CHANGING TERMS AND CONDITIONS OF EMPLOYMENT FOLLOWING TRANSFERS TO THE WESTERN CAPE DEPARTMENT OF HEALTH

by

Richard Joseph Roman

Submitted in partial fulfilment of the requirements for the degree of MAGISTER LEGUM

in the Faculty of Law at the Nelson Mandela Metropolitan University

DATE OF SUBMISSION JANUARY 2007

SUPERVISOR: PROF A J VAN DER WALT
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>SUMMARY</td>
<td>v</td>
</tr>
<tr>
<td>CHAPTER 1: INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td>CHAPTER 2: GENERAL PRINCIPLES OF LAW REGARDING TRANSFERS OF CONTRACT OF EMPLOYMENT</td>
<td>4</td>
</tr>
<tr>
<td>2.1 Introduction</td>
<td>4</td>
</tr>
<tr>
<td>2.2 International Labour Organisation</td>
<td>4</td>
</tr>
<tr>
<td>2.3 The Constitutional provisions</td>
<td>5</td>
</tr>
<tr>
<td>2.4 The Labour Relations Act</td>
<td>6</td>
</tr>
<tr>
<td>2.5 Provisions of the Public Service Act</td>
<td>7</td>
</tr>
<tr>
<td>2.6 Transfers Framework to facilitate transfers of personnel between the spheres of government</td>
<td>8</td>
</tr>
<tr>
<td>2.6.1 Internal framework</td>
<td>8</td>
</tr>
<tr>
<td>2.6.2 Scope</td>
<td>8</td>
</tr>
<tr>
<td>2.6.3 Responsibility of both employers</td>
<td>9</td>
</tr>
<tr>
<td>2.6.4 Criteria of transfer</td>
<td>9</td>
</tr>
<tr>
<td>2.6.5 Managing the Conditions of Service</td>
<td>10</td>
</tr>
<tr>
<td>2.6.6 Deadlock mechanisms</td>
<td>10</td>
</tr>
<tr>
<td>2.7 Conclusion</td>
<td>11</td>
</tr>
</tbody>
</table>
CHAPTER 3: TRANSFERS IN TERMS OF SECTION 197 OF THE LABOUR RELATIONS ACT 66 OF 1995

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>3 1</td>
<td>Introduction</td>
<td>12</td>
</tr>
<tr>
<td>3 2</td>
<td>The original section 197 of the Labour Relations Act</td>
<td>13</td>
</tr>
<tr>
<td>3 3</td>
<td>The amended section 197 of the Labour Relations Act</td>
<td>16</td>
</tr>
<tr>
<td>3 3 1</td>
<td>The interpretation of section 197</td>
<td>16</td>
</tr>
<tr>
<td>3 3 2</td>
<td>Criteria for transfer</td>
<td>17</td>
</tr>
<tr>
<td>3 4</td>
<td>Roleplayers in transfers</td>
<td>17</td>
</tr>
<tr>
<td>3 4 1</td>
<td>Tripartite</td>
<td>17</td>
</tr>
<tr>
<td>3 4 2</td>
<td>Outsourcing</td>
<td>18</td>
</tr>
<tr>
<td>3 4 3</td>
<td>Restraint of trade</td>
<td>19</td>
</tr>
<tr>
<td>3 5</td>
<td>Rights and duties of employers before and after transfers</td>
<td>19</td>
</tr>
<tr>
<td>3 5 1</td>
<td>General considerations</td>
<td>19</td>
</tr>
<tr>
<td>3 5 2</td>
<td>Liabilities</td>
<td>20</td>
</tr>
<tr>
<td>3 5 3</td>
<td>Dismissals</td>
<td>21</td>
</tr>
<tr>
<td>3 5 4</td>
<td>Transfer Agreement</td>
<td>22</td>
</tr>
<tr>
<td>3 5 4 1</td>
<td>Parties to the agreement</td>
<td>22</td>
</tr>
<tr>
<td>3 5 4 2</td>
<td>Legislative framework</td>
<td>23</td>
</tr>
<tr>
<td>3 5 4 3</td>
<td>Terms and conditions of transfer</td>
<td>23</td>
</tr>
<tr>
<td>3 5 4 4</td>
<td>Transfer in circumstances of insolvency</td>
<td>24</td>
</tr>
<tr>
<td>3 5 4 5</td>
<td>Date of transfer</td>
<td>24</td>
</tr>
<tr>
<td>3 5 4 6</td>
<td>Dispute resolution</td>
<td>25</td>
</tr>
<tr>
<td>3 6</td>
<td>Conclusion</td>
<td>25</td>
</tr>
</tbody>
</table>
CHAPTER 4 CHANGING CONDITIONS OF SERVICE FOLLOWING TRANSFERS TO THE DEPARTMENT OF HEALTH

4 1 Introduction

4 2 Legal responsibility of the Department of Health in relations to ambulance services

4 2 1 Agency Agreement

4 3 Comparisons and analysis of conditions of service of the Department of health and ambulance personnel

4 4 Changing conditions of service

4 4 1 Pensions

4 4 2 Medical Aid

4 4 3 Grouplife Insurance

4 4 4 Long Service Award

4 4 5 Housing allowance

4 4 6 Annual bonus

4 4 7 Study bursaries

4 4 8 Encashment of leave

4 4 9 Cell phones contracts

4 4 10 Transportation

4 4 11 Uniform allowances

4 5 Changing conditions of service relating to salary increases

4 6 The effect of employee’s rights in relation to changing conditions of employment following transfers

4 6 1 Clause 8(6)(a)

4 6 2 Rights in terms of collective agreements

4 6 3 Arbitration awards

4 6 4 Claims

4 6 5 Behaviour of old employer

4 7 Consideration of changing conditions of service
SUMMARY

This treatise describes the difficulty of changing conditions of service following transfers in terms of Section 197 of the Labour Relations Act, 66 of 1995. The Constitution of the Republic of South Africa, Act 108 of 1996, provides that ambulance services are a Provincial Legislative competence. The City of Cape Town had for many years provided ambulance services on an agency basis to the Department of Health of the Provincial Administration of the Western Cape. The impact of the constitutional provision is that those employers and employees who are performing ambulance services are not entitled anymore to perform such function. The Department of Health must take control over the ambulance services and the employees of the City of Cape Town could be transferred.

The challenges facing both employers (old and new) and the trade unions to secure a transfer of the employees from the City of Cape Town to the Department of Health in terms of section 197 of the Labour Relations Act will be highlighted.

It is within the context of ensuring protection of jobs whilst simultaneously effect a transfer of contracts of employment that the Labour Relations Act expressly gives various options to the parties involves in a transfer. Of the options include:

- A transfer in terms of section 197(2) of the LRA where the service could be transferred from the old employer to the new employer as a going concern. This could happen without the consent of the affected employees or trade unions and collective agreements must be taken over as well, or

- The new employer complies with its obligations if the transfer takes place on terms and conditions that are on the whole not less favourable to the employees what they have received by the old employer.
In terms of this provision the overall package of conditions of service that was offered should not be less in comparison with that of the old employer.

- The parties also have the option to negotiate a transfer agreement that could regulate the conditions of service.

The focus is on the description of the conditions of service of both employers and the difficulty to persuade the trade unions to accept the Department’s conditions of service. Part of the difficulty is that the Department must obtain its mandate from the Department of the Public Service and Administration, who is also responsible for the determining of the conditions of service in the Public Service.

One of the challenges is that the Department of Health cannot accommodate collective agreements of entities outside the Public Service. The City of Cape Town’s conditions of service is in the form of a collective agreement and the Labour Relations Act is very specific with the various options. These options will be discussed and analysed.

In conclusion recommendations are made in regard to effect a transfer of conditions of employment in terms of the Labour Relations Act to enable the Department of Health to meet its constitutional obligation.
CHAPTER 1
INTRODUCTION

Companies may be faced with economic realities that will force them to either sell their business or part thereof or outsource non-core function. On the other hand legislation may also be prescribed that a specific sphere of government must now perform certain functions. Both instances pose the question: what will happen with the employees’ contract of employment and conditions of service? Will the new employer transfer them, as a going concern on the same or similar grounds or will there be a change thereof? Employees do not want to give away existing rights and benefits.

Under the previous Labour Relations Act\(^1\) the Industrial Court did not intervene in the sale of or insolvency of a business. The employer must terminate the contract of employment on notice for operational reasons and must then pay severance pay. The common law principles were followed and there was no automatic transfer of the contracts of employment.

In *Ntuli & others v Hazelmore Group t/a Musgrave Nurses Home*\(^2\) the Industrial Court held that the old employer must consult with the affected employees or their trade union representatives and the new employer regarding the possible transfer of the contracts of employment of the affected employees. Failing that, the employees could claim unfair labour practice and that they were unfairly retrenched. No unfair labour practice is committed where the new purchaser offered employees employment on the same or equivalent terms of employment when the employment relationship between the employee and the old employer was formally terminated.\(^3\) The Industrial Court therefore imposes a duty to consult on the old employer.

---

\(^1\) 28 of 1956.

\(^2\) (1988) 9 ILJ 709 (IC) See also *NUMSA v Merkor Industries* (1990) ILJ 1116 (IC).

A need was addressed in the Labour Relations Act\textsuperscript{4} (hereinafter after ‘the LRA’) to establish a mechanism whereby retrenchments would be minimized and whereby contracts of employment could be transferred to the new employer. By doing so, job losses would be avoided and such a provision would minimize unemployment. Grogan\textsuperscript{5} is of the opinion that it was for these reasons that section 197 of the LRA was created so that there be a statutory obligation on employers.

In terms of section 197 of the LRA contracts of employment can be transferred to another employer, without the employee’s consent, when the old employer as a going concern transfers the whole or any part of a business. Similar provisions are applicable in a situation of insolvency and if the business is transferred as a going concern.\textsuperscript{6}

A transfer could also be effected by concluding an agreement between the two employers on the one hand and the representative recognized union or in the absence thereof, the appropriate person on the other hand if there is a change in conditions of service.\textsuperscript{7} The employees must give their consent as in the matter \textit{Kgethe v LMK Manufacturing} (Pty) Ltd.\textsuperscript{8}

There are some requirements to be met prior to such transfers. The old and new employers cannot by agreement decide not to transfer the employees to the new employer.\textsuperscript{9}

Transfers in terms of section 197 of the LRA are easier said than done because they have created some realistic problems, which are more relevant in the government sector with an inflexible set of conditions of service.

\begin{itemize}
\item \textsuperscript{4} 66 of 1995.
\item \textsuperscript{5} Grogan \textit{Workplace Law} 7\textsuperscript{th} ed (2003) 218.
\item \textsuperscript{6} S 197(1)(b) of the LRA.
\item \textsuperscript{7} S 197 (6) of the LRA.
\item \textsuperscript{8} 1997 10 BLLR 1303 (LC).
\item \textsuperscript{9} See \textit{Schutte & others v Powerplus Performance} (Pty) Ltd (1999) 20 ILJ 655 (LC) and \textit{Foodgro, a Division of Leisuren Net Ltd}(1999) 20 ILJ 2521 (LAC).
\end{itemize}
The purpose of this treatise is to highlight some of the problems employers and organized labour encounter regarding transfers as a going concern with the view to assist towards the finding of solutions to these challenges. The specific service that will be referred to is the ambulance services from the City of Cape Town and their transfer to the Department of Health (hereinafter ‘the Department’). It will be limited to the conditions of service of both parties. The City of Cape Town Emergency Medical Services (hereinafter ‘the City’) consisted originally of 218 personnel of which 179 are ambulance and rescue services staff. The remaining 39 are support staff providing functions such as secretarial, vehicle maintenance, infection protection, communications, and financial and human resource administration.

To achieve that aim, I will give consideration to the following aspects.

In chapter two the focal point will be the general principle of law regulating the allocation and performing of the ambulance service, the labour laws regulating such transfers of contract of employment and the court’s general approach regarding conditions of service. Reference will also be made to the public service rules and regulations regarding transfers.

Chapter 3 includes an analysis of section 197 of the LRA with specific reference to the different roleplayers and what is required from them. Chapter 4 will include the description of the conditions of service and the difficulty around the various aspects thereof, including some recommendations. The discussion will be concluded in chapter 5.
CHAPTER 2

GENERAL PRINCIPLES OF LAW REGARDING TRANSFERS OF CONTRACT OF EMPLOYMENT

2.1 INTRODUCTION

Previously it was neither compulsory nor mandatory to protect the interests of the affected employees to transfer them to the new employer when selling a business. This resulted in the unemployment of employees whilst the same services continued under a new employer. With the democratisation process it was necessary to revisit the labour laws to protect the interest of the employees as well. There are different principles of law contained in the International Labour Organisation (ILO) conventions, in the Constitution of the Republic of South Africa,10 (hereinafter “the Constitution”) the LRA and the Public Service Act11 emphasizing fair labour practice and the protection of workers rights. The Department of Public Service and Administration also provided a transfer framework to facilitate transfers of personnel between the spheres of government. The role and relevancy of each of these provisions will be discussed below with specific reference to transfer of the ambulance services to the Department.

2.2 INTERNATIONAL LABOUR ORGANISATION (ILO)

One of the principles of the International Labour Organisation is providing universal guidelines on labour standards to ensure social justice and the elimination of exploitative and inhumane conditions of labour.12 The other objective is to

10 108 of 1996.
11 Proc R103 in GG 15791 of 1994-06-03.
promote labour rights to protect workers rights throughout the world. South Africa as a member country must give effect to the conventions such as freedom of association and unfair dismissals that were adopted in the Labour Relations Act. The Constitution also provides for the right to fair labour practice.

2.3 THE CONSTITUTIONAL PROVISIONS

The Constitution is the supreme law of the Republic of South Africa and sets out fundamental rights of all persons. Section 23 of the Bill of Rights in the Constitution provides inter alia that:

“Every person shall have the right to fair labour practices.”

In the matter Nehawu v University of Cape Town the Constitutional Court held that the purpose of section 197 of the LRA is to facilitate a transfer of a business or service and simultaneously protect workers rights against job losses. In addition to the compulsory fair treatment of all workers the Constitution also provides for the allocation and performance of certain services to a specific sphere of government. This is relevant because in this treatise the focus will be on the transfer of ambulance services from the City to the Department of the Provincial Government of the Western Cape. In terms of Schedule 5, Part A of Schedule B of the Constitution is ambulance services an exclusive provincial legislative competency. This is also confirmed in section 16(1) (b) of the Health Act.

The City has for many years provided the ambulance service on an agency basis for the Western Cape Provincial Administration (WCPA), which is funded by them. In November 1999 the Provincial Cabinet adopted a resolution that the ambulance

---

15 S 23(1) of the Constitution.
16 (2003) 24 ILJ 95 (CC).
17 63 of 1997.
services must revert to the provincial authority and in particular to the Department. Therefore, in terms of the Constitution the rendering of ambulance services by a provincial government is a mandatory requirement. Whether the Department has the capacity to administer and manage that function is not relevant. It is submitted that the government envisage the maintenance of one set of service standards, efficiency and the elimination of duplication of these functions.

In spite of this mandatory obligation, section 156(4) of the Constitution provides that the national and provincial government must allocate to a municipality by agreement and on conditions, matters as set out in Part A of Schedule 4 or Part A of Schedule 5 which include ambulance services. The only condition for such an allocation is that it should relate to local government. There is accordingly a choice where matters could be transferred to the local government. However, there seems to be a contradiction to the explicit provision in Part A of Schedule 5A of the Constitution that ambulance services is an exclusive provincial competency. It is therefore submitted that Part A of Schedule 5A should not be part of section 158 (4) of the Constitution for the reasons mentioned above.

The concern is what will happen to the employees who currently perform those functions? The LRA provides for the transfers of contracts of employment to the new employer.

2.4 THE LABOUR RELATIONS ACT

The purpose of the LRA\textsuperscript{18} is to give effect to section 23 of the Constitution, which is to

\begin{quote}
“Advance economic development, social justice…”
\end{quote}

According to Bendix\textsuperscript{19} the rationale of the labour laws is to ensure the protection of employees. Previously under common law when a business was sold, the new

\textsuperscript{18} Schedule 1 of the LRA.

\textsuperscript{19}
employer was not under any obligation to employ the old employees and no employee may be forced to continue his/ her contract of employment with the new employer.\textsuperscript{20} Section 197 of the LRA provides for a process to deal with transfers of employees between employers when selling or transferring a business.

The provincialisation of the ambulance services and the transferring of these personnel to the Provincial Government of the Western Cape (PGWC) had to be handled in terms of the provisions of section 197 of the LRA, the relevant Public Service Act and the public service regulations that regulate conditions of service within the public service.

\textbf{2.5 PROVISIONS OF THE PUBLIC SERVICE ACT}

The public service is established in terms of section 197 (1) of the Constitution and it is only applicable to national and provincial departments and not local authorities.

The purpose of the Public Service Act is to provide for the organization and administration of the public service and the regulation of conditions of service.

This act is applicable to those who are employed in the public service and those who are to be employed in the public service.\textsuperscript{21} The Minster of Public Service and Administration and the Executing Authority are responsible for policies related to \textit{inter alia} salaries and other conditions of service of employees,\textsuperscript{22} In addition the Minister may also make determinations regarding the conditions of service including the scales of salaries, wages, allowances of all the various classes, ranks, grades.\textsuperscript{23}

\textsuperscript{19} Bendix \textit{Industrial Relations in South Africa 4\textsuperscript{th} ed (2004)89.}
\textsuperscript{20} Basson et al \textit{Essential Labour Law (2002)266.}
\textsuperscript{21} S 2(1)of the Public Service Act.
\textsuperscript{22} S 3(2)(a)(iii) of the Public Service Act.
\textsuperscript{23} S 3(3)(c) of the Public Service Act.
There is nothing in the Public Service Act that refers to transfers between the spheres of government or reference to transfers between governments and local authorities. However, a framework has been established by the Department of Public Service and Administration to facilitate transfers of personnel between the spheres of government.

2.6 TRANSFERS FRAMEWORK TO FACILITATE TRANSFERS OF PERSONNEL BETWEEN THE SPHERES OF GOVERNMENT

This internal guideline provides for parameters within which the transfer of staff between the spheres of government will be regulated. It highlights the following:

2.6.1 INTERNAL FRAMEWORK

The rationale is that the Public Service Act and the Public Service Regulations\(^{24}\) do not provide a mechanism for transfers between spheres of government. The legislative framework of the Local Government\(^{25}\) does not specifically made provision for transfers to and from national and or provincial departments. As a result of inadequacies of a legal framework of staff mobility between the spheres of government, the Minister of Public Service and Administration issued a Transfer framework (TF) to facilitate transfers (Mobility) of personnel between the spheres of Government.\(^{26}\)

2.6.2 SCOPE

This transfer framework is applicable to national and provincial departments who are engaging in transfers of employees to and from local authorities. It is also

---

\(^{24}\) GN R1 in *GG* 7969 of 2001-01-05.


\(^{26}\) Reg in *GG* 7997 of 2004-06-28.
applicable to effect transfers to and from local government in terms of the Municipality Act.\textsuperscript{27}

2 6 3 RESPONSIBILITIES OF BOTH EMPLOYERS

The old employer should inform the unions on a consultative basis who will be affected and what the conditions of service would be. Where possible continuity of service for 12 months should be guaranteed and this is the responsibility of the new employer. There should be a valuation of accrued benefits and payments of transferring personnel in terms of accrued leave, service bonus, long service awards, severance pay, pension benefits merit awards, overtime and post retirement benefits. Both the old and new employers must apportion liability regarding the payments. The old employer must ensure it meets the financial obligations regarding their responsibilities.

2 6 4 CRITERIA OF TRANSFER

Transfers must be based on the principle of staff follow function. The Public Service Regulations\textsuperscript{28} have been amended advising departments that the transferring of staff from outside the public service must be done in terms of section 197 of the LRA. Section 197 remains applicable therefore and the process may not fall foul of the provisions contained in that section. It is submitted that irrespective of this amendment, the State is bound by the LRA in terms of section 209 of the LRA. Transfers must satisfy the pension fund rules. Pension transfers must meet the requirements of the Government Pension Law and the rules of the Government Employees Pension Funds.

\footnotesize
\textsuperscript{27} 17 of 1998.
\textsuperscript{28} GN R 785 in GG 7997 of 2004-06-28.
265 MANAGING THE CONDITIONS OF SERVICE

The current conditions of service of state employees are protected. The transferred employees’ conditions of service should on a whole not be less favourable. If the conditions of service in a collective agreement are less favourable, than that of the new employer, then the new employer may maintain less favourable conditions of service. A new agreement on conditions of service that will be applicable to the transferred staff must be concluded in terms of section 197(6) of the LRA.

Salaries should be in line with that of the new employer unless an agreement has been concluded on how to deal with the differences in salaries.

266 DEADLOCK MECHANISM

Several options could be considered in the event of deadlock between the parties:

- Private arbitration as a possible option to break a deadlock, as a last resort may for instance be used.

- The Minister of Public Service and Administration may be approached to deviate from this directive to enable parties to reach an agreement with a transfer.

- If a negotiated settlement is failing in terms of section 197(6) of the LRA, then the new employer must revert to section 197(2) of the LRA that is the retaining of existing rights. Thereafter the new employer could through a mechanism of engagement bring their conditions in line with the existing conditions of service of the current employer,
Provision is also made for retrenchments in the event that a transfer in terms of section 197 is not possible and that affected staff cannot be redeployed or re-skilled. In these situations section 189 of the LRA should be applied considering their dismissal offering a package in addition to a severance package.

Transfers of staff should also be considered however cognizance should be taken that a dismissal based on a transfer will be unfair as contemplated in the LRA.\textsuperscript{29}

This guideline will assist the employer to facilitate a transfer. The challenge is what if the new employer could not afford the conditions of service of the old employer? This transfer framework does not address the issue of transferring collective agreements adequately in the view of the fact that in terms of section 197(5)(b)(ii) of the LRA is the new employer bound by collective agreements.

The Department as a State employer, is bound by the Public Service Act, the Public Service Regulations and directives issued by the Minister of Public Service and Administration. All transfers must be handled in terms of the above transfer framework, unless the Minister of Public Service and Administration indicates otherwise.

\textbf{2.7 CONCLUSION}

This chapter outlined the general principles of law regarding transfers of contract of employment and more specific transfers of employees from the local government to the provincial government. It dealt specifically with who is constitutionally responsible for the rendering of ambulance services and specific guidelines to effect such and other transfers to the public service. The next chapter will focus on an analysis of section 197 of the LRA with specific reference to the different role-players and what is required from them.

\textsuperscript{29} S 187 of the LRA.
CHAPTER 3

TRANSFERS IN TERMS OF SECTION 197 OF THE

LABOUR RELATIONS ACT, 66 OF 1995

3.1 INTRODUCTION

Transfers of business are not limited to the private sector alone but also in the public sector by means of outsourcing, privatisation or public private partnership. Legislation may also dictate which sphere of government must render a particular service. An example is schedule 5 of the Constitution, which ambiguously state that the ambulance services is a provincial legislative competence. This means that if a local government is providing such a services then it could be regarded as unconstitutional. These services must be transferred to the provincial government, including the contracts of employment of the staff performing that function. Transfers of contracts are regulated by section 197 of the LRA.

Previously, in terms of common law, no employee may be forced to continue his or her contract of employment with the new employer and the new employer is not obliged to employ them. It resulted in many retrenchments.30

It is, according to Grogan31 for this reason that section 197 of the LRA was created as a statutory obligation on employers to compensate retrenched employees whilst at the same time avoiding job losses. With the practical challenges regarding different interpretations resulted to the amendment to section 197 of the LRA in 2002 and the inclusion of section 197A and 197B. It is therefore important to discuss briefly the original section 197 of the LRA.

---

3.2 THE ORIGINAL SECTION 197 OF THE LABOUR RELATIONS ACT

Of the requirements in the original section 197 of the LRA is that the new employer must honour all the term and condition of the old employer and that employment contracts could not be transferred without the employees consent. The consent of the employees are not needed in terms of section 197(2) of the LRA when all the rights and obligations are transferred as a going concern.

The Labour Court’s first attempt at interpreting section 197 of the LRA was in *Schutte v Powerplus Performance (Pty) Ltd*32 The Court accepted that ‘transfer’ of a business refers only to sale of a business which include mergers, take-over or partly restructuring within a company or group of companies. In this case the old employer (Supergroup) had entered into an agreement with a third party (Powerplus). Part of the agreement was that Supergroup sells its workshops to Powerplus to service its rented cars. The employees of Supergroup were informed that:

- The workshops were closing,
- They would earn less under the new employer,
- They were required to apply for their positions at Powerplus; and,
- In the event of them not applying for their new positions, they would be retrenched.

Some of the employees decided to take a severance package whilst the others sought:

- a declaratory order stipulating that Powerplus Performance employed them,
- an order interdicting Powerplus from altering their contract until the relevant bargaining council had dealt with the matter,
- to receive the same remuneration as they did from their previous employer.

---

The issue before the court to be decided was whether or not the agreement entered into between Powerplus and Supergroup amounted to a transfer of the whole or part of the business. The Court took the following factors in consideration to determine if there was a transfer of business as contemplated in section 197 of the LRA:

- pre-existing relationship between the buyer and seller;
- a previous “in principle” agreement to sell a certain part of the business;
- the wording of the contract itself;
- the fact that the buyer did employ the majority of the employees;
- use of the same premises by the buyer;
- continuation of the same activities without interruption.

The Court held that section 197(1)(a) of the LRA bound the employees and employer. Thus, in terms of section 197, where the transfer of a going concern takes place, the contracts of employment of the employees are transferred automatically to the new employer and they enjoy the same terms and conditions with the new employer as they did with the old employer. Therefore the contracts of the former employees of Supergroup were automatically transferred to Powerplus.

In the matter NEHAWU v University of Cape Town33 the Labour Appeal Court held that where a business was transferred as a going concern to a new employer, the contracts of employment of the employees of the business transferred automatically to the new employer. This is regardless of the agreement between the old and new employer.

The difficulty with the interpretation section 197 was also illustrated by the decision in the matter NEHAWU v University of Cape Town34. In this matter, the University of Cape Town (UCT) decided to outsource most of its cleaning, gardening and

---

33 [2000] 7 BLLR 803 (LC).
34 [2000] 7 BLLR 803 (LC).
maintenance operations. Nehawu, the union who represented the affected employees, argued that the outsourcing should be regarded as a transfer as part of UCT’s business as a going concern in terms of section 197 of the LRA. The contracts of the employees should automatically be transferred to the new companies who would take over the outsourced functions. UCT argued that section 197 was not applicable and applied section 189 of the LRA, which is about dismissals for operational requirements.

Nehawu then approached the Labour Court for a ruling that the outsourcing was a transfer as part of UCT’s business as a going concern and consequently the employment contracts of the 267 affected staff members should be transferred automatically to the outsourcing company. The Labour Court dismissed their application on the basis that the outsourcing was not a transfer in terms of section 197 of the LRA.

Nehawu, not satisfied with the ruling of the Labour court appealed to the Labour Appeal Court. The majority judgment of the Court held section 197 does not operate to transfer the employees automatically. There must be an agreement between the old and new employers for the transfer of the contracts of the employees to take place in terms of s 197. A transfer as a going concern necessarily means that employment contacts are also transferred; it is not a ‘going concern’ transfer. Nehawu’s application was dismissed.

In a dissenting judgement, Zondo JP disagreed with the majority judgment and held that section 197 does provide for the automatic transfer of employment contracts when a business is transferred as a ‘going concern’ and the agreement of the new and old employer is irrelevant in determining whether section 197 applies. Nehawu’s application was dismissed and the decision of the Labour Appeal Court was taken to the Constitutional Court, who overturned the decision of the Labour

Appeal Court by ruling that under the original section 197 of the LRA contracts of employment transferred automatically when businesses were transferred, irrespective of the wishes of the employer parties.

With these uncertainties regarding what constitute a transfer of a business as a going concern or has outsourcing taken place, it was necessary to review section 197 of the LRA.

3.3 THE AMENDED SECTION 197 OF THE LABOUR RELATIONS ACT

Given the shortcomings of the original LRA, the amended LRA has now expressly incorporated provisions to address the gaps. The new section 197 is attached as annexure A. The question arises how should section 197 of the LRA now be interpreted?

3.3.1 THE INTERPRETATION OF SECTION 197

The amended of section 197 of the LRA came into effect on 1 August 2002. In terms if section 39(2) of the Constitution is there an obligation on courts when interpreting any legislation to promote the spirit, purport and objectives of the Bill of Rights in the Constitution which include the rights of all people and affirms the democratic values of human dignity equality and freedom. Section 23 of the Constitution provides that “everyone has the right to fair labour practice.“ and some labour disputes may lead to constitutional challenges if it is not meeting the objectives of the Constitution.

37 S 7(1) of the Constitution.
The rationale behind section 197 of the LRA is according to the Constitutional Court in the matter *NEHAWU v University of Cape Town*\textsuperscript{38} the following:

“To protect the employment of the workers and to facilitate the sale of business as going concerns by enabling the new employer to take over the workers and to protect workers against unfair job losses.”

The above view is also shared by Murphy AJ in the matter *COSAWU v Zikhethele Trade (Pty) Ltd*\textsuperscript{39} that section 197 of the LRA is intended to protect job security as a result of business transfer.

3.3.2 CRITERIA FOR TRANSFER

According to Du Toit\textsuperscript{40} three hurdles must be crossed before section 197 will apply. The first is that the transaction must be a transfer. Secondly, the entity must be ‘the whole or part of any business…’ and thirdly it must be a ‘going concern’.

In *Maning v Metro Nissan*\textsuperscript{41} it was held that when a person buys a business as a “going concern” she/he is taking over a business that is active and operating so that the business may continue if the purchaser so desires.

3.4 ROLEPLAYERS IN TRANSFER

3.4.1 TRIPARTITE

The roleplayers in a section 197 transfer according to section 197(6)(a) of the LRA is between the old employer and new employer on the one hand and any person or employee organisation with whom the employer must consult.

\textsuperscript{38} (2003) 24 ILJ 95 (CC).
\textsuperscript{39} [2005] 9 BLLR 924 (LC).
\textsuperscript{41} (1998) ILJ 118 (LC).
The tripartite should work together as parties to effect a transfer. In the event of a transfer where all conditions of service and all benefits remain intact, then the only the two employers are involve, but the employees must at least be consulted.

3 4 2 OUTSOURCING

In the matter National Union of Metal Workers of SA on behalf of Matlala & Others and Active Distribution\textsuperscript{42} the respondent employer outsourced its administration and industrial relations functions to a labour broker. The four applicant workers in this matter were part of the transfer package and it was according to them against their consent. Bosch\textsuperscript{43} pointed out that in the matter Nehawu v UCT\textsuperscript{44} the Constitutional Court did not express a view that transferred employees could object to be transferred to a new employer.

It was found that the applicants did not work in the outsourced units, have not performed those functions associated with administration and industrial relations and have refused to be transferred to the new employer. The result is that they were dismissed. The arbitrator found that the respondent’s refusal to accept the applicant workers tender to work constitute a denial of their contracts and constitute a dismissal. Their dismissal was found to be procedurally and substantively unfair and the workers were retrospectively reinstated. From the matter is it submitted that the old employer cannot on arbitrary grounds decide who should be transferred with the business. It seems that one of the requirements is that there should be a linkage between the category of business to be transferred or outsourced and those employed within the affected division.

\textsuperscript{42} (2006) 27 ILJ 633 (BCA).
\textsuperscript{44} Supra.
3.4.3 RESTRAINT OF TRADE

What will happen in cases where some employees have as part of their contract of employment a restraint of trade?

In the matter Securior (SA)(Pty) Ltd & Another v Lotter the court held that whether a restraint of trade in a contract of employment survives after transfer of a business as a going concern under section 197 depends on the goodwill of the transferred business. It might or might not form part of the conditions of transfer.

Under normal circumstances restraint of trade agreement should be honoured and is enforceable.

3.5 RIGHTS AND DUTIES OF EMPLOYERS BEFORE AND AFTER TRANSFERS

3.5.1 GENERAL CONSIDERATIONS

The law clearly permits changes in the workplace and employees must adapt to meet the challenges it face. Employers must not only look at the financial benefits the changes and the minimum legal requirements attached to it. Critical is to maintain credibility and trust when important decisions are made that have an impact on employees. Genuine consultation is the first and important step of a successful transfer. Secondly, the new employer cannot alter contracts of employment unilaterally. Thirdly, where required, both employers on the one side

---

46 S 189(1) of the LRA refers to the reasons based on the employer’s operational requirements.
must, where required, negotiate with organised labour that represents the affected employees.

Lastly, employers must be reminded that they are in powerful means to enforce consent. They may lock out employees\textsuperscript{47} and those who refuse to agree could be dismissed.\textsuperscript{48} The playing field is definitely not equal and employers should be sensitive to the effect of changes on their staff. An agreement should regulate the liabilities of the parties in a transfer agreement.

### 3 5 2 LIABILITIES

Section 197(8) of the LRA provides that the old employer and the new employer remain jointly and severally liable to an effected employee in terms of liabilities for a period of 12 months after the date of transfer. Such liability only arises if the provisions of s197 (7) are not complied with. The date for a transfer cannot be backdated and a transfer is only effective once all the parties have been agreed to it, as it will circumvent the 12-month protection.\textsuperscript{49}

In terms of s197 (10) of the LRA no employer is responsible to or have any liability of any person who to be prosecuted for or sentenced for any crime.

The new employer is also taking over outstanding arbitration awards. In the matter \textit{NUMSA & Others v Success Panelbeaters & Service Centre CC t/a Score Panelbeaters & Service Centre}\textsuperscript{50} the old employer dismissed an employee prior to a transfer to a new employer. The employee successfully challenged his dismissal and the Labour Court ordered his reinstatement by the new employer as the business was taken over as a going concern.

\textsuperscript{47} See chapter 64 of the LRA regarding strike and lock-outs.
\textsuperscript{48} See s 189 of the LRA regarding dismissals based on operational requirements.
\textsuperscript{49} See \textit{Van der Velde v Business & Design Software (Pty)Ltd} [2006] 17(10) SALLR 1 (LC).
\textsuperscript{50} (1999) 20 ILJ 1851 (LC).
The new employer may have two workforces and it might happen that rationalization will follow. A dismissal under these circumstances will not necessarily be regarded as automatic unfair.\(^{51}\) In a point in *limine* the matter *Lotz v Anglo Office Supplies*\(^{52}\) the applicant was employed as sales representative and that particular division was sold to another company. The applicant declined to accept a transfer, a week before the contract to sell the business was concluded. The applicant was dismissed. The applicant sued his old employer on the basis that his dismissal was automatic unfair. In terms of section 187(1)(g) of the LRA a dismissal is automatically unfair if the reason for a dismissal is related to a transfer.

The question is who should be sued, the old employer or the new employer? It was also found the applicant’s name was not on the list of employees to be transferred as part of a going concern. The court held it was competent to sue the old employer.

In the matter *Van der Velde v Business & Design Software (Pty) Ltd and National Golf Network (Pty) Ltd*\(^{53}\) the two employer parties have agreed to a transfer agreement which was signed on 4 April 2003 but the effective date was backdated to 1 January 2003. The applicant employee’s was retrenched on 28 March 2003 for reasons relating to the business transfer.

One of the key concerns the court was asked to decide was which employer dismissed him. The Labour Court found that the dismissal has occurred as a result of the transfer and the transfer was the dominant reason for the dismissal. The

\(^{51}\) The LRA prescribed the procedures to be followed to retrench employees.

\(^{52}\) [2006] 5 BLLR 491 (LC).

\(^{53}\) [2006] 17(10) SALLR 1 (LC).
dismissal constitute a 187(1)(g) automatic unfair dismissal. The court found the old employer had dismissed the applicant.

The applicant was awarded compensation, equivalent to 12 months’ remuneration and this compensation was to be paid by the new employer.

Bosch\textsuperscript{54} argued that the clear purpose underlying the prohibition of transfer-related dismissal was to prevent employers from using dismissal as a means to avoid their obligations under s197 and an operational requirement dismissal in the context of s197 transfer is still possible. This view is supported as the LRA is making provision for dismissal for operational requirements.

3 5 4 TRANSFER AGREEMENT

3 5 4 1 PARTIES TO THE AGREEMENT

In terms of section 197(6)(a) of the LRA an agreement must be in writing and be concluded between the old and new employer on the one hand and any person or employee organisation the employer must consult with.

The two employer parties must in principle agree to a transfer, selling of the business or outsourcing of the business. The principle agreement will be regulated by an agreement, which will include possible assets, liabilities and how the staff will be handled. Once they have reached consensus on how the transaction will be handled, then the employee organisation or employees will become involve. This will be in the form of a transfer agreement and it must be in writing.\textsuperscript{55}

---

\textsuperscript{54} Operational Requirements Dismissals and section 197 of the Labour Relations Act: Problems and Possibilities" (2002) 23 ILJ 641.

\textsuperscript{55} S 197(6)(a) of the LRA.
3 5 4 2 LEGISLATIVE FRAMEWORK

A transfer of contracts could take place in terms of section 197(2) of the LRA where no consultation with representatives of the employees is necessary. In this instance everything will be the same only under the supervision of a new employer. It is still advisable to consult and inform the representatives of the affected employees. A transfer could also take place in terms of section 197(6)(b) of the LRA as per a negotiated settlement. The content of the contract of employment and conditions of service will determine which legislative framework will be appropriate.

Only those rights, which accrue contractually to employees prior to the transfer, are transferred, as was held in the matter between SACWU v Engen Petroleum Ltd. Rights of employees existed at the time of the transfer become the obligations of the new employer.

3 5 4 3 TERMS AND CONDITIONS OF TRANSFER

The new employer is not expected to provide employees with exactly the same terms and conditions of service as the old employer. The total package of an employee should on the whole not be less favourable on transfer. The transfer of employees must not interrupt their continuity of years of service. The old and new employer must agree to the values of certain entitlements for transferring employees as required in section 197(7)-(9) of the LRA and agree which employer is liable therefore. This includes the valuation of accrued leave pay, severance pay in the

---

56 (1998) 19 ILJ 1568 (LC).
57 S 197(3)(a) of the LRA.
event of dismissal and any other accrued but unpaid payments. This information must be disclosed to each transferring employee.

In the matter *Pama v CCMA*\(^{58}\) the Labour Court confirms that the old employer is not obliged to pay severance pay where there has been a transfer of its employees to a new employer in terms of s197 of the LRA.

If there is a collective agreement and or arbitration awards then flexibility is not allowed unless otherwise agreed.\(^{59}\) Regarding the entitlement of pension or provident fund benefits states section 197(4) of the LRA that it does not prevent “an employee from being transferred to a pension, provident, retirement or similar fund on condition that section 14 of the Pension Fund Act\(^{60}\) have been met.

### 3.5.4.4 TRANSFER IN CIRCUMSTANCES OF INSOLVENCY

The new section 197A of the LRA regulates transfers of business in circumstances of insolvency.\(^{61}\) The contracts of employment will be transferred to the new employer, while all the rights and obligations, at the point of transfer of the employees, will have to be honoured by the new employer, unless agreed to the contrary in terms of section 197(2)(b) of the LRA.

Section 41 (2) of the Basic Conditions of Employment Act\(^{62}\) deals with severance pay on dismissal for operational requirements and insolvency.

---

\(^{58}\) [2001] 9 BLLR 1079 (LC).

\(^{59}\) See s 197(5) (i), (ii) of the LRA.

\(^{60}\) 24 of 1956.

\(^{61}\) Disclosure of information concerning insolvency is regulated in terms of section 197B of the LRA.

\(^{62}\) 75 of 1997.
3545 DATE OF TRANSFER

The date of transfer must be agreed upon between all parties and should be included in the agreement.

The seller and purchaser could not manipulate the effective date of the transfer when the involvement of employees or their representatives is required. In Van der Velde v Business & Design Software (Pty) Ltd and National Golf Network (Pty)Ltd63 a sale agreement was concluded on 3 April 2003 and the transfer of the business effective from 4 April 2003. The two employers agreed to backdate all contracts of employment to 1 January 2003. The affected employees were not consulted in this regard.

The applicant employee was retrenched on 28 March 2003 for reasons relating to the business transfer. The court held the old and new employer could not manipulate the effective date of the section 197 transfer.

3546 DISPUTE RESOLUTION

A collective agreement must provide for a procedure to resolve any dispute about the interpretation or application of a collective agreement.64 It is submitted that a transfer agreement should include a clause on dispute resolution to ensure both parties adhere to the content of a transfer agreement.

36 CONCLUSION

In conclusion is it evident that section 197 of the LRA has developed to make it clearer for those affected by a transfer of a business or part of a business. The

---

63 [2006] 17(10) SALLR 1 (LC).
64 See s197 (24)(1) of the LRA.
playing field is not level for all roleplayers because once an employer decided on a transfer or selling his / her business, then the employees must succumb to that decision. Employees have no bargaining power and playing no significant role to influence the decision of the employer.

Given the history of South Africa, the vulnerable employees must be protected against unfair treatment that could lead to possible job losses. The employees rights are only protected in as far as it is stipulated in the s197 of the LRA and it is mainly procedural aspects which the two employers must follow to ensure procedural fairness. The substantial fairness relates to guarantees the take over of certain conditions of service such as collective agreements and certain benefits.

Although the aim of the legislation is to prevent or minimize job losses, employees may still be dismissed if they refuse be transferred after due processes have been followed. The legislation cannot guarantee job security as external factors such as market forces determine the direction of a business. I concur with Bosch\textsuperscript{65} that a dismissal is still possible under a section 197 transfer and dismissals under these circumstances will not automatically unfair as claimed in section 187(1)(g) of the LRA.

\textsuperscript{65} Bosch, Operational requirements dismissal and section 197 of the LRA: Problems and Possibilities (2002) 23 ILJ 641.
CHAPTER 4

CHANGING CONDITIONS OF SERVICE FOLLOWING TRANSFERS TO THE DEPARTMENT OF HEALTH

4.1 INTRODUCTION

In the previous chapter I highlight how section 197 of the LRA has been amended and the impact thereof for the roleplayers in transfers. The focus was also on the importance of the rights and duties of the old and new employers respectively.

In this chapter, I examine the practical application of section 197 and discuss the difficulty of accepting changing conditions of service and employee benefits prior to transfer.

Firstly, a perspective will be given who is legally responsible for ambulance services. Secondly, a comparison will be made with regard to conditions of service of the two employers. Thirdly, the focus will be on how the changing conditions of service impact on the various pension schemes. Fourthly, the emphasis will be on the impact of the changing conditions of service relating to future salary increases will impact on the transferred employees. Fifthly, the focus will be on the rights of employees in relation to changing conditions of service following a transfer. Lastly, consideration will be given on the changing conditions of service prior to a s197 transfer.
Recommendations will be made how to effect a transfer in terms of the provisions of the LRA and still reach your objectives.

The roleplayers on the one side is the Department of the Provincial Government of the Western Cape and the other employer party is the City.

The other party is the trade unions of Local Government namely the South African Municipal Workers Union, known as SAMWU and the Independent Municipal and Allied Unions Union known as IMATU, (hereinafter ‘the trade unions’).

4.2 LEGAL RESPONSIBILITY OF THE DEPARTMENT OF HEALTH IN RELATION TO AMBULANCE SERVICES.

The Emergency Medical Services was established by Municipal Councils, Divisional Council and Local Authority in terms of section 50 and 50b of the Hospital Ordinance,⁶⁶ which has not yet been repealed. They were then responsible for these services within their geographical areas. It became the responsibility of the City with the amalgamation of all the municipalities.

A shift in the responsibility of ambulance services took place after the democratization of South Africa in 1994. In November 1999 the Provincial Cabinet adopted a resolution that the ambulance services must revert to the provincial authority and in particular to the Department.

Ambulance services will be the functional responsibility of the Department. From above is it obvious that there is no need for the Department and the City, as the two employer parties, to agree to the transfer. The City has for many years provided the ambulance service on an agency basis for the Department and was funded accordingly.

---

⁶⁶ 18 of 1946.
Transfers fall squarely within the ambit of section 197 of the LRA. The employer parties have agreed that insofar as the transfer of staff is concerned that the process will be dealt with by way of the conclusion of an agreement contemplated by section 197(6) of the LRA.

Conditions of employment of the employees associated with the City are contained in collective agreements. The only manner to contract totally or in part out of the consequences of section 197(3) is by way of the conclusion of an agreement contemplated by section 197(6) of the LRA.

To ensure the Department is within its constitutional obligation, it entered into an agency agreement with the City.

4.2.1 AGENCY AGREEMENT

The essential features of the agency agreement are as follows:

i) that the City provides the service on behalf of the Department;

ii) that the employees engaged in the service are employed by the City on its establishment and in accordance with the terms and conditions of service applicable to the City’s employees inclusive of salaries and other benefits;

iii) that the Department reimburses the City’s expenses incurred in providing the service.

The termination of the agency agreement will result in the posts, which are presently filled on the City’s staff establishment becoming redundant. The City
would therefore have to comply with it’s own conditions of service relative to redundancies and also with the provisions of sections 189 and 189A of the LRA.\textsuperscript{67}

\section*{4.3 Comparisons and Analysis of Conditions of Service.}

In terms of section 3(2)(a)(iii) of the Public Service Act is the Minster of the Department of Public Service and Administration \textit{inter alia} responsible for policies on remuneration and other conditions of service of employees.

The conditions of service of the City and that of the Department have carefully been compared and the intention was to transfer them on the conditions of service of the public service. A comparative schedule reflecting the conditions of service of employees in the service of the City and that of the Department as well as what will apply to employees after transfer is attached as annexure B.

The comparison shows that in some areas the conditions of service of the City are markedly better than what of the public service can offer. In some instances certain conditions of service do not even exist in the public service. The transfer of staff from the City without addressing these areas of differences will result the Department not complying with the requirements of section 197 transfer process. It could ultimately lead to a breakdown of negotiations. Taking cognizance of the directive of the Minister of the Department of the Public Service and Administration that only the Public Service conditions of service can apply on transfer, force negotiators to seek alternative solutions to address shortfalls in conditions of service to be offered. One of the options is to include shortfalls into their salaries to compensate for worse off conditions of service.

\textsuperscript{67} This section relates to dismissal for operational reasons.
Where applicable, special arrangements were made in terms of the grouplife scheme of the City’s employees, as the Department does not have the same benefit. The Department had decided that, seeing the transfer of their contract of employment will adversely affect a group of employees, special continuing the payment of the employer’s contribution of the scheme made arrangements.

4.4 CHANGING CONDITIONS OF SERVICE

4.4.1 PENSION

Part of the conditions of service is the pension benefits. Pension funds are generally limited in its scope to a specific sector. In terms of a transfer of a contract of employment the rules of that particular pension fund will determine the various options available in terms of the particular pension fund benefit. Employees cannot claim a contractual right to remain members of their particular fund and are subject to the rules of the pension fund. In the matter *Telkom SA v Blom* the court held that the pension benefits must be paid out as there is no longer contractual relationship between the old employer and their employees. It is submitted that this conclusion misses the point that it is not a termination of contract of employment but a transfer of all benefits without interruption of years of service to a new employer. Section 197 of the LRA did not expressly guarantee pension rights but section 14 of the Pension Fund Act governing all transactions

The trade unions demanded that the transfer of the service to the Department could not take place until such time as the Registrar of Pension Funds certified that the criteria in terms of section 14(1)(c) of the Pension Fund Act is met. In terms of this section:” it requires the registrar to be satisfied that any scheme to amalgamate or

---

68 S 30(2) (T) of the Pension Fund Act.
69 S 13 of the Pension Funds Act.
70 Supra.
transfer funds is reasonable and equitable and accords full recognition to the rights and reasonable and equitable and accords full recognition to the rights and reasonable benefit expectations of the persons concerned in terms of the fund rules, and to additional benefits which have become established practice. 71

Section 197(4) of the LRA and section 14(1)(c) of the Pension Funds Act must be read together. Section 14(c) of the Pension fund Act reads that  ‘the registrar must be satisfied…’ The particular sub-section does not refer to a certificate by the Registrar of Pension Funds. A certificate by the Registrar is only referred in sub-section 14(1)(e) of the Pension Fund Act. A certificate by the registrar is not a requirement for transfer in terms of section 197(4) of the LRA. A certificate or report from an actuary who has compared the City’s pension funds with the Department’s pension fund seems to be sufficient to the effect that the criteria have been satisfied. Important is that such a report or certificate must be obtained prior to any transfer being affected.

Todd72 is of opinion that if benefits (pension) provided by the new fund constitute a reasonable substitute for the employees as a group, then the new employer’s primary obligation will be satisfied.

The City has three different pension funds schemes namely the National Fund for Municipal Workers and the Cape Municipal Pension Fund.

In terms of the conditions of service of the Department new employees must become members of the Government Employees Pension Fund (the ‘GEPF’) Where a member elects to transfer his/her pension benefits to the GEPF, the Registrar of Pensions will be approached in terms of the provisions of Section 14(1)(c) of the Pension Funds Act.

71 See also s 197(4) of the LRA.
4.4.2 MEDICAL AID

Transferred employees cannot, as in the case of pension fund, remain members of the medical aid scheme, unless that scheme is also a service provider of the new employer.

Employees of the City receive a medical aid allowance, which is much higher than that of the Department. The Department has various medical schemes with similar benefits. It was decided that the transferred employees of the City should apply for membership to one of the new employer’s medical aids.

4.4.3 GROUP LIFE INSURANCE

In terms of the conditions of service of the City is that all employees enjoy a minimum group life cover benefit of disability cover and death cover which is 2.5 times an employee’s annual salary. It is regarded as part of the employee’s retirement benefits and the cost thereof is borne by the employer. The public service does not have such a benefit but the Department is willing, as an exception, to allow the transferred employees to retain this benefit on the same conditions. There will be no additional expenditure for the Department as this cost is already included in the agency agreement costs.

4.4.4 LONG SERVICE AWARD

The long service award system of the City is substantively better than that of the Department. In order for staff of the City not to be worse off on the day of transfer, was it agreed that the long service awards of the effected employees be paid out on a pro rata basis and that expenditure could be claimed back from the Department.

4.4.5 HOUSING ALLOWANCE
The employees of the City are receiving a subsidy on a registered bond of up to a maximum of R85 000 whilst the department is paying a subsidy up to a registered bond of R70 000. The difference would be included in the salary of those who qualified therefore.

4.4.6 ANNUAL BONUS

The payment of bonuses of employees of the City is effected annually on a fixed date and not within the month of birth as in the case of the Department. In order to conform with the Department’s conditions of service the bonus pay date of the transferred employees will have to be changed to their month of birth. A pro rata bonus will be paid by the City on date of transfer and the other pro rata portion will be paid in their month of birth.

4.4.7 STUDY BURSARIES

Study bursaries and bursary obligations currently in place will be honored and transferred to the Department.

4.4.8 ENCASHMENT OF LEAVE

Encashment of leave is allowed once a year for the employees of the City whereas with the Department service is it only permissible at retirement, or as a long service award or leave not taken within a particular period due to operational reasons. Employees of the City were given the choice of either encashment of leave on date of transfer or transferring of their accumulative leave to the new employer.

4.4.9 CELL PHONE CONTRACTS
Cell phones contracts of those employees needed them for operational requirements will be honored for the duration of the contract. The Department’s cell phone policy will thereafter be applicable.

4 4 10 TRANSPORTATION

Those employees who are using their own transport for official business will be paid as per public service conditions of service. This arrangement will be revisited after 6 months of transfer. Those with subsidised motor finance scheme, contracts will be honored for the period of their existence.

4 4 11 UNIFORM ALLOWANCE

The staff receiving a uniform allowance will be convert to the conditions of service of the Department.

4 5 CHANGING CONDITIONS OF SERVICE RELATING TO SALARY INCREASERS

The staff of the City is according to their collective agreement entitled to annual salary increases for the duration of that collective agreement. The Minster of the Department of the Public Service and Administration is also responsible for the policy related to salaries. The City has a multi-year collective agreement providing for inflation related increases for three years. In terms of section 197(5)(a) of the LRA collective agreements bound the old employer immediately before transfer and in terms of section 197(5)(b) is the new employer bound by any collective agreements.

73  S 3(2)(a)(iii) of the Public Service Act.
However, the Department’s position was that those upon transfer who are above the maximum of the appropriate public service’s salary scale would be personal to incumbent.

The implication is that they will not receive any cost of living salary adjustments until such time as their salary within the appropriate public service’s salary scale. It is also regulated by Public Service Collective Bargaining Council (PSCBC) Resolutions 9 of 2001 and 6 of 2002 respectively.

The issue of pegging of salaries was taken on arbitration. In terms of an unreported arbitration award\textsuperscript{75} three arbitrators were appointed by the Public Health and Welfare Bargaining Council to arbitrate a dispute regarding the interpretation and application of a collective agreement in terms of section 24(2) of the LRA. The background is that staff of the ambulance services of the rural areas were transferred on 1 November 2000 to the Department. The applicant in this dispute was all transferred on personal salary notches. The issue to be decided is whether or not these staff on personal notches are entitled to salary increases in terms of Public Service Collective Bargaining Council (PSCBC) Resolution 9 of 2001\textsuperscript{76} and Resolution 6 of 2002.\textsuperscript{77} The award was that those who are on personal salary notches are not entitled to any salary adjustments.

It is submitted that this decision is not correct because general salary adjustments are to “protect” employees against inflation and increases in cost of living. The confusion came in between general salary increases, which are inflation related, and the annual notch increase, which is linked, to a particular salary scale. The notch increases in linked to satisfactory performances whilst the general increases is not linked to any performances by employees even those who are suspended with full

\textsuperscript{75} See PSCBC 27-02/03 of 16 June 2003.
\textsuperscript{76} This is a PSCBC resolution regulating the improvement in conditions of service of public service employees.
\textsuperscript{77} This is a PSCBC resolution regarding the annual wage increase and pay progression for the 2002/2003 financial year.
pay will get such benefit. One of the reason for such a position is that it is contrary to section 197 (3) which stated that transferred employees’ terms and conditions should on the whole not be less favourable than those which they were employed for by the old employer.

Secondly, wage agreements concluded in the PSCBC does not exclude certain categories of staff as it specific between the employer and employees who are employed by the State and who fall within the scope of the PSCBC. It is concluded that those employees must get at least the inflation related increases to cope with the cost of living and not the notch increases.

Needless the say that the trade unions who are aware of this arbitration award did not agree to the pegging of their members salary, as they will loose out on general salary increases.

The question is how did the transfer affect the rights of employees following a transfer?

4 6 THE EFFECT OF EMPLOYEE’S RIGHTS IN RELATION TO CHANGING CONDITIONS OF EMPLOYMENT FOLLOWING TRANSFERS

The provisions of section 197(2) of the LRA allows for an automatic substitution of the old employer and section 197(2)(b) saves all the rights and obligations between the employee and the old employer on transfer. Staff will then be transferred with all rights and obligations intact. The City has conditions of service called clause 8(6)(a) which give certain rights to employees.

4 6 1 CLAUSE 8 (6) (a)
Another right of employees of the City is what is called clause 8(6)(a) of the City’s conditions of service. This clause provides, inter alia, that where an employee’s post is abolished owing to the transfer by the City of any part of its operations to another person or body as a going concern, the incumbent of the post shall either be retired or:

“be carried in a supernumerary capacity at his previous rate of pay until by wastage or otherwise a vacancy is created in another post on the Human Resources Complement in which, in the appointing authority’s opinion, he may suitable be employed…provided further that if at any time during a period of six months from the date an employee’s post has been declared redundant, an employee whose services are retained in terms of this sub-paragraph may elect to be retired from the service in terms of the conditions and benefits states in 1.3 hereunder applicable to the approved fund as defined in the Condition of Service…of which he is a member”.

Therefore, an employee who becomes redundant has a period of six months within which he/ she can exercise an unfettered discretion whether or not to accept suitable alternative employment offered by the City and, in the event that such employee then opts for retirement, certain payments must be made. The financial implications for the City would have been R140 million if the unions trigger this option. The City will have to offer reasonable alternative employment to employees who’s post will become redundant as a result of the cancellation of the agency agreement, if it is to avoid the payments envisaged in clause 8(6)(a). There are also other rights in terms of collective agreements.

4 6 2 RIGHTS IN TERMS OF COLLECTIVE AGREEMENT
By virtue of section 197(3)(b) of the LRA the new employer would be obliged to honour collective agreements if it existed and were applicable to employees in the service of the City.

This section could be interpreted as meaning that the existence of a collective agreement governing as little as one term of employment renders section 197(3)(a) inoperative so that transfer is not possible unless the employees consent or all of the terms and conditions of service remain in place with the new employer.

Section 197(6) of the LRA is the mechanism whereby conditions of service applicable to the transferring of staff can be amended by agreement between the employers and the trade unions prior to transfer. The requirement to reach an agreement presumes that all the parties must be able to make compromises on certain rights.

The reality of the situation is, as stipulated previously, that the conditions of service of the staff of the City is regulated by a collective agreement between SALGA and the relevant trade unions. The position of the Department, as directed by the Minister of the Department of the Public Service and Administration is to manage only one set of conditions of service in the Public Service.

One of the reasons is not to create a situation where the same employer have different sets of conditions of service which might be difficult to manage and could lead to unhappiness amongst staff.

In terms of section 197(5)(a) read together with section 197(2)(b) of the LRA collective agreements bound the old and new employer as part of their contract of employment. This right may be enforceable in terms of the collective agreement itself. Collective agreements form part of existing rights of employees and obligation of the employer.

---

78 S 24 of the LRA requires that a collective agreement must include a dispute resolution.
In terms of that collective agreement a dispute must be referred to private arbitration and that must be honoured. On the other hand if section 197(3)(b) of the LRA is interpreted to mean that collective agreements must be honoured, but that other conditions may be varied, provided that the overall package of employment terms and conditions is at least equal, effect would be given to both subsections 197(3)(a) and (b) of the LRA and to the intention of the legislature to facilitate commercial agreements whilst safeguard employee rights. It is supported that this is a more reasonable interpretation.

When the service is to be transferred in terms of section 197 of the LRA and without the consent of the trade unions and effected employees, then the Department would have to honour existing collective agreements and would have to ensure that the remainder of the terms and conditions of service are on the whole no less favourable than those currently in existence on the date of transfer.

4 6 3 ARBITRATION AWARDS

In terms of section 197(5)(a)) of the LRA arbitration awards also bound the old and new employer as part of their contract of employment and in terms of section 197(2)(b) of the LRA part of the rights and obligations of the old employer and affected employee at the time of the transfer.

4 6 4 CLAIMS

Section 197(9) of the LRA states that both employers (old and new) are jointly and severally liable in respect of any claim regarding any term or condition of employment that arose prior to the transfer. This provision will ensure that employers will apply their minds very cautiously to prevent unnecessary claims.
The City will be responsible to offer alternative employment but there could be a claim against the Department as a consequence of the posts in the City becoming redundant on their establishment. One of the reasons is that the Department has over the years reimbursed the City in respect of the expenses as per agency agreement and thereby it could be argued that the Department is also liable to reimburse the City in respect of retrenchment benefits of the affected employees.

The trade unions have indicated they prefer a section 197(2) transfer and thereby ensuring they keep all their benefits intact. Both employer parties are fully aware of the implication if section 8(6)(a) should it become operational. The Department should make every attempt to offer alternative employment on reasonable comparable terms and conditions to avoid incurring such a liability.

Claims are restricted to terms and conditions of service only.

4.6.5 BEHAVIOUR OF OLD EMPLOYER

In terms of section 197A(6)(c) of the LRA ‘anything done by the old employer before the transfer‘ is not transferred to the new employee, thereby limited it to the old employer only in circumstances of insolvency.

4.7 CONSIDERATION OF CHANGING CONDITIONS OF SERVICE

4.7.1 OFFERS MADE

Extensive consultation took place with the trade unions, well in advance to explain the reasons for the transfer, the legal, and other implications thereof. Offers were made as per annexure B to ensure each employee will be informed how the transfer will have an impact on his/her personal position. Various workshops were held with staff to give more clarity on the Department’s conditions of service. The service of
a facilitator was also acquired to assist with the facilitation process with the aim of concluding an agreement.

472 TRANSFER AS GOING CONCERN

Whenever there is a transfer of a business or part of a business as a going concern as envisaged in section 197 of the LRA, then section 197(2) will automatically be applicable. The only way to contract out of the automatic application of section 197(2) is to conclude an agreement contemplated by section 197(6) of the LRA.

Section 197(3)(a) of the LRA reads as follows: -

“The new employer complies with subsection (2) if that employer transferred employees on terms and conditions that are on the whole no less favourable to the employees than those on which they were employed by the old employer.”

The interpretation of this section could mean either the following:

i) if any particular term or condition of employment is regulated by a collective agreement, no deviation from any of the old employer’s terms and conditions of service is permissible without the consent of the employees, or

ii) That the terms and conditions of service which are regulated by a collective agreement are protected, but that the remainder of the terms of the terms and conditions governing employment may be
departed from without the consent of the employees, provided that the employees are put in a position where their terms and conditions of service are ‘on the whole not less favourable.

Section 197(3)(a) enables a transfer of a business as a going concern, inclusive of the employment contracts, without the consent of the employees if the terms and conditions of service are on the whole no less favourable.

4 7 3 REASONABLE OFFERS

The Department could only offered employment to employees of the City on the standard terms and conditions that apply in the public service. Whether alternative employment is reasonable or not depends on the circumstances of each individual case. In Irwin & Johnson Ltd v CCMA\(^79\) the court had regarded to the following factors in finding that an offer of alternative employment did not constitute a reasonable offer:

i) previous years of service would not be recognized;  
ii) employees’ employment with the new employer would be subject to a probationary period;  
iii) no nightshift allowance would be paid  
iv) there was no guarantee of employment beyond a period of 12 months, which was the contract period applicable to the new employer.

This decision was however overturned on appeal.

In the Department’s case, employees of the city’s previous experience would be regarded as continuously service, there will be no probation period, all allowances

will be paid or included in salaries and there is no concerns about retrenchments as the Department does not have a retrenchment agreement or policy.

4 7 4  REFUSAL TO BE TRANSFERRED

Section 197 of the LRA is not addressing a refusal to be transferred to a new employer. It seems that employees cannot refuse a transfer on condition that all the requirements of section 197 are met. The parties can by agreement agree on the individuals who will not be transferred to the new employer.\textsuperscript{80} If an employee does not want to be transferred, is the only option to resign. In the matter \textit{Fourie & Iscor Ltd}\textsuperscript{81} the old employer subsequently retrenched employees who have refused a transfer and the court held that these employees are not entitled to severance pay because they have refused reasonable alternative employment.

The old employer cannot dismiss employees for operational reasons.\textsuperscript{82} Such dismissals will be automatically unfair if it is related to a transfer.\textsuperscript{83}

From above a distinction could be made between three types of transfers of contracts of employment.

Firstly, if the transfer of business is taking place with the new employer who’s conditions of service and benefits are more favourable than that of the old employer and the new employer is meeting all the other requirements in terms of section

This is making the transfer of contracts of employment easier as all transferred employees will benefit from the higher salaries and conditions of service of the new employer. An example is services rendered by non-government organizations

\textsuperscript{80} S 197(2) of the LRA allows the parties to agree otherwise.

\textsuperscript{81} [2000] 11 BLLR 1269(LC).

\textsuperscript{82} S 213 of the LRA described operational requirements which is based on the economic, technology, structural or similar needs of an employer.

\textsuperscript{83} S 187(g) of the LRA 66 of 1995.
(NGO’s) on behalf of the Department such as Santa hospitals. The only reliable income is the state subsidy and the conditions of these employees are less favourable than that of the state employees.

It is also possible to effect a transfer if the terms and conditions of service of affected employees are not governed by any collective agreements or the Department is able to honour the agreement.

Secondly, if the transfer of business is taking place with the new employer on the same conditions of service and is meeting all the requirements in terms of section 197(3). This transfer will be regarded as a going concern and the only change is a new owner. All collective agreements and conditions of service will remain in force. This is mostly where for example an owner did sell his business.

The third group is more problematic and complicated in the sense that where the transferred employees remuneration and conditions of service are far better than what the new employer is offering. In this instance negotiations must take place in terms of section 197(6)(b) of the LRA to secure a fresh agreement. The difficulty is that trade unions will not easily agree to less favourable conditions of service and they will insist on collective agreements regulating their conditions of service, particularly if it is more favourable. The employees of the City are falling within this category.

475 DECLARATOR

If the unions persist that a transfer in terms of section 197 of the LRA is not competent because certain collective agreements will not be complied with by the Department, or a certificate must be obtained from the registrar of pension funds or that the report of the actuary is insufficient, an application could be made to the Labour Court for a declarator. The Labour Court has the power in terms of section 158(iv) of the LRA to make a declaratory order.
If the trade unions claim that section 197(2) of the LRA is automatically applicable to a particular transfer given their favourable conditions of service and collective agreements, then it will be very difficult for the new employer to defend such a case. On the other hand, the new employer could also approached the Labour Court for a declarator if the unions refuse to accept an offer which is on the whole not less favourable in terms of conditions of service. It will be very problematic with collective agreements. If it cannot be honoured, a transfer as a going concern seems doomed to fail.

The trade unions stated that their mandate from their members is a transfer in terms of section 197(2) of the LRA. Given the firm position of the trade unions is it very difficult to effect a transfer of a business. The following recommendations should have been seriously considered by the employer (old employer and new employer) in the event of deadlock.

4 8 RECOMMENDATION

The parity of conditions of service can be addressed in three ways, namely by collective agreement or through efflux ion of time or by way of section 189 of the LRA.

4 8 1 AMENDING TERMS AND CONDITIONS OF SERVICE

It is trite that an employee’s terms and conditions of service cannot be unilaterally amended. The consent of the employee is required without their consent. Therefore, one way of bringing parity is through a process of collective bargaining

84 In terms of s197(6) of the LRA an agreement must be concluded between the employers on the one hand and the employees on the other hand.
of which employees either individually or through their trade unions agree to an amendment to their terms and conditions of service to bring about a measure of parity.

The challenge is that employees did not will nor their trade unions are unlikely to agree to any alteration of their conditions of service, unless it is to their advantage.

To effect a transfer to a national or provincial sphere of government within the framework of labour legislation, the government must develop a control system to manage the different conditions of service of the transferred employees as well as operational collective agreements until it’s expired date. It is then possible to effect a transfer in terms of section 197(3) of the LRA. Nothing in section 197 of the LRA prevents an employer to once the transfer has been implemented, seeking to change the terms and conditions.85

4.8.2 EFFLUXION OF TIME

The employer also has a choice to sit out a number of years and deal with the parity issue on an incremental basis. One tool is to use the annual wage increments to bring about a measure of parity. An employee does not have a right to a wage increase and different employees can get different percentage increases in order to bring parity. This might be regarded as discrimination and be challenged but the aim is to reach parity rather than to discriminate. Another option to promote parity is through promotions over a period of time. An example is where a particular employee could be offered a promotion post on condition he/she accepts the new terms and conditions of service.

The difficult with achieving parity is that it takes a long time as you will have two employees each with the same length of service and performing the same function but being treated differently as far as the terms and conditions are concerned.

4 8 3 THE APPLICATION OF SECTION 189 OF THE LRA

Section 189 of the LRA provides the employer with an option and possibility of dealing with this problem and at the same time bringing about a measure of parity as far as terms of conditions of service is concerned. The employer, if contemplating dismissing one or more employees, must evoke section 189 for reasons based on the employer’s operational requirements. “Operational requirements” is defined in section 213 of the LRA as “requirements based on the economic, technological, structural or similar needs of the employer”.

If an employer is going to embark on a process of restructuring which may or may not lead to dismissals on operational grounds, the employer must, in terms of section 189(2) of the LRA consult with the view of reaching consensus on-

“(a) appropriate measures to -

(i) to avoid the dismissals;
(ii) to minimize the number of dismissals;
(iii) to change the timing of the dismissals;
(iv) to mitigate the adverse effects of the dismissals;

(b) the method of selecting employees to be dismissed; and
(c) the severance pay for dismissed employees.”

86 S 189(1)(a)-(d) describes the sequence of priority with whom the employer must consult, either as required per collective agreement, workplace forum or registered unions whose members are likely to be affected or employees likely to be affected.
One of the basis on which dismissal could be avoided is through the offer of alternative positions on alternative terms and conditions of service. The employer to achieve a measure of parity can use this mechanism.

In such circumstances the affected employees are under a measure of risk if they discarded any alternative offer of new positions on new terms of conditions of service.

In terms of section 14(4) of the BCEA “an employee who unreasonably refuses to accept the employer’s offer of alternative employment with that employer or with any other employer, is not entitled to severance pay…”

The implication is that an employee forfeits his or her rights to severance pay if he or she rejects a reasonable offer of alternative employment.

Section 189 of the LRA offers the State as employer who is embarking on a process of restructuring or reorganization the ideal opportunity to retrench employees who are surplus to its establishment and at the same time achieve a measure of parity in regard to terms and conditions of service.

4.9 CONCLUSION

The Department embarked upon a lengthy process of consultation with the City and negotiations with the trade unions with the view to effect the constitutional obligations of the Department.

The provisions of the LRA caused considerable difficulty inasmuch as the conditions of service of the Department is laid down by the Department of the Public Service and Administration and these conditions differ substantially from those applicable to the City’s employees.

A complexity relating to the section 197(6) of the LRA is the Department’s ability to offer commensurate conditions of service to City’s staff within the limitations of the
public service rules. The Department has not been able to put a package in place that satisfied the interpretation of “on the whole not less favourable”.

The trade unions were not prepared to agree to a variation and or the waiver of the terms and conditions of applicable collective agreements. This resulted that a transfer of the service in terms of section 197 of the LRA cannot take place.

CHAPTER 5

CONCLUSION

An ambulance service is as per the Constitution a provincial competency and the first step in this process is to ensure that only the province is rendering ambulance services. This has been done through an agency agreement with the City and the Department. The general law relating to the transfers of contract of employment in terms of section 197 of the LRA is to protect the rights of the affected employees.

The Public Service Act and the Public Service Regulations do not provide a mechanism for transfers between spheres of government. The Municipal Act\(^87\) does not either made provision for transfers to and from national and or provincial departments.

The comparison and analysis of the conditions of services between the City and that of the Department are significant different. Both employer parties on the one side and the trade unions on the other side embarked upon a lengthy process of negotiations with the trade unions with the view to effect the transfer. The parties could not reach agreement on the conditions of service and collective agreements. In addition, the mandate of the Department was very inflexible as the Department is not accommodative of another set of conditions of service. The core terms and

\(^87\) 17 of 1998.
A collective agreement\textsuperscript{88} governs conditions of service of all City’s employees.

If negotiations failed in either a 197(6) process, then the only option is a 197(2) process whereafter a process of amalgamation could follow. The trade unions had a collective agreement which had been concluded at national level and they could approached the Labour Court for an interdict on the basis that section 197(3)(b) of the LRA\textsuperscript{89} had not been complied with.

It is submitted that it is not only the trade who are the stumbling block in this section 197 transfer, but also the polices and directives of the public service that prevented a transfer. It appears to be an inflexible position of the Department. The trade unions prefer a transfer in terms of section 197 (2) as a going concern, which is to protect their member’s interest. The Department was unable to offer an alternative, which are not worse off.

However, section 209 of the LRA specifically states that the State is bound by this LRA. If there is conflict between the provisions of the LRA and any provision of the Public Service Act or any directives issued by the Minister of Public Service and Administration, then the provisions of the LRA will prevail.

The fact that the Department could not accommodate the collective agreements appears to constitute a bar to a transfer of the ambulance services. The trade unions were not prepared to agree to a variation and or waiver of the terms and conditions of the applicable collective agreements.

To effect a transfer to a national or provincial sphere of government within the framework of labour legislation, the government must develop a control system to

\textsuperscript{88} The agreement between SALGA and trade unions were signed on 29 December 2003.
\textsuperscript{89} This section deals with collective agreements that must be honoured.
manage the different conditions of service of the transferred employees as well as operational collective agreements until it’s expired date. It is then possible to affect a transfer in terms of section 197(3) of the LRA. Nothing in section 197 of the LRA prevents an employer to once the transfer has been implemented, seeking to change the terms and conditions.  

There is no need to amend section 197 of the LRA to suit a particular employer, particularly the State as the biggest employer. Creative ways of applying the law to reach your objectives is still possible within the framework of the law.

In this treatise it was sought to integrate the laws relating to transfers with the practical application thereof and the challenges facing all the roleplayers therein.

---

ANNEXURES

ANNEXURE A

197 Transfer of contract of employment:

(1) ...

(1) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6)-

(a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;

(b) all the rights and obligations between the old employer and the employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee.

(c) ...

(d) ...

(2) (a) The new employer complies with subsection (2) if that employer
employs transferred employees on terms and conditions that are on the whole not less favourable to the employees than those on which the old employer employed them.

(b) Paragraph (a) does not apply to employees if any of their conditions are determined by a collective agreement.

(3) Subsection (2) does not prevent an employee from being transferred to a pension, provident, retirement or similar fund other than the fund to which the employees belonged prior to the transfer, if the criteria in section 14 (c) of the Pensions Funds Act, 1995 (Act 24 of 1956) are satisfied.

(4) (a) For the purpose of this subsection, the collective agreements and arbitration awards referred to in paragraph (b) are agreements and awards that bound the old employer in respect of the employees to be transferred, immediately before the of transfer.

(b) Unless otherwise agreed in terms of subsection (6), the new employer is bound by –

(i) any arbitration award made in terms of this Act, the common law or any other law

(ii) any collective agreement binding in terms of section 23; and

(iii) unless the commissioner acting in terms of section 62 decides otherwise.

(6) (a) An agreement contemplated in subsection (2) must be in writing and concluded between –

(i) either the old employer, the new employer, or the old and new employer acting jointly, on the one hand; and
(ii) the appropriate person or body referred to in section 189 (1), on the other.

(b) …

(c) …

(7) The old employer must-

(a) agree with the new employer to a valuation as at the date of transfer of-

(i) the leave pay accrued to the transferred employees of the old employer;

(ii) the severance pay that would have been payable to the transferred employees of the old employer in the event of a dismissal by reason of the employer’s operational requirements; and

(iii) any other payments that have accrued to the transferred employees but have not been paid to employees of the old employer;

(b) conclude a written agreement that specifies-

(i) which employer is liable for paying any amount referred to in paragraph (a), and in the case of the apportionment of liability between them, the terms of the apportionment; and

(ii) what provision has been made for any payment contemplated in paragraph (a) if any employee becomes entitled to receive a payment;

(c) disclosure in terms of the agreement contemplated in paragraph (b) to each employee who after the transfer becomes employed by the new employer; and

(c) take any other measures that may be reasonable in the
circumstances to ensure that adequate provision is made for any obligation on the employer that may arise in terms of paragraph (a)

8…… For a period of 12 months after the date of transfer, the old employer is jointly and severally liable with the new employer to any employee who becomes entitled to receive a payment contemplated in subsection (7) (a) as a result of the employee’s dismissal for a reason relating to the employer’s operational requirements or employer’s liquidation or sequestration, unless the old employer is able to show that it has complied with the provisions of this section.

(9) The old and new employer are jointly and severally liable in respect of any claim concerning any term or condition of employment that arose prior to the transfer.

(10) This section does not effect the liability of any person to be prosecuted for, convicted of, and sentenced for any offence.
<table>
<thead>
<tr>
<th>Conditions of Service</th>
<th>City of Cape Town</th>
<th>Conditions of Service (COS) of Public Service (Department of Health)</th>
<th>Conditions of Service (COS) on transfer</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>General Salary Adjustment</strong></td>
<td>Usually annually on 1 July in terms of the agreement after negotiations in the bargaining Council.</td>
<td>General salary increases normally take place on an annual basis as negotiated at central level in the PSCBC</td>
<td>Transfer to Public Service COS</td>
</tr>
<tr>
<td><strong>Increments</strong></td>
<td>Individual increases on appropriate salary scale on anniversary of appointment and according to collective agreements</td>
<td>Salary progression wef 1 July subject to satisfactory performance.</td>
<td>Transfer to Public Service COS</td>
</tr>
<tr>
<td><strong>Annual Bonus</strong></td>
<td>13th cheque payable during November. Pro rata on transfer</td>
<td>13th cheque payable in month of birth Pro rata will be paid first year.</td>
<td>Transfer to Public Service COS</td>
</tr>
<tr>
<td><strong>Telephone</strong></td>
<td>Permanent allowance</td>
<td>Depending on operational requirements (Bleeper, radio, cell phone)</td>
<td>Transfer to Public Service COS</td>
</tr>
<tr>
<td><strong>Hours of work</strong></td>
<td>40 hour shifts workweek</td>
<td>40 hours per week</td>
<td>Transfer to Public Service COS</td>
</tr>
<tr>
<td>Normal shift</td>
<td>Sundays and Public Holiday+ one additional day’s pay</td>
<td>R1.33 per hour for night shift (hours 19h00 – 07h00). No additional payment between hours of 07:00 and 19:00.</td>
<td>Transfer to Public Service COS</td>
</tr>
<tr>
<td>-------------------</td>
<td>------------------------------------------------------</td>
<td>-------------------------------------------------------------------------------------------------</td>
<td>-------------------------------</td>
</tr>
<tr>
<td>Overtime</td>
<td>Double time for Sundays and public holidays. Payment as stipulated in the BCEA.</td>
<td>Paid at a rate of double time on Sundays and Public Holidays and between the hours of 20:00 and 06:00. Time and a third for other time.</td>
<td>Transfer to Public Service COS</td>
</tr>
<tr>
<td>Medical Aid</td>
<td>60% employer contribution and 40% employee contribution. No maximum</td>
<td>Employer 66.66% vs. MEMBER 33.33%) of actual membership fee to a maximum of R1014.00 per month. Employees can choose any medical aid.</td>
<td>6 x difference in employer contribution Transfer to Public Service COS</td>
</tr>
<tr>
<td>Medical Fund</td>
<td>18% employer 8.5 employee Defined contribution dependant on strength of the financial market when on retirement</td>
<td>PGWC 13% / Employee 7.5% Government Employees Pension Fund. Employees can transfer benefits to GEPF. Defined benefit with a fixed calculated formula.</td>
<td></td>
</tr>
<tr>
<td>Pension Fund</td>
<td>Maximum of R8500.00. 20% of amount for which person qualifies / Minimum 21 years old + 1 years pensionable service Existing guarantees will be transferred</td>
<td></td>
<td>Transfer to Public Service COS</td>
</tr>
<tr>
<td>Housing Bond</td>
<td>Subsidy in respect of a mortgage bond to a maximum of R85000.00 calculated to a specific formula. Maximum of R346 p.m. on R70 000 bond subject linked to interest rates</td>
<td></td>
<td>Difference in employer contribution will be added to the salary. Transfer to Public Service COS</td>
</tr>
<tr>
<td>Guarantee</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Monthly housing</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>allowance</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

59
<table>
<thead>
<tr>
<th>Transportation</th>
<th>Director/ Chief Officer who partakes in the motor finance scheme</th>
<th>Present scheme limited to Senior Management</th>
<th>Transfer to Public Service COS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sick Leave</td>
<td>42 days sick leave per annum (accumulative)</td>
<td>36 working days normal sick leave per 3 calendar years (full pay) Temporary disability leave as required per leave cycle (NOT CAPPED) Permanent disability leave with full pay subject to certain provisions (NOT CAPPED) Leave for occupational injuries and diseases</td>
<td>Transfer to Public Service COS</td>
</tr>
<tr>
<td>Annual Leave</td>
<td>35 calendar days if earning more than R46 812 per annum 30 calendar days if earning less than R46 812 per annum.</td>
<td>Normal Workers: 22 working days (less than 10 years service) 26 working days (10 years +) 28 working days (appt &lt; 1/7/1968) Commencing on 1 January each year</td>
<td>Employees have a choice to have Leave credits paid out or transferred to Public Service Transfer to Public Service COS</td>
</tr>
</tbody>
</table>
ARTICLES


Bosch C “Transfers of contracts of employment in the outsourcing context” (2001) 22 ILJ 840

Taylor M “Constitutional Court rules on outsourcing’” SA Labour Bulletin Volume 27 No 1 February 2003

BOOKS


Du Toit, D; Bosch, D; Woolfrey, D; Godfrey, S; Rossouw, J; Christie, S; Cooper, C; Giles, G and C Bosch *Labour Relations Law: A Comprehensive Guide* (2003) 4th edition Butterworths: Durban


Grogan, J *Dismissal* (2002) Juta and Co Ltd: Cape Town


TABLE OF CASES

COSAWU v Zikhethele Trade (Pty) Ltd [2005] 9 BLLR 924 (LC)

Fourie & Iscor Ltd [2000] 11 BLLR 1269(LC)

Foodgro (a division of Leisuren et Ltd) v Kei (1999) 20 ILJ 252 (LAC).

Irwin & Johnson Ltd v CCMA & others (2002) 23 ILJ 2058 (LC)

Kgethe v LMK Manufacturing (Pty) Ltd (1997) 10 BLLR 1303 (LC)

Lotz v Anglo Office Supplies [2006] 5 BLLR 491 (LC)

Maning v Metro Nissan & another (1998) 19 ILJ 118 (LC)

Moore & others v Telkom SA Ltd & others (2002) 23 ILJ 1062 (LC)

National Education Health & Allied Workers Union v University of Cape Town & others (2003) 24 ILJ 95 (CC)

National Union of Metal Workers of SA on behalf of Matlala & Others and Active Distribution (2006) 27 ILJ 633 (BCA)

Ndima & Others v Waverly Blankets Ltd (1999) 20 IJL 1563 (LC)

NEHAWU v University of Cape Town (2002) 23ILJ 306 (LAC)

NEHAWU v University of Cape Town (2003) 24 ILJ 95 (CC)
Ntuli & others v Hazelmore Group t/a Musgrave Nurses Home (1988) 9 ILJ 709 (IC)

NUMSA v Merkor Industries (1990) 11 ILJ 1116 (IC)

NUMSA & Others v Success Panelbeaters & Service Centre CC t/a Score Panelbeaters & Service Centre (1999) 20 ILJ 1851 (LC)

Pama v CCMA [2001] 9 BLLR 1079 (LC)

SACWU v Engen Petroleum Ltd (1998) 19 ILJ 1568 (LC)

SATU v Good Hope Press Group (Pty) Ltd (1991) 12 ILJ 608 (LAC)

Schutte & others v Powerplus Performance (Pty) Ltd & another (1999) 20 ILJ 655 (LC)

Securior (SA)(Pty) Ltd & Another v Lotter [2005] 10 BLLR 1023

Telkom SA Ltd & others v Blom and others [2003] 7 BLLR 638 (SCA)

Van der Velde v Business & Design Software (Pty)Ltd (2006) 27 ILJ (LC)

Waverley Blankets Ltd v CCMA & others [2003] 3 BLLR 236 (LAC)
<table>
<thead>
<tr>
<th><strong>TABLE OF LEGISLATION</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Basic Conditions of Employment  Act 75 of 1997</td>
</tr>
<tr>
<td>Health Act 63 of 1997</td>
</tr>
<tr>
<td>Hospital Ordinance 18 of 1946</td>
</tr>
<tr>
<td>Labour Relations Act 28 of 1956</td>
</tr>
<tr>
<td>Labour Relations Act 66 of 1995</td>
</tr>
<tr>
<td>Municipal Act 17 of 1998</td>
</tr>
<tr>
<td>Pension Fund Act 24 of 1965</td>
</tr>
<tr>
<td>Public Service Act, 1994</td>
</tr>
<tr>
<td>Public Service Regulations, 2001</td>
</tr>
<tr>
<td>The Constitution, Act 108 of 1996</td>
</tr>
</tbody>
</table>