it gives workers the right to strike and the employer the right to lockout to enforce collective bargaining and enforce non-right disputes, and it gives unions and employers the right to conclude various kinds of collective agreements. These are enforceable through the LRA. This has resulted in a strong trade union system that has allowed trade unions to exert significant economic power in the negotiation process. However, this power is constrained by the size of the union's membership, whether they have sufficient membership power to exert a substantial strike, and whether they are majority or minority unions in certain circumstances.²⁵⁵ It is also restricted by the absence of a duty on employers to bargain in any matter, and most important is the absence of a duty on employer to consult their workers and unions on section 197, unless the employer wants to vary the ordinary legal consequences of a transfer that falls within the ambit of section 197. Thus in some senses section 197 is designed to tip the scales in favour of employers.

Comparatively, in Europe and particularly in the United Kingdom, there is a considerably higher level of duty to consult on the transfer process, and the failure to do so is justiciable by the courts. The absence of similar provisions in South Africa means that there is higher potential for strike action in section 197 matters that do not fall within the duty to bargain. Whereas the European counterpart recognises the employees as stakeholders to the commercial transactions, it is argued that to a large extent, section 197 of the LRA only recognises the transferor and transferee employers.

It is submitted that an amendment of the LRA should provide a justiciable consultation process which would allow employees greater participation in the transfer process and the consequences of the transfer.

²⁵⁵ For example, as in the *Lebwaba* case, a majority union can constrain the right of minority unions to strike through a collective agreement with the employer.

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