THE RIGHTS OF EMPLOYEES FOLLOWING A TRANSFER
OF AN UNDERTAKING IN TERMS OF SECTION 197 OF THE
LABOUR RELATIONS ACT IN AN OUTSOURCING
CONTEXT

by

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DECLARATION

I, Chantell Belinda Crouse student number 200321447, hereby declare that “The Rights of Employees Following a Transfer of an Undertaking in Terms of Section 197 of the Labour Relations Act in an Outsourcing Context” for LLM (Labour Law) is my own work and that it has not previously been submitted for assessment or completion of any postgraduate qualification to another University or for another qualification.

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CONTENTS

SUMMARY ................................................................................................................................. ii

CHAPTER 1: INTRODUCTION ........................................................................................................... 1

CHAPTER 2: REQUIREMENTS FOR SECTION 197 OF THE LRA AND THE SCOPE OF ITS APPLICATION .......................................................................................................................... 7
  2.1 Introduction .............................................................................................................................. 7
  2.2 What about second-generation outsourcing? ......................................................................... 21

CHAPTER 3: SECTION 197 OF THE LRA AND OUTSOURCING TO A LABOUR BROKER ................................................................. 34

CHAPTER 4: THE EFFECT OF SECTION 197 OF THE LRA ON EMPLOYERS, BOTH “OLD” AND “NEW” ................................................................................................................................. 38

CHAPTER 5: EMPLOYERS RIGHTS IN RESPECT OF A DISMISSAL AS A RESULT OF A TRANSFER ................................................................. 45

CHAPTER 6: THE RIGHTS OF EMPLOYEES IN TERMS OF SECTION 197A OF THE LRA WHERE THEIR EMPLOYER IS SEQUESTRATED OR HIS BUSINESS LIQUIDATED ......................................................................................... 55

CHAPTER 7: CONCLUSION .............................................................................................................. 63

BIBLIOGRAPHY .............................................................................................................................. 65

Table of Cases .............................................................................................................................. 65
Table of Statutes ............................................................................................................................ 67
Websites ........................................................................................................................................ 68
The protection that employees enjoy under our common law in the transfer of a business of its employer is very little. Common law only concerns itself with the lawfulness of a contract of employment. Common law is, however, now also experiencing the effect of the Constitution which provides for fair labour practices.

Proper legislation was enacted to afford employees proper protection against dismissals resulting out of a transfer of a business by the employer as a going concern.

Such a dismissal would be automatically unfair in terms of section 187(1)(g) of the LRA.

The protection that employees enjoy is governed by section 197 of the LRA.

This section provides that the new employer is placed in the “shoes” of the old employer. It also further states that the new employer could be held accountable for the unlawful actions of the old employer against an employee prior to the transfer taking place.

Section 197 of the LRA, however, does not apply to all transfers of businesses. There are some key concepts that are of importance to determine its applicability. Such concepts include whether there was a transfer of a business or a part of the business and whether it was transferred as a going concern.

The words “transfer” and “business” are defined in section 197(1)(a) and (1)(b) of the LRA.

However, the words “going concern” are not defined and one would have to scrutinise case law for guidance in considering whether the transfer was done as a going concern.
A leading case is that of *Schutte v Powerplus Performance (Pty) Ltd.* In this case the court held that one must consider the substance of the agreement in determining whether the business was transferred as a going concern. It further held that the lists of factors that one should have regard to are not exhaustive.

Section 197 of the LRA also applies to employees whose services have been outsourced.

Outsourcing of services occurs where an employer discontinues a service or activity that is in most cases not part of the main business of the employer, and contract an outside contractor to take over that service or activity.

This matter was given clarity in the case of *SA Municipal Workers Union v Rand Airport Management Company (Pty) Ltd.*

The court came to the conclusion that section 197 could apply to outsourcing, provided it passes the test of “transfer” as well as the test of what constitutes a “business or service”.

Outsourcing to labour brokers is, however, not covered by section 197 of the LRA.

The matter was given consideration by the Labour Court in *CEPPWAWU v Print Tech (Pty) Ltd.*

Another question is whether second-generation outsourcing is covered by section 197 of the LRA.

Second Generation Outsourcing occurs when an employer put the outsourced service out to tender upon the outsource contract coming to an end and a new entity is awarded the outsourcing opportunity following the original outsource entity being unsuccessful in its bid to secure the contract for an additional term.

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A leading case dealing with second-generation outsourcing is *Aviation Union of South Africa v South African Airways (Pty) Ltd.*

The court accepted that a purposive interpretation of section 197 rather than a literal interpretation thereof should be followed in consequence of the literal interpretation might having the result of excluding second-generation employees from the protection of section 197 of the LRA. It would undermine the clear purpose of the LRA.

In the matter of *NEHAWU v UCT* the Constitutional Court laid down the purpose of section 197 of the LRA.

Ngcobo J held as follows:

“The concept of fair labour practice must be given content by the legislature and thereafter left to gather a meaning, in the first instance, from the decisions of the specialist tribunals including the LAC and the Labour Court. These courts and tribunals are responsible for overseeing the interpretation and application of the LRA, a statute which was enacted to give effect to s 23(1). In giving content to this concept the courts and tribunals will have to seek guidance from domestic and international experience. Domestic experience is reflected both in the equity-based jurisprudence generated by the unfair labour practice provision of the 1956 LRA as well as the codification of the unfair labour practice in the LRA. International experience is reflected in the Conventions and Recommendations of the International Labour Organisation. Of course, other comparable foreign instruments such as the European Social Charter 1961 as revised may provide guidance.”

The *Aviation* case however was recently taken to the Supreme Court of Appeal by SAA.

The Supreme Court of Appeal held that the Labour Appeal Court had erred in following a purposive interpretation of section 197 of the LRA. It held that the courts should not read in words where legislation is clear and unambiguous. The only instance where words should be read into a piece of legislation is if such piece of legislation is unconstitutional.

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4 2010 (4) SA 604 (LAC).
The Supreme Court of Appeal held that section 197 of the LRA does not apply to second generation outsourcing.

Employees also enjoy protection against the insolvency of an employer and the transfer of the business as a going concern as the result of the employer’s liquidation or sequestration. This provision is covered by section 197A of the LRA.
CHAPTER 1  
INTRODUCTION

What happens to employees in the sale of a business or a takeover by another employer? This is one of the great concerns of employees when informed that the business is being sold or being taken over by a new employer.

Employees are under the misconception that once a business is sold their employment relationship automatically terminates.

This however was the situation under common law prior to the implementation of section 197 of the LRA.

The protection that employees enjoyed under our common law in the transfer of a business of its employer was very little. Common law only concerned itself with the lawfulness of a contract of employment.

Prior to the implementation of labour law legislation governing the transfer of an undertaking, an employer had the right to choose whether or not he wants to contract with the employees. This was part of the notion of a persons’ right to “freedom of contract”.

This right was confirmed in the case of Ntuli & Others v Hazelmore Group t/a Musgrave Nursing Home.6

It was held by the Industrial Court that a transferor of an undertaking cannot transfer his or her obligation under a contract of service to the transferee of the undertaking without the consent of the employee first having been obtained.

The Industrial Court also suggested that there was a duty, not only on the seller, but on the purchaser to consult with the employees prior to the transfer of the business.

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6 (1988) ILJ 709 (IC).
Because of the lack of labour legislation on this matter, the Industrial Court provided for general guidelines in the transfer of a business to protect the rights of employees and to prevent unfair labour practice.

In *Kebeni v Cementile Products (Ciskei)*\(^7\) the Industrial Court laid down some of these guidelines and requirements.

The court provided that the seller (the “old employer”) had to consult with its employees prior to the sale of its business and that the purpose of the consultation would be to discuss the measures to be taken on how to protect the interest of the employees and the preservation of the employment relationship in the transfer of a business.

The problem with our common law principle of “freedom of contract” was problematic in the sense that it was two sided. Not only had the employee the choice whether or not he wanted to work for the new employer, but the employer also had the choice whether or not he wanted to take on the services of the old employee or terminate the employment contract.

From the above it is clear that the common law provided insufficient protection to the employee in the case of the transfer of an undertaking.

The above being one of the main reasons for implementation of labour legislation and more particular section 197 of the Labour Relations Act.

Section 197 also relates to the common law in that it provides for the consent of the employee in the event of the contract of employment being transferred.

Section 197 however contains express exceptions to this rule in the event where a business is being transferred in whole or part and as a going concern; or where the

\(^7\) *(1987) 8 ILJ 442 (IC).*
whole or any part of the business is transferred as a going concern where the employer is insolvent and being wound-up or is being sequestrated; or because the scheme of arrangement or compromise which is being entered into is to avoid the winding-up or sequestration of the employer for reasons of insolvency.

Although the employee, under common law, had a right to sue his “old” employer for damages in the event of his employment contract being terminated by the “new” employer, this protection was meaningless in the case where the “old” employer was insolvent.

Another reason for the implementation of section 197 is to give effect to a South African citizen’s right to fair labour practice as entrenched in our Constitution.

In NEHAWU v UCT\(^8\) the Constitutional Court looked at the concept of fair labour practice.

It was held that the concept of fair labour practice is not capable of precise definition due to the tension between the interest of workers and the interest of employers that is inherent in labour relations. Therefore it must be given its content by the legislature and by gathering meaning from decisions of specialist tribunal which includes the Labour Appeal Court and the Labour Court.

The courts will have to seek guidance from domestic and international decisions in giving content to this concept and may have regard to foreign instruments as well.

The court thus has a crucial role to ensure that the right to fair labour practice is honoured.

The court also has an important supervisory role to ensure that legislation giving effect to constitutional rights is properly interpreted and applied.

\(^8\) (2003) 24 ILJ 95 (CC).
In the above case the court also looked at the concept of fairness and whether it only attains to employees.

The court referred to the case of *National Union of Metalworkers of SA v Vetsak Co-operative Ltd and Others*\(^9\) which held that:

> “Fairness comprehends that regard must be had not only to the position and interest of the workers, but also those of the employer, in order to make a balanced and equitable assessment.”

A similar view was expressed by Nienaber JA in the *NEHAWU* case. He wrote:

> “The fairness required in the determination of an unfair labour practice must be fairness towards both the employer and employee. Fairness to both means the absence of bias in favour of either.”

The court held that the purpose of the LRA

> “is to advance economic development, social justice, labour peace and the democratization of the workplace”.

On the purpose of section 197 of the LRA there seems to be a two-fold view.

The majority view is that the primary purpose is to facilitate the transfer of the business, whereas the minority view is that its purpose is the protection of workers in the event of the transfer of the business.

Nienaber JA is of opinion that the answer lies somewhere in between.

The conflict that lies in the transfer of business is the employers’ interest in the profitability, efficiency or the survival of the business appose to the workers’ interest in job security and the right to freely choose an employer.

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\(^9\) 1996 (4) SA 577 (A).
The common law provided very little protection to the workers in these situations. Under common law the sale of a business resulted in the loss of employment.

The Industrial Court did attempt to remedy this situation by providing certain guidelines and requirements which needed to be followed by an employer when he wanted to sell his business. One such duty that was imposed on the employer was to consult with his employees prior to the sale of his business.

Later a statutory duty was also imposed on the employer to pay severance packages to their employees, but this situation had the potential to impact the economic development negatively as well as undermine the promotion of labour peace.

Section 197 provides for relieve to employers and employees by aiming to minimize the tension between the employers' interest and that of the employees.

Ngcobo J in the NEHAWU case held that section 197 has a dual purpose; it facilitates the commercial transactions in the sense that the new employer need not to find new employees who have no experience and who have never done the work before and in the same time provides for job security of the employees.

From the above it is clear that a future employer cannot pick and choose which employees to take on; they also cannot dismiss an employee because a transfer has taken place. Section 197 of the Labour Relations Act 66 of 1995 regulates the transfer of a business. The purpose of this section is to protect the employment security during transfers.

The effect of section 197 has far-reaching implications for the new employer, which implications are dealt with herein at a later stage.

Section 197 does, however, not apply to all transfers of business. The wording of the section contains some key concepts which are discussed in Chapter 1 hereof with reference to case law.
But what about the rights of employees when a business management decides to outsource its services? This situation is also dealt with in Chapter 2 hereof. Outsourcing to labour brokers is discussed in Chapter 3. The importance here is to establish whether section 197 of the Labour Relations Act applies to such outsourcing.

In Chapter 4 the effect of section 197 on both the “old” and the “new” employee is discussed.

Chapter 5 deals with the rights of employees who have been dismissed as a result of a section 197 transfer.

Another concern for employees is how their employment contracts are affected if their employer is sequestrated or his business is liquidated. Section 197A of the Labour Relations Act deals with this situation. In the past the approach has been that in the case of an insolvent employer, all contracts of employment with employees terminate automatically.

Section 38 of the Insolvency Act 24 of 1936 provides for the suspension of all contracts of employment between an employer and its employees, which section also now includes the duty to consult before suspending. This matter is given more consideration in Chapter 6 hereof.
CHAPTER 2
REQUIREMENTS FOR SECTION 197 OF THE LRA AND THE SCOPE OF ITS APPLICATION

2.1 INTRODUCTION

A transfer of business takes place where an entity is transferred from one business to another as a going concern and retains its identity after the transfer.

Section 197 of the Labour Relations Act 66 of 1995 (LRA) only applies in the case of a “transfer of a business”.

It is important to look at the definition of the phrases “transfer” and “business” as defined in the Act when establishing the applicability of section 197.

Business is defined in section 197(1) (a) of the LRA as:

“… the whole or a part of any business, trade, undertaking or service”,

and “transfer” is defined in section 197(1)(b) of the LRA as:

“… the transfer of a business by one employer (‘the old employer’) to another employer (‘the new employer’) as a going concern”.

In Schutte v Powerplus Performance (Pty) Ltd\textsuperscript{10} the court gave a broad definition as to what will be regarded as a “transfer” as defined in the LRA.

It held that a business may be transferred in circumstances other than a sale.

A transfer arising from a merger, takeover or a part of a broader process of restructuring within a company or groups of companies will also be included in the definition of “transfer” for the purposes of section 197.

\textsuperscript{10} (1999) 20 ILJ 655 (LC).
The facts of the case were as follows:

The employees had been employed in three workshops by Super Rent, a car rental company, which was a division of Super Group. Their work entailed repairing and servicing Super Rental vehicles. Super Rent then entered into an agreement in terms of which it sold 50% of its shares to Powerplus.

Powerplus would purchase all the workshops belonging to Super Group and continue to service Super Rent vehicles.

The employees at Super Group workshops were informed that the workshops were closing down and they were informed that they would be retrenched.

Some of the employees accepted positions at Powerplus, but claimed that they were entitled to the same pay as they had received at Super Group.

In making its decision in regard to that transfer of the business of Super Group did take place, the court considered the following:

- The aspect dealing with the transfer of the employees;
- the transfer of stock and equipment; and
- the sharing of premises.

The court also considered the following facts:

- There had been no interruption of service provided by the workshops;

- there had been a simultaneous transfer of certain managerial staff;

- that the parties had regarded the arrangement as an alternative to closure of the workshop; and

- the retrenchment of the maintenance staff.
It is important that the business had to be transferred “as a going concern”.

A distinction is often made between a sale of shares, a sale of assets and the sale of the business itself.

It is often argued that the sale of shares and sale of assets are excluded from section 197 as these do not constitute a transfer of a business as a going concern.

In *Kgethe v LMK Manufacturing*¹¹ the Labour Court held that a sale of assets of a business did not constitute a transfer as a going concern.

In this case the applicants were employed by the first respondent up until 30 June 1997. During the first half of 1997 the first respondent experienced some financial difficulties. In order to avoid its liquidation, management held that they had three options to consider. Firstly the sale of the shares, secondly the sale of the business as a going concern and thirdly the sale of all or a part of the assets of the respondent.

The first respondent decided to exercise the third option and an agreement was concluded between the first and the second respondents under the heading “Agreement of Sale of Assets”.

The employees were informed on the 13th of June 1999 by management, in the person of one Fraser, of the financial difficulties that the first respondent was facing and also of the options available to the first respondent, which at that time was either liquidation or sale including take over of debt.

They were advised that the first respondent was doing its best to secure employment for the employees.

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Fraser, however, did not inform them about the agreement between the first and second respondents concerning the sale of the assets.

On 17 June 1997 a fax was sent to Fraser in which the complaints were raised that the first respondent had entered into negotiations with the prospective buyers without prior consulting with the union, NEWU. The details of the buyers and terms pertaining to the negotiations had not been disclosed as well as that the jobs of NEWU members had been placed at risk by the first respondent.

One Nomvela, from NEWU, demanded an undertaking from Fraser that the sale of the business would be suspended until the first respondent had complied fully with the provision of section 189 of the LRA, which deals with the dismissal of employees due to the operational requirements of the employer.

A meeting was conducted on 19 June 1997 in which Fraser advised Nomvela that the subject to be discussed was not a “takeover” but the sale of the first respondent’s assets. Nomvela then requested that Fraser confirm that the employment of all the existing employees had been secured in the negotiations with the second respondent.

Fraser handed him a letter from the second respondent dated 19 June 1997 which read as follows:

“This serves to confirm that the weekly paid permanent employees presently employed at LMK Manufacturing (Pty) Ltd will be re-employed subject to acceptance of new employment contracts and working conditions.”

He further advised that casual workers, whose names appeared on a list which was later furnished to NEWU, would not be re-employed.

On 20 June 1997 NEWU received a fax from apparently a labour consultancy firm acting on behalf of the first respondent which letter recorded that:

“(a) the meeting of 19 June had been held in order to discuss ‘the sale of the company’;
(b) NEWU had been apprised of the reasons urgently necessitating ‘the sale of the assets of LMK’, which reasons were repeated in the letter;

(c) NEWU had been advised that an application for the liquidation of the first respondent had been put on hold pending ‘the sale of LMK and payment of creditors by 30 June 1997’;

(d) for liquidation to be avoided it was crucial that the sale ‘take place’ on 30 June;

(e) NEWU had been informed that ‘the sale of the assets’ had been agreed upon between the first respondent and another company, the agreement being that the new owners would acquire the assets of the first respondent and would in turn pay the creditors of the latter;

(f) in order to distance itself from the bad name of the first respondent in the market place the purchaser was starting a new company;

(g) a copy of the sale agreement with the heading ‘Sale of Assets’ reflecting the name of the new company and the names and addresses of its directors had, in confidence, been handed to NEWU;

(h) NEWU had been advised that jobs had been secured for all permanent wage employees as from 1 July on the same conditions and at the same wages as then prevailed and that a letter to that effect had been handed to NEWU, and that different provisions - the details need not be set out - relating to the termination of the employment of the casual workers (who were divided into two categories) and their possible re-employment would operate.\footnote{12}

The above clearly did not reflect the true situation and another letter was sent by fax to NEWU on 21 June 1997 by Fraser, reading as follows:

“The remuneration will not be less than that presently paid by LMK. The hours of work and other benefits will be in line with the Basic Conditions of Employment Act. Any benefits presently enjoyed, which do not comply with the Basic Conditions Of Employment Act, will be brought in line with the requirements of this Act, whether this means reducing or improving such benefit.”

NEWU requested the labour consultancy company to provide them with the details and copies of the first respondent’s bank statements, a list of assets and debts, a copy of the agreement relating to the sale of the assets, full particulars of the creditors and the amounts owed to them by the first respondent, proof from the Registrar of Companies relating to the change of the company’s name, details of the existing contract relating to casual workers and proof that the agreement of sale of

\footnote{12} \textit{Kgethe v LMK Manufacturing} para 13.
the assets stipulated that all permanent-wage employees will work on the same terms and conditions with same wages.

NEWU further indicated in the letter that it did not accept the terms of the casual workers.

There was no response to this letter.

At a further meeting on the 23rd of June 1997 Nomvela again demanded that all employees be retained on terms and conditions not less favourable than those prevailing. It is the contention of Nomvela that Fraser refused to address this “repeated request”. Fraser, however, on the other hand contended that he could not bind the purchasers to any agreement, but that he would speak to the buyers and revert back to NEWU.

Fraser failed to revert to NEWU despite further demands by NEWU that should the demand not be met, they will approach the court for appropriate relief.

Another dispute that occurred at the meeting on the 23rd of June 1997 was the averment by Fraser that he offered the agreement of sale of assets to NEWU for inspection, but that the offer was refused by NEWU. Nomvela denied that such an offer had been made and averred that Fraser had consistently denied them access to the agreement on the ground of confidentiality.

Despite the above, it is an agreed fact between the parties that NEWU did not view the agreement.

Fraser sent a letter to all the staff members on the 23rd of June 1997 which read as follows:

“Please be advised that LMK Manufacturing (Pty) Ltd has been sold and we hereby give you one week’s notice.

LMK Manufacturing (Pty) Ltd was faced with the option of either liquidating the company or selling the company. With the sale of the company we have been able to
secure the employment of all permanent weekly paid staff. Should the company have been liquidated, everybody would have lost.

Please be advised that the new owners will be taking over on the 1st July 1997.

We thank you for your service and loyalty during the period that you were employed by LMK Manufacturing (Pty) Ltd and wish you the best for the future.”

Fraser only responded to NEWU’s letter of 23 June 1997 on the 25th of June 1997 which letter read as follows:

“With reference to the above fax please take notice of the following points.

We have sold the assets of LMK Manufacturing (Pty) Ltd. It is not a takeover.

At the last meeting held at our offices on the 23/6/97, we gave you the opportunity to read the ‘Sale of Assets Agreement’ and a schedule of the liabilities of the company. From this you would have seen for yourself that LMK cannot continue to trade and that there are not any funds available for severance packages.

We have done everything in our power to ensure that as many [employees] as possible are given employment with the new buyers.

All [employees] of LMK Manufacturing have been given a [week’s] notice on the 23/6/97. They will be paid this week’s notice/severance plus all leave pay outstanding. This is in terms of the Labour Relations Act No 66 of 1995 which you refer to in your fax of 21st June 1997.

We sincerely hope that you do not find it necessary to take this matter to the Labour Court in view of the above information, but should you do so, we will defend the matter.”

The applicants launched an urgent application with the Labour Court on the 27th of June 1997 for relief in the form of a rule nisi together with an interim order. The matter was postponed to the 1st of July 1997 by agreement.

On interpretation of the applicants’ papers the judge contended that what the applicants sought was information which related to the retrenchment or termination of the services of the applicants and secondly compliance with the employer’s duty in terms of section 197 of the LRA.

The Labour Court held that section 197 was not applicable to the sale of the assets and that there was no entitlement to any information bearing on an alleged non-compliance with the provisions thereof.
In *Ndima v Waverley Blankets Ltd* and *Sithukuza v Waverley Blankets Ltd* the court had to consider the issue of the sale of shares. The court held that a distinction should be made between the transfer of a business as a going concern and a transfer of possession and control of the business; as a consequence the sale of shares seemed to be excluded from section 197.

The LRA does not define the concept “as a going concern”, which causes great confusion.

A leading case dealing with the requirement “as a going concern” is *Schutte v Powerplus Performance (Pty) Ltd*. The court held that one must consider the substance of the agreement in determining whether the business is transferred as a “going concern”.

Factors which the court considered in determining whether the transfer is one of a going concern can also be found in the above-mentioned case.

In this case the court took the following factors into account in finding that there was a transfer of a business as required in terms of section 197:

- 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;
- the use of the same premises by the buyer; and
- continuation of the same activities without interruption.

The court held that no exhaustive list of factors exists to determine whether a business is transferred as a going concern.

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A number of factors which will be regarded as relevant are whether the assets transferred are both tangible and intangible, whether or not workers are taken over by the new employer, whether customers are transferred and whether or not the same business is being carried on by the new employer.

If the above two mentioned requirements are present, the transfer of the business will be considered to be one to which section 197 of the LRA is applicable and the employees will enjoy its protection.

To establish whether section 197 will also be applicable to the outsourcing of service by an employer it is firstly important to establish what is meant by the outsourcing of service.

Outsourcing occurs when an employer discontinues a service activity and decides to outsource such activity which might have otherwise been performed by its employees to a third party.

Outsourcing will take place where an employer discontinues a service or activity, that is in most cases not part of the main business of the employer, and contract an outside contractor to take over that service or activity.

An important question that arises here is whether outsourcing such an activity amounts to a transfer of a business or service which attracts the applicability of section 197 of the LRA.

In the case of *SA Municipal Workers Union v Rand Airport Management Company (Pty) Ltd*\(^{15}\) the Labour Appeal Court had to consider the question of whether an outsourcing agreement can be deemed to be a sale of a portion of a business.

The first respondent, namely Rand Airport Management Company, operated and managed the Rand Airport. It experienced some financial problems and indicated

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\(^{15}\) (2005) 26 *ILJ* 67 (LAC).
that certain specialised services appeared to be more costly when conducted “in house” and indicated that it wanted to outsource the non-core activities, namely Security, Garden Services and Cleaning.

On the 21st of July 2002, Rand Airport Management Company gave notice that the non-core activities will be outsourced and on the same date sent out letters to the affected employees informing them that they will be retrenched due to operational reasons and not due to a transfer in terms of section 197.

The matter was brought before the Labour Appeal Court which had to decide whether there had been a transfer of business as contemplated in terms of section 197 of the LRA.

The court considered the definition of “service” and held that both gardening and security functions fell within the definition.

Accordingly the court held that gardening and security services would be capable of being transferred if they passed the test of a “transfer” as well as the test of what constitutes a “business or a service”.

In making its decision the court referred to the Constitutional Court case of NEHAWU v University of Cape Town16 in establishing the meaning of the phrase “transfer of a business as a going concern”.

In this case the Constitutional Court had to decide whether the outsourcing of the University’s cleaning, maintenance and gardening functions constituted a takeover of a going concern.

The union applied to the Labour Court for a declaratory order to the effect that the employment of its members had been transferred to a number of service providers, on the same terms and conditions, when the university outsourced the gardening, maintenance and security functions.

16 (2003) 24 ILJ 95 (CC).
The union lost, primarily because the court took the view that there had been no transfer of a part of the University’s business as a going concern.

The union applied to the Constitutional Court for leave to appeal, which was granted.

The Constitutional Court overruled the interpretation given to section 197 by the Labour Appeal Court.

A purposive approach to section 197 required that consideration of work security be given primacy, and on this basis, the court held that section 197 had an automatic and obligatory effect. In other words, as soon as a commercial transaction assumed the form of the transfer of the whole or part of a business as a going concern, then the contract of employment of the old employer’s employees transfer to the new employer, unless there is a contracting out of the consequence in terms of the section.

The intentions of the two employers are irrelevant. The transfer takes place by operation of law.

The court stated that a number of factors should be taken into account when considering the question whether a transfer of a business was transferred as a going concern, which factors include:

- In regard to the transfer or not of assets, both tangible or intangible, whether or not workers are taken over by the new employer;

- whether customers are transferred; and

- whether or not the same business has been carried on by the new employer.

The court held that the above lists are not exhaustive and should not be considered in isolation. A determination must be made on a case-to-case basis.
The Constitutional Court found that the facts before it did amount to a takeover as a going concern and accordingly attracted the applicability of section 197 of the LRA.

The Constitutional Court also considered whether an agreement to transfer the employees from the “old” employer to the “new” employer was a prerequisite before it would constitute a transfer of a business as a going concern. The court found that such an agreement was not a prerequisite.

The Constitutional Court further held that the LRA does not define the concept “going concern”.

It held that the ordinary meaning must therefore be given to the concept, and that what must be transferred be a business in operation “so that the business remains the same but in different hands”.

Each matter must be determined objectively and in the light of the circumstances of each case. Regard must be given to the substance and not the form of the transaction.

The Constitutional Court dealt with the concept of “going concern” as follows:

“[56] The phrase ‘going concern’ is not defined in the LRS. It must therefore be given its ordinary meaning unless the context indicates otherwise. What must be transferred must be a business in operation ‘so that the business remains the same but in different hands’. Whether that has occurred is a matter of fact which must be determined objectively in the light of the circumstances of each transaction. In deciding whether a business has been transferred as a going concern, regard must be had to the substance and not the form of the transaction. A number of factors will be relevant to the question whether a transfer of business as a going concern has occurred, such as the transfer or otherwise of assets, both tangible or intangible, whether or not workers are taken over by the new employer, whether customers are transferred and whether or not the same business has been carried on by the new employer. What must be stressed is that this list of factors is not exhaustive and that none of them is decisive individually. They must all be considered in the overall assessment and therefore should not be considered in isolation.

[57] There is nothing either in the context or language of section 197 to suggest that the phrase ‘going concern’ must be given the meaning assigned to it by the majority. On the contrary, the purpose of the section and the context in which that phrase occurs suggest otherwise.
The fact that the seller and the purchaser of the business had not agreed on the transfer of the workforce as part of the transaction does not disqualify the transaction from being a transfer of business as a going concern within the meaning of section 197. Each transaction must be considered on its own merits, regard being had to the circumstances of the transaction in question. Only then can a determination be made as to whether the transaction constitutes the transfer of a business as a going concern."

The fact that the transferor and transferee had not agreed on the transfer of the employees of the transferor, does not disqualify the transaction from being a transfer of a business as a going concern and not attracting the applicability of section 197 of the LRA. Each transaction must be considered on its own merits.

Zondo J in the case of Rand Airport set out the steps one should have regard to in determining whether there has been a transfer.

The first would be to have regard to the meaning of the word “business” in section 197, which was amended to include “service”.

The court turned to the Shorter Oxford English Dictionary for the definition of service.

The word “service” is defined in the aforesaid dictionary as:

“The provision of a facility to meet the needs or for the use of a person or a person’s interest or advantage; assistance or benefit provided to someone by a person or thing; an act of helping or benefiting another; an instance of beneficial, useful or friendly actions; the action of serving, helping or benefiting another; behaviour conductive to the welfare or advantage of another, friendly or professional assistance.”

The LRA states that a service includes even internal services of a business insignificant to the service provided by the business to outsiders.

The next step is to determine whether the activity or service that is being outsourced can be regarded as a service, business or part of a business.
In answering this question, both the Labour Appeal Court and the Constitutional Court, referred to the case of *Spijkers v Gebroeders Benedik Abbatoir v Alfred Benedik en Zonen*¹⁷ which laid the test down as follows:

“The decisive criterion … is whether the business in question retains its identity. Consequently a transfer of an undertaking, business or part of a business does not occur merely because its assets are disposed of. Instead it is necessary to consider … whether the business was disposed of as a going concern, as would be indicated, inter alia, by the fact that its operation was actually continued or resumed by the new employer, with the same or similar activities.”

It held that the determination is an objective determination and cannot be conclusive. The court referred to a number of factors in making the determination of the aforesaid phrase:

- What will happen to the goodwill of the business, the stock-in-trade, the premises of the business, contract with clients or customers, the workforce, the assets of the business;

- whether there has been an interruption of the operation of the business and, if so, the duration thereof;

- whether same or similar activities are continued after the transfer or not or others;

- whether the entity in question retains its identity.

The Labour Appeal Court in the *Rand Airport* case, however, concluded that the facts of this particular matter did not amount to outsourcing as no outsourcing agreement was entered into and no outsourcing took effect between the respondents.

The court came to the conclusion that section 197 could however apply to outsourcing, provided it passes the test of “transfer” as well as the test of what constitutes a “business or service”.

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¹⁷ 1986 ECR 1119.
The court concluded that a “service” for the purpose of section 197(1)(a) must embody an entity with a separate management structure with its own goals, assets, customers and goodwill and that, accordingly, the transfer of the “gardening function” of the Rand Airport did not constitute a part of business as defined and that there was no transfer of this function as a going concern.

The court held that section 197 did not apply where nothing more than an activity is outsourced. In this case the court held that the gardening services were not an entity, they had no management structure, assets, goodwill, goals or customers to speak of and were “merely an activity”.

2.2 WHAT ABOUT SECOND-GENERATION OUTSOURCING?

Second-Generation Outsourcing occurs when an employer put the outsourced service out to tender upon the outsource contract coming to an end and a new entity awarded the outsourcing opportunity following the original outsource entity being unsuccessful in its bid to secure the contract for an additional term.

Does section 197 of the LRA apply to Second-Generation Outsourcing?

A leading case dealing with second-generation outsourcing is Aviation Union of South Africa v South African Airways (Pty) Ltd.\(^\text{18}\)

In this case the court had to decide whether business that had been outsourced and was being transferred from one contractor to another, attracted the applicability of section 197 of the LRA.

The primary employer, SAA contracted with LGM to provide certain services to it. Part of the initial service agreement was that all affected employees of SAA would be transferred to LGM in terms of section 197 of the LRA.

\(^{18}\) [2008] 1 BLLR 20 (LC).
Before this contract expired, LGM changed ownership and SAA cancelled its contract with LGM, advertising for tenders for the relevant services with no provision that employees be transferred to the successful new contractor.

The employees of LGM, fearing and facing the possibility of retrenchment, launched an urgent application with the Labour Court for an order, amongst others, declaring that the termination of the LGM contract or the appointment of a new service provided constituted, or would constitute, a transfer of the undertaking or services provided by LGM to SAA, declaring that the termination of the employees employment would constitute an automatically unfair dismissal, restraining SAA from itself performing any of the services provided by LGM or permitting any other party to do so until the employees were transferred to SAA or to any new service provider, and restraining LGM from dismissing the employees until their transfers had been effected.

As the above amounted to a second-generation outsourcing, the issue before the court was whether section 197 of the LRA was applicable.

In outsourcing transactions, the business of the old employer may be transferred to a new employer only in the first transfer and therefore the Labour Court held that section 197 can only be applicable to first-generation outsourcing.

The Labour Court referred to the decision of *Cosawu v Zikhethele Trade (Pty) Ltd*¹⁹ and held that this case was the only authority for the proposition that, where the second business was so closely aligned to the first business that it was, in fact, identical and section 197 might be applicable.

The facts of Zikhethele were as follows:

Fresh Produce Terminals at the Cape Town, Port Elizabeth and Durban harbours outsourced the terminal and stevedoring serviced to outside companies which ultimately became Khulisa.

¹⁹ [2005] 9 BLLR 924 (LC).
The two main players in Khulisa were the managing director, Mr Mfundisi and Mr Immelman, the operations director. As a result of an acrimonious dispute between these two directors, Fresh Produce Terminals rethought its relation with Khululisa.

It put its terminal and stevedoring contracts out to tender and two new companies tendered for the business, namely Zikhethele, run by Mfundisi, and a company formed by Immelman, trading as Signal Hill. Fresh Produce Terminals awarded the outsourcing contract to Zikhethele, whereupon Signal Hill launched an urgent application in the High Court to interdict the implementation of the contract.

In the interim COSAWU wrote a letter to Mfundisi to enquire if the Khulisa employees were to be retrenched or whether they would transfer in terms of section 197 to Zikhethele. Mfundisi did not provide a candid response, possibly as a result of some of the Khulisa employees supporting Immelman’s bid for the contract.

On the 1st of April 2005, the day when Zikhethele stepped into the shoes of Khulisa as Fresh Produce Terminals’s service provider, Mfundisi in his capacity of Managing Director of Zikhethele informed all Khulisa employees that they were seconded to Zikhethele from the 1st of April to the 11th of April.

The purpose of the secondment seems to have been motivated by the fact that the application launched by Immelman’s company to undo the outsourcing between FPT and Zikhethele would be heard on the 11th of April 2005.

The matter was not heard on that date and on the 26th of April 2005 Mfundisi addressed a second memorandum to Khulisa employees informing them that their secondment would end the 29th of April 2005.

The employees of Khulisa were invited to apply for positions with Zikhethele if they wished to be employed by Zikhethele, which indicated that there would be no automatic transfer of employer from Khulisa to Zikhethele.
On the 26th of April 2005 an application was made to place Khulisa under provisional liquidation, which order was granted on the 5th of May 2005.

As it was evident that only those employees who formally applied for positions at Zikhethelhe would be employed by Zikhethelhe, COASWU launched an application in the Labour Court to declare that all the rights and obligations between Khulisa and Khulisa employees, not employed by Zikhethelhe, transferred automatically in terms of section 197 of the LRA to Zikhethelhe when it won the contract to provide the terminal and stevedoring services to FPT.

In considering whether second-generation outsourcing attracted the applicability of section 197 of the LRA the court stated as follows:

“Although the matter was not pertinently argued before me, a compelling argument can be made, based on the express language in section 197 of the LRA, that the requirement in section 197(1)(b) that a transfer of business be by one employer to another precludes its application to second generation contracting-out, because in such arrangements nothing is transferred by the old employer to the new employer. Hence, second generation contracting out is effectively exempted from the application of section 197.”

The court also considered foreign jurisprudence, more specifically European law.

The court considered the UK Court of Appeal decision in Dines v Initial Services20 which formulated a second-generation transfer as a two-phased process, the first being the handing back of the service by the first contractor to the primary employer and the second phase being the granting by the primary employer of the service to the second contractor.

Although European law does not rely on the concept of a going concern, our courts have relied heavily on what constitutes a transfer of a business in European law in interpreting a transfer of a business as a going concern.

20 1994 IRLR 336.
The court found in this case that there were significant features present to indicate that there was a transfer of a business as a going concern and accordingly that section 197 of the LRA is applicable.

Factors which gave rise to the court’s decision above are:

- The history of the outsourcing activities was such that the service provided had remained almost identical from the first outsourcing to the present.

- The same jobs had to be done.

- The jobs were done in the same location.

- The jobs were done by using the same operational methods.

- The same premises, fittings and equipment used by Khulisa were now at the disposal of Zikhetele.

- Some of the suppliers appeared to be the same.

The court also took into consideration the fact that in the event of the employees not enjoying the protection of section 197 of the LRA, it would result in their being not only without employment, but also without any payment of severance pay because Khulisa was in the process of being wound-up.

Despite the court acknowledgment of the above in the matter of Aviation,21 it concluded that the Zikhetele decision is the only authority for the proposition that, where the second business is so closely aligned to the first business, it is in fact identical, section 197 of the LRA being applicable.

The Labour Court found that section 197 is not applicable to second-generation outsourcing.

21 Aviation Union of South Africa v South African Airways (Pty) Ltd 2010 (4) SA 604 (LAC).
It held that affected employees may pursue a remedy in terms of section 189 of the LRA.

The court held that the business of the old employer can only be transferred to the new employer in the first transfer.

Basson J concluded:

“I am not persuaded that, in the light of the expressed and unambiguous wording of section 197(1)(b), that it would be appropriate to interpret section 197(1) to also apply to a transfer ‘from’ one employer to another as opposed to a transfer by the ‘old’ employer to the ‘new’ employer.”

The court further held, although an agreement between the new and old employer to transfer employees is not a pre-condition for section 197 transfers, it was clear that SAA did not wish to take over employees of LGM.

The matter went on appeal.22

On appeal the Labour Appeal Court considered the two schools of thought, the literal school of thought which consists of giving the “ordinary meaning” to the words of section 197, and the purposive school of thought.

The court held that in following the literal approach of section 197 it would have the effect of the section being inconsistent with provision of section 3 of the LRA which reads:

“Interpretation of this Act:

Any person applying this Act must interpret its provisions -

(a) to give effect to its primary objects;
(b) in compliance with the Constitution; and
(c) in compliance with the public international law obligations of the Republic.”

22 Ibid.
The literal approach will have the effect of limiting the application of section 197 and not to extend its application to further transfers.

In the matter of NEHAWU v UCT\textsuperscript{23} the Constitutional Court laid down the purpose of section 197 of the LRA.

Ngcobo J held as follows:

“The concept of fair labour practice must be given content by the legislature and thereafter left to gather a meaning, in the first instance, from the decisions of the specialist tribunals including the LAC and the Labour Court. These courts and tribunals are responsible for overseeing the interpretation and application of the LRA, a statute which was enacted to give effect to s 23(1). In giving content to this concept the courts and tribunals will have to seek guidance from domestic and international experience. Domestic experience is reflected both in the equity based jurisprudence generated by the unfair labour practice provision of the 1956 LRA as well as the codification of the unfair labour practice in the LRA. International experience is reflected in the Conventions and Recommendations of the International Labour Organisation. Of course other comparable foreign instruments such as the European Social Charter 1961 as revised may provide guidance.”

The Constitutional Court held that the purpose of section 197 is twofold: firstly to protect workers and secondly to facilitate transfers of businesses.

The Labour Appeal Court in Aviation turned to the purposive school of thought. It held that in following a purposive interpretation of section 197 would have the effect of ensuring the applicability of section 197 to the situation.

Murphy AJ suggested that to achieve the purpose of section 197 the word “from” must be read into the place of the word “by” in section 197 to avoid the problem created by the word “by” in this section.

The court accepted that a purposive interpretation of section 197 rather than a literal interpretation thereof should be followed, as following the literal interpretation would have the result of excluding second-generation employees from the protection of section 197 of the LRA. It would undermine the clear purpose of the LRA.

\textsuperscript{23} (2003) 24 ILJ 95 (CC).
The court demonstrated its decision in following a purposive interpretation by referring to other case law such as Carephone (Pty) Ltd v Marcus NO & others\textsuperscript{24} and Sidumo v Rustenburg Platinum Mines Ltd.\textsuperscript{25}

In Carephone the ground justifiability or rationality, although not appearing in section 145 of the LRA as a ground for review, was read by the court into the section to bring it in line with the interim Constitution.

The words “subject to” were also read into section 158(1)(g) to replace the word “despite” to bring that provision in line with the Constitution.

In Sidumo the word “reasonableness” as a ground for review was read into section 145 of the LRA to bring it in line with the Constitutional provision which requires an administrative act to be lawful, reasonable and procedurally fair.

A similar approach was adopted in the recent case of Sanders v Cell C Provider Company (Pty) Limited,\textsuperscript{26} which dealt with the situation where a company terminates its arrangement with one franchisee and awards the franchise to a third party.

The facts of the case are as follows:

Cell C is a mobile-phone operator which sells airtime contracts, mobile phones and accessories to members of the public and, through franchise agreements, on a national basis. Until 30 April 2010 Advance Worx and G-Worx were franchisees of Cell C, conducting business as Cell C Queenstown and Cell C King Williamstown, respectively.

Mr Sanders was a general manager of these franchises. Cell C gave Advance Worx and G-Worx notice that the franchise arrangements would terminate on 30 April 2010, but they were obliged to continue with the normal operation of the business

\textsuperscript{24} (1998) 19 ILJ 1425 (LAC).
\textsuperscript{26} [2010] 9 BLLR 973 (LC).
until that date, after which they had to assist in the handing over and transition of these businesses to a new franchisee, PE Rack.

The managing directors of Advance Worx and G-Worx informed Sanders and the other staff members that they would need to consult about retrenchments because of the termination of the franchise arrangements. Sanders alleged that section 197 applied to the transaction, and therefore his contract would transfer along with all the other employees to PE Rack.

Both Cell C and PE Rack denied that section 197 applied, resulting in an application to the Labour Court.

The Labour Court confirmed that section 197 of the LRA has a twofold purpose as stated by the Labour Appeal Court in the Aviation case, namely, to protect workers against the loss of employment in the event of a business transfer and to facilitate the sale of businesses as going concerns.

The term “going concern” implies that what is transferred must be a business in operation. In determining whether this has occurred is a question of fact to be determined objectively in the light of the circumstances of each case.

The absence of an agreement to transfer the employees of the “old employer” does not mean that it cannot be a transfer as a going concern.

In this case the court took a “snapshot” test at the business, franchise, prior to 30 April 2010 and the “new” business after 30 April 2010. It found that the business remained located at the same place, had the same telephone number as well as the nature of the business remained the same. The only visible change would be the faces of the new employees.

The court stated that there was clearly a transfer of the business from one entity to another.
The court further went on to state that in following a literal interpretation of section 197 of the LRA, there would be no transfer of the business and the purpose of section 197 to the extent that it is aimed at safeguarding jobs, would be defeated.

In this case, Cell C has effectively outsourced its business by appointing franchisees. It decided to change the entity to whom business has been outsourced and it was free to do so. However, this could not detract from the right of the employees affected by those decisions. The employees were entitled to the protection afforded to them by the Constitution and the LRA.

Therefore, the court held that the takeover of the business by PE Rack constituted a transfer in terms of section 197 of the LRA.

Sanders was declared to have automatically transferred to PE Rack on the same terms and conditions as previously applied.

The Aviation27 matter was however taken to the Supreme Court of Appeal by SAA. The issue that was before the court was the interpretation of section 197 of the LRA. The court had to decide whether there has been a second transfer of business as a going concern by the old employer to the new employer and possible subsequent transfers. In the event of it finding that there had been subsequent transfers, whether section 197 of the LRA is applicable to such a transfer.

The Supreme Court of Appeal held that no other subsequent transfers have been proved saved for the first transfer between SAA and LGM.

The first transfer referred to as first generation outsourcing and the second (subsequent) transfers referred to as second generation outsourcing.

SAA appealed to this court on two basis: Firstly that the Labour Appeal Court erred in its interpretation of section 197 of the LRA and secondly that it erred in finding on the facts that there was a transfer of a business as a going concern.

The trade unions, AUSA and SATAWU, on the other hand argued that the purposive approach that was given by the Labour Appeal Court should be adopted and that the continuation of the services by SAA did amount to a transfer of a business as a going concern.

SAA argued that the plain an unambiguous language of section 197 of the LRA clearly sets out the legislature’s intention that section 197 should only apply where there is a transfer of a business as a going concern by the old employer to a new employer. That section 39(2) of the Constitution, which compels interpretation of legislative provisions in the light of the values embedded in the Bill of Rights, applies only where the language of the statute is not unduly sustained.

SAA relied on two Constitutional Court cases namely *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & other* and *In re Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others.*

In these two cases it was held that the judicial officers must prefer interpretation of legislation that falls within the constitutional bounds and that limits must be placed on the application of this principle. There is a duty on the one hand on the judicial offers to interpret legislation in conformity with the Constitution and on the other hand to pass legislation that is clear and precise. A balance will often have to be struck as to how tension is to be resolved when considering the constitutionality of a particular piece of legislation, but such legislation should not be unduly strained.

It was held in *Minister of Safety and Security v Sekhoto* that there is a distinction between interpreting legislation to give effect to the Bill of Rights and reading in of words following upon a declaration of constitutional invalidity.

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28 2001 1 SA 545 (CC).
It held that interpreting legislation to give effect to the Bill of Rights is limited to what the text is capable of meaning and that the reading in of words should only take place if the legislation is founded to be unconstitutional.

In *S v Zuma*30 the Constitutional Court also held that courts must caution against using the Constitution to interpret the language of the legislature to mean whatever the court wants it to mean.

The Supreme Court of Appeal held that there was no Constitutional challenge of section 197 and to read in words to mean something different was not legitimate.

SAA contended that the language of section 197 is clear and unambiguous and have to be given its ordinary meaning. In reading in words into the section as done by the Labour Appeal Court clearly represents a radical departure from the fundamental rule of statutory construction.

SAA further argued that there was no evidence before the LAC to establish that there was a transfer of a business activity as a going concern. That it is a factual matter that needs to be determined objectively by reference to all relevant factors considered cumulatively.

The trade unions on the other hand argued that the only probable interference to be drawn was that there was a double transfer after the outsourcing agreement had been terminated and SAA. The trade unions argued that such interference could be drawn from the affidavits which were placed before the Labour Court as evidence.

The Supreme Court of Appeal held that a court must base its decisions in motion proceedings upon the facts which are presented to it on paper and not on the weighing up of probabilities.

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30 1995 2 SA 642 (CC).
It accordingly held that the Labour Court’s decision to dismiss the application was correct.

From the above it is clear that second generation outsourcing does not attract the applicability of section 197 of the Labour Relations Act.

I am of opinion that the Saunders case will soon follow with an appeal against the decision of the Labour Court as it strongly relied on the decision of the Labour Appeal Court in the Aviation matter which has now been overturned by the Supreme Court of Appeal.
In Chapter 2 it became clear that section 197 does apply to first-generation outsourcing and not to second-generation outsourcing.

But does section 197 also apply to outsourcing of services to a labour broker?

The matter was given consideration by the Labour Court in CEPPWAWU v Print Tech (Pty) Ltd. [2010] 6 BLLR 601 (LC).

The facts of the case were as follows:

The respondent handed its employees a letter on the 25th of October 2004 informing them of its decision to restructure in terms of section 189 (3) of the LRA. The letter contained the following heading:

"CONTEMPLATED DISMISSALS DUE TO OPERATIONAL REASONS"

The respondent also envisage its intention to outsource its hourly paid production personnel to a labour broker.

During a meeting on the 17th of October 2004, the issue of alternative positions with the labour broker was discussed with the effected employees. The meeting was adjourned to the 29th of October 2004 to enable the employees to consider the alternative.

On the 29th of October 2004 the employees contended that they wanted to meet the labour broker, which meeting was set up and held on the 1st and 2nd of November 2004.
The employees were encouraged to accept the alternative employment with the labour broker. The applicants rejected the offer which resulted in their retrenchment.

The dispute was referred to the CCMA for conciliation but was unsuccessful.

The intention of the respondents was to retrench its entire labour force and outsource its activities to a labour broker. This was evident from a letter dated 10 November 2004 which it addressed to its employees and which stated the following:

“[t]he company has now decided to proceed with the process of outsourcing its labour force to the labour brokers, Colven Associates Border CC, as from 14 November 2004 (effective date)”.

It was common cause that the business of the respondents remained the same only but for the outsourcing of its labour force.

Although the employees were outsourced, they would have continued to render the same services for the respondent.

The local organizer of the union at the time contended that its members were unhappy to be transferred to the labour broker as their new contract would be a fix-term contract whereas they were previously permanently employed.

The union conceded that its members would have accepted the alternative if the contracts were permanent.

In terms of the contract which was offered to the employees they would only be employed as long as the client needed their employment.

The contract stated that:

“assignment will automatically terminate when the Company is instructed by the Client to remove the Assignee and/or when the assignment as set out in of (sic) Annexure A end. There will thus be no entitlement by the Assignee to notice or severance pay at any point whatsoever.”
The contract further stated that:

“[t]he Assignee will not be entitled to participate in the funds, benefits and other conditions applicable to permanent employees of the Company and/or the Client”.

The applicants contended that they were unfairly dismissed as the respondent transferred a part of its business as a going concern without their consent and without transferring all their existing rights and obligations of employment to the labour broker, which is contrary to the provision of section 197(2) of the LRA.

The Labour Court had to decide the issue of whether section 197 is applicable to the outsourcing of services to a labour broker.

The Labour Court held that the transfer of the labour force did not constitute outsourcing of “services” within the definition of section 197 of the LRA.

In court relied on the Labour Court decision of NUMSA v Staman Automatic CC\(^{32}\) as authority for what constitutes a transfer of a business in terms of section 197.

In \textit{Staman} the court held as follows:

“... The NUMSA employees are regular employees of Staman. They place their labour potential at the disposal of their employer and become entitled to remuneration. They work with either the machines that produce plastic products, machine operators or they are general workers. They are not employed to render a service on behalf of Staman. Their work is connected to the machines. The machines are part of Staman’s infrastructure. Staman has no intention of parting with its machines by selling or disposing of them. There is clearly no transfer of the machines or the business. This is evident from the ‘transfer of business agreement’.”

The court also held that:

“... The services of the employees, in this case, are not an economic entity that will retain its identity after the purported transfer. That the employees may not see a difference as regard their job functions, because they will be contracted back to perform the same functions at Staman does not mean that they retain their previous identity. What

\(^{32}\) (2003) 24 \textit{ILJ} 2162 (LC).
Staman and Jobmates seek to do is to define the employees by reference to their employment status and not as a stable economic entity.”

The Labour Court in *Print Tech* accordingly held that there has been no transfer of services and that section 197 of the LRA is not applicable.
CHAPTER 4
THE EFFECT OF SECTION 197 OF THE LRA ON EMPLOYERS,
BOTH “OLD” AND “NEW”

It is important to reiterate the fact that section 197’s purpose is to protect employment security during transfers.

Section 197(2) lists the consequences of such a transfer for both the “old” and “new” employer and reads as follows:

“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 the transfer;
(b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;
(c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer, and
(d) the transfer does not interrupt an employee’s continuity of employment, and an employee’s contract of employment continues with the new employer as if with the old employer.”

From the above it is apparent that the new employer is bound by the actions of the old employer prior to the transfer of the business. The “new” employer can also be held liable for the unfair dismissal of an employee by the “old” employer prior to the transfer.

In the NUMSA v Success Panelbeaters and Service Centre CC t/a Score Panelbeaters and Service Centre\(^{33}\) an employee was unfairly dismissed by the old employer. The court held that the employee had to be reinstated and that the new employer was obliged to take the employee into service.

\(^{33}\) (1999) 20 ILJ 1851 (LC).
From the above case it is clear that section 197(2) imposes great implications on the new employer.

Another case illustrating one of such implications is that of *Keil v Foodgro (a division of Leisurenet Ltd)*.\[^{34}\]

The facts of the case were as follows:

The applicant was employed by MacRib Fast Food System (Pty) Ltd (“MacRib”) as its national public relations officer and marketing manager. In 1997 MacRib was sold to the Respondent as a going concern. The applicant was informed by MacRib that the business was being transferred to the respondent but ensured her that she would be employed by the respondent on the same terms and conditions as she had with MacRib.

She continued to work for the respondent in the same position that she held at MacRib after the business was transferred.

On 23 January 1997 she received and signed a letter of appointment, with the respondent setting out the terms and conditions of her employment with the respondent containing essentially the same terms and conditions as her old contract of employment with MacRib.

The letter of appointment however set out the following:

- That her appointment was effective only from 1 January 1997;

- that the first three months of her employment would be probationary of nature; and

\[^{34}\] [1999] 4 BLLR 345 (LC).
that the letter of appointment comprised the entire contract between her and Foodgro.

The applicant was informed by the respondent on 30 May 1997 that her employment contract would be terminated on 30 June 2010 due to operational requirements.

The letter was preceded by two meetings which were held between Foodgro officials and the applicant herself.

On termination, the applicant’s severance package was calculated from 1997 on the basis that she had only been employed by the respondent since 1 January 1997.

The applicant brought an application before the Labour Court for unfair retrenchment. The Labour Court ruled in favour of the applicant and ordered the respondent to pay a statutory retrenchment package, calculated from 1993 as well as compensation plus costs.

The respondent contended that he retrenched the applicant on the principle of last-in–first-out. It argued that the applicant was taken over in a transfer of business by it and that it had entered into a new contract with the applicant which only commenced on the date of transfer.

The court rejected this argument on the ground that one of the consequences of a section 197 transfer is the continuity of the employment. The respondent should have taken the applicant’s service with MacRib into account.

The matter was taken on appeal by the respondent.35

The appellant based its appeal on the following grounds:

- That the court a quo had erred in finding that the letter of appointment did not replace the employment contract with the previous employer; and

35 Foodgro (a division of Leisurenet Ltd) v Keil [1999] 9 BLLR 875 (LAC).
that the letter of appointment did not affect the previous length of service.

The issue before the Labour Appeal Court was the proper interpretation of the LRA.

It was held by the Labour Appeal Court that the primary aim of section 197 of the LRA was to extend greater protection to employees than that available in common law.

While amendment of the terms and conditions of employment on transfer of a business, by agreement between the parties, is provided for in section 197(2)(a) of the LRA, section 197(4) expressly forbids contracting out of transfer of employment contract or interruption of period of service.

The court came to the conclusion that the letter of appointment did not replace the original employment contract or affected the previous length of service.

The appeal application was dismissed with costs.

This case resulted in the transferred employees being safeguarded from being selected for retrenchment by the new employer on the basis of the last-in-first-out election criterion.

The effect of section 197 is, however, not without any exceptions.

In terms of section 197(3)(a) of the LRA the new employer is not expected to provide the employees with contracts of employment with exactly the same terms and conditions as those of the old employer, unless such terms and conditions were determined by a collective agreement in which event the new employer would have to comply with them.

The new employer may offer different terms and conditions to employees after transfer to the extent that such terms and conditions are on the whole not less
favourable to the employees than those to which they were employed by the old employer.

Should the new employer wish to change the terms and conditions of such an employment contract it will have to be in writing and concluded between either the old employer, the new employer, or the old and new employers acting jointly, on the one hand, and the appropriate person or body referred to in section 189(1) on the other hand.

From the above it is apparent that it is possible to contract out of the same terms and conditions of the employment contract. The next question is whether it is possible to contract out of all the consequences of section 197 of the LRA.

In the *Foodgro* case the court held that it was not possible to contract out of the continuity of employment. Although this decision was made under the old section 197, it would seem that the current section 197 does allow contracting out of any one or more of the consequences listed in section 197(2).

In *SACWU v Engen Petroleum Ltd* the court held that employees could only insist on such terms and conditions which existed between them with the old employer at the time of the transfer. They could not insist on better terms and conditions of employment.

It is also important to bear in mind that not all rights are provided by the employer, having the effect that such rights cannot be transferred in terms of the old section 197. Examples of such rights would include pension benefits which are governed by section 14 of the Pension Funds Act, 1956.

The current section 197 of the LRA now clearly allows the transfer of employees from one pension fund to another as a result of a transfer of business provided that such transfer complies with section 14 of the Pension Funds Act, 1956. Employees may thus be transferred without their consent to a different pension fund, provident,

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retirement or similar fund from the one to which they belonged prior to the transfer, provided that it complies with section 14 of the Pension Funds Act, 1956.

Section 14(1) of the Pension Funds Act states that:

“No transaction involving the amalgamation of any business carried on by a registered fund with any business carried on by any other person (irrespective of whether that person is or is not a registered fund), or the transfer of any business from a registered fund to any other person, or the transfer of any business from any other person to a registered fund shall be of any force or effect unless – (c) the registrar is satisfied that the scheme referred to in paragraph (a) is reasonable and equitable and accords full recognitions –

(i) to the rights and reasonable benefit expectations of the persons concerned in terms of the rules of a fund concerned, and

(ii) to any additional benefits the payment of which has become established practice, and that the proposed transactions would not render any fund which is a party thereto and which will continue to exist if the proposed transaction is completed, unable to meet the requirement of this Act or to remain in a sound financial condition or, in the case of a fund which is not in a sound financial condition, to attain such a condition within a period of time deemed by the registrar to be satisfactory."

The above consequences are not the only ones. Section 197(7) – (9) set out some additional principles.

Section 197(7) states that:

“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 payment 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 apportionment of liability between them, the terms of that apportionment, and

(ii) what provisions has been made for any payment contemplated in paragraph (a) if any employee becomes entitled to receive a payment;
(c) disclose the terms of the agreement contemplated in paragraph (b) to each employee who after the transfer becomes employed by the new employer; and

(d) take any other measure that may be reasonable in the circumstances to ensure that adequate provision is made for any obligation on the new employer that may arise in terms of paragraph (a)."

Section 197(8) states that:

“For a period of 12 months after the date of the 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 the employer’s liquidation or sequestration, unless the old employer is able to show that it has complied with the provisions of this section.”

Section 197(9) states that:

“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.”
An employee enjoys very little protection against unfair dismissal under our common law. The common law focuses on the lawfulness of the employment contract between the parties and not the reason for the dismissal. Under the common law the employer can do virtually what he likes.

This was the main reason for the implementation of labour legislation. Such legislation is aimed to redress the imbalance of power between the employer and employee.

Under common law the employer has all the power and can threaten to dismiss an employee should he not agree to its terms and conditions of employment, irrespective of whether such conditions are reasonable and fair.

The common law is also now experiencing the effect of the Constitution, more specifically section 23(1) thereof which reads as follows:

“Everyone has the right to fair labour practices.”

Section 186(1)(f) of the LRA describes a dismissal to mean that -

“an employee terminated a contract of employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer.”

This type of dismissal occurs when an employee is transferred to a new employer and the new employer provides for terms and conditions of the employment contract that are substantially less favourable than those provided by the old employer and as a result thereof the employee resigns.

Such a resignation by the employee will be regarded as a constructive dismissal.
In order to succeed on a claim of constructive dismissal the employee must prove, as also set out in *Mafomane v Rustenburg Platinum Mines Limited*,\(^37\) the following:

(a) the employee terminated the contract;
(b) continued employment was intolerable;
(c) the intolerability was of the employer's making; and
(d) the employee resigned as a result of the intolerable behaviour of the employer.

The test for “intolerable” is an objective one. The question that one should ask is whether any reasonable employee in the circumstances would have found the circumstances to be intolerable.

The intolerability must have been due to an act of the employer and there must have been no other means, except resignation, available to the employee. The employee will have to prove the link between the resignation and the intolerability.

The test is two-fold. Firstly, the employee must establish that there was no voluntary intention by the employee to resign and secondly the court must consider the employer's conduct as a whole and determine whether its effect is of such a nature that the employee cannot be expected to tolerate it.

In the *Jooste v Transnet Limited t/a SA Airways*\(^38\) the court pointed out that the timing of the resignation and the education of the employee are of significant importance when deciding whether the resignation was voluntary.

The resignation must also have been an action of last resort by the employee. Same was confirmed by the commissioner in *Smith v Magnum Security*.\(^39\)

\(^{37}\) [2003] 10 BLLR 999 (LC).
\(^{39}\) [1997] 3 BLLR 336 (CCMA).
In order to prove that the resignation was the “last resort”, it was held in *Beets v University of Port Elizabeth*\(^{40}\) by the commissioner that the employee would have to prove that some degree of coercion, duress or undue influence was involved.

It was submitted in the *Watt v Honeydew Diaries (Pty) Limited*\(^{41}\) that the employee bears a considerable risk in the case of constructive dismissal for a number of reasons.

The first is that the employee must resign and if such employee is unable to show the requisite conditions that render continued employment intolerable then the resignation remain valid. Secondly, the onus of proof is on the employee. Thirdly, the test is an objective one and finally there exist no concise guidelines for constructive dismissal.

However, it would seem that an employer would not be able to justify such a constructive dismissal in terms of section 186(1)(f).

The only question that one needs to ask is whether the employer offered less favourable terms and conditions of employment and if so, whether they were substantially less favourable.

The next question would be to ask whether the employer created an intolerable working environment that leaves the employee little option but to resign and claim constructive dismissal.

The employee will only have to prove that the new terms and conditions of employment are less favourable than that of the old employer. The onus will then be on the employer to justify such conditions of employment.

This seems to be a form of constructive dismissal without the need for the employee to prove that the employer has made continued employment “intolerable”.

\(^{40}\) 2000 8 BALR 871 (CCMA).
\(^{41}\) (2003) 24 ILJ 466 (CCMA).
Should the new employer simply decide to dismiss the employee as a result of a transfer of a business, or a reason related to a transfer as contemplated in section 197 or section 197A, such dismissal would be regarded as automatically unfair dismissal – section 187(1)(g) of the LRA.

In the case of an automatically unfair dismissal the employer will not be able to defend the termination of the employee by proving that there was a fair reason for such a dismissal.

There is, however, once again an exception.

The employer will be able to justify the termination if he can prove that the dismissal was based on an inherent requirement of the job or that the dismissal is one based on age if the employee has reached the normal or agreed retirement age of persons employed in that capacity.

Section 187(2) of the LRA reads as follows:

“Despite subsection (1)(f) –

(a) a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job;

(b) a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity.”

In *Dlamini v Green Four Security*42 the applicants, who were all security guards, were dismissed for refusing to shave or trim their beards because it was against their religious convictions to do so. They claimed their dismissals were automatically unfair and sought compensation of 12 months’ remuneration.

The respondent argued that the applicants were contractually bound to be clean shaven and that they had been beardless when they commenced their employment.

The court found that it was obliged to consider the constitutional implications of the dispute between the parties, which entailed a three-step process: firstly, whether the facts amounted to discrimination; secondly, if the answer is yes, whether it is capable of being justified as an inherent requirement of the job, and thirdly, if it is in fact an inherent requirement of the job, is it discriminatory on the basis that the impact is not ameliorated by a reasonable accommodation, modification of or exemption from the rule?

The court further held that the onus was on the applicants to prove that not to shave their beards was a requirement of the religion.

It was held that the applicants had failed to discharge this onus. The court made this finding on the facts that the applicants were selective of which part or rule of the religion they adhered to as they worked on Sundays, which was also prohibited by their church.

The court then went to the second step to determine whether the discrimination against the applicant could be justified as an inherent requirement of the job.

It held that it was the respondent's onus to prove that the rule was justified and found that the primary justification for the rule was neatness and hygiene. The court found that the rule had a clear purpose as opposed to the rule of the religion.

In considering the third step, in ascertaining whether the respondent had sought to accommodate the applicants reasonably, the court held that the applicants did not challenge any failure by the respondent in this regard, and even if the respondent did in fact offer them an alternative, they would not have accepted it.

Accordingly the court held the dismissal to be fair.

From the above case law it is clear that one will have to follow a three-step process in determining whether a dismissal based on discrimination is fair. One will firstly have to establish whether there is discrimination, a differentiation between parties or workers.
If the answer to this question is "no", then there is no need to proceed to step two and three, but if the answer is "yes", step two and three will have to be complied with in order to establish the fairness or justification of the discriminatory event.

It is further important to take note that a dismissal for operational reasons will only be fair in relation to a section 197 transfer if the dismissal is based on the operational requirements of the old employer and not those of the new employer.

An important case is that of Western Cape Workers Association v Halgang Properties CC.43

The facts of the case were as follows:

The employer sold its business to one Wembly. It was an agreed term in the sale agreement that upon date of transfer all risk and benefit of ownership in respect of the business would pass to Wembly.

Prior to the date of transfer, several meetings were held between the workers of the employer and a representative of Wembly to resolve the question of the transfer of their employment contracts to Wembly.

They were told that their contracts would be transferred on the same terms and conditions and those years of service would be recognised, but for administrative reasons, they would have to enter into a new contract with Wembly.

The workers refused and insisted that they be paid for their years of service with their employer and that they be kept in his employment, and not be transferred.

In the light of this, the employer considered that the only other option open to him would be to retrench the workers for operational requirements. His reason being that he was selling a major portion of his business.

The employer then invited the workers and their union to make possible representation on how retrenchments could be avoided, to discuss retrenchment benefits and other matters.

The workers refused, taking the view that the employer was “still alive and kicking”.

A dispute occurred and the matter was referred to the CCMA.

Discussion, however, continued and the workers were offered a one-year employment contract by Wembly, but demanded an indefinite contract, which Wembly refused.

The employer then addressed a letter to the workers recording their dismissal for operational requirements, tendering four weeks written notice and indicating that their refusal of the offer of employment disentitled them to severance pay.

The union, on behalf of two workers, took the matter to the Labour Court, seeking an order for reinstatement.

The Labour Court held that the workers had been unfairly dismissed by the employer and directed the employer to reinstate them.

The decision was taken on appeal where the Labour Appeal Court held that the business had already been transferred as a going concern and that reinstatement was no longer possible.

It held that the union sought a reinstatement order that would be binding on Wembly, but that he should have been joined to the proceedings.

The court upheld an appeal for want of joinder.

The Labour Court found it unnecessary to consider the question whether the dismissal of the workers had been substantially or procedurally fair.
The applicants made an application for appealing against the order of the Labour Appeal Court.

They applied for a certificate in term of Rule 18, which the Labour Appeal Court declined on the basis that no proper case had been made for condonation of the late application for such a certificate.

The court, however, considered it desirable in the interest of justice to deal with the matter at once.

The applicants alleged that the decision of the Labour Appeal Court infringed the rights of the workers to fair labour practices. It further contended that unfair dismissal by the employer had to be deemed to have been committed by Wembly and that the reinstatement order against the employer had consequently to be deemed to be against Wembly as there was a transfer as a going concern.

The applicants used as authority the judgment of Success Panel Beater & Service Centre CC v NUMSA. In this case the Labour Appeal Court sanctioned the notion that the “new employer” would be bound by a declaratory order of the court for reinstatement of an employee who was dismissed by the “old employer” prior to the transfer of the business as a going concern.

The Labour Appeal Court in the Halgang Properties case, however, held that the applicants could not use the Panel Beater case as authority. This case was different from the one at hand as there was a waiver of joinder, which was lacking in this case.

The Labour Appeal Court held that the correct procedure would be to join the new employer to the proceedings.

The Constitutional Court held that they could not fault the decision of the Labour Appeal Court and further held that it would not be in the interest of justice to grant leave to appeal.

The application for appeal was accordingly dismissed by the court.

From the above case law one can draw the conclusion that a “new employer” can be joined in an application for unfair dismissal against the “old employer” prior to the transfer of the business as a going concern. This will have the result of the “new employer” being held accountable for the unlawful actions of the “old employer” against an employee and can result in a declaratory order being made against the “old employer”, which will be binding on the “new employer”, provided that the “new employer” is joined to the proceedings.

The effect of this declaration is that employees are safeguarded.

In order for a dismissal based on operational requirements to be procedurally fair, the employer will have to comply with section 189 of the LRA.

Section 189 reads as follows:

“(1) When an employer contemplates dismissing one or more employees for reasons based on the employer’s operational requirements, the employer must consult –

(a) any person whom the employer is required to consult in terms of a collective agreement;

(b) if there is no collective agreement that requires consultation, a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum;

(c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals;

(d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.

(2) The consulting parties must attempt to reach consensus on
(a) appropriate measures –

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

(b) the method for selecting the employees to be dismissed; and

(c) the severance pay for dismissed employees.

(3) The employer must disclose in writing to the other consulting party all relevant information, including, but not limited to –

(a) the reasons for the proposed dismissals;

(b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;

(c) the number of employees likely to be affected and the job categories in which they are employed;

(d) the proposed method for selecting which employees to dismiss;

(e) the time when, or the period during which, the dismissals are likely to take effect; the severance pay proposed;

(f) any assistance that the employer proposes to offer to the employees likely to be dismissed; and

(g) the possibility of the future re-employment of the employees who are dismissed.

(4) The provisions of section 16 apply, read with the changes required by the context, to the disclosure of information in terms of subsection (3).

(5) The employer must allow the other consulting party an opportunity during consultation to make representations about any matter on which they are consulting.

(6) The employer must consider and respond to the representations made by the other consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing.

(7) The employer must select the employees to be dismissed according to selection criteria –

(a) that have been agreed to by the consulting parties; or

(b) if no criteria have been agreed, criteria that are fair and objective.”
CHAPTER 6
THE RIGHTS OF EMPLOYEES IN TERMS OF SECTION 197A OF THE LRA WHERE THEIR EMPLOYER IS SEQUESTRATED OR HIS BUSINESS LIQUIDATED

In the past the employment contracts of employees were terminated upon the insolvency of their employer. They had a limited claim against the insolvent estate of their insolvent employer.

However, section 38 of the Insolvency Act No 24 of 1936 and section 197A of the LRA now apply to the employment contracts of employees of an insolvent employer.

Section 38 of the Insolvency Act has the effect of suspending contracts of employment from date of granting of the sequestration or winding up order, including the provisional order.

During suspension the employees do not render their services and are not remunerated. No employment benefits accrue to the employees during such suspension.

The suspended employees are entitled to claim unemployment compensation from date of suspension.

Section 38 of the Insolvency Act further imposes a duty on the trustee or liquidator of the insolvent employer to consult before he/she may terminate the employment of any of the employees.

He/she must consult with the persons designated in terms of a collective agreement, a workplace forum or the affected employees or their trade unions. The purpose of such consultation is to attempt to reach consensus on appropriate measures to save the whole or a part of the business, which may include a transfer in terms of section 197A of the LRA.
Unless the liquidator or trustee and employee agree on continued employment, all employment contracts automatically terminate within 45 days. The employee will then have a claim against the insolvent estate of the employer for any loss suffered as a consequence thereof.

In such an event the employees will be entitled to severance pay under section 41 of the Basic Conditions of Employment Act No.75 of 1997 which reads as follows:

“(1) For the purposes of this section, “operational requirements” means requirements based on the economic, technological, structural or similar needs of an employer.

(2) An employer must pay an employee who is dismissed for reasons based on the employer’s operational requirements severance pay equal to at least one week’s remuneration for each completed year of continuous service with that employer, calculated in accordance with section 35.

(3) The Minister may vary the amount of severance pay in terms of subsection (2) by notice in the Gazette. This variation may only be done after consulting NEDLAC and the Public Service Co-ordinating Bargaining Council established under Schedule 1 of the Labour Relations Act, 1995.

(4) An employee who unreasonably refuses to accept the employer’s offer of alternative employment with that employer or any other employer, is not entitled to severance pay in terms of subsection (2).

(5) The payment of severance pay in compliance with this section does not affect an employee’s right to any other amount payable according to law.

(6) If there is a dispute only about the entitlement to severance pay in terms of this section, the employee may refer the dispute in writing to –

(a) a council, if the parties to the dispute fall within the registered scope of that council; or

(b) the CCMA, if no council has jurisdiction.

(7) The employee who refers the dispute to the council or the CCMA must satisfy it that a copy of the referral has been served on all the other parties to the dispute.

(8) The council or the CCMA must attempt to resolve the dispute through conciliation.

(9) If the dispute remains unresolved, the employee may refer it to arbitration.

(10) If the Labour Court is adjudicating a dispute about a dismissal based on the employer’s operational requirements, the Court may inquire into and determine the amount of any severance pay to which the dismissed employee may be entitled and the Court may make an order directing the employer to pay that amount.”
Section 197A and section 197B of the LRA applies to all transfers as a going concern where the employer is insolvent.

Section 197A reads as follows:

“(1) This section applies to the transfer of a business –

(a) if the old employer is insolvent; or
(b) if a scheme of arrangement or compromise is being entered into to avoid winding up sequestration for reasons of insolvency.

(2) Despite the *Insolvency Act, 1936* (Act No. 24 of 1936), if a transfer of a business takes place in the circumstances contemplated in subsection (1) unless otherwise agreed in terms of section 197(6) –

(a) the new employer is automatically substituted in the place of the old employer in all contracts of employment in existence immediately before the old employer’s provisional winding up or sequestration;

(b) all the rights and obligations between the old employer and each employee at the time of the transfer remain rights and obligations between the old employer and each employee;

(c) anything done before the transfer by the old employer in respect of each employee is considered to have been done by the old employer;

(d) the transfer does not interrupt the employee’s continuity of employment and the employee’s contract of employment continues with the new employer as if with the old employer.

(3) Section 197(3), (4), (5) and (10) applies to a transfer in terms of this section and any reference to an agreement in that section must be read as a reference to an agreement contemplated in section 197(6).

(4) Section 197(5) applies to a collective agreement or arbitration binding on the employer immediately before the employer’s provisional winding up or sequestration.

(5) Section 197(7), (8) and (9) does not apply to a transfer in accordance with this section.”

Section 197B reads as follows:

“(1) An employer that is facing financial difficulties that may reasonably result in the winding up or sequestration of the employer must advise a consulting party contemplated in section 189(1).

(2) (a) An employer that applies to be wound up or sequestrated, whether in terms of the *Insolvency Act, 1936* or any other law, must at the time of making
application, provide a consulting party contemplated in section 189(1) with a copy of the application.

(c) An employer that receives an application for its winding up or sequestration must supply a copy of the application to any consulting party contemplated in section 189(1), within two days of receipt, or if the proceedings are urgent, within 12 hours."

In the matter of Jenkin v Khumbula Media Connexion (Pty) Ltd the Labour Court had to decide whether the dismissal of the applicant was procedurally fair, if yes, what compensation should be paid and whether the business of African Impression Media was transferred to the respondent as a going concern in terms of section 197A of the LRA.

The facts of the case were as follows:

The applicant worked as a printer for Transnet which was referred to as Transnet Production House. His duties involved making copies of documents and manuals for customers which he would then bind.

Transnet Production House was acquired by a company Linkallooh (Pty) Ltd in January 1991 which traded as Skotaville Press which became African Impression Media (Pty) Ltd in 2002.

The applicant contended that his duties remained the same as well as his terms and conditions of employment. He was performing his duties as if nothing had changed.

The name of the company changed again in 2006 to Khumbula Media Connexion.

The applicant contended that everything remained the same, except for the name of his employer. His manager was the same person and the CEO as far as he was aware was also the same person.

The applicant did not apply for a new position with the company, neither was he approached to sign any contract. In March 2007 people arrived at the applicant’s

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45 2010 (ZALC) 78 (2 June 2010).
office and started removing furniture. He sought legal advice and wrote to the respondent on the 12th of March 2007 informing them that he would continue to report for work until told otherwise.

He received a response on 13 April 2007 informing him that the lease of the premises expired and that he should stay at home until further notice as the company is looking for other premises.

He was also advised that he would receive his full pay and employment benefits.

During the end of 2007 the applicant was informed by his medical aid that his membership had lapsed due to non-payment of his premiums by the respondent.

When the applicant queried this with Mr Ngcobo, in the respondent’s employ, at a meeting in December 2007 he also requested copies of payslips that he had not received and requested that the medical aid premiums be paid.

Mr Ngcobo advised him that he would look into the matter and get back to him. Mr Ngcobo further informed him that he would return to him with a retrenchment proposal when they meet again in January 2008.

No meeting took place in January. The applicant continued to receive his usual salary for December and January.

The applicant received an amount of R16 224.00 in February 2008 as payment of the arrear medical aid contributions.

The applicant did not receive his salary for March. When he queried this lapse he was told by the respondent that his contract had terminated. The respondent presented the court with an unsigned contract which purported to have placed the applicant on a one-year fixed term contract commencing on the 18th of October 2006 and expiring on the 30th of September 2007, together with a “Severance/Retrenchment Package” which was also unsigned.
The applicant responded that this was the first time that he saw the contract and “Severance/Retrenchment Package” and that he had not entered into such contract or package as alleged.

Mr Ngcobo testified to the effect that in May 2006 African Impression Media (Pty) Ltd, of which he was the owner, was placed under provisional liquidation at which time he became a consultant to the respondent, Khumbula Media Connexion (Pty) Ltd, a company owned by his wife.

It is clear from the evidence that African Impression Media (Pty) Ltd continued its operation until March 2007 when its furniture was removed.

The only change appears to have been that with effect from October 2006. The offices were run and operated by the respondent. This was evidenced by the payslip issued to the applicant in September. However, the payslip which was given to the applicant in October reflected the employer as Khumbula Media Connexion. All the other particulars on the payslip were identical except for the date of engagement of the applicant which was reflected as 1 October 2006 such as to his previous payslips which recorded the date as 17 August 1981.

Mr Ngcobo could not offer evidence to establish what had transpired regarding the liquidation, any agreement, if any, with the liquidators and any details regarding the contracts and the customers that he suggested were different from those his company African Impression Media had dealt with.

His evidence was to the effect that he did not consider the continuation of the printing centre to be a transfer of business or a part thereof as a going concern and accordingly the applicant’s retrenchment package should not take into consideration the applicant’s previous years of employment.

Concerning the retrenchment package, he contended that it was discussed with the applicant, although not signed. He was unable to explain why the respondent had not complied with the terms of the purported agreement.
He suggested that the applicant had applied for employment after the liquidation of African Impression Media during a meeting in December and that alternative employment was offered to the applicant in Johannesburg, which was turned down.

The applicant in return again reiterated the fact that he had never seen the unsigned document.

The Labour Court referred to the case of Johnson & Johnson (Pty) Ltd v Chemical Workers and Industrial Union\(^46\) in considering the procedural fairness of the dismissal of the applicant.

In the Johnson & Johnson case the court clearly sets out the requirements for compliance with the procedural aspects of section 189 of the LRA. The Labour Court stated as follows:

> “The important implication of this is that a mechanical, ‘checklist’ kind of approach to determine whether s 189 has been complied with is inappropriate. The proper approach is to ascertain whether the purpose of the section (the occurrence of a joint consensus seeking process) has been achieved.”

The court in the matter of Jenkin found that the respondent did not comply with section 189 and that the applicant’s dismissal was procedurally unfair.

Concerning section 197A of the LRA the court looked at the definition of business in the LRA.

The court held that section 197A only applies in cases of insolvency. This section specifically provides that if the old employer is insolvent, the contract of employment does not automatically terminate where a transfer of a business takes place. In such a situation the new employer is automatically substituted in the place of the old employer.

\(^46\) (1999) 20 ILJ 89 (LAC).
In considering the evidence before it, the court found that a transfer as envisaged by section 197A of the LRA did take place and as a consequence section 197A(2)(d) is applicable in the calculation of the severance pay of the applicant.

From the above case law it is clear that the employees of an insolvent employer do enjoy protection under section 197A of the LRA.
CHAPTER 7
CONCLUSION

From the discussion contained in this treatise it is clear that employees do enjoy extensive protection when a business is transferred by its employer as a going concern.

Employers must be careful when considering terminating employment contracts of their employees because they are selling their business or utilising outsourcing services. This may result in unfair dismissal claims for which the “new” employer can be held accountable.

The employment continuity of the employees is also not interrupted by the transfer. In the event of their being retrenched in the future by the new employer, their years of service with the “old” employer will have to be taken into account when determining their severance packages. Failure in this regard will result in the retrenchment being unfair.

Retrenchment of employees will also only be fair if the retrenchment is based on the operational requirements of the “old” employer.

The employee is entitled to terms and conditions that are not less favourable to those which it had with its “old” employer.

The purpose of section 197 of the LRA is to protect employment security during transfers.

An employer who wishes to outsource its activities will also have to comply with section 197 of the LRA as section 197 applies to the outsourcing of services, provided that it passes the test of a transfer of a business as a going concern by the old employer to the new employer.

Section 197 of the LRA does not apply to second-generation outsourcing.
The Supreme Court of Appeal held that when legislation is clear and unambiguous, the intention of the legislature must prevail. The only instance where words must be read into legislation is to bring it in line with the Constitution.

It is not the function of the court to draft legislation.

Outsourcing to a labour broker is not covered by section 197 of the LRA and employees will not enjoy its protection.

In the case of the employer being sequestrated or liquidated, the employment contract does not automatically terminate or come to an end. Section 38 of the Insolvency Act provides for the suspension of the contract. This situation is also regulated by section 197A of the LRA.
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