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Service delivery in the context of section
197 of the Labour Relations Act

Nicky van der Westhuizen





Introduction

- Section 197 of the LRA regulates the employment consequences of the transfer of a business as a going concern
- Application of s197 has been controversial:
 - Transfer of a business
 - Outsourcing
 - Second-generation outsourcing
 - Attention from the Labour Court (LC), Labour Appeal Court (LAC) and, this year and most recently, Supreme Court of Appeal (SCA)





Introduction

- What do you need to know?
 - What does section 197 say?
 - What are the consequences of section 197?
 - Does section 197 apply in a particular transfer of a business?
 - Does section 197 apply in outsourcing arrangements?
 - Does section 197 apply in second-generation outsourcing arrangements?
 - What are the requirements for concluding agreements where section 197 is applicable?
 - Are retrenchments permissible following a section 197 transfer?





What does section 197 say?

- “197(2) *If a transfer of a business takes place...*” → list of consequences
- So first question: what is a “transfer of a business”?
 - (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.
- “going concern” not defined in the LRA → emerged through case law





Consequences of section 197

- new employer automatically substituted in place of old employer in respect of all contracts of employment in existence immediately before date of transfer
- all rights and obligations between old employer and an employee at the time of the transfer continue in force as if between new employer and employee
- anything done before the transfer by or in relation to old employer (including dismissal , unfair labour practice or unfair discrimination) considered to have been done by or in relation to new employer
- no interruption of service (length of service recognised)





Consequences of section 197

- If new employer is automatically substituted in place of old employer in respect of all contracts of employment :
 - do employees need new contracts of employment with new employer?
 - what happens if new employer and old employer do not agree that section 197 is applicable?
- Does the new employer have to provide exactly the same terms and conditions of employment to affected employees?
 - 197(3): terms and conditions of employment must be “on the whole not less favourable to the employees” (except if regulated by collective agreement)





Consequences of section 197

- Transfer of benefits?
 - All rights and obligations of old employer transfer to new employer (197(2)(b))
 - What if benefits are different: medical aid? Pension fund? Insurances?
 - 197(4) “... does not prevent an employee from being transferred to a pension, provident, retirement or similar fund other than the fund to which the employee belonged prior to the transfer, if the criteria in section 14(1)(c) of the Pension Funds Act, 1956 (Act 24 of 1956), are satisfied”





Consequences of section 197

- New employer bound by collective agreements
- New employer bound by arbitration awards





Does section 197 apply in a particular transfer?

- Four requirements:
 1. transfer
 2. of a "*business*"
 3. "by one employer... to another employer"
 4. as a going concern





“Transfer”

- Not defined in LRA
- Dictionary definition: “to convey or take from one place, person etc. to another; to transmit, transport; to give or hand over from one to another.”
- any transaction which has the effect of shifting a business from one employer to another - no requirement for a sale or for money to change hands.
- In *Schutte & others v Powerplus Performance (Pty) Ltd & Another* (1999) , Labour Court found:
 - range of transactions in terms of which a business may be transferred, including a sale, transfer, merger, takeover, donation, exchange of assets etc





“business”

- Defined in LRA
- includes the whole or a part of any business, trade, undertaking or service.

“by one employer..to another employer”

- much debate, particularly with regard to outsourcing and second-generation outsourcing





“going concern”

- In *NEHAWU / UCT* , Constitutional Court confirmed there is no definition for “going concern” - what is transferred must be a business in operation “*so that the business remains the same but in different hands*”.
- Must be determined objectively in light of the circumstances of each transaction. Factors to be considered include:
 - was there a transfer of the goodwill of the business?
 - what happened to the stock in trade?
 - what happened to the premises from which the business operated?





“going concern” (cont.)

- what effect did the transfer have on contracts with clients or customers?
- is it intended that the employees will transfer?
- what will happen to the assets of the business?
- has there been an interruption in the operation of the business?
- Essentially what is transferred must be a business in operation so that the business remains the same but in different hands.





Outsourcing

- outsourcing = activity where an employer, rather than using its own employees, contracts with a service provider to take over a particular function
- may involve core and/or non-core activities
- why outsource?
 - employers free themselves of managing non-core activities
 - reduce costs associated with such activities
- Does section 197 apply to outsourcing?



Outsourcing (cont.)

- *SAMWU & Others v Rand Airport Management Company (Pty) Ltd & Others*
 - RAM decided to outsource some non-core elements, including gardening, security and cleaning
 - LAC: inclusion of “service” in definition of “business” – where service forms integral unit that is transferred → s197 applies





Second-generation outsourcing

- when an entity chooses to outsource any part of its business activities = primary outsourcing
- secondary outsourcing (second generation outsourcing) = when first outsourcing contract comes to an end and original employer appoints another entity or service provider to provide the outsourced services
- *COSAWU v Zikhethale Trading* (2005) 26 ILJ 1056 (LC)
 - purposive interpretation
 - section 197 does apply to second-generation outsourcing





Second-generation outsourcing

- *Aviation Union of South Africa & Others v SAA (Pty) Ltd & Others*
 - LC: LRA only contemplates first generation outsourcing, and section 197 does not apply to second generation outsourcing
 - LAC:
 - job security of employees as real purpose of section 197
 - can apply in second generation outsourcing
 - SCA: wording of section 197 does not allow for application to second generation outsourcing
 - Constitutional Court?






Agreements where section 197 is applicable

- Two types of agreements:
 - Section 197(6) agreements
 - Section 197(7) agreements






Section 197(6) agreements

- contracts out of consequences of section 197
- must be in writing
- concluded between:
 - old employer or new employer or old and new employer jointly; and
 - consulting body in terms of section 189 (i.e. trade unions, employees, etc)
- when would you use / require these?






Section 197(7) agreements

- old employer and new employer must agree to valuation at date of transfer of –
 - accrued leave pay
 - severance pay that would have been payable
 - any other accrued payments that have not been paid
- old employer and new employer must conclude written agreement specifying
 - which employer is liable for above payments (or apportionment of liability); and
 - what provision has been made for payment of above





Section 197(7) agreements

- old employer must further:
 - disclose terms of the agreement (as to liability for payment) to each employee who becomes employed by new employer after the transfer; and
 - take any other measure that may be reasonable in the circumstances to ensure adequate provision is made for any obligation on new employer to make payments
- what if old employer does not comply with requirements?
 - joint and several liability for 12 months where employees retrenched





In practice:

- Where FM is in-house and service provider is being appointed:
 - Ensure service providers tendering are aware of provisions of section 197
 - Factored into costing
 - Terms and conditions of employment must be matched



In practice:

- Where Service Provider becomes the 'new employer' in terms of section 197 :
 - ensure access to information about existing terms and conditions (incl. remuneration) of employees
 - need to provide terms and conditions that are on the whole no less favourable
 - reach agreement re: accrued leave pay, severance pay and any other payments
 - ensure disclosure of liabilities
 - obtain indemnities re: transferring employees





- Indemnities / warranties re:
 - identity of transferring employees
 - entitlement of employees to work (i.e. work permits, visa's)
 - terms and conditions of employment
 - employees serving notice / proposals to terminate employment
 - no changes to terms and conditions prior to implementation
 - disputes and disclosure of claims or threatened claims
 - payment of contributions / levies
 - compliance with employment legislation
 - no post retirement medical aid obligations





Retrenchments following a s197 transfer

- Retrenchments regulated by section 189 of LRA
- Consultation process in terms of section 189 – normal process BUT consider :
 - selection criteria
 - bumping
 - severance pay





Retrenchments following a s197 transfer (cont.)

- But – be careful of section 187 of LRA:

"187 Automatically unfair dismissals

(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is - ...

(g) a transfer, or a reason related to a transfer, contemplated in section 197 or 197A;"

- So – if employer were to dismiss an employee for reasons related to the transfer of a business as a going concern, such dismissal would be automatically unfair.





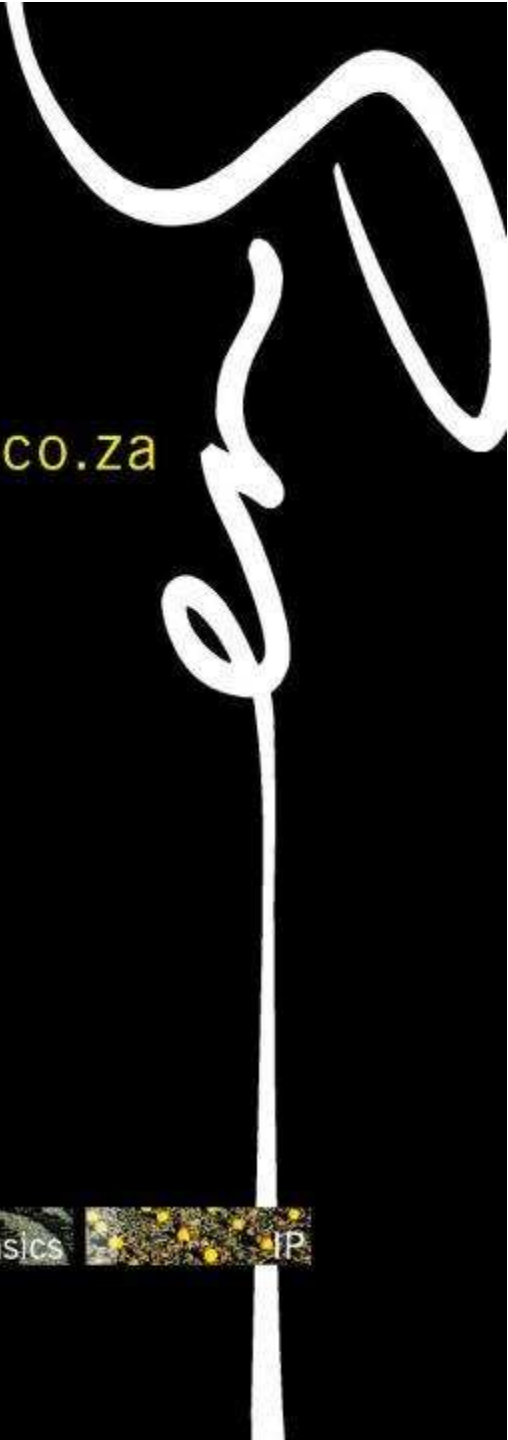
Retrenchments following a s197 transfer (cont.)

- Definitely can't retrench in anticipation of transfer
- Post transfer: retrenchments must be very carefully undertaken when a transfer has occurred
- Seek legal advice!





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thank you

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