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**Transfer of Undertakings - The Protection of Employment  
in South Africa**

*From adopting European law to present problems of Section 197 of the  
Labour Relations Act*

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**Declaration**

I, Eckhardt Weber, hereby declare that the work on which the thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university. I authorise the University to reproduce for the purpose of research either the whole or any portion of the contents in any manner whatsoever.

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## Summary

Since 1995 South Africa regulates the transfer of a business according to Section 197 of the Labour Relations Act. The variety of ways to restructure a business brought forth an extensive amount of litigation. The Labour Courts had to establish under which circumstances Section 197 LRA applies and how each requirement would be construed. This development culminated in two Constitutional Court judgments, in 2002 and 2011, and an amendment of Section 197 LRA in 2002. The first contention was resolved when both the Constitutional Court judgment and the redraft stipulated that Section 197 LRA entails automatic transfers of employment despite a dissenting employer's intention. The Constitutional Court settled the second dispute in ruling that second-generation outsourcing falls within the ambit of the provision.

Although those principles have been established, Section 197 LRA will still cause contention and litigation. Since the provision derived from its European counterparts, it is worthwhile to acknowledge the developments and present situation in their jurisdictions. England and Germany both had to implement the standard of transfer regulation set out by the European Acquired Rights Directive. Nevertheless, the reception of those conditions, preliminary rulings of the European Court of Justice and the ambit of application have varied intensely over the course of time.

Each country's development will deliver insights on how public policy and conflicting expectations have balanced the different interests in a transfer situation and shaped the application requirements. It is through this comparative approach the thesis tries to guide solutions for both present and future controversies.

The legal analysis will be put in the greater context of the political, economical and emotional interests when a business is transferred. Since the employees, as the weakest party in the process, do not always value their job security highest, the thesis will therefore compare their information and consultation rights and the possibility to reject their automatic transfer as well.

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## 1. Chapter One - Introduction

In our modern society change is a constant factor for development. This holds true for human interactions, culture and the business world. In such an environment of continuous change people want, while still seeking for the new and different, consistency and stability in their lives. The major support comes from personal attachments, family and friends, a home and a secure job. However, through industrialization and globalisation the world started rotating faster, and so did people's jobs. Businesses adjust to change in an ever-increasing speed of transformation and the labour force has to adjust or be adjusted. Lay-offs become ordinary, outsourcing is a way to downsize a company and mergers and acquisitions are a daily occurrence in the economy. These changes are, at least in most cases, necessary to keep up with competition and remain profitable. Therefore the legislature has to accept and protect those decisions as entrepreneurial freedom. Yet at the same time regulations were imposed to restrict capital from gaining more and more profit solely on their labourers' backs. This mission is difficult, for it has to value all facts and interests directly involved while still keeping in mind macro economic effects.

One piece in that puzzle is the regulation of transfer of undertakings. How should one impose on the business decision of selling or sourcing out parts of a company? Is it best to leave the fate of the workers up to the labour market or should they be protected through transferring them with their business? Again their rights and interests cannot be regarded without consideration of the employers involved. The old employer might prefer the automatic transfer, for it protects him<sup>1</sup> from retrenchment costs and possible litigation. On the other hand, this advantage will be priced into the sale or outsourcing agreement and may only make him feel restricted in his opportunities. The buyer or contractor may prefer the business with or without the employees; his freedom of choice and bargaining possibilities would be restricted as well.

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<sup>1</sup> Note: For entire content of thesis the use of the male form (he/his) embodies the female form (she/her) as well.

Though the specific outcome is arguable, it is obvious that transfer of undertakings had to be regulated in order to recognise their imposition on the economy and give the parties involved guidelines in the process.

### 1.1. Goal of the thesis

In 1995 South Africa followed Europe's approach in this field of jurisprudence.<sup>2</sup> It may be labelled as primarily employee protective (in retrospect) compared to other regions of the world, e.g. the USA.<sup>3</sup> Though the idea is similar to the European Union and England or Germany, there are differences in wording and background that have to be evaluated and regarded. Through this analysis of the South African Regulation Section 197 LRA, its distinctions to the European Acquired Rights Directive and the German and English implementation can be pointed out. Afterwards it will be possible to show the advantages of similar jurisprudence whilst combining it with the domestic background. However, before one might apply foreign case law onto the South African statute, each idea has to be scrutinized and the possible differences considered. The thesis will present certain developments of transfer of undertaking regulations where this approach appears helpful and effective for further advance of Section 197 LRA.

In all countries, as different as they may be, the majority of labourers affected by transfer of undertakings are easily replaceable on the job market. To respect their rights accrued over the period of employment and protect them from exploitation, these regulations prove to be essential. Still, one must keep in mind that this ideal should be accomplished by minimum restrictions on the employers involved. Too much employee protection could lead to an environment which delays restructuring and in the end brings forth less profitable companies. This will eventually lead to retrenchments or even bankruptcy, and keep foreign investments out of the country. In macro economic terms the idea should always be to minimize the effects of a transfer on both employer and employee, while still regarding their rights, especially by prohibiting an unregulated way of employee dismissals.

The goal of the thesis is to examine the South African solution to the protection of employment in case of a transfer of business. Therefore its history and development

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<sup>2</sup> Section 197 LRA 1995.

<sup>3</sup> Which due to their at-will employment do not have statutory dismissal protection or regulations of undertakings.

of statute and jurisprudence will be portrayed and examined. The past and present problems will be pointed out and their recent treatment evaluated.

## 1.2. Research Method

In order to establish the legislative background the thesis will begin with a basic outline of the situation of a business transfer. Each party involved and its major concerns will be demonstrated to establish the political, social and economical background of transfer regulations. This setting has to be regarded when the different statutes, judgments and articles are analysed. Additional to the nation-based study, the thesis will gain its main ideas through the comparative approach, comparing European concepts in the field of transfer of undertakings to the domestic regulation. The comparative part is based on the European directive and England because Section 197 LRA mainly derived from this legislative background, and Germany because of the author's judicial education. Other countries are not included.

## 1.3. Outline of the thesis

Chapter two of the thesis will focus on the application of transfer regulations and what is needed to trigger its consequences. After an introduction to the situation of transfer of undertakings, the parties involved and their interests, the South African requirements for Section 197 LRA are pointed out. The thesis will then proceed with a brief description of the European, English and German protection of employment in the case of a transfer of business. In doing so, the focus will mainly lie upon the development of the present regulations and the changes that have been made over the course of time. The conclusion will lead to ideas and new approaches for future South African case law, and how a combination of concepts may help to establish more legal certainty.

What the thesis cannot provide is a deeper examination of the consequences after a transfer of business has been ascertained, as well as supplementary topics that only touch the edges of Section 197 LRA.<sup>4</sup>

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<sup>4</sup> E.g. the notions of employee and employer in the context (because the thesis only regards the application in Part I, it requires examining the situation when a *business is transferred as a going concern*. The question which employees are assigned to the undertaking primarily regards a legal consequence. The situation where the ascertainment of a transfer is based on the question how many employees are assigned to the undertaking in ratio to those who have already been transferred, is a matter of fact and only relevant in a minority of cases), the date of the transfer, etc.

Chapter three will round up the differences in regulations of transfer of undertakings through paying regard to the process of information and consultation and the connection to a right to object to the automatic transfer by the employee. The different procedures in each country will be put in the greater context of the whole regulation. This part will again involve an evaluation of the South African approach in contrast to the European ideas.

Chapter four summarizes the main results and in a final conclusion will point out how the comparative approach helped to evaluate the South African regulation from external angles. Interests and consequences that are sometimes not apparent at first and have been experienced in other countries open up new ways to approach new cases. The wider scope of regulations helps identifying unexplored territory and increases legal certainty in a field of constant change.

## 2. Chapter Two – The idea of transfer of undertaking regulations and comparison of application

### 2.1. The idea behind regulations for transfer of undertakings

From an entrepreneurial point of view, one may ask why labour law regulations are needed if a business is transferred through an asset deal. At first glance it seems to be unnecessary to impose regulations in this sector because the employees will just 'follow their employment'. If the old employer is not able to provide work for the present amount of workers, he will retrench them due to operational requirements. However, as a business has been sold, this business somewhere else will provide new jobs, often for the former employees already involved with it in the beginning and already acquainted with its characteristics. That way the free market will find its own solution for the problem. Legislative regulation is not necessary. For years this has been the situation in South Africa, as well as England and Germany. Transfers of undertakings were unregulated and only subject to rules of the common law.<sup>5</sup>

Unfortunately this view is only half the truth in transfer cases. Although the market will eventually connect employment and employees, there are two main reasons for legislative intervention. On the one hand there is the minimization of disadvantageous effects due to the transfer,<sup>6</sup> and on the other hand the choice to prevent the exploitation of the party with least leverage in the situation, the workers.<sup>7</sup>

The second factor cannot be regarded independently but has to be put into context of dismissal regulations. History has shown that especially with shareholders being owners of a company, the respect and involvement for the employee decreases towards a minimum that has to be protected by the state.<sup>8</sup> The most drastic example can be found in the period of industrialisation in England in the 19<sup>th</sup> century, known

<sup>5</sup> See Chapter 2.3.1.1 for South Africa and Chapter 2.4.4.1 for England. Germany did apply general rules of the Bürgerliches Gesetzbuch (BGB) the German Civil Code, Chapter 2.4.3.1.

<sup>6</sup> Blackie & Horwitz (1999) 'Transfer of Contracts of Employment as a Result of Mergers and Acquisitions: A Study of Section 197 of the Labour Relations Act 66 of 1995' 20 *ILJ* 1388 therefore regard Section 197 LRA as an (potentially) important factor for South Africa to compete in a global competitive environment and for achieving economies of scale through mergers or outsourcing.

<sup>7</sup> Although the workers have been regarded as having similar powers of restructuring and changing a business and their working conditions through their trade unions, *National Education Health & Allied Workers Union v University of Cape Town & others* (2000) 21 *ILJ* 1618 (LC) para 22; it is a slightly generalizing point of view since a lot of workers are not involved in unions or their powers are not comparable to the employer's side.

<sup>8</sup> HJ Willemsen 'Umstrukturierung und Übertragung von Unternehmen: Arbeitsrechtliches Handbuch' (2011) at 768.

as the Manchester Capitalism, when employment standards were lowered to a bare minimum for further profit. Over the course of time employee rights grew, and a minimum standard of rights is now provided all over the industrialized world. Not to say that transfer of undertaking regulations are needed to protect employees from a similar fate, yet it represents one little piece of the puzzle of employment protection. The infinite supply of labourers offers employers the opportunity to lay off any unwanted worker and replace him with another one, often at a lower salary. To prohibit such ways of profiting through workers' exploitation, dismissal regulations had to be implemented. As employers and their lawyers always discovered new ways to circumvent these basic dismissal protection, transfer of undertakings as a loophole had to be regulated. Although most business transfers may have other reasons, a regulation to omit this tactic of retrenchments was the original intention in Germany.<sup>9</sup>

The first reason mentioned shows that legislature paid regard to all parties involved in a business transaction. Even if the market system connects open positions with job-seeking labourers, it does not happen in the most (cost) effective way. In the majority of cases where a business is sold, all that is required to operate it properly should be sold with it. Obviously the employees are normally not included as lock, stock and barrel.<sup>10</sup> However, most business run with employees assigned to them, and their knowledge of the business and its characteristics is an additional value to it.<sup>11</sup> That value can be kept alive best if these employees still operate the business, even under new supervision and ownership. Another disadvantage of the market alone regulating the situation is the costs to retrench and re-employ the labourers. On the one side the old employer has to pay retrenchment costs, either in form of severance or leave pay and sometimes lawyers or even litigation costs. On the other side the new employer will have to go through an application and hiring process, involving interviews and evaluation of the employees. These additional costs can be avoided if the transfer does not affect the employment relationships. However, if the business is not profitable with its workforce, it should be downsized. Such a process,

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<sup>9</sup> HJ Willemsen (2011) at 769.

<sup>10</sup> The court in *Ntuli v Hazelmore t/a Musgrave Homes* (1988) 9 ILJ 709 (IC) at 714 A used this expression for the description of a business. The situation may be different in very specialized sectors where the skills of the employees are more valuable than the property. But employees are still not 'sold' but the old employer is paid to accept their contracts being taken over.

<sup>11</sup> Disregarding the cases where the business is sold due to the poor performance of its employees.

though, should not be combined with a sale, where the new employer cherry-picks his employees. Either the old or the new employer should evaluate how the business is operated best and then can apply operational changes.

This background shows that in our modern society it is economically and socially important to regulate transfer of undertakings. The thesis tries to evaluate the different approaches and their potential to achieve the aforementioned goals.

## 2.2. Transfer of an Undertaking – The parties involved

So far the regulation of transfer of undertakings has been put into the bigger context of labour law and its economic effects. For a deeper understanding of a provision regulating a transfer, the different interests have to be pointed out.

Three parties are involved: the old employer<sup>12</sup>, the new employer<sup>13</sup> and the employees<sup>14</sup>. Each one has different interests, most of which are influenced financially, economically and emotionally.

### 2.2.1. The old employer:

The old employer decided to discontinue running his business or part thereof. This can be due to a variety reasons; most often it is a decision to focus on core values or cut costs.<sup>15</sup> As businesses grow and they sometimes develop or acquire diversified industries, the main subject of the company becomes distorted. To concentrate on the core business model, parts of the company have to be sold or outsourced. The former employer is looking to make the company more profitable and contemplates achieving it by cutting unnecessary and more often hidden costs.

After he makes the decision to transfer the business, his interests are focused on getting a high price if he is selling, or achieving a low price if he is contracting out. Although he is looking for a good deal, the transaction costs are another important concern. Keeping them down will not only help decrease costs but also improve and accelerate the concentration on its core values. The less time spent on the transfer, the faster the company will be able to increase its net profit again. Additionally, he prefers to keep his business decisions confidential as long as possible.

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<sup>12</sup> Synonyms in this thesis: seller, transferor.

<sup>13</sup> Synonyms in this thesis: buyer, contractor, transferee (transferor in second-generation outsourcing).

<sup>14</sup> Synonyms in this thesis: worker, labourer.

<sup>15</sup> D Du Toit 'The transfer of enterprises and the protection of employment benefits in South and Southern Africa' (2004) 8 *LDD* 85 at 86.

The interests of the old employer can therefore be summarized as price, time and information non-disclosure.

#### 2.2.2. The new employer:

The new employer wants to expand, either by acquiring another business or by providing a service. Similarly to the old employer, his first interest is either to keep the costs down if buying a business, or achieving a high price if delivering a service. Because the prices are always connected to the transaction costs, the new employer tries to decrease them as well. The new employer, though, is in the best situation because he can negotiate the price according to what he is interested in. If he can run the business or service with his own workforce, he will not be interested in taking over the existing one. If he needs or even wants the extra staff he, on the other hand, would prefer an easy and fast way of employing the former workforce. Again the new employer prefers to keep his business activities secret as long as possible.

The interests of the new employer can therefore be also summarized as price, time and information non-disclosure.

#### 2.2.3. The employees

The employees want consistency. As simple as this may sound, it shows that primarily the employees want to keep the position, rights and salaries that they already have. To improve their situation in the case of a transfer is less likely. Almost similarly important is the disclosure of information by their employer. If a transfer is being contemplated, the workers want to know their situation and possible effects on their employment. Finally, they, at least more than the employers, have other interests attached to their jobs. Similarly important, the place of their employment, the people in charge, the safety at work, the benefits and even emotional aspects may be of value, although those intentions are only indirectly financial issues. The emotional side also regards the freedom to choose the person, company and brand one wants to work for, but puts the focus on the organization itself rather than the person of the employer.<sup>16</sup>

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<sup>16</sup> Blackie & Horwitz (1999) 20 *ILJ* 1387 at 1388.

The interests of the employees can therefore be summarized as job safety, information disclosure and emotion<sup>17</sup>.

#### 2.2.4. The situation

An unregulated transfer of business will leave the new employer in the most, and the employees in the least, favourable position. The old employer finds himself somewhere in the middle; while he has to bargain for a good position he will still be concerned with the settlement of his employment contracts.

The new employer can decide whatever seems right in his position, because he has no obligation of taking over the business with its employees. He can negotiate the price and the conditions of the takeover due to his vision. If he sees a running and profitable working unit, he may choose the package deal including the employees. If he prefers a business where part of his labour force can be included, he will probably exclude most of the original employees. Especially important and well-trained employees may be his choice, but not the average, unskilled one. It is also a perfect situation for him to downsize the undertaking.

The situation shifts in favour of the old employer if the outsourcing of a service represents the transfer of an undertaking. In general, in this context the old employer as the client puts out a service in a tendering process and prospective contractors put in their bid. The position with the most leverage will be on the side of the client, who may choose from various offers. The employees still take on the least favourable position.

In this setting, a regulation has to even out each position to at least a minimum amount of protection and still be an economically reasonable law. The favoured solution is the automatic transfer of the employment contracts, safeguarding all rights and working conditions while preventing agreements between the employers that favour only their own, but not the business' economy.

This conclusion of an automatic transfer is not the only solution to this situation, and it took seven years after releasing a first provision regulating transfer of businesses in South Africa to acknowledge this position. The influence of the common law was

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<sup>17</sup> B Jordaan 'Transfer, Closure and Insolvency of Undertakings' (1991) 12 *ILJ* 935 at 960; compare the Hierarchy of Needs by Abraham Maslow *Hierarchy of Needs: A Theory of Human Motivation* (1954).

strong enough to support another view of Section 197 LRA 1995 until the Constitutional Court ruled for the first time in 2002.<sup>18</sup>

Since the main idea and goals of the regulation have been established, it has still caused other problems in South Africa, as well as in the European Union. Although the idea of transfer of business regulations has been widely accepted, its application is still contentious. Another dispute in South Africa culminated again in 2011 when the Constitutional Court made its decision concerning second-generation contracting out.<sup>19</sup>

Not only the application of each regulation, but the process and consequences also raise new questions. The idea of disclosing information to the workforce and the result of employees objecting to the transfer has demanded changes in legislation and resulted in new opinions in the courts of Europe. Closely connected to the question of the regulations' application, the employees' desire for information and emotional stability comes into play.

As for the comparison to the European Union, developments in England and Germany especially will show how more problems can arise about the same (old) notions, and that the employees' role in the transfer cannot be merely reduced to his protection through the automatic transfer. There will be cases where other interests weigh far more to them.

Transfer of undertaking regulations take effect on many levels; it is the almost impossible idea of considering and balancing every relevant factor which all regulations have in common. This comparative thesis will try to help display old and new aspects, minimize a few of the obstacles and finally provide more legal certainty.

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<sup>18</sup> *National Education Health & Allied Workers Union v University of Cape Town & others* (2003) 24 ILJ 95 (CC) hereinafter referred to as *NEHAWU*. The case involved first generation outsourcing of gardening, maintenance and security from the University of Cape Town to service providers.

<sup>19</sup> *Aviation Union of SA & Others v SA Airways (Pty) Ltd. & Others* (2011) 32 ILJ 2861 (CC) hereinafter referred to as *SA Airways*. The case, which will be discussed at length *infra* at Chapter 2.3.2.5, concerned a second generation outsourcing, when SA Airways changed contractors of support services.

## 2.3. South Africa

### 2.3.1. South African History on the Regulation of Transfer of Undertakings

South African Law derived from two different backgrounds. On the one hand Dutch settlers implemented their domestic law, which derived from continental European law that was built on the ancient Roman law. On the other hand the English as the next colonist occupying South African territories executed the principles of the English Law.<sup>20</sup> Over the course of time both institutions found their way into the South African Law system.<sup>21</sup> As transfer of undertakings had not been regulated by any Roman-Dutch law, the ideas of the common law were applied by the courts when a business was sold.<sup>22</sup>

#### 2.3.1.1. The situation of the common law

Until 1995 common law principles regulated cases of labour law disputes when an undertaking was being transferred.<sup>23</sup> The situation can be compared to the unregulated situation described *supra*,<sup>24</sup> and the different positions were left up to the bargaining strength of the employers and employees. The parties involved had different leverage, with the new employer being in the strongest, the old employer in a neutral and the employees in the weakest position. The deals were more or less made 'on the back of the employees'.

One principle of the common law prohibited the change of the employer without the employees' consent. In general the common law provided the possibility for the cession of a contract through a bilateral agreement. This was applicable to all civil contracts except the ones of personal nature. A contract is of personal nature if it makes any reasonable or substantial difference to the other party whether the cedent or the cessionary is entitled to enforce it.<sup>25</sup> This was applied to the employment contract in the English decision of *Nokes v Doncaster Amalgamated Collieries Ltd*,<sup>26</sup>

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<sup>20</sup> Basson et al *Essential Labour Law* (2005) at 3.

<sup>21</sup> J Grogan *Workplace* (2012) at 2.

<sup>22</sup> *Ibid* at 2.

<sup>23</sup> The only two statutes that already regulated the issue of the transfer of businesses were The Manpower Training Act, 56 of 1981, in Section 22 (5)(a), and the Basic Conditions of Employment Act, 3 of 1983, in Section 12 (7). Both acts were results of the Wiehahn Commission and its recommendations but were not conveyed into a context of employment issues.

<sup>24</sup> The Situation, Chapter 2.2.4.

<sup>25</sup> N Smit *Labour Law Implications of the Transfer of an Undertaking* (2001) LLD at 86; *Eastern Rand Exploration Co v Nel* 1903 TS 42 at 53.

<sup>26</sup> *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 at 1020.

and cited with approval by the Industrial Court in various decisions.<sup>27</sup> Two reasons have been found to mitigate for this conclusion: the right of the employee to choose his employer, and that it is wrong to disregard the person of the employer as irrelevant to any employee.<sup>28</sup> A mere cession was not enough; the only way of transferring employees was possible through a cession and delegation or novation of the contract. A tripartite agreement between the old and the new employer as well as the employee would be needed, but no bilateral agreement was sufficient.

Although the original thought was to protect employee rights and show the difference towards a status of forced labour, this protection would eventually turn against them under modern labour market circumstances. Not the freedom to choose their employers, but the security of employment came into focus. Still, the right to choose for whom to work was important, and had to be regarded, though not as the first and only purpose. Instead, multiple interests needed to be combined.

#### 2.3.1.2. 1956 LRA, Wiehahn Commission and the Industrial Court

In 1956 the Industrial Relations Act was passed, but yet did not entail any provision regarding the transfer of undertakings. The situation would still only be covered by the basic principles of the common law until the next phase of Labour Law regulations; the amendments in 1979 as a result of the Wiehahn Commission appeared. Due to the economic situation of South Africa and the urgent need for foreign investment, the commission was established to evaluate possible changes in different areas.<sup>29</sup> Although a main part of their research and evaluation was Labour Law in South Africa, their result still did not include any regulation regarding the transfer of undertakings. Nevertheless, a minimum of labour protection was achieved with the introduction of *unfair labour doctrine*. Combined with the establishment of the Industrial Court, which identified *unfair dismissals* as an *unfair labour practice*, a first step towards employee protection during a transfer was achieved.<sup>30</sup> In 1980 the new court applied its fair procedure ruling on a transfer of an undertaking for the first

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<sup>27</sup> *Ntuli v Hazelmere t/a Musgrave Homes* (1988) 9 ILJ 709 (IC) and *NUMSA v Metkor Industries* (1990) 11 ILJ 1116 (IC).

<sup>28</sup> "the difference between servant and serf" *Nokes* [1940] AC 1014 at 1020.

<sup>29</sup> C Thompson '25 years after Wiehahn' (2004) 25 ILJ iii-vii.

<sup>30</sup> Du Toit et al *Labour Relations Law: a comprehensive Guide* (2006) at 10; Basson et al (2005) at 6 regard the establishment of the Industrial Court as the most important result of the Wiehahn Commission.

time in the case of *Kebebi v Cementile Products Pty Ltd*.<sup>31</sup> For the time being the Industrial Court, although falling short of the automatic transfer, provided the employees with other protection. The employers had to follow an exact regimen of steps if the transfer would ultimately result in retrenchments. The Industrial Court required them to have tripartite consultations, and reasonable efforts by the transferor to ensure workers' interests and fair operational dismissals had to be made upon valid economic reasons and the expense of severance pay.<sup>32</sup> To live up to the requirement of a *fair* procedure, employers, though still not bound by a legal cession, were compelled to provide information, consult and compensate, because the transfer amounted to an agreement or retrenchment. This first judicial approach towards transfer of undertakings regulation should always be regarded when examining present cases. Although the legislative statutes have overridden the common law position and the principles of the Labour Relations Act of 1956, every procedure by the employer still has to be *fair*.<sup>33</sup> Nevertheless the situation was still not satisfactory to the parties involved; although the new employer in principle still had the freedom provided under common law, the employees still lacked real job protection and the old employer had to disclose information that he would rather have kept confidential.<sup>34</sup>

### 2.3.1.3. The Labour Relations Act 1995

The course of time showed that the political situation in South Africa had to change. Disregarding the political background, the ideas implemented in the interim Constitution of 1993 led to a new Labour Relations Act, which for the first time included in Section 197 a provision regarding transfer of undertakings.

In 1995 the Labour Relations Act was passed and included Section 197, a provision specifically regulating transfer of undertakings. Although it gave rise to major disputes among judges of the different labour courts, the Constitutional Court in 2002 ruled that it already provided for automatic transfer of employees despite any agreement of the employers, as long as the requirements of the provision are met. The court established the dual purpose of Section 197 LRA to be the protection of

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<sup>31</sup> *Kebebi v Cementile Products Pty Ltd* (1987) 8 ILJ 442 (IC).

<sup>32</sup> Todd et al *Business Transfers and Employment Rights in South Africa* (2004) at 11.

<sup>33</sup> Section 23 of the Constitution and Section 3 LRA; see *infra* at Chapter 3.2.1.3 the right of the employees under new Section 197 LRA to information and consultation.

<sup>34</sup> Todd et al (2004) at 12.

employees and the facilitation of transfers.<sup>35</sup> This interpretation was built upon comparative and purposive arguments due to the general requirements in Sections 1 and 3 LRA and Section 19 (1) of the Constitution of South Africa. These provisions require a purposive and fair interpretation of any regulation in the Labour Relations Act. All future judgments had to pay regard to this purpose to be in accordance with the Constitution.

Section 197 LRA 1995 was an immense change to South African protection of employment in situation of a business transfer. Nevertheless, it was not able to settle all questions arising in cases of businesses' restructuring. Within the first years, its plain application and requirements, especially in comparison to the former common law position, was at question. The employees' representatives tried to widen the application to additional situations in the following years. The main targets became first-generation and consequently second-generation outsourcing agreements. The questions concerning the scope of Section 197 LRA in these areas were left for the new version in 2002.

#### 2.3.1.4. The Labour Relations Act Amendments 2002

Due to an on-going dispute over the application of Section 197 LRA 1995 and its unfortunate wording, the legislature released new Sections 197, 197 A and 197 B LRA in 2002. Although it clarified questions surrounding the employers' freedom to influence the Section's application, it did not seem to clarify its application concerning outsourcing operations. First-generation outsourcing was nevertheless accepted through the Labour Appeal Court's decision in *SA Municipal Workers Union & Others v Rand Airport Management (Pty) Ltd. & Others*.<sup>36</sup> Yet it took the case of *SA Airways*' going to the Constitutional Court in 2011 to finally include second-generation outsourcing into the scope of Section 197 LRA.<sup>37</sup> After a dispute about the meaning of the word *by*, the highest court ruled in favour of a wider scope, saying *by* includes various meanings.<sup>38</sup>

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<sup>35</sup> *NEHAWU* (CC) para 53.

<sup>36</sup> *SA Municipal Workers Union & Others v Rand Airport Management (Pty) Ltd. & Others*, (2002) ILJ 2304 (LC), (2005) ILJ 67 (LAC) hereinafter referred to as *SAMWU*.

<sup>37</sup> *SA Airways* (CC).

<sup>38</sup> For further interpretation of the Constitutional Court judgment regard *infra* the detailed examination of the case *SA Airways* at Chapter 2.3.2.5.

### 2.3.1.5. Common law and the scope of Section 197 LRA

Another issue that appeared outside of the labour courts is the application of common law principles when people working for an employer are not regarded as employees in the sense of the Labour Relations Act. In the case of *Murray v Minister of Defence* the Supreme Court of Appeal expressed its' views on the relation between common law and labour statutes.<sup>39</sup> The court ruled that a duty of *fair dealing* with the employees lies upon the employer in all employment relationships.<sup>40</sup> The question that has to be answered is how far these developments will establish a second stream of employee litigation and whether it can be transferred into the context of Section 197 LRA. It is fair to say that the decision may have an influence on the overall protection of employees, but it will not influence the *application* of Section 197 LRA towards employees under the LRA. The issue seems to be finalised through the judgment of *SA Maritime Safety Authority v McKenzie*, where WALLIS AJA rejected the application of the *Murray* decision, beyond the narrow factual matrix of that case.<sup>41</sup> In this context the main argument has already been stated in *SANDU v Minister of Defence & Others*; that one has to rely on the enacted legislation of a constitutional right. It is that legislation one has to challenge based on the constitutional right. Thus, directly challenging the constitutional right does not adhere to constitutional standards.<sup>42</sup> Section 197 LRA exclusively regulates the *application* of transfer of undertakings. There is no room for further direct constitutional rights. Additionally, the common law position has been pointed out *supra*, and even under the influence of a new constitution, has not been changed to automatic transfers. Despite Section 197 LRA the South African Law does not provide for a legal cession in the transfer context.

### 2.3.1.6. Summary of the developments in South Africa

It seems that the questions of Section 197's LRA application have finally been cleared up, and will be easily construed henceforth. However, an international

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<sup>39</sup> *Murray v Minister of Defence* (2008) 29 ILJ 1369 (SCA).

<sup>40</sup> J Grogan (2012) at 4.

<sup>41</sup> *SA Maritime Safety Authority v McKenzie* (2010) 31 ILJ 529 (SCA), the development will again be discussed *infra* at Chapter 3.2.1.3. A thorough analysis and regard of the important case law would exceed the main interest of this thesis excessively. For further information regard T Cohen 'Jurisdiction over employment disputes - light at the end of the tunnel?' (2010) 22 *SA Merc LJ* 417-428.

<sup>42</sup> T Cohen (2010) 22 *SA Merc LJ* 417 at 420 referring to *SANDU v Minister of Defence & Others* (2007) 8 BCLR 863 (CC).

comparative study reveals the opposite, due to a continuous amount of litigation in foreign jurisdictions. Even though the most recent Constitutional Court decision helped clear a dispute among labour law specialists, it included another important dictum. The way to apply Section 197 LRA is through thorough examination of the facts of each case. During the last years the label of second-generation outsourcing took the centre stage without regard being paid to the most profound juristic methods of applying the facts of a case to the wording and intention of a provision. It was either *by* or *from*, a yes or no towards second-generation outsourcing. Instead the basic idea of a provision covering transfer of undertakings was neglected and overlooked. It is still the key issue of each case to uncover whether a business has been transferred as a going concern. This business that was in operation and is again in operation profits from its employees. However, it raises the question of how much is needed for such an assumption. The thesis will therefore explore the interpretation of Section 197 LRA through the methods of judicial construction. First, the whole section will be analysed and then divided into the application requirements. Second, the notions, *business*, *transfer* and *a going concern*, and their counterparts in European jurisdictions will be scrutinized. All elements have been formed through important judgments, which will guide their interpretation.

### 2.3.2. The application of Section 197 LRA 2002

The right approach to the interpretation of the application requirements will focus on the wording and the construction applied in the courts as well as through law academics. Every analysis has to bear in mind the twofold purpose of Section 197 LRA: facilitation of transfers and protection of employees. The latter one can further be separated into protection through automatic transfer and conserving the former terms and conditions the employees enjoyed prior to the transfer.<sup>43</sup> Nevertheless the first step is paying regard to the words used by the statute.

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<sup>43</sup> P Benjamin 'A matter of ongoing concern: Judicial interpretation and misinterpretation of section 197 of the Labour Relations Act' (2005) 9 *LDD* at 169.

*Transfer of contract of employment.*

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

(a) *“business” includes the whole or a part of any business, trade, undertaking or service; and*

(b) *“transfer” means the transfer of a business by one employer (“the old employer”) to another employer (“the new employer”) as a going concern.*

(2) *If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6)—*

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

(b) *all the rights and obligations between the old employer and 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.*

Subsection (2) provides requirements and consequences for the provision to apply, whereas subsection (1) has to be regarded when examining the notion *transfer of a business*. This element can be divided into the two parts of *business* and the *transfer* of such. The legislature provided a definition for each of those terms.<sup>44</sup> Subsection (1)(a) tells us a business includes the whole or part of any business, trade, undertaking or service. Subsection (1)(b) describes a *transfer* as a transfer of a business by one employer (“the old employer”) to another employer (“the new employer”) as a going concern.

Both definitions seem to use more words than needed. Subsection (1)(a) makes use of synonyms and can be described as tautological.<sup>45</sup> Only the term *trade* may be viewed differently because it generally involves the purpose of profit.<sup>46</sup> However, it is widely accepted that Section 197 LRA also applies to non-profitable organisations and businesses. The implementation of synonyms for the word business can only be

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<sup>44</sup> *SA Airways (CC)* para 41: ‘...complementary and their role is to facilitate the achievement of the purpose for which the section was enacted’ although part of the minority judgment, both judgments agreed upon the legal issues but split on the facts of the case. And at para 45: ‘The aim is to cast the net as wide as possible’.

<sup>45</sup> J Grogan *Dismissal* (2010) at 410.

<sup>46</sup> J Grogan (2012) at 286.

regarded as a way to make sure no possible sort of structured organisation could fall out of its range.<sup>47</sup>

Even more obvious is the tautological use/repetition of the word *transfer*. The *transfer* is a transfer of a business, of a *business* could be more or less a combination of subsections (1) and (2). The purpose of making matters clearer resulted in this definition.<sup>48</sup> Nevertheless, it takes the focus away from the important requirements that have to be met. First a change of hands through a transfer from one employer to the next has to take place, and second it has to take place as *a going concern*. As with the definition of the word business, the definition of transfer shows a wide interpretation to cover every possible transaction.<sup>49</sup>

The last part, *a going concern*, seems to be the only limiting factor in the requirements for Section 197 LRA. The wide scope of *business* and *transfer* represent an access to the provision that pays respect to the intentions of employee protection and transfer facilitation. On the other hand, the legal consequences are only reasonable and intentional if the protection of the employees to keep their jobs is in any way supportive of the business. Although the main legislative goal is to preserve a profitable business in operation, which is running with its already trained workers, the entrepreneurial decisions cannot be disregarded. If the situation does not fulfil these requirements the overprotection of employees is economically disadvantageous. This is the background of limiting the scope of Section 197 LRA to transfers of the kind of *a going concern*.

It can be summarized that the application of Section 197 LRA requires three (four) elements:

- *A business,*
- *a transfer* as a change of hands and
- the transfer happening as *a going concern*
- (*by the old employer.*)

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<sup>47</sup> *SA Airways* (CC) para 40: 'It is apparent from this definition that the section is designed to cover every conceivable business.' P Benjamin (2005) 9 *LDD* 169 at 172.

<sup>48</sup> Due to the difficulties of Section 197 LRA 1995 the Explanatory Memorandum of the 2002 amendments placed the focus on clarification of the provision and its intentions.

<sup>49</sup> *SA Airways* (CC) para 46: 'The breadth of the transfer contemplated in this section is consistent with the wide scope it is intended to cover'.

The fourth element that was thrown onto the field is found in the word *by*, indicating how the transfer process has to take place. The analysis of the construction of the particular notion and the judicial development will be provided *infra*, but although the Constitutional Court has decided on the issue, it is still not clear whether to regard *by* as the fourth application requirement or rather as an unimportant and overrated imperfection of the drafters. Therefore, this thesis places the focus on three elements and will show how the fourth element may very well have found its way into the construction of the notion *a going concern*.

Although the different elements interfere and influence each other, it is useful to analyse them each separately. This has (sadly) been handled differently over the course of judgments in the past 17 years, but it provides clear structure and transparent interpretation.<sup>50</sup> The order may be handled differently, but it seems to be most logical to start with the question of a business, for it is the item that may change hands. Thereafter the thesis will proceed with the notion of a *transfer*, the question of *a going concern* and the contention about the meaning of the word *by*.

#### 2.3.2.1. The Business

*Business* itself has been best summarized as ‘an organized grouping of resources, which has the objective of pursuing an economic activity.’<sup>51</sup> Although such a definition is rather accepted now, the notion has been contended intensely over the years. The main discussions evolved over the inclusion of outsourcing, respectively what is needed to constitute a *business*. The interpretation has to pay regard to the reason for the notion itself and the changes applied in 2002, when inserting the word *service*. If it is not possible to say that a separable coherent grouping exists, (1) Section 197 LRA cannot be applicable. Without the outline of that business it is not possible to determine the employed workers, who will be affected by the transfer (2) The business has to be outlined to apply the test of *a going concern* being transferred (3). These are the three reasons for the implementation of the word *business*.<sup>52</sup>

Again, one has to start with the business definition of Section 197 LRA subsection (1). ‘*A business is a whole or part of any business, trade, undertaking or service*’.

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<sup>50</sup> The same is true for European, German and English judgments.

<sup>51</sup> Du Toit et al (2006) at 452.

<sup>52</sup> Todd et al (2004) at 32.

Business, trade, undertaking and why a service?

The definition<sup>53</sup> can again be divided into two parts, the business synonyms and *service* being a new word since the 2002 amendments.

It is widely accepted that business, trade and undertaking all represent the same word.<sup>54</sup> As noted *supra* the tautological repetition, necessary or not, at least shows the legislative intention of including all possible structures of businesses to be included. This is equally accepted for governmental or administrative businesses.<sup>55</sup> The remark that *trade* inherits the idea of gaining profit does not change the intentions mentioned. The synonyms are not exclusive, but only examples of the businesses to be included in the provision.<sup>56</sup>

The constitution of a *business*

A business can be found in an infinite amount of varieties. Nevertheless, basic structures and elements will be found in all of them. Each business will usually entail some of these main components: tangible or intangible assets, goodwill, management staff, a workforce, premises, a name, contracts, an activity it performs, operating methods; all being linked to one another.<sup>57</sup> In the modern business world it cannot be disregarded that the assets can include intellectual property assets.<sup>58</sup> The first deciding factor as to whether Section 197 LRA shall apply or not will constitute taking the facts of a case and applying a test to determine whether the entity constitutes a business. As easy as this test may be for the sale of a production company with essential premises and tangible assets, it should also provide certainty in smaller, less asset-reliant areas. The case of *SA Municipal Workers Union & Others v Rand Airport Management Co (Pty) Ltd*<sup>59</sup> showed an interpretation by the Labour Court which, besides mixing the elements of *business* and *a going concern*,<sup>60</sup>

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<sup>53</sup> J Grogan 'Outsourcing Services, The effect of the new section 197' (2005) 3 *Employment Law* at 7 describes it as not a definition but rather a statement that business includes parts of business.

<sup>54</sup> J Grogan (2010) at 410 who is of the view that its purpose is to emphasize the application to parts of businesses.

<sup>55</sup> Todd et al (2004) at 33.

<sup>56</sup> Todd et al (2004) at 33.

<sup>57</sup> Todd et al (2004) at 33.

<sup>58</sup> Olivier & Smit 'Transfer of a business, trade or undertaking' (1999) *De Rebus* at 83

<sup>59</sup> *SA Municipal Workers Union & Others v Rand Airport Management Co (Pty) Ltd* [2002] 12 BLLR 1220 (LC) hereinafter referred to as *SAMWU*.

<sup>60</sup> P Benjamin (2005) 9 *LDD* 169 at 171 described it as a discrimination of certain groups of employees without any support of the language in Section 197 LRA.

had a narrow view due to a too conventional and traditional sense of a business.<sup>61</sup> In that case Rand Airport decided to outsource gardening and security to a service provider. The Labour Court came to the conclusion that not every activity may constitute a *service* and support functions particularly do not fulfil such requirements.<sup>62</sup>

A second approach to the notion is through a negative definition. Therefore one has to establish what is not needed for an entity to constitute a business. It is submitted that the entity does not have to be part of the core operations of a company, nor does it need to contain significant tangible or intangible assets; it does not require to generate gain or profit and need not to have been in existence prior to transfer.<sup>63</sup>

To require a *business* to be part of the core part of a company would undermine the purpose of Section 197 LRA. The majority of undertakings being sold are non-core functions which are either not profitable in their current state or distract the company from its true values. It defies common sense that a company would sell its core and profitable business parts and then being stuck with only the support functions like cleaning and maintenance. Although there might be situations where a core part is being sold, it will not represent the majority of cases where employees require Section 197 LRA to apply. The wording of the definition, which does not indicate a scope of including only core functions, backs up this logical argument.<sup>64</sup> A difference among the workforce between core and non-core employees is not intended either.<sup>65</sup>

## Service

Service, on the other hand, led to great confusion and unstructured judgments in the first years after its implementation in 2002.<sup>66</sup> However strict or wide the interpretation of service is viewed, it cannot change the idea of the overall provision.

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<sup>61</sup> Todd et al (2004) at 34 but regard *infra* under *Service* that the LC decision was still under the precedent of the LAC in the *NEHAWU* case.

<sup>62</sup> *SAMWU* (LC) para 34 stating they do not constitute a part of a business, the case will be examined more under that notion.

<sup>63</sup> Todd et al (2004) at 35-37 and regard *infra* the part *Invention of a business*. It is an uncommon exception and only applicable in certain circumstances.

<sup>64</sup> Todd et al (2004) at 35.

<sup>65</sup> Todd et al (2004) at 36.

<sup>66</sup> The Explanatory Memorandum puts its focus on clarifying the meaning of the section and points out two elements: an economic entity consisting of an organised grouping of economic resources that must be transferred and retain its identity after the transfer, at 47.6, Government Gazette No 21407, 27 July 2000. The similarities to the European wording cannot be disregarded.

The remark that foreign jurisprudence will not be of assistance because the insertion of the word service is unique to South Africa may be a bit farfetched.<sup>67</sup>

Nevertheless, the word raised some contention about its influence on the interpretation of the section. The word was added to the definition of business in subsection (1)(a) and only there takes direct effect. In the event of a business consisting only of a service being performed, it is obvious that this has to have an impact on the interpretation of the subsequent requirements *transfer as a going concern*.<sup>68</sup> Nonetheless, it does not erase further analysis of those elements.<sup>69</sup> The implementation of service did not widen the provision's scope to include all service provision changes like the English Transfer of Undertakings Protection of Employment Regulations specifically state in regulation 4 (3) TUPE 2006.<sup>70</sup> It can best be summarized as a clarification and alteration of criteria that will be decisive for the other notions (*transfer* and *a going concern*).

After the amendment the legal commentators and the Labour Courts had different views about a *service* being a business and its consequences for Section 197 LRA. To view it only as a business rendering services to clients and not within a larger company is too narrow a view, and can only be regarded as legal history.<sup>71</sup> Still, it seems obvious that the legislature must have had some intention when changing the statute in that particular part.<sup>72</sup>

The main case that dealt with this issue was the aforementioned case *SAMWU*,<sup>73</sup> which was held in the Labour Court and taken on to the Labour Appeal Court.

The Labour Court judgment has to be regarded under the binding precedent of the LAC's decision in the *National Education Health & Allied Workers Union v University of Cape Town & others*.<sup>74</sup> That case dealt with a similar arrangement to

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<sup>67</sup> M Beaumont 'Coping with corporate re-organization ,Outsourcing is dead, long live outsourcing'' (2005) *Beaumont Express* at 53.

<sup>68</sup> Labour-intensive businesses in contrast to asset-reliant businesses.

<sup>69</sup> PAK Le Roux 'Consequences arising out of the sale or transfer of a business: Implications of the Labour Amendment Act' (2002) *CLL* 61 at 64.

<sup>70</sup> Transfer of Undertakings Protection of Employment = TUPE

<sup>71</sup> J Grogan (2010) at 411, 412.

<sup>72</sup> J Grogan (2005) 3 *Employment Law* at 5.

<sup>73</sup> *SA Municipal Workers Union & Others v Rand Airport Management (Pty) Ltd. & Others*, (2002) *ILJ* 2304 (LC), (2005) *ILJ* 67 (LAC).

<sup>74</sup> *National Education Health & Allied Workers Union v University of Cape Town & others* (2002) 23 *ILJ* 306 (LAC) hereinafter referred to as *NEHAWU* where the Labour Appeal Court was of the view that the notion *a going concern* required the agreement of the employers and was later overturned by

*SAMWU*. The University of Cape Town had decided to outsource parts of its gardening, maintenance and security services. The Labour Appeal Court had been of the view that the notion *a going concern* required the agreement of the employers, but was later overturned by the Constitutional Court. Additionally, the LAC agreed that outsourcing as a temporary situation was not to be covered by the scope of Section 197 LRA. Consequently in *SAMWU* the two interpretations of *service* in the LC (still bound by the old LAC interpretation of *a going concern*) and the LAC (feeling influenced by the insertion of the word *service*) have been described as too narrow and too wide, and that the truth must lie somewhere in between.<sup>75</sup> The LC set his mind to pure clarification of Section 197 LRA through the insertion of *service*, and that it did not alter its reach.<sup>76</sup> Therefore LANDMAN J had difficulties in seeing a support function itself constituting a business in the sense of Section 197 LRA.<sup>77</sup> In his conclusion he denies the fact that support services such as gardening, cleaning or security are businesses. He however does mingle the two elements of *business* and *a going concern*.<sup>78</sup> As mentioned earlier, the LC was in the unfavourable position of still being bound by the LAC's view in *NEHAWU*, and it was obvious that the LAC decision in *SAMWU* would bring up some different ideas. Through the dictionary definition of *service* and the constant use of the word *service* by the respondents for the activities, DAVIS AJA drew the conclusion that gardening and cleaning constitute *services*, and therefore are a *business* as required in Section 197 LRA.<sup>79</sup> This interpretation does not hold up to the wording of subsection (1)(a). The definition is not exhaustive, and mainly just states that a business may only consist of the rendering of services.<sup>80</sup> The aspect shows the difficulty that may arise if the two elements of *business* and *a going concern* are not strictly separated. Although the LAC established the inclusion of outsourcing into Section 197 LRA, it did not finalize the question arising around the relation between *service* and *business*, and further to the notion *a going concern*.

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the Constitutional Court. Additionally the LAC agreed that outsourcing as a temporary situation was not to be covered by the scope of Section 197 LRA.

<sup>75</sup> SM Van Niekerk 'Bleached Skeletons Resurrected and Vibrant Horses Corralled - SA Municipal Workers Union v Rand Airport Management Company (Pty) Ltd & Others and the Outsourcing of Services' (2005) *ILJ* 661 at 663.

<sup>76</sup> *SAMWU* (LC) at 2309.

<sup>77</sup> *SAMWU* (LC) at 2310.

<sup>78</sup> See C Bosch 'Balancing the Act: Fairness and Transfers of Businesses' (2004) 25 *ILJ* 923 at 932.

<sup>79</sup> *SAMWU* (LAC) at 78.

<sup>80</sup> SM Van Niekerk (2005) *ILJ* 661 at 664.

It is submitted that the word did not represent a complete new scope to Section 197 LRA.<sup>81</sup> Outsourcing seemed to be included after the Constitutional Court decided in the *NEHAWU* case for the old Section 197 LRA 1995. However, integrating the word *service* helped clear that issue and after the case of *SAMWU v Rand Airport Management* the inclusion of outsourcing was not at question anymore.<sup>82</sup> The definition of business nevertheless got clarified and consequently the Labour Court applied it in the sense that *services* may constitute a business, but not the service itself.<sup>83</sup> The indirect consequences of *service* have to be regarded for the other notions *infra*.<sup>84</sup>

#### The 'invention' of a business

Another problem may arise when the business was not a separate unit while still part of the old employer but became independent only after the transfer. Bosch is of the view that as in the English case of *Fairhurst Ward Abbots Limited v Botes Building Limited & others*<sup>85</sup> the *business* only needs to be separate through the transfer.<sup>86</sup> In this case, a local authority divided a former geographic area into two areas and gave them out to tender. As one new area was rewarded to a new contractor, he refused to take on the employees formerly assigned to that area. Although the whole area was handled by one business before, it now had been divided into two businesses. This situation is similar to the *NEHAWU* case where only part of the cleaning was outsourced. However, it does not prevent the application of Section 197 LRA. It is sufficient if the entity being transferred can be described as sufficiently coherent.<sup>87</sup> This interpretation can be drawn if the first part of the *business* definition is regarded. Since a part of a business cannot be regarded as a whole separate business, the part that is being transferred may only be acknowledged afterwards. As long as the part constitutes an economic entity through the transfer, the requirement of a

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<sup>81</sup> PAK Le Roux 'Outsourcing and the transfer of a business as a going concern' (2007) 17 *CLL* 31 at 32 correctly points out that interpreting the LAC judgment in *Rand Airport* as any activity constituting a *service* automatically triggers Section 197 is doubtful and the conclusion itself wrong. The expansion of *business* to *services* can only have a direct impact for this notion, not the whole section. The courts followed this approach in *Buys v Impala Distributors & another* [2007] ZALC 61.

<sup>82</sup> At least in a first-generation situation.

<sup>83</sup> *SA Airways* (CC) para 52.

<sup>84</sup> E.g. the change of hands may only be permanent in the sense of a service agreement and the comparison for a going concern may focus less on the tangible assets and more on the intangible assets.

<sup>85</sup> *Fairhurst Ward Abbots Limited v Botes Building Limited & others* [2004] EWCA Civ. 83.

<sup>86</sup> Todd et al (2004) at 37.

<sup>87</sup> Todd et al (2004) at 38.

*business* is met. This interpretation on the other hand can be misleading. The result cannot be that an investor takes over separate and individual assets, tangible or intangible, which are not related to each other, and then structures them as a business in his own company and falls within the ambit of Section 197 LRA. However, this is not covered by the provision. It would contradict the idea of the provision to maintain a business in operation. The “invention” of a business only applies to situations where a business could not be outlined beforehand only due to its integration into another, bigger business.

Whole or a part – how less can the part be?

When an entire company is sold it is easy to detect that the company altogether embodies a whole business. A *part* of a business is certainly harder to ascertain. It does not only include a branch of business in a big company, for example the mobile division in a telecommunication company. Instead a *part* of a business must be existent with even less requirements, which led to misunderstandings and problems. The *part* does not have to be the most profitable part of the business, but in itself needs to be able to gain income, not in the moment it is sold, but as a general possibility. If not, it would not have any value on the market. The construction of the word business on the other hand does not involve *any* part of a business possible to fall under Section 197 LRA. The part has to be a business in the sense of an operating and coherent grouping, an identifiable aspect or component of a business.<sup>88</sup>

The insertion of the words *part of* again supports the intention to apply the provision to a wide spectrum of possible situations; as long as the main idea of it is not overthrown, that each part has to be operable as a self-contained unit after the transfer.<sup>89</sup> Therefore the *part of a business* and a *business* are more or less a notion of the same idea. The comparative analysis will show that the European regulations are detaching themselves from that definition.

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<sup>88</sup> P Benjamin (2005) 9 *LDD* 169 at 172, who specifically gives the example that it cannot matter whether all or only some of the gardeners are transferred; J Grogan (2010) at 296.

<sup>89</sup> Blackie & Horwitz (1999) 20 *ILJ* 1387 at 1401.

### Summary of the notion business

The outline of the *business*, either before the transfer or through the transfer, is the first snapshot one has to take.<sup>90</sup> The second one will be taken after the transfer. The comparison between the two is the question of a *going concern*, as will be described *infra*. The construction of business can be summarized as an entity, which can be non-profitable and non-core but in itself constitutes an organised grouping separable from other parts of the company and able to pursue an economic activity.

After the definition of business is established it is important to stipulate how the facts of a case have to be examined. Everything that the old employer is divested of has to be considered for the question if it amounts to being a business.<sup>91</sup> In this examination a court has to disregard potential disguises as a separation of the business through a phased transaction or the use of different buyers, which are in focus of the following notion *the transfer*.

#### 2.3.2.2. The transfer – change of the person in charge

In the general case beforehand, the business was identifiable; the next step is to display the change of ownership. Section 197 LRA and its legal consequences are only necessary if the contractual partner of the employee is not in charge of the business any more.

### Share Deals

In this context a short note to *share deals* is indicated. It appears obvious and is widely accepted that only the asset deal triggers Section 197 LRA.<sup>92</sup> Although all statutes and directives state that a change of ownership is a requirement for a transfer, some regard this as a mistake and prefer the inclusion of shares sales into its scope.<sup>93</sup> In a share deal, where the buyer takes over a company through the purchase of its stocks, the legal construction does not change. Therefore the employment contracts are still intact and no party has been substituted. There is no new debtor

<sup>90</sup> *FAWU v The Cold Chain (Pty) Ltd & Another* [2010] 1 BLLR 49 (LC).

<sup>91</sup> C Bosch 'Of Business Parts and Human Stock: Some Reflections on Section 197(1)(a) of the Labour Relations Act' (2004) 25 *ILJ* 1865 at 1868.

<sup>92</sup> *Ndima & others v Waverley Blankets Pty Ltd* (1999) 20 *ILJ* 655 (LC), *Long v Prism Holdings Ltd & another* (2010) 31 *ILJ* 2110 (LC); *Martin Long v Prism Holdings Limited and another* [2012] ZALAC 5.

<sup>93</sup> J McMullen 'An Analysis of the Transfer of Undertakings (Protection of Employment) Regulations 2006' (2006) *ILJ* (UK) 113 at 117.

arriving on the scene as in an asset deal.<sup>94</sup> The ‘men in power,’ either the main stockholder or later the replaced executive officers, change without any influence to the employment contract. When referring to the arguments of the common law, which provided the employee with the important right of choosing the person to whom he was willing to give his labour, this seems to be inadequate. After the establishment of stock companies, a change of the person in charge became an occurrence without any right of the employee to information or a transfer. The times already showed a shift away from the employment relationship from being personal to a more informal band.<sup>95</sup> In a share deal, since all contracts stay the same, all accrued rights and benefits and the non-contractual rights remain with the employee. The difference between being *a servant or serf*, as pointed out by the English Court in the case of *Nokes v Doncaster Amalgamated Collieries Ltd*,<sup>96</sup> lost more and more importance over time in the corporate environment. On the other hand, Lord Romer in a dissenting judgment of the case pointed out that in a share sale most likely all directors and managers will introduce new and different policies and the employees could certainly not complain of an injustice.<sup>97</sup> The case was still under the influence of the common law in which the employment contract would come to an end in case of an asset deal (or amalgamation). However, the minority judgment points out the similarities to the share purchase. The regulations nowadays help prevent injustices after the change of ownership, which may raise the question why the most common method of changing control, the share deal, is not covered.<sup>98</sup> Despite the chance to find similarities between the two ways of business transfers, a line has to be drawn. The share deal is placed under the restrictions of Company Law and every change has to regard the best interest for the company. If a new major shareholder does not obey these sets of rules, other stakeholders in the company can enforce rights and approach the courts. Secondly, the Labour Law provides the same frame of permissible changes as it did before the main ownership changed hands. If operational requirements make it necessary to downsize the workforce, it may be done under the rules of the Labour Relations Act. The purposes of Section 197 LRA,

<sup>94</sup> G Driver ‘Commercial Perspective on Section 197 of the Labour Relations Act’ (2000) 21 *ILJ* 9 at 13.

<sup>95</sup> Todd et al (2004) at 6 referring to M Freedland *The Personal Employment Contract*, at 37 pointing out that most employment relationships are between an employee and a corporate body; HJ Willemsen (2011) at 768.

<sup>96</sup> *Nokes* [1940] AC 1014.

<sup>97</sup> *Nokes* [1940] AC 1014 at 1046, 7.

<sup>98</sup> Deakin & Morris *Labour Law: Fifth Edition* (2009) at 205, 3.75.

protection of employees and facilitation of the transfer, are two aspects that do not arise in a share deal. The protection wants to eliminate a dismissal due (only) to the transfer, whereas in a share deal, there is no transfer of employment relationship due to the same owning entity. The same holds true for the facilitation of transfers, because the Company Law regards how shares may be purchased or change hands and not the Labour Law.

It is still safe to say that share deals are not and do not have to be covered by Section 197 LRA.

#### A 'basic' transfer

The starting point is the event of selling a business lock, stock and barrel,<sup>99</sup> and putting it all in one sales agreement. The dictionary describes a transfer as 'make over the possession of property, a right, or a responsibility to someone else'.<sup>100</sup> It is another element of Section 197 LRA, which was chosen to include as big a variety of possible transfers as possible.<sup>101</sup> Next to *business* it was important to give a framework where Section 197 LRA was likely to apply, and to show the legal practitioner that in these situations he should evaluate the transfer on the background of automatically transferring the employees and their rights.

#### Different types of agreement

Does it have to be a sale or can it also be a temporary contract, a lease or even just an administrative restructuring? The diction of Section 197 does not provide further information about the juridical requirements of the transfer. In the case of *Schutte & others v Powerplus Performance (Pty) Ltd & another*,<sup>102</sup> the court states that not only sales but also other transactions, e.g. merger, takeover, donation and exchange of assets fall under the scope of the provision.<sup>103</sup> Another major statement was that the legal form of the transaction is not important because it is the substance of the

<sup>99</sup> *Ntuli v Hazelmere t/a Musgrave Homes* (1988) 9 ILJ 709 (IC) at 714 A, Du Toit, Darcy (2004) 8 LDD 85 at 100 referring to the Department of Inland Revenue in New Zealand.

<sup>100</sup> New Oxford American Dictionary

<sup>101</sup> *SA Airways* (CC) para 23; or Todd et al (2004) at 25 who ask if the requirement of a transferring transaction should be removed completely.

<sup>102</sup> *Schutte & others v Powerplus Performance (Pty) Ltd & another* (1999) 20 ILJ 655 hereinafter referred to as *Schutte*.

<sup>103</sup> *Schutte* para 48.2.

relevant transaction which will be regarded.<sup>104</sup> The interpretation even goes as far as to say that no contractual link is necessary between transferor and transferee.<sup>105</sup> It can be summarized as a conversion of an entity from one person to another without consideration of the validity of the transaction.<sup>106</sup> The importance lies upon the fact that the undertaking has been taken over by a new employer.<sup>107</sup>

#### Special Transfer situations

There may be situations where the employers do not want Section 197 LRA to apply, or a transaction cannot be reduced to a singular sales agreement. In these occurrences it may happen that different assets, properties and workers are transferred one at a time or even from different juristic entities. Overall it does not seem, or at least it has been tried to conceal, that a transfer has taken place. However, as the wording of Section 197 LRA states it does not have to be *one* transfer but rather *a* transfer.<sup>108</sup> The difference shows the scope of the element *transfer*. Given the purposive idea of a wide interpretation demonstrates that a transfer can entail anything between different entities to different times for the transaction to occur. The case of the business being transferred from different entities will be most common in cases of a service provision change, better to say a second-generation outsourcing. This issue will be considered *infra*.<sup>109</sup> Again, one has to pay regard to the substance and not the form of the transfer; the entity where the business is coming from cannot influence the interpretation as long as the parts together constitute a business. The same reasons apply to phased transfers. Although each transfer might not constitute a transfer of a business, the entirety of all transfers does. If the focus is paid to the substance and not the form of the transfer it is obvious that Section 197 LRA applies in the situation.

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<sup>104</sup> *NEHAWU (CC)* at 56 (although in the context of the notion *a going concern* does it apply to all requirements of Section 197 LRA?); *Schutte* para 42.

<sup>105</sup> *Nokeng Tsa Taemane Local Municipality & another v Metsweding District Municipality & others* (2003) 24 *ILJ* 2179 (LC) at 2183 (*Nokeng*) 'A transfer is a transaction which is determined by making a value judgment on all the relevant facts'; *Tekwini Security Services CC v Mavana* (1999) 20 *ILJ* 2721 (LC).

<sup>106</sup> *Blackie & Horwitz* (1999) 20 *ILJ* 1387 at 1409.

<sup>107</sup> N Smit 'The Labour Relations Act and transfer of undertakings' (2003) *De Jure* 328 at 342, who points out at 343 that the question of a *transfer* and that of a *going concern* should not be kept separate otherwise one would only muddle matters unnecessarily.

<sup>108</sup> Todd et al (2004) at 31.

<sup>109</sup> In the context of the role of the old employer as the transfer is initiated *by* him and under the evaluation of outsourcing and Section 197 LRA *infra* at Chapter 2.3.2.5.

The question may arise at what date the legal consequences should apply. Preferably for employees as well as the employer, the automatic transfer of employment should take place with each transaction. A retrospective transfer would harm the employer a lot more than complying with the Section beforehand.<sup>110</sup> Another way of concealing the transfer would be to make use of intermediaries. However, again the courts would scrutinize the system to uncover the truth behind the transactions. If it turned out that the substance of the arrangements constitutes a transfer of a business, Section 197 LRA would apply. Another last resort could be to pierce the corporate veil if compensation is claimed.<sup>111</sup>

After all, it is necessary to keep in mind that regard will always be paid to the substance and not the form of any kind of transaction.

#### 2.3.2.3. Necessity of *business* and *transfer*

Given the idea contemplated by JAFTA J in the latest Constitutional Court (minority) judgment,<sup>112</sup> that *business* and *transfer* have the widest possible scope, their requirement is at question.<sup>113</sup> However, a difference should be made between widening the scope of a notion and not needing it at all. Two arguments can be presented to show why the entrance into Section 197 LRA has to be through the terms *business* and *transfer*. On the one hand the deciding element as *a going concern* can only thoroughly be examined if the other terms have already been outlined.<sup>114</sup> For a clear and structured analysis, the ground has to be laid out for the test if the business has been kept in operation after the transfer. Only the established structure of a business that changed hands can be regarded as being in operation and suffice the requirement of *a going concern*. The second reason is displayed through an example of cases that do not fulfil the wide scope of *business* and *transfer*. Although the application should be wide, there are situations that may be interpreted as a transfer of undertakings by employee lawyers, but not if they are interpreted objectively and in accordance with the section's purpose. As the Constitutional Court

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<sup>110</sup> Todd et al (2004) at 31.

<sup>111</sup> Todd et al (2004) at 32.

<sup>112</sup> *SA Airways* discussed *infra* in Chapter 2.3.2.5.

<sup>113</sup> Todd et al (2004) at 25 who ask if the requirement of a transferring transaction should be removed completely. MJD Wallis 'Section of 197 is the Medium What is the Message' (2000) 21 *ILJ* 1 at 4 describes them as 'broad and general expressions'.

<sup>114</sup> Cp *supra* the three reasons for the notion business at Fn 48.

has stated a business cannot be the service itself.<sup>115</sup> It has to be a unit providing the service, and in that sense the element *business* is still a limiting factor. The same holds true for the notion *transfer*. There might be legal constructions as renting, subletting, leasing or other forms of temporary change of control that are still excluded from the provision. Those situations do not require a transfer of employment; it impacts the profitability of businesses if employees have to change. In conclusion, the first two elements *business* and *transfer* are the opening gate for Section 197 LRA to apply. The summary of present interpretation should be of guidance, whereupon the final hurdle, the question of *a going concern*, can be examined.

#### 2.3.2.4. *A going concern* as an on-going concern

The question whether Section 197 LRA applies to a specific business transaction is usually decided through the requirement of the transfer to happen *as a going concern*. The phrase found its way into the South African statute possibly through a statement in an ECJ judgment.<sup>116</sup> In 1986 the European Court made its decision in *Jozef Maria Antonius Spijkers C. V. v Gebroeders Benedik Abattoir C. V. & Alfred Benedik en Zonen B. V.*<sup>117</sup> and ascertained that a transfer took place if the business was 'disposed as a going concern'. The focus of the interpretation hereafter will be placed upon the words *a going concern*. The word *as* is used as a conjunction 'to indicate by comparison the way that something happens or is done',<sup>118</sup> and therefore does not alter the reach of the requirement of *a going concern*.

The term *a going concern* can be described as the main limitation factor of the transfer of business statutes because it is the element that provides the transfer of employees being economically reasonable. If the transfer does not happen as a going concern the automatic transfer of the employees is of no value to the new employer. He does not receive a business in operation, let alone the possibility to continue and provide work for its employees. On the other hand, if the business exactly represents an entity that is in operation with its employees and their skills, it would be a loss of

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<sup>115</sup> *SA Airways* para 52.

<sup>116</sup> Although it was already found in tax statutes beforehand, it is highly likely that the European Judgments had a major impact on the South African Regulation.

<sup>117</sup> *Jozef Maria Antonius Spijkers C. V. v Gebroeders Benedik Abattoir C. V. & Alfred Benedik en Zonen B. V.* Case 24/85 European Court reports 1986 Page 01119 (*Spijkers*); Zondo JP in the minority judgment of *NEHAWU* (LAC) therefore used the case as a guidance, para 49.

<sup>118</sup> New Oxford American Dictionary.

resources if the new employer could only decide on his own, microeconomic reasons whether to take over the employees or not. It is essential to interpret the meaning and implementation of *a going concern* based on this background.

A dictionary definition states that *a going concern* is a business that is operating and making a profit.<sup>119</sup> In the case of *Schutte* the Labour Court already established basic principles. The question of a going concern is a matter of substance and not form. All factors in favour of a transfer have to be weighed with the ones against a transfer while no single fact could be conclusive in itself.<sup>120</sup> The business has to basically be the same; just in different hands.<sup>121</sup> These assumptions show that there cannot be a single definition for *a going concern*, but rather a multifactorial approach to its determination.<sup>122</sup>

Although the 2002 amendments did not include the wording of the Acquired Rights Directive (an economic entity which retains its identity),<sup>123</sup> it was proposed in the LRA Amendment Bill in 2000, being the first guidance for the interpretation of *a going concern*.<sup>124</sup> However, the legislature did not define the term *a going concern* despite its importance for the application of Section 197 LRA.<sup>125</sup>

This may have served as a starting point of an uninfluenced interpretation of the term *a going concern*. The next relevant step is to pay regard to the judgments shaping its meaning over the last 17 years in South Africa. Until the 2002 Amendments Section 197 LRA already contained the phrase *as a going concern*, and it is essential to regard the development of its meaning up to the *NEHAWU* Constitutional Court decision in 2002. The first two decisions concerned were the cases *Foodgro v Keil*,<sup>126</sup> and *Schutte*.<sup>127</sup>

<sup>119</sup> New Oxford American Dictionary.

<sup>120</sup> *Schutte & others v Powerplus Performance Pty Ltd & another* (1999) 20 ILJ 655 (LC) (*Schutte*) relying on European Judgments, especially *Spijkers*.

<sup>121</sup> *CEPPWAWU obo Members v Hydro Colour Inks Pty Ltd* [2011] 7 BLLR 655 (LC).

<sup>122</sup> *Blackie & Horwitz* (1999) 20 ILJ 1387 at 1408.

<sup>123</sup> The Acquired Rights Directive is the legislative background for transfers in the European Union and will be described in detail *infra* at Chapter 2.4.1.1.

<sup>124</sup> P Benjamin (2005) 9 LDD 169 at 173.

<sup>125</sup> Bosch & Mohamed 'Reincarnating the vibrant horse? The 2002 amendments and transfers of undertakings' (2002) LDD 84 at 96.

<sup>126</sup> *Foodgro, a division of Leisurenent Ltd v Keil* (1999) 20 ILJ 2521 (LAC) (*Foodgro*).

<sup>127</sup> For information purposes, the facts of the cases were as follows: In *Foodgro v Keil*, Foodgro acquired MacRib and took over Ms Keil, Manager of Marketing. She nevertheless got retrenched after six months due to her short period of employment with Foodgro. The Labour Court stated that through Section 197 LRA her employment with MacRib had to be calculated as well. In *Schutte v Powerplus* the maintenance service for cars through Super Rent was cancelled, and Super Group its

Although the two judgments agreed upon automatic transfers and the construction of Section 197 LRA, the *NEHAWU* case gave rise to a completely opposite interpretation. The Labour Court already had its concerns, but felt bound by the precedent of the Labour Appeal Court in *Foodgro*. When the *NEHAWU* case came on appeal, the established ideas were overthrown. The Labour Appeal Court held that a transfer would only occur as *a going concern* if the employers also agreed on transferring the majority of the employees.<sup>128</sup> The notion *a going concern* could not suffice only through the transfer of assets or similarities in the business operation, without transferring the employees as well. This interpretation gave the employers the possibility to circumvent the application through transferring everything but the employees. The minority judgment of ZONDO JP supported another point of view: the question of *a going concern* should instead of being answered subjectively be scrutinized objectively on the matter of facts at hand, making the employer's agreement irrelevant.<sup>129</sup> The Constitutional Court finalized the issue in accordance with the amendments 2002, stating that a transfer as *a going concern* has occurred when the business remains the same but in different hands.<sup>130</sup> To determine this requirement an objective test has to be applied, and not the form but the substance of the transaction evaluated. The criteria in the test are whether or not tangible or intangible assets, staff, customers or premises are taken over by the new employer. There might be more factors that weigh either in favour or against the transfer as *a going concern*.<sup>131</sup>

#### Summary of the notion *a going concern*

The test for the notion *a going concern*, although its interpretation has been accepted since 2002, will still be the most difficult, unforeseeable and decisive requirement in the application of Section 197 LRA. In law the construction of a notion through a test always leaves a certain amount of uncertainty.<sup>132</sup> Therefore the decision strikes at the

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mother company, rewarded the services to Powerplus Performance. The employees claimed a Section 197 LRA transfer to the contractor.

<sup>128</sup> *NEHAWU* (LAC) para 9.

<sup>129</sup> *NEHAWU* (LAC) para 65.

<sup>130</sup> *NEHAWU* (CC) para 56.

<sup>131</sup> *NEHAWU* (CC) para 56.

<sup>132</sup> C Bosch 'Section 197 Transfer of a Business as a Going Concern: Reining in the Labour Appeal Court\*' (2003) *Obiter* 232 at 243 compares the test to the 'dominant impression test' and cites M Brassey 'The Nature of Employment' (1990) 11 *ILJ* 889 describing it as 'no test at all, but merely a shorthand way of saying that the decision cannot be taken without considering all the relevant factors'.

tension between the intention of the regulation and legal certainty. The variety of transactions constituting a transfer and requiring protection for employees omits a definition of *a going concern*. Based on the ideas of the constitutional framework the interests of the employees are valued higher than the freedom of employers. Thus the application of Section 197 LRA is rather uncertain for an employer when contemplating business restructuring. Nevertheless, the legislature and judiciary should try to provide as much certainty as possible. Therefore the test of a *going concern* should be handled in a comparable manner in all cases. The criteria should be the same and valued similarly. Through a coherent caseload legal certainty will be established, and will provide greater clarity for employers. A second aspect is the definition of the different criteria used in the test. They should be developed and improved. The comparative part of this thesis will point out approaches in Europe and Germany in that field, and additionally show how foreign jurisdictions provide another source of improving legal certainty for the notion *a going concern*.<sup>133</sup>

#### 2.3.2.5. Bye-bye to by?<sup>134</sup>

It has been proposed that Section 197 LRA should not be construed through three, but rather through four, elements,<sup>135</sup> the fourth one being the word *by* indicating the transfer does not only have to be *from* one employer to another but also with the former one playing an active role in the transaction.<sup>136</sup> This contention was not only academic, but also led to the second dispute among labour law professionals and among labour courts concerning Section 197 LRA, eventually giving rise to a Constitutional Court decision. After the Labour Court, the Labour Appeal Court and even the Supreme Court of Appeal had decided on the issue, it appealed to the Constitutional Court, as a second court not specialized in labour law, to ‘explain’ the provision in its constitutional context.<sup>137</sup> It resolved the dispute in the way that *by* will not be an independent fourth requirement in Section 197 LRA. The focus was redirected on the aforementioned notion; the question namely, whether *a going*

<sup>133</sup> C Bosch ‘Two Wrongs Make It More Wrong, or a Case for Minority Rule’ (2002) *SALJ* 501 at 510 proclaims to find the true meaning of *a going concern* in the decisions of the European courts.

<sup>134</sup> Headline of an article by J Grogan in *Employment Law*.

<sup>135</sup> *SA Airways* (LC) para 30.

<sup>136</sup> J Grogan ‘Outsourcing workers: A fresh look at s 197’ (2000) *Employment Law* 15 at 18; M Wallis (2000) *ILJ* 1 at 4; M Wallis ‘Is Outsourcing In - An ongoing Concern’ (2006) 27 *ILJ* 1; PAK Le Roux (2007) 14 *CLL* 31 at 34.

<sup>137</sup> *Aviation Union of SA & Others v SA Airways (Pty) Ltd. & Others* (2011) 32 *ILJ* 2861 (CC) (*SA Airways*).

*concern* had been transferred. The role of the old employer as being the positive and active figure as a decisive criterion became obsolete. The Constitutional Court evaluated the provision and its main goals and came to an uninfluenced conclusion to secure its intentions. It can be said that it took a court with less focus on labour law to bring Section 197 LRA back into its original environment.

Although in my view the decision was the right path for the South African provision, it cannot be disregarded that the step taken was questionable. The argument can be summarized as the literal school of thought against the purposive school of thought. To evaluate the different positions it is important to do it in the context of the key case, *Aviation Union of SA & Others v SA Airways (Pty) Ltd. & Others*.<sup>138</sup>

#### The case of *SA Airways*

South African Airways outsourced some of its maintenance, non-core businesses to a service provider, who was substituted by a second service provider in 2005. This substitution of contractors is labelled second-generation outsourcing and gives rise to the dispute of the application of Section 197 LRA.

In 2000 South African Airways<sup>139</sup> decided to outsource some services to LGM. The companies agreed on the outsourcing of the facilities management operations for a fixed period of ten years, with the option of renewal for SAA for another five years. The agreement included the sale of assets and inventory to LGM, with a right to repurchase by SAA, and LGM was provided access to SAA facilities and offices at the different South African Airports. In 2007 SAA terminated their contract based on the change of owner at LGM, a right included in the agreement in 2000. The employees who were originally transferred to LGM through Section 197 LRA were now redundant to LGM, and going to be retrenched. In this uncertain situation the unions approached the courts for a declaratory order regarding the application of Section 197 LRA and an automatic transfer from LGM to any new service provider or back to SAA.

The courts had different opinions about the case that mainly considered the interpretation of the word *by* in Section 197 LRA (1)(b). As for the Labour Court and the Supreme Court of Appeal, it was against the wording of Section 197 LRA to give

<sup>138</sup> *Aviation Union of SA & Others v SA Airways (Pty) Ltd. & Others*, (2008) ILJ 331 (LC), (2009) ILJ 2849 (LAC), (2011) ILJ 87 (SCA), (2011) ILJ 32 (CC) 2861 (*SA Airways*).

<sup>139</sup> Abbreviated SAA.

by a wider interpretation and disregard the role of the old employer. If he did not initiate the transfer it could not have been a transfer *by* him. Instead the Labour Appeal Court and ultimately the Constitutional Court applied a different meaning to the word *by* and interpreted it with a wider scope. They argued that *by* does not exclude a passive role of the old employer because it does not necessarily imply him to be the initiator of the process.

Nevertheless it is important to evaluate the decisions and the statement that *by* has to be interpreted as *from*. The main argument against the interpretation is the basic law principle of the separation of powers.<sup>140</sup> Since Rousseau, modern constitutions have been built on the threefold pillars of legislative, administrative and judicial power.

In 1995 the parliament passed its first version of Section 197 LRA.<sup>141</sup> Because of its ambiguous wording and the rising amount of litigation, Section 197 LRA was redrafted in 2002. With seven years of experience and another process of redrafting, Section 197 LRA received a new wording, which included the phrase ‘...*by one employer (the old employer) to another employer (the new employer)*...’.<sup>142</sup> The substitution of the particular word *by* with the word *from* through the courts could be criticized as redrafting a statute through judicial power. Although the constitution provides for and expects the judiciary to construe statutes in the light of the constitution, it goes one step further to adjust words of a statute to the court’s most suitable way.

#### *SA Airways* in the Labour Court

The Labour Court decision by BASSON J refers to the unambiguous meaning of the word *by*. She states that she is:

*“..not persuaded that the wording of subsection (1)(b) of s 197 gives rise to an ambiguity or doubt as to what the legislature had intended, namely to protect workers affected by a transfer of a going concern between two very specific entities namely the employer (which is specifically identified as the ‘old’ employer) to another employer (which is specifically identified as the ‘new’ employer)”*<sup>143</sup>

<sup>140</sup> For example *SA Airways* (SCA) at 94 G.

<sup>141</sup> Section 197 (1) (a) LRA 1995: ‘A contract of employment may not be transferred from one employer (referred to as “the old employer”) to another employer (referred to as “the new employer”) without the employee’s consent, unless – (a) the whole or any part of a business, trade or undertaking is transferred by the old employer as a going concern, or (b)...’.

<sup>142</sup> In Section 197 LRA (1)(b).

<sup>143</sup> *SA Airways* (LC) at 341 G.

BASSON J supports her literal and ordinary approach of interpretation with a reference to the cases *Ngcobo & another v Van Rensburg & Others*,<sup>144</sup> and *R v La Joyce (Pty) Ltd & Another*,<sup>145</sup> which stated that courts ought to be 'slow to depart from the literal meaning of the words used especially where there is no ambiguity'. The clear wording also prevents her from adopting a purposive view on the provision. The legislature seemed to have an intention not to include second-generation outsourcing and she does 'not see a necessity to read into s 197 words that are not there'.<sup>146</sup> With regard to two other decisions, *Bhyat v Commissioner for Immigration*,<sup>147</sup> and *Ndima & others v Waverly Blankets Pty Ltd*,<sup>148</sup> she declines the necessity for a different reading of Section 197 LRA and agrees only with the application to first-generation outsourcing.<sup>149</sup>

In this question another important case, *Cosawu v Zikhethale Trade (Pty) Ltd. & Another*,<sup>150</sup> has to be regarded. There, the Labour Court decided in favour of the employees and applied Section 197 LRA to second-generation outsourcing. The argument was built upon a purposive interpretation of the word *by* and the idea of a two-phased transfer, first from the contractor back to the old employer and then secondly from the employer to the new contractor.<sup>151</sup> BASSON J easily argued against being bound by the findings in *Zikhethale* due to the specific facts of that case, where the businesses were so closely aligned with each other as to call them identical and the situation was rather comparable to 'piercing the corporate veil'.<sup>152</sup> The Labour Court saw no reason to include second-generation outsourcing into the scope of Section 197 LRA.

#### *SA Airways* in the Labour Appeal Court

The Labour Appeal Court, although dismissing the application at hand in the majority judgment, unanimously handed down an opposite view about the word *by*

<sup>144</sup> *Ngcobo & another v Van Rensburg & Others* 1999 (2) SA 525 (LCC) at 530 G-H.

<sup>145</sup> *R v La Joyce (Pty) Ltd & Another* 1957 (2) SA 115 (T) at 116 A.

<sup>146</sup> *SA Airways* (LC) at 342 D.

<sup>147</sup> *Bhyat v Commissioner for Immigration* 1932 AD 125 at 129.

<sup>148</sup> *Ndima & others v Waverly Blankets Pty Ltd* (1999) 20 ILJ 1563 (LC).

<sup>149</sup> *SA Airways* (LC) at 342 F-I.

<sup>150</sup> *Cosawu v Zikhethale Trade (Pty) Ltd. & Another*, (2005) 26 ILJ 1056 (LC), (CA 7/2005) [2007] ZALAC 17 (LAC) (*Zikhethale*).

<sup>151</sup> *Zikhethale* (LC) para 30.

<sup>152</sup> *SA Airways* (LC) at 343 E.

and the Section's scope regarding second-generation outsourcing.<sup>153</sup> The two-phase transfer was nevertheless also vetoed because in the first phase, back from the contractor to the old employer, it would not be the contractor playing an active role by whom the transfer would take place, he would usually rather try to hold on to the contract.<sup>154</sup> ZONDO JP writes the first part of the judgment and he starts out by describing the rising dispute between two schools of statute interpretation. On the one hand he sees the 'ordinary meaning school of thought' and on the other hand the 'purposive school of thought'.<sup>155</sup> His first argument in favour of the purposive approach is Section 3 LRA. It states that:

*"Any person applying this Act must interpret its provisions:*

*(a) to give effect to its primary objects;*

*(b) in compliance with the Constitution;*

*(c) in compliance with the public international law obligations of the Republic".*

In this regard he refers additionally to Section 1 LRA, which provides the purpose of the LRA being to *advance economic development, social justice, labour peace and the democratisation* of the workplace, and Sections 23 and 39 of the Constitution.<sup>156</sup>

With regard to these intentions, he states that Section 197 LRA has to be interpreted purposively.<sup>157</sup> This purpose is, in review of the *NEHAWU* decision of the Constitutional Court, twofold, being the protection of employment and the facilitation of transfers.<sup>158</sup> ZONDO JP delivers another remarkable statement, not only in this context, saying that the purpose of transfer facilitation does not entail that Section 197 LRA protects the rights of employers.<sup>159</sup> He also makes a reasonable

<sup>153</sup> *SA Airways* (2009) ILJ 2849 (LAC).

<sup>154</sup> *SA Airways* (LAC) para 10.

<sup>155</sup> *SA Airways* (LAC) para 12.

<sup>156</sup> Section 23: Labour relations (1) *Everyone has the right to fair labour practices.*

Section 39: Interpretation of Bill of Rights

(1) *When interpreting the Bill of Rights, a court, tribunal or forum-*

*(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*

*(b) must consider international law; and*

*(c) may consider foreign law.*

(2) *When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.*

(3) *The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.*

<sup>157</sup> *SA Airways* (LAC) para 17.

<sup>158</sup> *SA Airways* (LAC) para 18, 19. In this context one remark is interesting about the interpretation of the second intention, to facilitate transfers. ZONDO JP points out that this purpose does not mean that the new employer may not have to take over employees but rather that he does not have to look for, recruit and train them.

<sup>159</sup> *SA Airways* (LAC) para 19.

remark to the changes of a lease. Section 197 LRA, it is submitted, covers lease agreements as transfers and applies automatic transfers if the lessee changes or the business falls back to the lessor. Yet the literal interpretation of *by* would circumvent the application of Section 197 LRA in these situations.<sup>160</sup> ZONDO JP proceeds with an analysis of case law regarding constitutional interpretation and agrees that *by* should be interpreted not just in its ordinary meaning. If such interpretation is “at war” with the purpose of a provision, the Court should rather give the word a meaning that is not.<sup>161</sup>

DAVIS J, who wrote the order, mainly stated that the requirement *by* had been fulfilled by LGM. Due to its involvement in the change of contractors and therefore his role has to be regarded as an active one. He already acknowledges this positive action in the initial agreement between SAA and LGM in 2000. It compelled LGM in an event of change of contractors to act on SAA’s behalf.

The interpretation of the judgment can be summarized as giving *by* more than the literal meaning of an active role of the old employer. Instead his role is fulfilled not only through being the initiator of the process but rather through being required to act (in any way) in order to transfer the contract. The ideas contemplated by ZONDO JP seem to go one step further, reading into the statute a word if otherwise the purpose cannot be achieved.

#### *SA Airways* in the Supreme Court of Appeal

The Supreme Court of Appeal again denied the application of Section 197 LRA in cases of second-generation outsourcing due to the word *by*. The purposive school of thought is not consonant with the approach of the Constitutional Court and Supreme Court interpretation of legislation.<sup>162</sup> The Court cites different judgments explaining the limitation of purposive interpretation. The argument is based on the clear and precise wording of Section 197 LRA. With reference to *Minister of Safety & Security v Sekhoto*,<sup>163</sup> the SCA displays ‘...*the distinction between interpreting legislation in a way, which promotes the spirit, purport, and objects of the Bill of Rights and the process of reading words into or severing them from a statutory provision ...*’. While

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<sup>160</sup> SA Airways (LAC) para 26.

<sup>161</sup> SA Airways (LAC) para 30.

<sup>162</sup> SA Airways (SCA) at 94 G.

<sup>163</sup> *Minister of Safety & Security v Sekhoto* (131/10) [2010] ZASCA 141 (19 November 2010).

on the subject the SCA disagrees with the decision in *Zikhethele* where ‘...*due to the specific facts of the case a particular outcome promoted the objects of the Act whilst disregarding the intention of the legislature as manifested in the clear language of the section*’.<sup>164</sup> The constitutionality of Section 197 LRA was never at question.<sup>165</sup> In the dictum of *Dadoo Ltd & others v Krugersdorp Municipal Council*,<sup>166</sup> it is said that ‘*a judge has authority to interpret, but not to legislate, and he cannot do violence to the language of the lawgiver by placing upon it a meaning of which it is not reasonably capable, in order to give effect to what he may think to be the policy or object of the particular measure*’. The SCA shares that view under the new Constitution and claims any further interpretation as ‘*to fail to respect the separation of powers and to usurp the function of the legislator*’.<sup>167</sup> The regard to former case law and their interpretation under the influence of the constitution lead the SCA to weigh the separation of powers over the purposes of Section 197 LRA.

On the other hand a minority judgment in the SCA recognised that to construe Section 197 LRA otherwise than to give effect to its purpose would encourage the abuse of employees by employers.<sup>168</sup>

#### *SA Airways* in the Constitutional Court

The Constitutional Court finalized the issue in November 2011, although the court was split into a majority,<sup>169</sup> which agreed that the facts of the case amounted to the application of Section 197 LRA, and a minority,<sup>170</sup> which denied it on the presented facts. Both judgments agreed upon the legal question at hand.<sup>171</sup> To summarize the outcome by saying in Section 197 LRA (1)(b) *by* now has the meaning *from* is simplifying a legal context without paying regard to the arguments and, in my opinion, wrong. The *SA Airways* case has been labelled with two terms: second-generation outsourcing and the meaning of *by*. Both issues do not have a yes-or-no answer when regarding the application of Section 197 LRA. Second-generation

<sup>164</sup> *SA Airways* (SCA) at 96 F.

<sup>165</sup> *SA Airways* (SCA) at 96 G.

<sup>166</sup> *Dadoo Ltd & others v Krugersdorp Municipal Council* [1920] AD 530 at 543.

<sup>167</sup> *SA Airways* (SCA) at 97 E.

<sup>168</sup> *SA Airways* (SCA) at 103 E.

<sup>169</sup> Written by YACOOB J.

<sup>170</sup> Written by JAFTA J.

<sup>171</sup> *Harsco Metals South Africa (Pty) Ltd AA v Arcelormittal South Africa Ltd* AO [2011] ZALCJHB 116 (*Harsco*) para 11.

outsourcing can fall within its ambit depending on the facts of a case.<sup>172</sup> ‘By cannot be equated with the word *from*; it should rather be given its ordinary meaning.’<sup>173</sup> Although YACOOB J himself rephrases Section 197 LRA as ‘...*from* the former to the latter’, this usage of words should not be overvalued and read in context with the overall statements of the judgment.<sup>174</sup> JAFTA J states ‘*confining transfers to those effected by the old employer is at odds with the clear scheme of the section*’.<sup>175</sup> YACOOB J relates to that by saying ‘*This judgment holds broadly that a permissible meaning of the word “by” inevitably leads to the conclusion of the section favoured by the Labour Appeal Court (LAC), and that it is unnecessary to equate the word “by” with “from” and conclude that a transfer from one person or entity to another suffices for purposes of Section 197*’.<sup>176</sup> While referring to the approach of the LAC in this matter and accepting that *by* should be given its ordinary meaning,<sup>177</sup> the interpretation of the Constitutional Court can only be summarized as paying regard to the facts of each case and then examining the role of the old employer. In the second-generation context, this being the contractor, the Constitutional Court casts the net very wide when it states that to fulfil this role it does not have to effect the transfer but rather allow it to happen.<sup>178</sup> Although the Constitutional Court did not equate *by* with *from*, it opened Section 197 LRA to any generation of outsourcing as long as it applied the facts to all requirements of the provision. It remains to be seen how the Labour Courts will apply the overall, sometimes vague, findings and how active or passive they will require the role of the contractor to be.

The Constitutional Court judgment did not put its main focus on the limitations of purposive interpretation and separation of powers, because it did not rewrite the statute but rather construed the role of the contractor in a broader sense.

#### Academic Examination

The issue of construing *by* especially in the context of second-generation outsourcing was disputed among labour law academics too. The same as in the courts, the view differed between the literal and the purposive approach. The literal approach was

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<sup>172</sup> The opposing view of the SCA was overruled in *SA Airways (CC)* para 81.

<sup>173</sup> *SA Airways (CC)* para 113.

<sup>174</sup> *SA Airways (CC)* para 79.

<sup>175</sup> *SA Airways (CC)* para 46.

<sup>176</sup> *SA Airways (CC)* para 81.

<sup>177</sup> *SA Airways (CC)* para 113.

<sup>178</sup> *SA Airways (CC)* para 113.

proclaimed by *Wallis* in 'Is Outsourcing In? An Ongoing Concern',<sup>179</sup> and his main counterpart was *Bosch* expressing his view in different articles and other supporters of the purposive school of thought.<sup>180</sup>

The literal view had again built their argument on the clear meaning of the word *by* and that the old employer therefore has to be a positive actor in the process for Section 197 LRA to apply.<sup>181</sup> *Wallis*' opinion has been adopted in the SCA judgment when he states that it is no excuse for changing the words of a statute when the judge in the COSAWU (*Zikhethele*) case said it might be better as a matter of policy if that had been the wording of the definition.<sup>182</sup> To support his argument of a clear wording, he relies upon dictionary definitions of the word *by*, which all involve the indication of agency, means, cause, attendant circumstance, conditions, manner and effects. It requires a positive role of the old employer for the transfer whereas reading it as *from* would reduce the transferor to a passive position.<sup>183</sup> This wording was chosen in an amendment to clarify the language of Section 197 LRA. Thus in *Wallis*' view the legislature was well aware of the consequences of choosing *by* instead of *from*. In comparison to Section 197 (7) LRA a contractual link between old and new employer is necessary to achieve an agreement, which obviously intertwines the notions of *transfer* and its happening *as a going concern*. Even if a purposive view should influence the construction of *by*, in *Wallis*' view there is a major difference between first and second-generation outsourcing.<sup>184</sup> He does not agree to the term second-generation outsourcing because it is no outsourcing process, as that already has taken place; it is merely a decision to change one's supplier.<sup>185</sup> Further, he points out that if the wording of Section 197 LRA does not provide the sufficient protection of employment, either an amendment by the legislature has to be passed,<sup>186</sup> or a constitutional challenge of the provision itself.<sup>187</sup> Additionally,

<sup>179</sup> M Wallis (2006) 27 *ILJ* 1 but already pointed out the same opinion in Section 197 is the Medium. What is the Message (2000) 21 *ILJ* 1 at 4.

<sup>180</sup> C Bosch 'Aluta Continua or Closing the Generation Gap' (2007) *Obiter* 84; 'Balancing the Act: Fairness and Transfers of Businesses' (2004) 25 *ILJ* 923 at 930; Todd et al (2004) 28.

<sup>181</sup> M Wallis (2006) 27 *ILJ* 1 at 10.

<sup>182</sup> M Wallis (2006) 27 *ILJ* 1 at 11 in this context he quotes *S v Zuma* 1995 (2) SA 642 (CC) where the Constitutional Court stated that '*the Constitution does not mean whatever we might wish it to mean and that its language must be respected*'; and other decisions similar to the SCA references.

<sup>183</sup> M Wallis (2006) 27 *ILJ* 1 at 13.

<sup>184</sup> M Wallis (2006) 27 *ILJ* 1 at 15.

<sup>185</sup> M Wallis (2006) 27 *ILJ* 1 at 2.

<sup>186</sup> In 2011 new amendments and a redraft of Section 197 LRA was negotiated but ultimately disregarded due to unbearable differences about other parts of the amendments, i.e. labour broker regulation.

practical problems have been brought forward to exclude Section 197 LRA from second-generation outsourcing. They have been mainly based upon the restraint of business restructuring and being disadvantageous in the long run. New contractors are exposed to significant risks if they have to take over staff, and costs are difficult to calculate due to the lack of information.<sup>188</sup>

The article 'Aluta Continua, or closing the generation gap: Section 197 of the LRA and its application to outsourcing' is *Bosch's* response to *Wallis's* view and other arguments against the inclusion of second-generation outsourcing. The main arguments of the literal school of thought are being scrutinized and negated. *Bosch* displays that the 2002 amendments did not during the preceding debates indicate any consideration of second-generation outsourcing and cannot be taken as a sign in favour of or against its inclusion.<sup>189</sup> In his opinion it has to be regarded as a 'drafting oversight'.<sup>190</sup> If the interpretation was not to include the word *from* into the definition, he instead contemplates a constitutional challenge to force the legislature to amend Section 197 LRA in order to comply with Section 23 of the Constitution.<sup>191</sup> The practical difficulties which have been raised are either not really relevant or have to defer to the purpose of employee protection.<sup>192</sup> The position has been adopted partly by the Labour Appeal Court and the Constitutional Court, as they have made use of most of the arguments, and presented them in a manner still inside the boundaries of purposive interpretation.

### Evaluation

This broad and extensive overview of different positions among courts and academics shows how much this dispute governed the development of Section 197 LRA in the last decade. It was necessary to point out the opposing opinions and their main arguments to display the importance of the question and to analyse it in the greater context of the application requirements. When two schools of thought dispute over the construction of a statute, it is impossible to proclaim one as the winner, even in the circumstance of a Constitutional Court judgment. Nevertheless, for the current

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<sup>187</sup> M Wallis (2006) 27 *ILJ* 1 at 16.

<sup>188</sup> PAK Le Roux 'Outsourcing and the transfer of employees to another employer: What happens in the 'second generation' transfer?' (2005) *CLL* 111 at 116.

<sup>189</sup> C Bosch (2007) *Obiter* 84 at 89.

<sup>190</sup> C Bosch (2004) 25 *ILJ* 923 at 930.

<sup>191</sup> Todd et al (2004) 28.

<sup>192</sup> C Bosch (2007) *Obiter* 84 at 99.

Section 197 LRA the final decision has made it clear that it does include second-generation outsourcing. In my opinion this is the right choice, despite the dangers of 'loose purposive interpretation'.<sup>193</sup> Separation of powers is obviously one of the most important basic principles of a modern democratic republic. However, the distinction between administration, legislature and judiciary is not as simple as three separate pillars being independent from one another. All powers are intertwined, and the separation is not static. It is a fine line on which the courts have to find a solution between constitutional, purposive construction of statutes and rewriting the law.

In the context of transfer of businesses, two major arguments support the purposive approach. The foreign jurisprudence has shown, not as a source of jurisprudence, but as a history of widening and narrowing its scope, that provisions are not set in stone when they are first released. The changes in the modern world are too substantial to cling to a wording without paying regard to its greater purpose. To adjust to the changes, some legal certainty must be sacrificed. Secondly, the purposive view respects the main intention of any transfer of undertaking regulation, which is to keep a business in operation and their main force, the employees, together. This question should not be decided through a dispute about the word *by* but rather through the test if *a going concern* is transferred.<sup>194</sup> While this still might not lead to more certainty in law, it provides a more substantial and fair case-by-case examination.

The result of the last constitutional judgment reminds the Labour Courts to focus on the elements at hand and their application onto the facts of each case. As easy as that may seem, to provide for an individual and fair ruling in each case, the other side of the coin is that it leaves all legal advisers in a cosmos of uncertainty.

The conclusion on the disputes about the word *by* may be found in the middle of the aforementioned opinions. Although the judgment in the Constitutional Court was described as having agreed upon *by* being a word with many meanings, at least the replacement of *by* with *from* does not seem to be the intended outcome. Therefore the argument such interpretation would go beyond purposive interpretation and the

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<sup>193</sup> Speech of President Zuma November 2011 - <http://www.timeslive.co.za/local/2011/11/01/courts-can-t-be-superior-zuma> followed by a Government 'investigation' into the courts way of shaping society, i.e. an investigation of its powers; an issue that would need further evaluation but excessively exceeds the topic of this thesis. The political issue did not aim at this particular judgment.

<sup>194</sup> C Bosch (2004) 25 *ILJ* 923 at 930 already points out that the focus should rather be on the notion *a going concern* instead of restricting the application through the word *by*.

courts would take on the role of the legislator might not be as valuable anymore. The wide interpretation still represents a dangerous territory, but the Constitutional Court seemed to be able to not overstep its boundaries.

The first case at the Labour Court that dealt with the interpretation of the Constitutional Court in this matter, *Harsco Metals South Africa (Pty) Ltd AA v Arcelormittal South Africa Ltd*,<sup>195</sup> points in this direction. Although first summarizing the *SA Airways* decision and its impact to a wider interpretation of the word *by* and therefore accepting almost any role of the first contractor as sufficient, the court then does not evaluate the requirement *by* separately when applying its findings to the facts of the case.

Time will show how the courts and law academics interpret the rulings after all. However, it seems as though that the Constitutional Court did not erase *by* and rewrite Section 197 LRA with *from*. Rather it expanded the meaning of *by* to any input of the first transferee possible. The requirement *by* is therefore closely connected to the question if the transfer has occurred as *a going concern*. In South Africa, for a second-generation outsourcing to fall within Section 197 LRA at least something has to be passed on from the first to the second contractor. If the first contractor does not provide any support or input while changing over his service to the second contractor, the result will hardly be interpreted as a transfer of a business.

This argument can also be supported by the legislative developments of the last few years. In 2010 a proposed amendment of the Labour Relations Act included a change of wording of *by* to *from*.<sup>196</sup> Since this proposal was not passed, a new amendment has been written, which now after the Constitutional Court judgement did not alter the wording.<sup>197</sup> It may have been easier to replace *by* with *from*; but in the context of the overall provision the interpretations given seem to be more supportive of the legislative intentions of Section 197 LRA.

The comparison to Europe, England and Germany *infra* will help put this idea in the greater picture of the application of transfer of undertaking regulations.

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<sup>195</sup> *Harsco Metals South Africa (Pty) Ltd AA v Arcelormittal South Africa Ltd* AO [2011] ZALCJHB 116.

<sup>196</sup> Labour Relations Amendment Bill 2010, <http://www.info.gov.za/view/DownloadFileAction?id=137361> (accessed 16.5.2012).

<sup>197</sup> Labor Relations Amendment Bill 2012, <http://www.labour.gov.za/downloads/legislation/bills/proposed-amendment-bills/memoofobjectslra.pdf> (accessed 16.5.2012).

### 2.3.2.6. Outsourcing and the elements of Section 197 LRA

After the three (four) main elements for the application of Section 197 LRA have been established and scrutinized, the issue of the last 10 years that caused all the contention should be analysed. The different elements have to be set into context of the different outsourcing generation.

It is now submitted that any generation of outsourcing may fall within the ambit of Section 197 LRA. The question of first-generation outsourcing being a transfer of an undertaking has been accepted since 2005 and the *SAMWU* decision of the LAC. All further generation outsourcing, or better to say any change of contractor, has been answered in the affirmative in the Constitutional Court decision of *SA Airways* at the end of 2011. Outsourcing falls within the ambit of Section 197 LRA if the requirements of *business*, *transfer* and *a going concern* suffice.

#### The first generation

Outsourcing has been defined as ‘obtaining (goods or a service) from an outside or foreign supplier, especially in place of an internal source’.<sup>198</sup> In the terms of Section 197 LRA it is any service provision that formerly has been rendered in-house, contracted out to a service provider. The first hurdle that has to be taken is the question whether the *service* that is being contracted out would itself constitute a *business*. It had been at question whether that only applied to core functions, until the LAC decision in *SAMWU*, when the word *service* was construed as including support services into the definition.<sup>199</sup> Nevertheless, the acknowledged interpretation of a *business*, which includes a *service*, requires the outsourced service to be an entity in operation. As for a sale of a business, as a first requirement the contracted *business* must be a unit that can be operated separable from its former company. In the case of an outsourced service, the entity in its recent structure must be an asset to the contractor and easily be operated under his own command. It does not fulfill the requirement of a business if the service represents only the activity itself rather than a separate economic entity that provides the activity.<sup>200</sup>

This leads to the second element, which applies if the outsourced service is *transferred*. The Labour Court in the *NEHAWU* case has negated the question of

<sup>198</sup> New Oxford American Dictionary.

<sup>199</sup> *Supra* Chapter 2.3.2.1.

<sup>200</sup> *SA Airways* (CC) para 52.

whether a contract to obtain a service from an outside supplier instead of an internal source would constitute a transfer. His argument was based on the difference between a purchase price and a fee, a sale being permanent and a service contract being limited to a period of time. Consequently it is missing a change of control due to the influence of the former employer on the service.<sup>201</sup> With this view, outsourcing would have fallen out of the scope of Section 197 LRA 1995. The argument builds upon the difference between a real change in ownership and supervision, compared to a feigned change due to the retention of authority within the client. The client is still in charge, and may very well change his service provider at any given time.

However, when a business is sold, nobody has the guarantee that it will not be sold again in the near future.<sup>202</sup> Neglecting the amendments in 2002 and the word *service* being included into the provision, other indications show that *transfer* does not omit contracting out. It is easiest to start with the arguments formerly presented against outsourcing. The wording of Section 197 LRA does not contain words like *sale* or *permanent*.<sup>203</sup> Rather it only focuses on a transfer and its wide scope. The whole provision does not pay any regard to fees, prices or money being paid either way; a difference between fee and any consideration for the sale cannot be made to exclude outsourcing. The issue of permanence is arbitrary, and it has been shown that no business contains the guarantee that a specific ownership will be permanent. Finally, the argument of retention of control lacks precision in regard to the different relations in an outsourcing arrangement.<sup>204</sup> The old employer hires a contractor, who is paid a fee and has to provide a service according to the old employer's wishes and control. The employees that render this service first have to obey to the command of their employer, the contractor. As for the service to the old employer, they will obey his decisions but only as representatives of the contractual partner, not as an employee. The control that the old employer retains is how a service ought to be provided, but not as an employment contract has to be fulfilled. The major difference

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<sup>201</sup> *NEHAWU (LC)* para 31, 2.

<sup>202</sup> E.g. private equity funds specialising in that subject, where they buy companies highly leveraged on credit and then after a fast restructuring exit with a higher return.

<sup>203</sup> Todd et al (2004) at 26.

<sup>204</sup> This may be a personal view, compared to the arguments presented concerning (only) the relation between Section 197 and 198 LRA in P Benjamin (2005) *LDD* 169 at 176, 7 who correctly denies the possibility for Section 197 LRA to apply when an employer decides to make use of a labour broker. The retention of control, especially in connection with the Occupational Health and Safety Act, could be similarly used as an argument in an outsourcing context. In my view though, there is a major difference between outsourcing and labour-broking that supports the following logic.

is that the employee is only subject to enforceable instructions by the new contractor and not the client, being the old employer. It can be narrowed down to the differences between a service contract and a labour contract. The old employer only retains the first one.

Despite the credibility of the arguments of the Labour Court in 2000, it is widely accepted that outsourcing constitutes a transfer after the Constitutional Court made its decision in the *NEHAWU* case and the legislature included *service* into the definition of *business*.<sup>205</sup> From a purposive point of view outsourcing a business is not different from selling that business in the sense of Section 197 LRA. Remember that the intention is to keep a business 'flourishing' and in operation, because the structure and knowledge of it is a main asset. That can especially be true in the service sector, where the employees are familiar and knowledgeable with their tasks. The searching, hiring and training of new employees increases the transaction costs. If the outsourced business was no longer profitable the separation could not be used to downsize it for operational requirements, which should rather be done either before or after the transfer, with the same employees but a different view on the situation. The element *transfer* includes sales and transactions, like outsourcing, equally.

After *business* and *transfer* have been examined in the outsourcing context, the last requirement *a going concern* has to be regarded. Although in most cases the question of whether or not *a going concern* has been transferred will be the arguable and challenging question; in outsourcing cases the ascertainment of a *business* will be hard to overcome. However, after that step has been taken the transferred entity will most probably stay in operation, but just in different hands, because the old employer will still require the services and most likely similar to the way they were done before. The focus will therefore mostly be upon the element of *business*, the first snapshot of the comparison before and after the transfer. Still the element of *a going concern* cannot be overlooked. It has to be examined on the facts of each case and the comparison will mainly be focused on the integration of the employees and the way the service will still be rendered, if what constituted the business has changed hands. The importance of clearer structures and an 'outsourcing' point of view will

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<sup>205</sup> Todd et al (2004) at 26.

be shown *infra*, where the European and German ‘mutual reshaping’ of interpretation ‘tools’ are displayed through recent case law.

Because outsourcing agreements will usually be in labour-intensive sectors, the decision that the business will be kept in operation but just in different hands has to focus on the integration of the service into the former company, and whether the new employer makes changes to circumstances or the activity itself. The focus will be on the ratio of employees taken over and employees left behind. However, there might be cases when assets provide the greater influence on the business and the take-over of staff may be disregarded after all. Every case has to be evaluated on its own merits.

Outsourcing and transfer of employment are not exclusive to each other. If the outsourced service meets the requirements of Section 197 LRA, it does receive the same protection as any other business transaction.

#### Second and further generations

The issue of second-generation contracting-out should not raise additional questions. After the settlement of the dispute around the meaning of the word *by*, every outsourcing process has to be examined equally. The new service provider has to take over a *business* in operation, through a *transfer* and keep it in operation afterwards. The only difference that has to be regarded is that the receiver of the service, the former old employer, still plays an important role. His influence on the elements of *business* and a *going concern* are probably greater than the influence of the recent contractor. The first outsourcing process and its evaluation regarding Section 197 LRA should be borne in mind as an indicator,<sup>206</sup> but as any other factor it will not be decisive; furthermore there will be situations where no first generation process ever took place.<sup>207</sup> Nevertheless, the ascertainment of a Section 197 LRA

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<sup>206</sup> *SA Airways* (CC) para 106, 108.

<sup>207</sup> In this regard J Grogan (2012) at 298 is interpreting the *SA Airways* judgment of the CC differently and in contrast to the Labour Court in *Harsco*. Although he finishes this part about Section 197 LRA with the statement, that where ‘the principal (*i.e. the client*) never performed the outsourced service, and where the first contractor performed it with its own employees and equipment, the appointment of a second contractor, will probably not attract section 197’. His previous analysis of the Constitutional Court judgment reflects the arguments of the respondents in the *Harsco* case. If there was no first generation outsourcing, any change in contractor will not be covered by Section 197 LRA. The reason, for him, lies within the question what constitutes the business and to whom it belongs. To Grogan in *SA Airways* the temporary *business* still belonged to SAA, and therefore allowed a second-generation transfer. In my opinion this interpretation intertwines different aspects. The *business* has to be with the employer or supervisor of the service, hence LGM. The assets and premises for the

transfer in a preceding outsourcing generation, first or any other generation, is a strong indicator for a future service provision change.<sup>208</sup> Although this requires a wider examination of facts, the basic principles and scrutiny of Section 197 LRA stay the same. The cases of second-generation outsourcing will probably cause much litigation in the coming years, and the interpretation of facts will vary according to the position of the interpreter. Although single-case justice again prevails over legal certainty, Section 197 LRA has to be construed in that way to reach its legislative purpose.

### 2.3.3. Summary

The analysis of the application of Section 197 LRA shows that although it entails only three requirements, it does not provide a significant level of legal certainty. Two of the three elements have a rather wide scope. A *business* may include every possible structured entity that pursues an economic activity. Nevertheless, the entity has to be separable and not be a service itself. The *transfer* as well includes every legal transaction, divided into parts or time, as long as the ownership of the outlined *business* has changed and the employees are opposed to new supervision. On the other hand the last element, *a going concern*, will often be decisive in the sense that the transactions do not amount to the transfer of an undertaking. Instead, only the makeover of assets and/or staff has occurred or an activity ceased and is now provided by somebody else. This arête between a transfer and a simple transaction of assets will be critical, and hard to predict in a lot of cases. Therefore the next part regards European experiences in transfer of undertaking regulations, and portrays their most important developments. The more cases are known, the easier it is to place the next situation either inside or outside of the scope of Section 197 LRA.

## 2.4. European Experiences

Section 197 LRA 1995 and 2002, the decisions of the Labour Courts and the review of it by the academic jurisprudence show that especially the European approach in

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business can still be owned by the client, but they do not represent the *business* (see comparative part and German jurisdiction). Again Grogan's generalising approach would limit the application because it does not pay regard to the facts of each case. This was obviously not the Constitutional Court's intention.

<sup>208</sup> *SA Airways* (CC) para 106.

this particular matter has had great influence on South Africa. As there is no reason to discontinue paying regard to the European experience as a guideline, it is a reasonable approach to analyse the development and present problems surrounding transfer of undertaking regulations in Europe. It may still provide a valuable source of information for South African courts in the future or even help predict the outcome of business reorganization for the employers involved. This idea has already been included Section 39 (1) (b) and Section 233 of the Constitution of South Africa as a requirement for the interpretation of any legislation.

However, one remark has to be made towards the ability of foreign jurisprudence as a guideline in domestic case law and statute interpretation. There have been disputes about the effect of foreign law and comparative law as a source of interpretation, especially concerning transfer of undertakings.<sup>209</sup>

Foreign law cannot deliver the solution to a domestic case. It cannot replace the juridical 'homework'. However, it can show the path as to how other jurisdictions cope with problems that arise from similar provisions.<sup>210</sup> The changes of businesses, laws and society demand a continuously adoptive process of law application. Every so often the first provision to regulate a certain problem or situation, and the first judgments applying it, do not oversee all possible interests and consequences. Although new laws are always a construction of politics and compromise,<sup>211</sup> they are still bound by permanent rules, e.g. within a constitution, and are drafted to fulfil specific purposes. The European Administrative Rights Directive (ARD) and Section 197 LRA in South Africa have very similar intentions. Despite different societies and backgrounds, to achieve the ideas intended, a glance at each other's jurisdictions will always be beneficial. Therefore the European decisions should be regarded as a guideline but no more. This holds especially true for the European Court of Justice, as it has not always ruled in the same way and has given rise to a lot of criticism after certain decisions.<sup>212</sup>

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<sup>209</sup> M Wallis (2000) 21 *ILJ* 1 quotes Professor Wedderburn 'to resist the temptation to rush headlong into an exercise of comparative jurisprudence'; Todd et al (2004) at 24.

<sup>210</sup> Blackie & Horwitz (1999) 20 *ILJ* 1387 at 1389 appropriately call it 'persuasive authority'.

<sup>211</sup> Which has been especially shown true for Section 197 LRA 1995 and Labour Law in South Africa, when in 1994 during the NEDLAC negotiations a consent on all major labour issues to draft the Labour Relations Act had to be achieved. Du Toit *et al* – Labour Relations Law at 23.

<sup>212</sup> Especially the *Christel-Schmidt* case in Germany, which again has to be regarded under the specific expectations of the former German cases; but also J McMullen 'Commentary: Contracting Out and Marketing Testing-the Uncertainty Ends?' *ILJ* (UK) 1994, 230 at 237; R Blanpain in

#### 2.4.1. The European Approach – an on-going development:

As the European Economic Community (EEC) developed, the necessity to align national regulations in commercial law became apparent. This was especially true in the field of labour law, where certain differences had to be adjusted in order to establish a free and balanced market. After the implementation of a common market in Europe in 1957,<sup>213</sup> economic competition had increased and trans-national considerations were made while restructuring a business. As a consequence international companies executed retrenchments of their workforce in countries with the least labour protection in the common market.<sup>214</sup> Based on the principle of minimum harmonisation, the European Economic Community drafted the Acquired Rights Directive (ARD) to circumvent future exploitation of divergent national (law) standards while on the other hand leaving room for every nation to specify the ideas within its domestic environment.<sup>215</sup> The European Community was of the view that economic policy and social policy are inseparably connected to each other, and only equality in social policy could provide for a functioning common market and free competition.<sup>216</sup> This background has to be borne in mind as the first intention when interpreting the directive.<sup>217</sup>

Although this main goal was achieved and the directive did not attract significant litigation in its first years, the development took a turn after it came apparent that the European Court of Justice (ECJ) applied a second purpose to the directive,<sup>218</sup> and seemed indecisive and vague about its application. In its view the directive had *‘to ensure as far as possible the continuation without change of the contract of employment or the employment relationship with the transferee in order to avoid the workers concerned being placed in a less favourable position by reason of the*

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*Changing industrial relations and modernisation of labour law : liber amicorum in honour of Professor Marco Biagi* (2003) at 63 writes: ‘the judgments of the Court (ECJ) in relation to the 1977 Directive – revised in 2001 – concerning the acquired right of employees in case of a transfer of an undertaking, are not only complex, but often not logical and de facto counter-productive’.

<sup>213</sup> The Treaty of Rome established the European Economic Community including Germany, France, Italy, the Netherlands, Belgium and Luxembourg on 25 March 1957.

<sup>214</sup> SJ Kokott *Der Betriebsübergang in Deutschland und Polen* LLD (2010) at 43 gives the example of the AKZO-case, where the enterprise AKZO had planned to downsize its undertakings in the Netherlands and Germany but ultimately chose to carry out a mass layoff in Belgium due to their poor labour protection.

<sup>215</sup> A European directive sets out a legislative aim leaving the member states the freedom to achieve it through implementing it into their own national legislation.

<sup>216</sup> SJ Kokott (2010) at 45, Schnorr ‘Entwicklungstendenzen des europäischen Gemeinschaftsrecht auf arbeitsrechtlichem Gebiet’ RdA 1981, 345 at 347 called it a ‘truism of national economy’.

<sup>217</sup> N Smit (2001) at 57.

<sup>218</sup> N Smit (2001) at 59.

*transfer alone*'.<sup>219</sup> A new field of employee protection evolved, which may have led to more job security but at the same time was criticized for constraining businesses, as well as preventing domestic or foreign investments.<sup>220</sup>

#### 2.4.1.1. The European Legislature

The Acquired Rights Directive<sup>221</sup> was first released and came into effect in the member states of the European Economic Community on the 14<sup>th</sup> of February in 1977.<sup>222</sup> It was not until 1998 that the European Union redrafted it in several regards and released the amended version on the 29<sup>th</sup> of June that year.<sup>223</sup> In 2001 the Directive was at last consolidated through a new version, which did not entail any substantial changes except renumbering.<sup>224</sup> The original directive not only included the automatic transfer of employment contracts but also required the transfer of rights and obligations of any collective agreement (subsection 3), the establishment of an unfair dismissal if connected to the transfer (subsection 4) and information and consultation of the employees' representatives (subsection 6).

The application of the ARD 2001:

##### *Scope and definitions*

##### *Article 1*

*1. (a) This Directive shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.*

*(b) Subject to subparagraph (a) and the following provisions of this Article, there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.*

Although the directive has been changed over the course of time, litigation has been mainly about its application, i.e. the requirements of '*a transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a*

<sup>219</sup> *Landsorganisationene i Danmark v Ny Mølle Kro* (1989) IRLR 37 at para 29.

<sup>220</sup> HJ Willemsen 'Erosion des Arbeitgeberbegriffs nach der Albron-Entscheidung des EuGH' (2011) at 768.

<sup>221</sup> Full title of the directive: 'Directive on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, business or parts of undertakings or business.' Abbreviated ARD.

<sup>222</sup> EEC Directive 77/187/EEC –

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31977L0187:EN:HTML>.

<sup>223</sup> EC Directive 98/50/EC –

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998L0050:EN:HTML>.

<sup>224</sup> EC Directive 2001/23/EC –

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0023:EN:HTML>.

*legal transfer or merger*'.<sup>225</sup> After various decisions of the European Court of Justice (ECJ) the amended directive included a definition for the term *transfer*, being 'a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary'.<sup>226</sup> The insertion of this definition was due to diverging views between the ECJ in his *Christel-Schmidt*<sup>227</sup> and *Ayşe-Süzen*<sup>228</sup> decisions and a proposal of the European Commission.<sup>229</sup>

The European directive requires two elements, the *business* and that it has undergone a *legal transfer or merger*. Bearing this construction in mind, the questions of the directive's interpretation revolved around the outline of a *business* and the requirements of a *transfer*. The new definition of the transfer since 1998 was due to the preliminary judgments of the ECJ in *Ayşe-Süzen*.<sup>230</sup> It is its view upon the interpretation of the ARD that shaped its application and opened up for employee lawyers a new argument in dismissal litigation.

#### 2.4.1.2. The European Jurisprudence

##### Transfer test, 7 points and a going concern

The judgment that still determines the test for the question as to whether a *transfer* has taken place was the Dutch case of *Jozef Maria Antonius Spijkers C. V. v Gebroeders Benedik Abattoir C. V. & Alfred Benedik en Zonen B. V.*<sup>231</sup> It was the first time the ECJ used the term 'as a going concern' regarding the notion of a transfer, whereupon the business had to retain its identity after the transfer to fall within the scope of the ARD. It was the first step towards clarification of the expression 'the transfer of an undertaking'.<sup>232</sup>

<sup>225</sup> Article 1 of 77/187/EEC and Article 1 (a) of 98/50/EC.

<sup>226</sup> Article 1 (b) of 98/50/EC.

<sup>227</sup> Case 392/92, 1994 E.C.R. I-237 (*Christel-Schmidt*).

<sup>228</sup> *Ayşe-Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice* Case C 13/95 (*Ayşe-Süzen*)

<sup>229</sup> EEC – OJ 1994, C 274/10 (COM (94) 300 final, 8.9.94) .

<sup>230</sup> European legislation is interpreted by the European Court of Justice. In every member state courts are allowed (or in last instance required) to apply for a preliminary ruling presenting a relevant question related to the case at hand, which needs to be answered in order to decide the case in accordance with the European directive, Art. 267 TFEU (Treaty on the functioning of the European Union).

<sup>231</sup> *Jozef Maria Antonius Spijkers C. V. v Gebroeders Benedik Abattoir C. V. & Alfred Benedik en Zonen B. V.* Case 24/85 European Court reports (1986) Page 01119 (*Spijkers*).

<sup>232</sup> C De Groot 'The Council Directive on the Safeguarding of Employee's Rights in the Event of Transfers of Undertakings: An Overview of the Case Law' (1993) 30 *CMLR* 331 at 334.

The transferor had ceased the complete business before the transfer was executed and the transferee only took over assets and inventory. He began activating the business after some time, and therefore did not rely on the previous client base. The ECJ construed the notion 'transfer of an undertaking' as a whole and came to the conclusion that not only the disposition of assets could trigger the directive.<sup>233</sup> The focus rather had to be laid upon the question of whether the undertaking had kept its identity, which was to be ascertained if the assets were disposed of *as a going concern*.<sup>234</sup> To support this approach the ECJ proclaimed criteria that were to be scrutinized when *a going concern* was transferred. The criteria, which determined this question, were '*the type of the undertaking or business, if tangible assets (such as buildings and movable property) were transferred, the value of the intangible assets, whether or not the majority of the employees were taken over or not, whether the customers were transferred and the similarity of the activities before and after the transfer*'.<sup>235</sup> Although all those factors weigh heavily towards or against the assertion of a transfer, they all represent single factors and only an overall assessment can deliver a reliable result. This examination is a factual one and has to be exercised by the national court that is dealing with the case.<sup>236</sup>

### Legal Transfer

Another aspect that attracted some litigation was the question of the legal agreements that would cause the directive's application. While the first cases were still made of plain sales agreements, the national courts later approached the ECJ asking what else could be interpreted as a *legal transfer*. In the case of *Landsorganisationen I Danmark v NY Molle Kro*,<sup>237</sup> the European Court of Justice agreed that after the lessee's breach of a lease agreement, if the lessor takes over the undertaking, the requirements for a *legal transfer* are met.<sup>238</sup> The reasoning for the ECJ was built upon the purpose of the directive in any situation where *there is a change in the legal or natural person who is responsible for carrying on the business and who by virtue of that fact incurs the obligations of an employer vis-à-vis employees of the undertaking, regardless of whether or not ownership of the undertaking is*

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<sup>233</sup> *Spijkers* at 12.

<sup>234</sup> C De Groot (1993) 30 CMLR 331 at 335.

<sup>235</sup> *Spijker* at 13.

<sup>236</sup> *Spijker* at 13; R Blanpain *European Labour Law* (2003) at 699.

<sup>237</sup> *Landsorganisationen i Danmark v NY Molle Kro* 1989 IRLR 37 ECJ (*Ny Molle Kro*).

<sup>238</sup> *NY Molle Kro* at 6.

transferred.<sup>239</sup> This approach was further developed in the case of *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S*,<sup>240</sup> and other cases.<sup>241</sup> In its view a legal transfer is met either by a sale, a lease, a lease-purchase agreement, a municipality discontinuing subsidies and causing a change of control or any other legal construct that may arise, including unilateral decisions. The wider interpretation is supported by the ECJ's choice of words, for as in the *Ny Molle Kro* case it still relied 'on the basis of a lease', and the *Berg* case 'was on the basis of a contract'; in the *Stichting* judgment it ruled without any contract basis at all.<sup>242</sup> The notion of a legal transfer has therefore been described as hardly being regarded as a 'serious impediment to the applicability of the directive'.<sup>243</sup> After the wide scope of the requirement of a *legal transfer or merger* was established, the crucial criterion was left to the question as to whether a *transfer of a business* occurred as established in *Spijkers*. The range of potential business transfers had yet to be developed.

#### Outsourcing and 'transfer of an undertaking'

Another milestone towards employee protection, which eventually led to a new argument in dismissal cases for employee lawyers,<sup>244</sup> was the case of *Christel Schmidt v Spar- und Leihkasse der früheren Ämter Bordesholm, Kiel und Conshagen*.<sup>245</sup> Ms Christel Schmidt was employed at a local bank in northern Germany as the only member of the cleaning staff. When the bank decided to outsource its cleaning services to a contractor, the ECJ ruled that the ARD applied. The decision represents the widest possible interpretation of a transfer of an undertaking. The reception of the judgment in the (general) press was an outcry and led to cynical comments as 'Cleaning lady as business unit'.<sup>246</sup> The ECJ stated that neither the fact that the business was only ancillary nor the fact that it only consisted

<sup>239</sup> *NY Molle Kro* at 12.

<sup>240</sup> *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S*, ECJ Case 324/86, judgment on 10th February 1988, reported at [1988] ECR 739.

<sup>241</sup> *Berg v Besselsen* [1990] ICR 396 (*Berg*), *Bork International v. Foreningen af Arbejdsledere i Danmark* 144 and 145/87; *Sophie Redmond Stichting v Bartol*, C 29/91 (*Stichting*).

<sup>242</sup> C De Groot (1993) 30 *CMLR* 331 at 344.

<sup>243</sup> C De Groot 'The Council Directive on the Safeguarding of Employee's Rights in the Event of Transfers of Undertakings: An Overview of the Case Law' (1998) 35 *CMLR* 707 at 709.

<sup>244</sup> Hardly any dismissal case in Germany did not try relying on the argument of the unfairness of a dismissal due to a transfer of an undertaking; HJ Willemsen (2011) at 771.

<sup>245</sup> Case 392/92, 1994 E.C.R. I-237 –

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61992CJ0392:EN:HTML>.

<sup>246</sup> 'Putzfrau als Betriebsteil' cited in HJ Willemsen (2011) at 772.

of one employee excluded the case from the scope of the directive.<sup>247</sup> The absence of any tangible assets did not prevent the ECJ from applying the directive. It further ascertained that the business retained its identity because the activities are being carried out similarly.<sup>248</sup> The ECJ disregarded three facts that were argued to oppose the directive's application. Neither the 'undertaking' consisting of a provision of services, without any connection to the company goals and instead being ancillary and being only performed by one single employee, stood in the way of *Schmidt's* acquired rights to be transferred. Before the ECJ had the chance to consider his reasoning again the Commission drafted a proposal for changes of the Acquired Rights Directive, which visibly distinguished between a transfer of an undertaking and the transfer of a mere activity, omitting the latter one of its scope.<sup>249</sup>

Not long after his *Christel-Schmidt* decision, the ECJ had the chance to review its understanding of the directive when the case of *Ayşe-süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice* came into its hands about three years later.<sup>250</sup> The case was similar to *Christel-Schmidt* because it involved another outsourcing arrangement that had to be examined, though this time in a 'second-generation' context. Zehnacker provided the cleaning services in a school, where Ms Süzen and seven other employees were the assigned cleaning staff. Through the change of contractors to Lefarth GmbH, Zehnacker dismissed the eight employees and the new contractor reemployed seven of them except Ms Süzen. The question the German courts submitted to the court was whether Ms Süzen would automatically transfer with the service contract. The ECJ denied the proposal and made an important statement by saying that '*an entity cannot be reduced to the activity entrusted in it*'.<sup>251</sup> Despite his ruling in the Schmidt case the ECJ directed himself back to focus on the facts at hand and a distinction of service provision changes and transfer of undertakings. It seemed as if the ECJ took opinions and criticism by the commission and legal academics into account when developing its application of the ARD.<sup>252</sup> Still, it has been argued that the *Ayşe-süzen* case is less of a turning point

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<sup>247</sup> *Christel-Schmidt* at 11, 14 and 15.

<sup>248</sup> *Christel-Schmidt* at 16 and 17.

<sup>249</sup> EEC – OJ 1994, C 274/10 (COM (94) 300 final, 8.9.94).

<sup>250</sup> *Ayşe-Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice* Case C 13/95 (*Ayşe-Süzen*) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61995J0013:EN:HTML>.

<sup>251</sup> *Süzen* par 15.

<sup>252</sup> C De Groot (1998) 35 *CMLR* 707 at 728.

than seemed at first glance.<sup>253</sup> The aforementioned proposal of the Commission expressed that a ‘*transfer only of an activity of an undertaking, business or part of a business, whether or not it was previously carried out directly, does not in itself constitute a transfer within the meaning of the directive*’.<sup>254</sup> Nevertheless the new draft did not make the same distinction, but rather focused on the economic entity test established in the *Ayşe-süzen* case. Yet compared to the *Christel-Schmidt* case the decision established an inversion through the difference between an economic entity performing an activity and an activity itself. Transfer of undertakings and service provision changes were still two different situations, whereas the latter one had to fulfil the requirements of the former to fall within the ambit of the directive.

#### Specifying the *Spijker*-test I

In the case of *Carlito Abler and Others v Sodexho MM Catering Gesellschaft mbH*<sup>255</sup> a hospital in Vienna contracted its catering services to be supplied by Sanrest from 1990 till 1998 and then changed to Sodexho for the service. As there had been no contractual link between the two contractors, none of the employees had been taken over and Sanrest did not provide Sodexho with any data relating to the provided services; Sodexho denied the existence of a transfer. Mr Abler and others approached the courts for a declaration to be transferred, raising the question for the ECJ whether the use of substantial parts of the tangible assets previously used by the first contractor and subsequently made available to it by the contracting authority, despite no take over of staff, did amount to a transfer.<sup>256</sup> The ECJ answered in the affirmative and stated that the use of water and energy, and the service premises together with the necessary equipment by both contractors can provide sufficient proof for an entity to keep its identity.<sup>257</sup> The case opened a very broad interpretation of the notion *business* and the requirements for it to be transferred as a going concern due to the amount of assets that satisfied the *Spijker* test.

<sup>253</sup> Deakin & Morris (2009) at 199, 3.68.

<sup>254</sup> EEC – OJ 1994, C 274/10 COM (94) 300 final, 8.9.94 at 11.

<sup>255</sup> *Carlito Abler and Others v Sodexho MM Catering Gesellschaft mbH* C-340/01, ECR, 2003, 14023 –<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001CJ0340:EN:PDF> (*Carlito Abler*).

<sup>256</sup> *Carlito Abler* at 27.

<sup>257</sup> *Carlito Abler* at 43.

### Specifying the *Spijker*-test II

The path the ECJ had struck was not providing tangible and practical terms. A German court reconsidered these concepts when asking if a transfer of assets can only be concluded if they are used on an independent commercial basis. In the case of *Nurten Güney-görres, Gul Demir v Securicor Aviation (Germany) Ltd, Kotter Aviation Security GmbH & Co KG*,<sup>258</sup> the German Government contracted first Securicor Aviation and later Kotter Aviation Security for their services at the security gate of the Düsseldorf airport. The equipment, walk-through metal detectors, conveyer belt with automatic X-ray screening, hand-held metal detectors and explosives detectors were owned, provided and maintained by the German State. The equipment could not be used for the contractor's own purposes and had no additional economic value to him. While referring to its earlier decisions, the ECJ stated that the wording of the directive does not entail any remark as to distinguish between an independent and contractual predetermined use of the assets that are transferred.<sup>259</sup> The independent commercial use was dismissed and could not be used as a relevant criterion for the evaluation of the transfer of assets. Rather, all assets, even if constricted to the single contract, had to be valued in the overall test if the business had been transferred. This idea to specify the *Spijker* test was not in accordance with the directive, and legal uncertainty prevailed around effective employee protection. The idea the ECJ overthrew indirectly with *Abler* and directly with the *Güney-Görres* judgment will more thoroughly examined in the national context.<sup>260</sup>

### Business integration requirements – keeping the identity through a functional link

The *Dietmar Klarenberg v Ferrotron Technologies GmbH case*,<sup>261</sup> widened the scope of the directive to another extent, where the integration of the business into the transferor's units while dissolving the organisational autonomy of the transferred business does not preclude its application. Mr Klarenberg was employed by Electrotechnology GmbH (ET), which sold most of its patents, software licenses and inventions based on them to Ferrotron. Four employees were taken over by Ferrotron as well. Mr Klarenberg was not among them and approached the German Labour

<sup>258</sup> *Nurten Güney-Görres, Gul Demir v Securicor Aviation (Germany) Ltd, Kotter Aviation Security GmbH & Co KG*, joined cases C-232/04 and C-233/04, ECR, 2005, 11237 (*Güney-Görres*).

<sup>259</sup> *Güney-Görres* para 11.

<sup>260</sup> *Infra* at Chapter 2.4.3.3.

<sup>261</sup> *Dietmar Klarenberg v Ferrotron Technologies GmbH*, C-466/07 (*Klarenberg*).

Court after ET went bankrupt only half a year later. Because the assets were not used similarly and the business substantially changed, the German court requested a preliminary ruling about the question whether the business has to keep its organisational autonomy after the transfer. The ECJ denied that and reasoned his argument with the consideration not only of the wording of the directive but also the context and the objectives pursued.<sup>262</sup> After repeating earlier judgments the court came to the conclusion that although the organisational autonomy may not be retained, the directive nevertheless will be applied, if '*a functional link between the various elements of production is preserved, and that that link enables the transferee to use those elements to pursue an identical or analogous economic activity, a matter which it is for the national court to determine*'.<sup>263</sup> Interestingly, the German Federal Labour Court denied the application of § 613 a BGB after all, and despite the findings of the ECJ.<sup>264</sup> The requirements of the second snapshot have been dissolved to less than an identical or even similar picture. The interpretation of the contractual link is left to the national courts, and its reception in Germany shows that it still can be interpreted in accordance of the purpose of transfer regulation.<sup>265</sup>

Summary of regulations of the ARD and the relating guidelines of the ECJ:

The application requirements of the Acquired Rights Directive are established in Article 1 Section 1 (a). There has to be a transfer of an undertaking through a legal transfer or merger. That element is further specified as a transfer of an economic entity which retains its identity, meaning an organized grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary, Article 1 Section 1 (b). This statutory introduction is the starting point since 1998 and the last amendment to the Acquired Rights Directive. It was a result of influences by the European Court of Justice, national labour courts and the European Commission. Since then the interpretation was further specified through following ECJ judgments providing a new guideline to the construction of the legal definitions. The main ideas and quotes that are mobilised every time help guide the courts to directive compliant decisions. It has to be regarded that the entity 'cannot

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<sup>262</sup> Klarenberg para 37.

<sup>263</sup> Klarenberg para 38.

<sup>264</sup> BAG 13. October 2011, 8 AZR 455/10.

<sup>265</sup> *Infra* at Chapter 2.4.3.4 again the national context will help outline the consequences of the ECJ judgment.

be reduced to the activity entrusted in it',<sup>266</sup> and 'the transfer must relate to a stable economic entity whose activity is not limited to performing one specific works contract'.<sup>267</sup> 'In order to determine whether the conditions for the transfer are met, it is necessary to consider all the facts characterising the transaction in question, including in particular the type of undertaking or business concerned, whether or not its tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, for which those activities were suspended'.<sup>268</sup> 'However, all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation, but must take into account that the type of undertaking or business concerned necessarily varies according to the activity carried on, or indeed the production or operating methods employed in the relevant undertaking, business or part of a business'.<sup>269</sup> 'Thus, the fact that the tangible assets are taken over by the new contractor without those assets having been transferred to him for independent commercial use does not preclude there being either a transfer of assets, or a transfer of an undertaking or business within the meaning of Directive 2001/23'.<sup>270</sup> When assessing if the economic entity was preserved, only 'the retention of a functional link of interdependence, and complementarity, between those elements is required'.<sup>271</sup>

#### Extra Case: Albron

The Dutch case of *Albron Catering BV v. FNV Bondgenoten and Roest* is not directly related to the notions referred to above.<sup>272</sup> Since the case evolves around the definition of employer, it will be used as a comparative aspect and placed in context with the interpretation of Section 197 LRA later on. Mr Roest was employed by a service company. The service company itself was part of the Heineken Group in the Netherlands. His daily work took place in catering, another business of the Heineken

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<sup>266</sup> *Ayse-Süzen* para 15.

<sup>267</sup> *Güney-Görres* para 32.

<sup>268</sup> *Spijkers* para 13.

<sup>269</sup> *Spijkers* para 13.

<sup>270</sup> *Güney-Görres* para 14.

<sup>271</sup> *Klarenberg* para 47.

<sup>272</sup> *Albron Catering BV v. FNV Bondgenoten and Roest*, ECJ Case C-242/09, [2011] IRLR 76.

Group. The catering business was subsequently sold as a going concern from the Heineken Group, not from the service company, to Albron. The European Court of Justice had to answer whether the ARD would apply although the Heineken Group was technically not Mr Roest's employer, because that was the service company. The ECJ answered in the affirmative by applying the term 'non-contractual employer' to the Heineken Group. Further being only a non-contractual employer is sufficient for the directive's application. In Germany criticism arose about the judgment. It was due to the member states' prerogative concerning the definition of employment relationship in the transfer environment,<sup>273</sup> and the fact that the 'rights' towards the 'non-contractual employer' were not the rights Mr Roest hoped to see transferred, i.e. remuneration. Instead it was recommended to approach cases of a constant separation of contractual and factual employment relationship in the opposite direction.<sup>274</sup> The service company provides a business for its employees in the Heineken Group. Despite the fact that the Heineken Group as the owner decides to sell the catering functions, the service company loses its business to Albron. The business transfers from the service company to Albron and therefore includes all employees and their rights towards their contractual employer. The connection between the employee and his workplace prevails over the employment contract. The case is relatively new and the consequences cannot be foreseen, but a narrow interpretation is expected, especially due to the close relationship between the Heineken Group and the service company. A generalisation to all labour broker companies or other similar circumstances do not seem to be accurate. Nevertheless, due the intention of the ARD, the application to such situations appears reasonable, despite the different methodological explanations.

#### 2.4.1.3. Summary of the European guidelines

The European perspective on the Acquired Rights Directive, although still only providing a frame for each national conversion, had great impact on the employment protection in its member states. With its renewal in 1998 and numerous ECJ judgments, the European approach can be summarized as an employee protective provision that, while missing reliable legal certainty, helped harmonize the national

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<sup>273</sup> Article 2 (2) ARD.

<sup>274</sup> HJ Willemsen 'Erosion des Arbeitgeberbegriffs nach der Albron-Entscheidung des EuGH' (2011) *NJW* 1546.

legislation and prevent exploitation of workers in the globalising markets. The various judgments and their *dicta* already represent the outline of the application in the member states. The statements alone provide the information of the minimum of employee protection in the member states, as national statutes may increase the protection due to article (8) of the ARD.<sup>275</sup> Nevertheless the facts of each case have to be evaluated by the national courts and it is their duty to provide reliable judgments based on the European influence and domestic characteristics. The next part displays the challenging assignment for the national labour courts of combining European and national legislation and litigation while regarding the very purpose of transfer of undertaking regulations.

#### 2.4.2. The influence on Germany and England

The illustration of the European framework and its adaptation in England and Germany illustrates certain points where each jurisdiction valued its law and influences differently. Based on the European frame, England (ultimately) went further ahead than what was required by it with their TUPE 2006 regulations. Germany, on the other hand, sometimes has to be redirected back into the employee-friendly view of the ECJ. Not to say that the German approach is employer friendly, but judging by the case law of the last 30 years, Germany has had difficulties with the strong purposive school of thought in Luxembourg. Instead, the Federal Labour Court of Germany continuously tried to methodologically scrutinize the application of § 613a BGB and provide, in his own way, some amount of legal certainty. This reason was a main argument for the English implementation of service provision changes into the scope of TUPE. However, the intention to decrease the amount of litigation evolving around the question of whether an activity represents a business entity is still at question.<sup>276</sup>

Concerning the 'European' transfer, all national courts apply the interpretation of the ECJ, which widens the directive's application to most business transactions. The criticism mostly focuses on the difficult task of distinguishing a mere business

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<sup>275</sup> Article 8: *This Directive shall not affect the right of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees or to promote or permit collective agreements or agreements between social partners more favourable to employees.*

<sup>276</sup> The English government handed out a survey to companies all over the UK to evaluate their impression of the new TUPE regulations, especially the inclusion of service provision changes.

activity from a business unit. Through other judgments, other requirements have also been moderated to achieve the purpose of employment protection.

The following part of the conversion and implementation of the European legislature and jurisprudence in the United Kingdom<sup>277</sup> and Germany focuses on their specialties and differences. The European background will be pointed out during that examination, but rather more fertile is the national transformation and reception of its requirements. Through the wording of the directive and the precedents at the ECJ, both countries ought to have similar protection in the transfer environment. Although both live up to that standard, it is the national characteristic and development that provides insights about the development and future goals of transfer regulations. This comparison of different law systems and factual backgrounds helps in developing ideas for the South African solution. Each nation paid regard to its history. In the national chapters not all application requirements will be regarded, but the focus will rather be placed upon the main points of friction.

### 2.4.3. Germany

#### 2.4.3.1. History

The history of German regulation of transfer of undertakings dates back to 1972 when § 613a BGB was released.<sup>278</sup> The first version of employment protection in case of a transfer in Germany only entailed the automatic transfer of the employment contract and shifted individual rights and duties from the old to the new employer. The provision overcame the flaw of the legal custom that the labour courts had already been practising for 40 years. Similar to ideas in South Africa, the German jurisprudence first looked at the only statutory regulation that entailed a legal cession, § 566 BGB, which provided protection for the tenant if property was sold.<sup>279</sup> Despite obvious similarities, the German Labour Courts declined an analogy and applied the idea of a tacit tripartite agreement in case of a transfer of an undertaking.<sup>280</sup> However, any party, especially the new employer, could object the

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<sup>277</sup> United Kingdom and England will be used as synonyms although the author is well informed about the difference, but England has been used in most articles as the name when referring to UK's TUPE regulations.

<sup>278</sup> BGB is the Bürgerliches Gesetzbuch, the German Civil Code; the Regulations of Labour Law are separately drafted in many different statutes. The main issues though are already covered in the Civil Code (§§ 611-630 BGB).

<sup>279</sup> *Supra* Chapter 2.3.1.1: 'huur gaat voor koopt'.

<sup>280</sup> Federal Labour Court.

agreement and a business easily downsized. Thus § 613a BGB was released with the primary intention to close the obvious loophole in dismissal protection.<sup>281</sup>

After the requirements listed by the Acquired Rights Directive in 1977, the German Legislature amended § 613a BGB in 1980. The new version provided the employee with continuation of his employment relationship, the transfer of rights and duties, now including rights arising from a collective agreement, explicit prohibition of transfer dismissals and information and consultation requirements. During the following years and especially under the influence of the redraft of the directive in 1998/2001, § 613a BGB was amended accordingly.

Although European Legislation has outlined main parts of § 613a BGB, this part focuses primarily on the reception and interpretation of the individualities of the German provision.

#### 2.4.3.2. The application of § 613a BGB

*(1) If a business or part of a business passes to another owner by legal transaction, then the latter succeeds to the rights and duties under the employment relationships existing at the time of transfer.*<sup>282</sup>

The application of 613a BGB requires in Section (1) only a business or part of a business to be passed to another owner by means of a legal transaction. The German jurisprudence construes the provision in three different elements, the *change of ownership (change in the proprietor's legal personality)*<sup>283</sup> of a *business or part thereof* through a *legal transaction*.<sup>284</sup>

Most litigation and misunderstanding has been brought upon through the notion of a *business or part thereof* and in how far it has been *transferred*, i.e. the transferee has taken it over as the business that it was, i.e. as a going concern. During the first years of its implementation the German Federal Labour Court regarded the transfer of tangible or intangible assets mandatory for its application.<sup>285</sup> It was not until the judgment of *Ayşe-süzen* of the ECJ in 1997 that the German Federal Court revised its views. In the same instance it gave up another different opinion on the application of

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<sup>281</sup> HJ Willemsen (2011) at 765.

<sup>282</sup> § 613 a BGB (1) Sentence 1.

<sup>283</sup> This becomes obvious when regarding the case law where merely the right of use is transferred, e.g. a leaseholder is the proprietor of the business if it runs the business in its own name, Lingemann, Steinau-Steinbrueck & Mengel *Employment & Labor Law in Germany* (2003) at 38.

<sup>284</sup> Schaub & Koch *Arbeitsrecht von A-Z* (2009) at 18.

<sup>285</sup> Schaub & Koch (2009) at 18; the fact if staff was taken over was not considered at all.

§ 613a BGB. In contrast to the European Court, the German Federal Labour Court held that the transferee did not need to continue operating the business but that the possibility to keep it in operation was sufficient for the application of § 613a BGB.<sup>286</sup> Over the course of judgments the requirement of a *business or part thereof* in the German as well as the European statute has been regarded as obsolete, because the notion has completely been substituted by the requirement of article 1 (b) of the ARD, which only requires an *economic entity*.<sup>287</sup> Any judgment shows that German labour courts start their examination with the notion *business or part thereof* but immediately apply the notion of an *economic entity* in the sense of article 1 (b) ARD. From there on for further ‘clarity’ the rest of article 1 (b) ARD, ‘an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary’, and various statements of ECJ judgments are regarded to examine on the facts of the case if there is business. As these differences have been not been disputed for 10 to 15 years, more recent case law points out problems that arose after the German Federal Court had inherited the views of the ECJ and tried to combine it with its own legacy regarding the test of a transfer and the retention of identity.

#### 2.4.3.3. The transfer test - Outsourcing and new criteria for more legal certainty

Although concerning the notion *business* the German courts had adopted the European view by the end of the millennium, new disparities arose about the specific interpretations advanced by the ECJ through his decisions in *Spijkers*, *Schmidt* and *Süzen*. After the outsourcing cases generally opened the European employment protection in transfer situations to service provision changes, the hardest question the courts had to answer was to distinguish between the transfer of a mere function and a transfer of an undertaking.<sup>288</sup> Only the latter is covered by the German provision (as well as the European directive) but especially in labour-intensive sectors the difference is hard to obtain. For cases where the client provides the equipment and

<sup>286</sup> BAG 23 May 1985, 5 AZR 30/84; the differences may be explained through the point of view of the ECJ that tried to protect employees from a negative effect of the ARD’s application if the continuation is possible but not executed. This would most certainly result in retrenchments. The German position on the other hand gives the employee a very protective right to object (infra Part III), where the employee is given at least a month time to decide whether to stay on with the new or go back to the old employer. The protection given by the ECJ is not really needed in Germany, but as the ECJ provides precedents for all countries of the EU it has to regard the broader picture.

<sup>287</sup> A Junker ‘Die Abgrenzung des Betriebsübergangs (§ 613a BGB) von der Auftragsnachfolge in der Rechtsprechung des BAG und des EuGH’ (2010) *SAE* 239 at 242.

<sup>288</sup> Weiss & Schmidt *Labour Law and Industrial Relations in Germany* (2008) at 143.

the premises where the services have to be rendered and any new contractor makes use of them, the German Federal Labour Court established a new criterion. It stipulated that only if the contractor was provided the equipment for his *own commercial use* would it be relevant in the overall examination.<sup>289</sup> Although the criterion provided a useful instrument to distinguish between transfers and mere changes of contractor, it also gave the employers a tool to easily circumvent the provision's application. They always agreed on a clause stating all property was only to be used in name and for the client, and could be sure no transfer would be ascertained if only no employee was taken over.

Consequently, the European Court of Justice once again denied this as an approach not entailed in the directive.<sup>290</sup> The German Federal Court as a result now focuses on a new measure to improve the comparison of the entity before and after the transfer. It had already been mentioned in 1986 before the ECJ gave any of his remembered outsourcing judgments, but was not adopted by the courts.<sup>291</sup> The German Federal Court inherited its name as 'Kern der Wertschöpfung', which may be translated as '*core of value creation*'. While the German Federal Court at first tried to ascertain a relevant transfer if the service provider could make use of the assets for his own commercial use, they shifted to the question of whether the use of the assets represents the actual core in the context of value creation. Examples in the affirmative are security services at the airport,<sup>292</sup> where the contractor makes use of the premises and assets in order to fulfil his duty, or a catering service,<sup>293</sup> that makes use of the kitchen equipment in order to provide the food. In those cases the service provider requires the provided equipment in order to fulfil its contractual duties. The value of each of these services is mainly provided through the use of assets provided by the client. The core value does not lie within the employees but rather their equipment. On the other hand, in a hospital a contractor that looks after the heating does not make use of the heating system but merely provides a service *on* it.

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<sup>289</sup> German Federal Court 11 December 1997, 8 AZR 426/94, NZA 1998, 532 (*Catering*).

<sup>290</sup> Supra at Chapter 2.4.1.2 in the case of *Güney-Görres*, which again led German legal practitioners to regard the ECJ's reasoning as hardly worth that description, HJ Willemsen 'Europäisches und deutsches Arbeitsrecht im Widerstreit? - Aktuelle "Baustellen" im Recht des Betriebsübergangs' (2008) NZA-Beilage 155.

<sup>291</sup> HJ Willemsen 'Die neuere Rechtsprechung des Bundesarbeitsgerichts zu § 613 a BGB' (1986) ZIP 477 at 481.

<sup>292</sup> Federal Labour Court NZA 2006, 1105.

<sup>293</sup> Federal Labour Court 6 April 2006, 8 AZR 222/04, NZA 2006, 723.

Therefore the Federal Labour Court denied the application in the latter case.<sup>294</sup> Although the criterion ‘core of value creation’ should not be simplified whether the service is *of* or *on* the assets, it is helpful to demonstrate the idea behind the court’s reasoning.

The criterion does not provide complete legal certainty, but it helps improve the distinction between a mere service provision change and a transfer of a business. Although it cannot prevent one from ‘tautological pseudo-justification’ it has been argued to be a reasonable substitute for the criterion of *own commercial use*.<sup>295</sup> Nevertheless, the question of whether the contractor is performing work through the use of certain assets instead of performing work on those assets has been criticised as not a very sharp criterion.<sup>296</sup> The contention lies within the difference between the two criteria. The measure of whether equipment was also used for *own commercial use* represented a yes-or-no answer for the application of § 613a BGB itself. The *core of value creation*, on the other hand, is a highly evaluative element and will not deliver similar legal certainty. However, this has protected it from being eliminated by the ECJ so far.

It is important to place the *core of value creation* in the overall context of a transfer examination. In the judgments it has not been exactly placed into the order one should examine the question of a *transfer*, but has rather been valued in the overall assessment. However, it seems helpful to regard the criterion as an addition to the *Spijkers*-test. When applying the 7-point test, the first distinction is made between asset-reliant and labour-intensive entities. After the business that might have transferred has already been outlined in a first step, the criterion of ‘core of value creation’ now might help to locate it to either of the two groups. If the core lies within the employees’ service and not the assets, the take-over of staff must be valued higher than the use of assets. How far this criterion actually improves legal certainty and if ECJ will keep accepting it is a question that remains to be seen. It is, however, the right path of the German courts to establish new, more practicable notions that may very well improve guidance for legal practitioners.

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<sup>294</sup> Federal Labour Court 22 January 2009, 8 AZR 158/07, SAE 2010, 244.

<sup>295</sup> HJ Willemsen (2008) *NZA-Beilage* 155 at 157.

<sup>296</sup> A Junker (2010) SAE 239 at 242.

#### 2.4.3.4. *Klarenberg* and the retention of identity

Another issue the German labour courts had to overcome was the application in cases where the business is integrated into the buyer's company so significantly that it cannot be identified as a separate unit anymore. Until the *Klarenberg* decision,<sup>297</sup> the Federal Labour Court required the transferred business to be identifiable after the transfer for § 613a BGB to apply. The lower labour courts did not agree with that view and in the end the provincial labour court in Düsseldorf applied to the European Court of Justice in the *Klarenberg* case. As a result another criterion had to be deleted from the test developed under the German statute. The differences and debates between the German Federal Labour Court and the ECJ have led to even greater uncertainty in this field of law, and caused a German Labour Law professor to claim that the 8<sup>th</sup> senate of the Federal Labour Court can only be regarded as an 'executing leg' of the ECJ.<sup>298</sup> The problem has been described as misinterpretation or overlooking of each other's dicta. Hence, a large amount of controversy about the *Klarenberg* case could have been prevented if people had paid regard to the difference in the European and German Court interpretations of the directive and § 613a BGB. The German courts had developed the requirement of the transferred business to 'keep its organised independence',<sup>299</sup> while the ECJ never used similar words. Therefore to apply the directive to transfers where the business is integrated and does not keep its identity should not have been a big surprise after all.<sup>300</sup> After that judgment the Federal Labour Court now only requires the entity to keep a functional link between its assets. This again has been criticized as substituting one criterion by just a weaker criterion.<sup>301</sup> It remains to be seen if the courts will from now on ask the question 'would the economic entity remain if not immediately integrated into the new company?' or if the courts will prefer to dilute the snapshot comparison to a mere question of similarities.<sup>302</sup> Although the case is mostly a consequence of formalistic and language differences, there is another issue that cannot be disregarded. The idea of transfer of undertakings can in Germany only be

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<sup>297</sup> *Supra* at Chapter 2.4.1.2.

<sup>298</sup> 'ausführendes Organ' A Junker (2010) *SAE* at 239.

<sup>299</sup> Federal Labour Court 27.4.2000 – 8 AZR 260/99; Hauck, in *Festschrift für Bauer* (2010,) 401 at 402.

<sup>300</sup> A Junker (2010) *SAE* 239 at 240.

<sup>301</sup> HJ Willemsen 'Erneute Wende im Recht des Betriebstübergangs – ein Christel-Schmidt II Urteil des EuGH?' (2009) *NZA* 289 at 293.

<sup>302</sup> HJ Willemsen (2009) *NZA* 289 at 295.

constitutional if the restrictions placed upon the employers provide them with advantages at the same time. Therefore § 613a BGB is only applicable if the new employer takes over the business in operation, this being the financial advantage he acquires that evens out the disadvantages of automatic employment transfer.<sup>303</sup> This functional link between the assets will therefore always be examined thoroughly.

The German Federal Court was not of help for employee *Klarenberg* after all. The delay of his process through the preliminary judgment of the ECJ only suspended the denial of the application of § 613a BGB by the German Federal Labour Court. Its reasoning included the new European criterion, but while focussing on the functional link, required an identifiable connection. This had not even been ascertained from the old employer, so the new findings were therefore irrelevant.<sup>304</sup> Although the ECJ had widened the scope of the ARD once again, in Germany the Federal Labour Court still tries to fit its findings into an established constitutional frame. It provides the businesses with more than interpretations, which can only be described as subjective legal fairness.

#### 2.4.3.5. Summary of the Input of the ARD in German transfer law

Although the European Court of Justice may not have always agreed with the opinions or ideas of the Federal Labour Court of Germany, the conflicting approaches still helped shape the Acquired Rights Directive and its construction. Nevertheless, the construction of § 613a BGB, although heavily influenced by the ARD, can still provide additional insights for the problems of the applications of transfer of undertaking regulations, and help future questions arising in South Africa. The German interpretation, in accordance with the directive, nowadays still focuses on the difference between asset-reliant and labour-intensive undertakings. As in many occasions that criterion can be ambivalent and the ECJ and its 'employee friendly glasses' still favours asset-reliant interpretations,<sup>305</sup> the focus on the core of value creation can be a helpful tool. Another approach to start with is the difference between making use *of* or *on* the provided assets. Additionally Germany had to cope with the decision in *Klarenberg*, whereafter the transferred business did not have to

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<sup>303</sup> HJ Willemsen (2011) at 803.

<sup>304</sup> HJ Willemsen (2009) *NZA* 289 at 295.

<sup>305</sup> A Junker (2010) *SAE* at 244.

be identifiable as the same business anymore but rather functional links between the parts of it had to be observable.

#### 2.4.4. England

The comparison of the English regulations towards the European directive has a different focus from the chapter concerning the German developments. Through the latest amendments their litigation shifted away from the question between transfer of undertakings and service provision changes. Nevertheless, the development of the legislation and jurisdiction gives important insights about transfer of undertaking regulations.

The English legislature has had two milestones in the area of employment protection. In 1981 the first TUPE – Transfer of Undertakings Protection of Employment – Regulations were passed. They were the necessary conversion of the frame set out by the Administrative Rights Directive 77/187/EEC. In 2006 England drafted new TUPE Regulations, though still a consequence of the new directive in 2001, they went ahead with an even wider approach than most countries in the European Union. From then on TUPE regulations undoubtedly included service provision changes.

##### 2.4.4.1. English History

The English common law was the background for South African decisions about transferred businesses. The concept, as pointed out supra,<sup>306</sup> was established through the decision of *Nokes v Doncaster Amalgamated Collieries Ltd.*<sup>307</sup> An employment contract was of a nature so personal that no partner could be changed without the consent of the other.<sup>308</sup> Any sale of a business therefore resulted in the termination of the employment relationship with the old employer. Generally the end of the contract was determined as a wrongful dismissal rather than an automatic discharge.<sup>309</sup>

First statutes that regulated transfer of undertakings were the Contract of Employment Act 1963, the Redundancy Payments Act 1965, the Contracts of Employment Act 1972 and the Employment Protection (Consolidation) Act 1978.

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<sup>306</sup> *Supra* Chapter 2.3.1.1

<sup>307</sup> *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] Appeal Cases (AC) 1014 (House of Lords)

<sup>308</sup> *Bolwell v Redcliffe Homes Ltd* [1999] IRLR 485.

<sup>309</sup> Deakin & Morris (2009) at 217 referring to *Nokes v Doncaster Amalgated Collieries Ltd* and *Re General Rolling Stock Co, Chapman's Case* (1866) LR 1 Eq 346.

However, none of these provided for protection of the employees or changed the common law position profoundly.

After the European Economic Community released the Administrative Rights Directive in 1977, it took the English government until 1982 for their regulations to come into effect. Maggie Thatcher and her cabinet were quite reluctant to adhere to the two-year deadline of converting the European Directive.<sup>310</sup> Afterwards the regulations had to be adjusted several times, once especially because the first version only applied for a business that was focused on gaining profit.<sup>311</sup> Another time the EC Commission approached the ECJ against the United Kingdom to compel the legislature for an amendment concerning employee information and consultation.<sup>312</sup> A complete renewal was drafted in 2006 after the new directive 2001/23/EC was released; it clarified various problems and implemented the new requirements of the directive of 2001. The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) is still in effect.<sup>313</sup>

#### 2.4.4.2. The present law – European Transfer<sup>314</sup>

The application of TUPE regulations is twofold. The known, directive mandatory, transfer of an undertaking is still the common case. However, in 2006 an extra subsection was drafted additionally to expressly include *service provision changes*.

3.—(1) *These Regulations apply to—*

(a) *a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;*

(2) *In this regulation “economic entity” means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.*

Regulation 3 (1)(a) repeats the provisions made by the European directive. The TUPE regulations in so far only implement Article 1 (b) of the Directive 2001/23 and their interpretation will be led by European case law of the past and the future.<sup>315</sup>

<sup>310</sup> Deakin & Morris (2009) at 217; Hardy & Adnett (1999) *Journal of European Social Policy* 128 at 129

<sup>311</sup> *Dr Sophie Redmond Stichting v Bartol* [1992] IRLR 366, Since 2007 the English directive goes beyond that in the Code of Practice on Workforce Matters in Public Sector Service Contracts (2007) including all transfers within the public sector or in and out of the public sector under the TUPE regulations, Deakin & Morris (2009) at 198, 3.67.

<sup>312</sup> *Commission v United Kingdom* Case 382/92 (1994) ECR-I 2435, minor amendments were drafted in 1995 and 1999.

<sup>313</sup> Abbreviated TUPE, the TUPE Regulations of 1981 will be abbreviated TUPE 1981.

<sup>314</sup> Also referred to as the ‘old’ transfer.

The elements, disregarding the geographical requirements of the transfer, are ‘a transfer of an undertaking, business or part of an undertaking or business to another person’ whereas the transfer is specified to be ‘... a transfer of an economic entity which retains its identity’.<sup>316</sup> The notion of an economic entity is further defined in subsection (2) as ‘... an organised grouping of resources, which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary’.<sup>317</sup> The similarity of the first element, to be *an undertaking, a business or part of an undertaking or business*, to the South African statutes is obvious and the same holds true for its interpretation. Until 2006 the TUPE 1981 included a short ‘definition’ of an undertaking as including any trade or business.

The transfer does not use the words *a going concern* but rather requires the *economic entity to retain its identity*. The interpretation of this notion has been similarly problematic to the interpretation of *a going concern* in South Africa. Under the influence of European case law it was necessary to establish whether the undertaking was asset-reliant or labour-intensive, and hence the transactions being made would constitute ‘...an economic entity which, despite changes, remains identifiable, though not necessarily identical, after the alleged transfer’.<sup>318</sup> The problem with this distinctive approach was pointed out in the decision of *Scottish Coal Co Ltd v McCormack*,<sup>319</sup> where the court stated that the two categories were ‘neither mutually exclusive nor exhaustively definitive’.<sup>320</sup> In any case an overall estimation that does not isolate single factors but rather includes a multi-factorial approach has to be applied.<sup>321</sup> The ‘old’ transfer definition is mainly shaped by ECJ judgments and due to the similar use of language did not lead to parallel case law, as has been seen in Germany.<sup>322</sup>

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<sup>315</sup> J McMullen (2006) *ILJ* (UK) 113 at 116.

<sup>316</sup> Article 3 Section (1) (a).

<sup>317</sup> Article 3 Section (2).

<sup>318</sup> *Kelman v Care Contrast Services Ltd* [1995] ICR 260 (EAT).

<sup>319</sup> *Scottish Coal Co Ltd v McCormack* IDS Brief 791, October 2005.

<sup>320</sup> N Selwyn— at 276.

<sup>321</sup> *P & O Trans European Ltd v Initial Transport Services Ltd*, [2003] IRLR 128.

<sup>322</sup> The thesis therefore concentrates on the development in English law and the new ambit of service provision changes. J McMullen *ILJ* (UK) 2006, 113 at 117 refers to a circular and unpredictable test that was applied in England to be in accordance with the ECJ judgments. For comparative reasons the German jurisdiction is used more to focus on the development of the *going concern test* whereas the English findings are used as a source of overall development in the field of transfer regulations.

With the implementation of the new TUPE regulations the English legislature did not clearly state whether the economic entity has to be 'stable' after the transfer.<sup>323</sup> Following the ECJ case of *Ledernes Hovedorganistion(acting for Rygaard) v Dansk Arbejdsgiverforening (acting for Str M lle Akustik A/S)*,<sup>324</sup> the English Employment Appeal Tribunal applied in *Mackie v Aberdeen City Council* the requirement of the economic entity being *stable*, which is different from the performance of a single specified works contract.<sup>325</sup> However, as the 1981 regulations did not express this requirement, it is submitted that although the new regulations did not change this fact, it is still a prerequisite for the provision to apply.<sup>326</sup> This shows one aspect where the English courts did not take over the ECJ decisions literally and apply the transfer regulation in a wider ambit.<sup>327</sup>

To avoid further litigation distinguishing between mere services and businesses, the English legislature decided to include all service changes. Although with the new regulation 3 (1)(b) TUPE all contractor changes are supposed to be covered, the 'old' definition of transfer of undertakings did not become irrelevant. If a case does not meet the requirements of the new section of service provision changes, it could still fall within the ambit of regulation 3 (1)(a) TUPE and a standard transfer. The European transfer regulation in TUPE is in complete accordance with the directives regulation.

#### 2.4.4.3. Ownership change

The ownership change again has the same ambit as in Europe or Germany. The nature and style of the transaction does not impede the application.

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<sup>323</sup> J McMullen (2006) *ILJ* (UK) 113 at 116.

<sup>324</sup> *Ledernes Hovedorganistion(acting for Rygaard) v Dansk Arbejdsgiverforening (acting for Str M lle Akustik A/S)* ECJ Case C-48/94 [1996] IRLR 51.

<sup>325</sup> *Mackie v Aberdeen City Council*, [2006] All ER (D) 297 (Jun).

<sup>326</sup> J McMullen (2006) *ILJ* (UK) 113 at 116.

<sup>327</sup> This difference is allowed through article 8 ARD because it improves the protection of employees to an even broader range of cases. (On the other hand one might compare the requirement of stability with the German (former) application to cases where only the possibility to carry out the business was sufficient. This has been overruled by the ECJ for reasons of employee protection).

#### 2.4.4.4. Service provision changes

##### *A relevant transfer*

3.—(1) *These Regulations apply to—*

*(b) a service provision change, that is a situation in which—*

*(i) activities cease to be carried out by a person (“a client”) on his own behalf and are carried out instead by another person on the client’s behalf (“a contractor”);*

*(ii) activities cease to be carried out by a contractor on a client’s behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person (“a subsequent contractor”) on the client’s behalf; or*

*(iii) activities cease to be carried out by a contractor or a subsequent contractor on a client’s behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf,*

*and in which the conditions set out in paragraph (3) are satisfied.*

*(3) The conditions referred to in paragraph (1)(b) are that—*

*(a) immediately before the service provision change—*

*(i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;*

*(ii)*

*the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and*

*(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client’s use.*

Subsection (1)(b) TUPE 2006 regulations is a new stage in employment protection.

This can hardly still be labelled as a transfer of undertakings protection law. The extension of the regulation’s scope may best be described by a legal fiction, feigning that a service itself (a plain activity) be regarded as an undertaking and therefore cause the consequences of automatic transfer of contracts, rights and duties.

The reasons the English legislature went in this direction were legal certainty through clarification and decreasing litigation.<sup>328</sup> The amount of case law either at the ECJ or domestically did not develop a certainty that lawyers could rely on when being consulted. To avoid those uncertainties and disputes about the application of TUPE regulations, all service provision changes from 2006 onward were implemented into the provision’s ambit. National regulations are permitted to entail further employee protection than the European directive itself requires, as stated by Article 8 of the ARD. Through the application in (basically) all outsourcing cases it was also achieved to base each contractor’s bid in a tender to be based ‘on commercial merits,

<sup>328</sup> TUPE 2006 Explanatory Memorandum at 7.5.

rather than on differing views of the employment rights of employees'.<sup>329</sup> This idea was regarded as a 'level playing field' for the bidding contractors.<sup>330</sup> The price should not be lowered through employee exploitation, but rather a more economical business organization and performance.

The regulation applies to all circumstances where an activity ceases and is carried out by another person, whether a first contractor, another contractor or the former client himself, as long as it happened on behalf of the client.<sup>331</sup> Further requirements are laid down in subsection (3), which limits the application to organised groupings whose principal purpose is the contracted service, and the service does not only involve a single task or the mere supplying of goods.<sup>332</sup>

Although the provision still refers to an organised grouping, it becomes obvious that the former problems laid down by the European judgments of *Spijker*, *Süzen* or *Güney-Görres* are not decisive any more. The English courts do not have to pay regard to the difference of labour-intensive or asset-reliant undertakings, where the categorization can be more difficult than it would at first suggest.<sup>333</sup> Although the English courts have already, before the TUPE 2006 regulations were enacted, applied a less strict approach while examining the characteristics of a business, they still left great uncertainty for the employees concerned.<sup>334</sup>

The new service provision changes section is only 6 years old, but nevertheless has not had the impact on litigation that the drafters had hoped for.<sup>335</sup> The definition of 'service provision change' has to be interpreted disregarding all litigation and definition of the 'former transfer',<sup>336</sup> and one has to apply '...a pragmatic and common sense approach by going through the wording of reg. 3(1)(b) carefully'.<sup>337</sup>

The first notion that has to be fulfilled is that of an *organised grouping*. Although the former definitions are not to be influential, it is obvious that an *organised grouping* cannot be ascertained if a contractor provides its services with a changing group of

<sup>329</sup> J McMullen (2006) *ILJ* (UK) 113 at 117.

<sup>330</sup> TUPE 2006 Explanatory Memorandum at 7.6, a term already mentioned in *Securicor Guarding Ltd v Fraser Security Services Ltd* [1996] IRLR 552 at 556.

<sup>331</sup> Section 1 (b) TUPE 2006.

<sup>332</sup> Again disregarding geographical requirements.

<sup>333</sup> J McMullen (2006) *ILJ* (UK) 113 at 118.

<sup>334</sup> J McMullen (2006) *ILJ* (UK) 113 at 118.

<sup>335</sup> On the other hand England has had less litigation concerning the 'old transfer definition, if one were to compare the cases from Germany submitted to the ECJ.

<sup>336</sup> *Metropolitan Resources Ltd v Churchill Dulwich Ltd* [2009] IRLR 700.

<sup>337</sup> *Cheeseman v Brewer Contracts Ltd* [2001] IRLR 144.

employees.<sup>338</sup> In *Eddie Stobart Ltd v Moreman and others*,<sup>339</sup> the EAT found that employees only mostly responsible for one client did not form an *organised grouping*. *Eddie Stobart* provided services to two clients, for the one during the day shift, for the other one during the night shift. Because the employees were arranged in a shift pattern, either worked more for one than the other client. This arrangement nevertheless did not amount to an organised grouping of one specific client. Here again the boundaries of an employee protective provision were being tested, and to what extent the courts would apply it. It is wise of the courts to stick to their interpretation and not widen the scope to an indefinite amount of cases. An *organised grouping* requires precise employees that are assigned to the service and client, and should not be applied coincidentally. The two exceptions to the rule are single task contracts or the supply of goods.<sup>340</sup>

One issue that should be noted especially when comparing the regulation of service provision changes to South African case law is the requirement that all changes are initiated on the client's behalf. Therefore the contractor cannot rid himself of a group of employees through terminating a service contract and then losing the tender. The change of contractor has to be initiated by the client.<sup>341</sup>

A negative consequence though, which arose after the implementation of service provision changes, was that the outgoing contractor may immediately raise his salaries or improve the employees' terms and conditions the moment he knows he will lose the tender. After the transfer has taken place those changes will have a negative impact on the competitor, and may improve the first contractor's market position.<sup>342</sup>

#### 2.4.4.5. Summary of the English position

The English position has left behind the most contested questions of transfer of undertaking regulations through implementing a new scope with service provision

<sup>338</sup> N Selwyn *Selwyn's Law of Employment* (2008) at 278.

<sup>339</sup> *Eddie Stobart Ltd v Moreman and others* UKEAT/0223/11/ZT.

<sup>340</sup> Regulation 3 (3)(a)(ii), (b).

<sup>341</sup> That was the case in *Crossroads Distribution Pty Ltd t/a Jowells Transport v Clover (SA) Pty Ltd & Others* (2008) 29 ILJ 1013 (LC) (Crossroads), when the first contractor ceased his services and applied for a declaratory order that a transfer took place so he could dispose of his employees. The Labour Court denied the application of Section 197 LRA due to the fact that the transfer did not amount to a *going concern*. The importance of the initiator will be regarded *infra* in the comparative analysis Chapter 2.6.

<sup>342</sup> Unknown Author *TUPE regulations – The silent migrants* (2009) Better Business April at 20.

changes. Every transaction in England now has to be regarded from two possible angles and the majority of cases will be covered by either of the regulations. Although the English regulations improved employee protection and legal certainty, the positive impact on litigation and economically consequences remains to be seen.

#### 2.4.5. Differences between English and German reception of European standards

It is noteworthy to compare the main differences in England and Germany based on the European origin. At first the English only applied the common law rule of termination and re-employment of the affected employees. On the other hand, Germany as a continental European country already favoured a transfer and drafted a regulation before the European Economic Community enforced it with the ARD. After an on-going reluctance of implementation in England due to their economic friendly politics in the 1980s, it took till the mid-nineties for the English legislature to adopt all requirements set out by the directive. Germany instead had included all requirements already in 1980 in its first version of § 613a BGB, which was based on the first version of the ARD.

After the *Christel-Schmidt* judgment, on the other hand, things started to change. The German law society, courts and academic jurisprudence had a hard time coping with the findings of the ECJ and denied the application of § 613a BGB when only a sole activity was transferred.<sup>343</sup> The European Commission and the ECJ changed their view towards the 'German' position through the decision in *Ayşe-Süzen* and the redraft of the Acquired Rights Directive. The English courts had another perception of *Christel-Schmidt*, and favoured the findings due to new legal certainty that basically all outsourcing contracts would fall within the ambit of TUPE 1981.<sup>344</sup> The English Appeal Tribunal preferred the *Christel-Schmidt* findings and the greater freedom of applying them to national law to a leap back in the ECJ.<sup>345</sup> This distinction of interpretation led to a different approach of converting the ARD of 1998, respectably 2001, whereas Germany just redrafted minor changes and England came up with completely new regulations, including a provision explicitly for service provision changes. The application of transfer of undertaking regulations changed from overly narrow and reluctant in England and quite employee friendly in

<sup>343</sup> The same was the opinion in France.

<sup>344</sup> J McMullen (1994) 23 *ILJ* (UK) 230.

<sup>345</sup> P Davies 'Opting out of Transfers' (1996) 25 *ILJ* (UK) 247 at 252.

Germany to a narrower approach in Germany and the widest possible ambit in England. Political changes and influences have played a major role in the turn of events, especially in legislature but also in jurisprudence. After the idea of automatic transfers had been established in England, their focus lay upon legal certainty through a wide scope in order to decrease litigation. Germany, on the other hand, still 'suffers' a great amount of litigation concerning the ascertainment of an economic entity or a mere activity. This still leads to new ECJ case law and enough work for new articles in German Law Journals. So far the European definition of a transfer has been called kafkaesque,<sup>346</sup> because it seems that every new approach for a definition gets specified through another one in the next judgment. Still, England's approach with the wider ambit has to prove it is advantageous for both the employers and the employees. The evaluation put out by the government in the beginning of 2012 will reveal how far the goals, certainty and less litigation, have been reached in the last six years. Only if costs of the contractors have also been lowered can there be an advantage on their side. To follow a similar approach all over Europe or in another country cannot be supported if the only profit is higher employee protection through higher burdens on the employer. On the other hand, one might ask why there should be a difference made between services on assets or with assets if economically in both cases assets and their operators are part of separated companies. One reason might be an easier re-employment of workers whose value lies within their service and less in the assets they operate. Again, the amount of influences and interests make it hard to ascertain one right approach to the situation. Nevertheless, all European countries have to specify their transfer of undertaking regulation in accordance to the rest of their approach to labour, and especially dismissal, law. Therefore no detail can be evaluated independently, but all facts that were displayed will help place Section 197 LRA in the context of transfer regulations.

## 2.5. Consequences and Influences on South Africa

It is submitted that South Africa gathered information and ideas from Europe, especially England, before drafting its own regulation for transfer of undertakings. Original Section 197 LRA 1995 was enacted in a time when the European statutes and judgments had not yet established a clear path. These imprecisions and the strong background of the common law may have influenced the ambivalent wording.

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<sup>346</sup> R Blanpain (2003) 59, at 64.

After the 1995 regulation it was not certain whether an automatic transfer was mandatory or could be agreed upon between the former and future employer. Although main issues had been resolved in 2002 either by the Constitutional Court judgment in *NEHAWU* or the redraft of Section 197 LRA, the word *by* gave rise to new disputes. As with the European statutes and the different interpretations of the directive, it seems obvious that this area of labour law has not found its resolution. Whenever old questions are being answered, new problems arrive on the horizon. The new approach in English law is presently under observation and research has been instigated to evaluate the improvements, if any, of the subsection regarding service provision changes.

The comparison to the recent problems in Germany shows that the South African statute's application currently is interpreted more as the German and European directive than the English TUPE regulations. It shows that due to the similar path South Africans have chosen in the field of outsourcing, in any generation, the latest developments in Germany can be of help to future cases in South Africa.

The notions *business* and *transfer* are both similarly construed in all countries. The former requires the outline of an economic entity pursuing an activity, whether central or ancillary. The latter regards any change of employers as sufficient. The third requirement, the notion of *a going concern* in South Africa, though not statutorily expressed in Europe, raises similar questions in all countries.<sup>347</sup> A transfer amounts to the requirement of *a going concern* if the factors set out in the *Spijkers* test establish the transferred business in different hands. Although the main factors in each country are based on the ECJ decision in *Spijkers*, the test has undergone developments that helped to increase its certainty. Nevertheless, all four jurisdictions often examine the requirements of *business* and *a going concern* at once. Although they are closely connected, it would be advantageous if a separate analysis were provided. As mentioned *supra*, a sale will have the focus more on the second snapshot and the comparison, whereas a service provision change will already question the existence of a business, the first snapshot.<sup>348</sup> Most judgments directly examine the comparison between the two, and miss out on a more logical reasoning. The establishment that a service does constitute a *business* can be done without

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<sup>347</sup> As long as the 'old' transfer situation is concerned, in contrast to service provision changes in England.

<sup>348</sup> Chapter 2.3.2.6.

considering changes the new employer might already have applied or the question of how far a contractual link is still given. These developments will be combined with the situation in South Africa to provide guidance for upcoming cases.

## 2.6. Combining ideas

With the establishments made in the Constitutional Court judgment in *SAA* in South Africa in November 2011, any generation of outsourcing now may fall within the scope of Section 197 LRA. Although the judgment did not deliver a winner in the dispute between two schools of thought, it is apparent that the purposive interpretation will guide the courts' decisions. The similarities between the approach in the European Court of Justice and the South African Constitutional Court cannot be disregarded. The South African approach delivers employee protection to the extent the wording of Section 197 LRA provides (or even a bit beyond that). On the other hand, it still values the original idea to keep together a business in operation. The step England took with the inclusion of service provision changes is not at question in South Africa, and will not be interpreted into the current wording of Section 197 LRA. The differences from Germany, on the other hand, show that South Africa as well has a problem providing the concerned employers and employees a reliable guideline on whether Section 197 LRA will apply or not. It can be said that South Africa and Germany are in a similar position, on the one hand having to accept the specifications by an outside source, the Constitutional Court and the ECJ both not being specialised labour courts, and on the other hand transforming them and using them in the factual basis of a case.

The requirements of *business* and *transfer* (as change of ownership) are similar in all jurisdictions. The comparative approach has already influenced the establishment of an equally wide ambit in South Africa as in Europe. Nevertheless, the notion *business*, as already being closely connected to the notion *a going concern*, does need further development. The approaches to determine whether the business was transferred as a going concern, should perhaps be used to outline the business. The economic entity should be established before the next step, if it and the new employer arrive, is taken.

The question of keeping the identity (*a going concern*) will still rely on the test invented by the European Court of Justice. It has been generally accepted as a

reasonable guidance in South Africa to analyse the question of *a going concern* transfer. However, with the latest *Klarenberg* judgment the term ‘the same business, but merely in different hands’ is not exact any more. Although it has been described as a ‘Christel Schmidt II’,<sup>349</sup> the result does not seem to alter the reach of the Acquired Rights Directive to another unintended and unforeseeable risk of new cases. The South African courts already evaluate each case on its own merits and should not depart from this path. The second snapshot therefore does not have to be identical to the first one, as long as it is still the ‘same’ business in a functional sense inheriting it as value. Without using a dogmatic approach to the question, a decision can value all the facts of a case and still adhere to the scope of the section.

With the new approach of decreasing the importance of *by* in Section 197 LRA, the relevance of this wording can be put into context with the European and German ideas. In my view the Constitutional Court judgment in *SAA*, as well as the *Hasco* judgments, both did not clearly wish to exchange *by* with *from* and deny any relevance of it. Rather, they construed it differently and especially abandoned a yes-or-no interpretation concerning second-generation outsourcing. What they did was to establish another criterion that can help examine whether an economic entity was transferred as a going concern. Interestingly, the English Appeal Tribunal in 1993 held a similar view in *Dines v Initial Health Care Services*.<sup>350</sup> While applying the ‘snapshot’ comparison, the court expressed that the second snapshot must be ‘the result of’ or ‘by reason of’ a transfer. It implied ‘some formal nexus between transferor and transferee’.<sup>351</sup> The idea was given up again due to the development in European cases, especially *Stichting*. Nevertheless, the incident shows that *by* has not only concerned courts in South Africa. However, the European concern was focused around another notion of the application: the question of a legal transfer, i.e. the requirements of the changeover of ownership. In South Africa the context was different. The interpretation of the LC or SCA did not entail a contractual nexus between transferor and transferee, but rather focused on an initiative role of the former. In European law the notion *legal transfer* or *merger* has been degraded to

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<sup>349</sup> HJ Willemsen (2009) *NZA* at 289.

<sup>350</sup> *Dines v Initial Health Care Services* [1993] IRLR 321, appealed and turned over by the Court of Appeal [1994] IRLR 336, J McMullen (1994) *ILJ* (UK) 230 at 238 points out that otherwise there would have been an illogical difference between first- and second-generation outsourcing and this were to put the incoming contractor in a much better bargaining position than the original one.

<sup>351</sup> J McMullen (1994) *ILJ* (UK) 230 at 235.

nothing more than a change of supervision, disregarding any contractual or administrative implications. Although an active role of the old employer is not essential in Europe for the ARD to apply, the role of the old employer influences the decision. In a service provision change, the focus of South African and of European law (excluding new regulations in England) lies upon the distinction between a mere activity and an entity that changes hands. For guidance, all jurisdiction turns to a 7-point-test developed in *Spijkers*. The first question that is asked is whether the entity is more labour-intensive or more asset-reliant. The answer to that question already leads the way for the importance of the latter points in the overall assessment. In Germany, for example, a further principle to help examine that first point is to assess if the core of value creation lies within the assets or the people working with these assets. This already determines how important either the use of the assets by the following contractor or the transfer of staff will be regarded. If the assets (machines, premises, etc.) are the core of value creation, the usage by both contractors is important. However, the former contractor who made use of these assets has to give them back, hand them over or even introduce the new contractor to them. This will be necessary, as the value he created towards the client was based on the assets he was provided. The more they were responsible for his service, the less it is possible for the contractor to just 'pack his bags and move on'.<sup>352</sup> If, on the other hand, the value of the business was mainly achieved through labour, the 7-point-test will preferably focus on the transfer of staff to the contractor in order to assess the overall solution. It can be summarized that either way, to answer the question of a business transfer as a going concern in the affirmative the former contractor has to have some input during the change over. This is the reason why in South Africa the word *by* should not be disregard or overlooked, although not as a fourth requirement for the application of Section 197 LRA but as another criterion to establish whether an economic entity (a business) transferred as a going concern. If the first contractor is not involved in the change to the new contractor at all, either by providing the assets or the staff, it will be hard to ascertain a transfer (and still be in line with the constitutional interpretation). It was for the same reason that the first-generation contracting out process was stressed as being almost determinative for the question of a second-generation outsourcing. Although the consequence that, if the first

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<sup>352</sup> *Harsco* para 21.

contract did not fall within the ambit of Section 197, the same would be true for the second, cannot be concluded,<sup>353</sup> it is a major indication if the first-generation outsourcing was regarded as a transfer of an undertaking. If the client later on just changes contractors and expects a similar service, the hand-over may very well trigger Section 197 LRA again. If the first time a business exchanged hands was as a going concern and the same business will now be provided by a third person, the business will change hands once again. For this to happen an active, but not initiative or exclusively positive, role of the first contractor will consequently be necessary. Maybe the draft of Section 197 LRA with *by* should be reviewed more positively after all.

Nevertheless, one other comparative approach should be regarded in this instance. Although the European directive and the German conversion do not regard the roles of the contractor or client as crucial, the TUPE regulations in their new *service provisions changes* do. Regulation 3 (1)(b) TUPE 2006 only applies if the service provision change occurs '*on the client's behalf*'. This shows a contrary position to the argument of the literal school of thought in South Africa, which constrained the application of Section 197 LRA only to the opposite constellation, i.e. on the contractor's behalf. In the case of *Crossroads*, the service provider cancelled the contract and was of the view that Section 197 LRA should apply. There might be cases where the reason for the contractor to demand for the transfer regulation to apply will be to the detriment of the employee, because the client is incapable of supervising it and has not yet found a new contractor.

The *Albron* case should be regarded at this point as well. Although primarily concerned with labour broking, there seems to be a similarity to the South African questions about the roles of the client and the first contractor in a second-generation outsourcing. The contractual employer is the contractor, but the client seems to be the actual employer in charge. Therefore, if the client ceases his contract with the first contractor and changes over to contractor number two, this decision will be assigned to the first contractor, i.e. transferring *by* him.<sup>354</sup> On the other hand the argument would be that it is the client as the old employer who transfers the business to the new contractor, and although the employees are not contractually assigned to

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<sup>353</sup> *Harsco* para 20 referring to YACOOB J at para 106-8 in *SA Airways*.

<sup>354</sup> Reasoning of HJ Willemsen (2011) *NJW* 1546.

him anymore, they in fact 'work' for him. The input of the first contractor is not needed anymore.

Although one might use this foreign jurisprudence again to support an argument in a domestic dispute, it appears to be too farfetched to rely on the arguments of this case. Whichever way the arguments are presented, employees assigned to client or active role assigned to first contractor, the situation interferes with two different sets of contractual relationships. It was pointed out earlier that the employment relationship is different from a normal civil contract because it is of personal nature. There are often unequal positions on opposing sides, and this led to laws protecting the weaker party. As mentioned in an outsourcing context, it is towards the contractor that the workers have to obey their employees' duties, and not to the client. The relationship to the client is based upon a service contract between only him and the contractor. This is the major difference between the *Albron* case and outsourcing cases; the workers are not under the order of a new 'factual' employer, but a contractual partner of their employer.

It is more reasonable to follow the way provided by the Constitutional Court in the SAA judgment and the ideas mentioned that *by* very well is best interpreted in the context of *a going concern*. Still, South African employers should keep the *Albron* case in mind, as for the Labour Courts the European jurisprudence has always been a helpful guide, and if the employee protection requires a new argument it might come to mind. In any restructuring process the management should be aware of the possibility, especially if the companies are interwoven (e.g. *Zikhethele*), that the contractual relations will not be decisive. Especially in the context of labour broking, new developments might appear.

The case is an example for the close connections between the different questions about the application of transfer regulations. The input of *by* could be seen as a fourth requirement, the requirement of a contractual nexus between old and new employer, a specification for the notion *a going concern* or a distinction between the contractual and factual employer. It shows the complexity in this field of law. Another issue that is increasing is situations where the application of Section 197 LRA inverts from being labour protective to being disadvantageous for the

employees. Examples are the sale to a near bankrupt company,<sup>355</sup> and labour broker arrangements.<sup>356</sup>

Still, with the latest Constitutional Court judgment in South Africa, the path has been opened for any outsourcing arrangement to be included and provide automatic transfers. Although these questions have been raised and answered in Europe by the time the latest amendment of the ARD was released, it did not circumvent new litigation and new questions presented to the ECJ. These cases can be of future guidance for the South African labour courts. However, the contentions about *by* and other approaches to the South African statute show how the country has developed its own interpretation and arguments based on domestic characteristics. As much as foreign guidance can be of help for employers and employees in South Africa concerned with questions of Section 197 LRA, the domestic development can only be regarded as positive, as it increases legal certainty based on South African case law.

For now the application has found its clear ambit and it is advisable for an employer to consider its application whenever a restructuring or outsourcing process is contemplated. Even with the comparative approach, some questions still cannot be answered. It remains to be seen if the English service provision changes are advantageous or not. The idea of keeping a business in operation has been decreased to keeping an activity in operation. This activity may not have an additional value that ought to be secured through an automatic transfer. The plain employee protection might be counterproductive in the long run. On the other hand, a decrease in litigation would be welcome, and legal certainty might help German and South African employers to plan their business. The difference in Germany between a service with and a service on assets does not include an explanation of why the one employee deserves more protection than the other. If the concept of core value was carried to extremes, the more a worker is specialised and makes use of important and mostly expensive equipment, the more likely it will represent a *business* and an automatic transfer will occur. However, this highly skilled worker has probably the least problems in finding new employment. The untrained, easily replaceable group of employees who are in need of the protection, on the other hand, will not constitute

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<sup>355</sup> Which would be secured through joint liability and the possibility to pierce the corporate veil.

<sup>356</sup> *NUMSA v Staman Automatic CC and Other* (J1196/03) [2003] ZALC 88 (13 August 2003); *CEPPWAWU & others v Print Tech Pty Ltd & others* (2010) 31 ILJ 1850 (LC).

a business, because the value will be only created through his service. Again, one might make use of the more American and liberal argument, that in every sector an employee can make himself essential and prevent retrenchments. If the retrenchment is inevitable, that worker thus should not be valued higher than any other unemployed person on the job market.

As with most labour regulations, a country has to develop its own fine line of protection and liberalisation. In the application of transfer of undertakings regulations, South Africa has found its pathway and should try to establish legal certainty through conformity of judgments. Such an environment will provide efficacy of employee protection whilst leaving a reliable framework for employers to restructure their businesses and cope with the demands of modern economy and globalisation.

### 3. Chapter Three – Information, Consultation and the Right to object

#### 3.1. Introduction

After the comparison of its application as the main focus of this thesis, another aspect of the provision is interesting to compare in its individual realisation. The rights to information, to consultation,<sup>357</sup> and to object the automatic transfer are closely connected to the purpose of the provision itself.

When a company starts contemplating the sale or outsourcing of parts of its business, it may still take months before any change is implemented. Nevertheless, when a potential buyer is found for negotiations or a contract is being put out to tender, upcoming modifications for the workforce become feasible. If the management regards the transaction as a transfer with its concomitant legal consequences, it can foresee the impact on the employees. On the other hand, most strategies of restructuring involve a certain amount of secrecy, thus the conflict of interests becomes evident once again. All parties, the employers as well as the employees, require information and certainty for their future planning. On the other hand, both employers attempt confidentiality as long as possible. The question in how far the employers have to disclose information about an upcoming transfer is an aspect as similarly important to the employee as the protection of the employment itself.

It can therefore be expected that all provisions share similar ideas of providing the employee with information about his future employment. It shall not be left up to the last day before the transfer that the employee is notified of a change in his contractual counterpart.<sup>358</sup>

As both the English and the German statute derive from the European directive, both ensure a minimum requirement of obligations upon the employer. However, the English statute has specified its obligations to a far greater amount. On the other

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<sup>357</sup> The thesis focuses on information disclosure and does not scrutinize the requirements of consultation obligations. Although both terms are often used in the same context and refer to similar ideas, they represent different rights. If the right to consult is individually analysed, this only entails the employer's duty to present forthcoming changes and listen to the employees' thoughts about them, not a right to bargain, negotiate or veto them.

<sup>358</sup> This again shows a difference between asset deals and share deals, as for most asset deals the change of ownership is obvious to the workforce and directly noticeable in the every day labour. The usual share deal, instead, often involves a slow and quiet takeover where an evident change only takes place once the new major shareholder makes use of his influence through his shareholder rights, i.e. replacing board members or eventually changing the management.

hand the South African Section 197 LRA does not go into detail about the disclosure of specifics of the upcoming transfer, but rather focuses on the pecuniary outcome of the transfer for each employee.

Closely connected to the obligations of information and consultation is the question of whether each employee has the right to object to the transfer and what the outcome of an objection will be. After a detailed outline of the information process, the connection to the power to object will be demonstrated. However, once again, despite their coherent intentions, all countries differ vastly regarding the rights of the employees if they want to opt out of the automatic transfer.

### 3.2. Information and Consultation

The information and consultation process is twofold. All countries place their main focus on information and consultation of employee representatives, often included in other statutes or other acts.<sup>359</sup> This thesis will centre the analysis on the individual employee and his rights despite the influences of collective councils or representatives. Although employee representation has been established in most companies, in smaller businesses or new ventures employees should still be provided similar rights while not yet having established representation. The comparative examination considers the individual information requirements of each provision.

#### 3.2.1. South Africa

Although information and consultation obligations can be found throughout the Labour Relations Act or other statutes, the investigation has to begin with Section 197 LRA itself and only in a second step include others statutes or more general provisions. The analysis will therefore examine Section 197 LRA, dismissal regulations, and conclude with common law and general (constitutional) rules of fair conduct.

##### 3.2.1.1. Section 197 LRA

Having a closer look at the outset of the South African provision shows the deficiency of any obligations on the employer to consult or even inform his employees prior to the transfer. The only parts of Section 197 LRA that regard consultations are subsections (6) and (7).

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<sup>359</sup> E.g. in Germany in the BetrVG (Works Council Constitution Act).

*Section 197 LRA – South Africa:*

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

*(i) either the old employer, the new employer, or the old and new employers acting jointly, on the one hand; and*

*(ii) the appropriate person or body referred to in section 189(1), on the other.*

*(b) In any negotiations to conclude an agreement contemplated by paragraph (a), the employer or employers contemplated in subparagraph (i), all relevant information that will allow it to engage effectively in the negotiations.*

*(c) Section 16(4) to (14) applies, read with the changes required by the context, to the disclosure of information in terms of paragraph (b).*

*(7) The old employer must -*

*(b) conclude a written agreement that specifies -*

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

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

*(c) 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).*

The aim of subsection (6) is the establishment of a structured and reliable process in the case that the parties, employers and employees' representatives, agree on consequences differing from the ones intended in Section 197 LRA itself. In subsection (2) the provision stipulates for an exception to the rule that all contracts of employment transfer automatically to the new employer and with them all rights and obligations, etc. If the parties wish to conclude an agreement to avoid any of these consequences they have to obey to the rules laid out by subsection (6); only through that process the agreement will be lawful. If the employers do not intend to diverge from the general consequences of Section 197 LRA, there is no need for consultation under subsection (6). The same holds true for subsection (7), which does not entail any duty of employee information or consultation prior to the transfer. Instead subsection (7) provides the employees with information about their rights secured in Section 197 LRA and whom to approach if they want to enforce them. All obligations that have transferred to the new employer have to be laid out for the employees; they have to be informed if the new employer, the old employer or both are their accurate opponents. However, as that information only becomes valuable to

the employees after they were opposed to a transfer in their contractual partner, the obligation on the employer can begin only *after* the date of the transfer. The regulation, regarded independently, cannot be extended to a time prior to the actual transfer because the information does not serve any purpose or probably has not been negotiated yet.

To summarize both subsections, the only obligation for the employers to consult with the employees or their representatives is the exception of not intending an automatic transfer or other legal consequences of Section 197 LRA or providing the employee with information that he would only require *post* transfer. Section 197 (6, 7) LRA do both not require the employers, old or new, to provide the employee with information about the transfer itself or any details relating to the transfer.

As Section 197 LRA does not entail any further subsections regarding information or consultation, other statutes separate from the provision itself or general labour rights or practices may provide for a right of information.

#### 3.2.1.2. Dismissal regulation

One argument that has been relied upon was the obligations of information by the employer in Section 189 LRA. That section is already connected to Section 197 LRA as for subsection (6) mentioning it in (a)(ii). In the case of *SACCAWU v Western Province Sports Club*,<sup>360</sup> the latter as the old employer entered into an outsourcing agreement with the Property Facilities Company to take over housekeeping, kitchen and bar hand services. They agreed on Section 197 LRA to apply, especially upon the requirements of subsection (6), and informed the affected employees jointly in a meeting about the upcoming details. The employers did not give the workers (at least verbally) the possibility to object to the transfer. The employees applied for an urgent interim interdict on the grounds that they were not informed prior to the transfer and not consulted in terms of Sections 197 (6), 189 LRA. The court declined all claims. The reasoning was twofold. On the first regard, the court stated that Section 197 LRA itself does not provide for consultation of the affected employees during the transfer.<sup>361</sup> Subsection (6) on its own only gives an exception to the employers to negotiate different terms and conditions, divergent to consequences in subsection (2),

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<sup>360</sup> *SACCAWU v Western Province Sports Club* (2008) 29 ILJ 3038 (LC) (*SACCAWU*).

<sup>361</sup> *SACCAWU* para 22.

and to read the subsection with Section 189 LRA does not in any way extend its scope. Rather, the referral is focused on the contact to the correct employee representatives.<sup>362</sup>

### 3.2.1.3. General rules of fair conduct

However, MOLAHLEHI J pays regard to another set of rules that were brought forward to support the applicants' interdict. They relied on the Constitutional rights 9, 10, 22 and 23 of the Constitution of South Africa. Nevertheless the court denied any Constitutional right as unsustainable, because Section 197 LRA provides for the security of the employment's rights through a transfer to the new employee.<sup>363</sup> As far as freedom of trade or occupation are concerned, the judge dismissed a breach through the outsourcing agreement.<sup>364</sup>

On the other hand MOLAHLEHI puts the focus on industrial relations and good labour practices.<sup>365</sup> Although the employees did not gain any rights for their claim out of these basic rules in labour law, it points out the direction for any employee information or consultation in a transfer environment. In yet another decision, the Labour Court ruled that it was a '... gross irregularity [committed by the commissioner] by finding that the applicant had to engage in a "consultation process" with the first respondents before the transfer'.<sup>366</sup>

On the other hand the Labour Court has stipulated that both employers had a duty to inform the affected employees about the new employer, the terms and conditions of employment, their remuneration and benefits, who and how it would be paid.<sup>367</sup> This statement has been rightly criticized though, because the court failed to deliver any sort of judicial explanation for the duties.<sup>368</sup> Additionally, the context was an

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<sup>362</sup> SACCAWU para 19 – 21.

<sup>363</sup> SACCAWU para 24.

<sup>364</sup> SACCAWU para 25.

<sup>365</sup> SACCAWU para 23.

<sup>366</sup> *Kopeledi Pty Ltd v Madontsela* (2009) 30 ILJ 158 para 30.

<sup>367</sup> *SA Chemical Workers Union v Unitrans Supply Chain Solution Pty Ltd t/a Unitrans Freight & Logistics & Another*, (2009) 30 ILJ 2469 at 2473B-C; in a similar direction, but in the context of unfair dismissal see *Chemical Energy Paper Printing Wood & Allied Workers Union & others v Herber Plastics Pty Ltd & another* (2002) 23 ILJ 1044 (LC).

<sup>368</sup> C Bosch 'The Employee's Right to Procedural Fairness in the Context of Transfers of Businesses' (2009) 30 ILJ 2253 at 2255.

unprotected strike action in response to unjustified conduct by the employer and not a transfer concerning the question of information obligation.<sup>369</sup>

South African Labour Law in its interpretation by the Labour Courts still does not seem to provide the individual employee with any information, let alone consultation entitlements prior to a transfer. His rights are sufficiently protected through the implementations in Section 197 LRA, and extending that ambit is not required.

#### 3.2.1.4. Academic Review of legislature and judicial approach

South African academics have supported different positions.<sup>370</sup> Based upon international comparisons, historic background and logic reasoning, an obligation to inform and consult affected employees has been requested.<sup>371</sup> A closer look at other regulations of the Labour Relations Act shows that the disclosure of information has been an important obligation on the employer. It is especially regulated in the context of dismissals, Section 189 LRA, concerning organisational rights and Section 16 LRA.<sup>372</sup> These are cases though where employment representatives will have to be informed.<sup>373</sup> Additionally, the right of fair labour practices in the Bill of Rights and the Promotion of Access to Information Act 2 of 2000 are cited to support an analogy of LRA provisions for information disclosures in a transfer environment.<sup>374</sup> Despite the legal systematic reasoning, obvious arguments and the view to foreign jurisdictions support that claim. Some of the reasons for the employees to be informed and consulted might be: the possibility to object to the transfer,<sup>375</sup> the interest in the person of the employer,<sup>376</sup> the logistical and technical consequences involved,<sup>377</sup> the possibility to bargain and the respect to the employees being stakeholders in the company.<sup>378</sup> Moreover, the written contract between an employee and employer does not represent the employment relationship that is transferred; a consultation and information process could help decrease friction with the new

<sup>369</sup> C Bosch (2009) 30 *ILJ* 2253 at 2255.

<sup>370</sup> N Smit (2001) at 301; Todd et al (2004) at 87, C Bosch (2009) 30 *ILJ* 2253.

<sup>371</sup> N Smit (2001) at 301.

<sup>372</sup> N Smit (2001) at 301.

<sup>373</sup> N Smit (2001) at 301 referring to Section 84, 85 LRA.

<sup>374</sup> N Smit (2001) at 302.

<sup>375</sup> Which will be regarded *infra* at Chapter 3.3.5.

<sup>376</sup> Keeping in mind the ideas of the common law.

<sup>377</sup> E.g. just a simple change of location.

<sup>378</sup> N Smit (2001) at 302, 3, C Bosch (2009) 30 *ILJ* 2253 at 2258 referring to B Jordaan (1991) 12 *ILJ* 935 at 959.

employer and integrate the employee,<sup>379</sup> not to mention the advantages for the both employers if their employees feel treated fairly.<sup>380</sup>

Smit therefore concludes with the statement that ‘there does not appear to be any sound reason why these rights should not apply in the event of a transfer of an undertaking either.’<sup>381</sup> Nevertheless, it is important to build such a right upon legal grounds. Because the Labour Relations Act or other statutes themselves do not provide for a particular right to information about a transfer process, the options are either to create an analogy of other information regulations or construe it from constitutional rights.

For an analogy, it has to be established that the legislation did unintentionally overlook the necessity to regulate the information obligations for the employers. The development of Section 197 LRA and a systematic view of regulations in closer context with it lead to the conclusion that the drafters were aware of the situation. The Explanatory Memoranda of either Section 197 LRA 1995 or 2002 do not provide background on the issue. However, the information requirements set out in Section 197 LRA (6), (7), in Section 189 LRA and in Section 16 LRA express the concern about information rights of the employees. It can be submitted that the legislature intentionally did not include information or consultation rights for the individual employee *ante* transfer.

Despite the intentions of the drafters, the constitution or the background of the common law might force information obligations upon the employers.

This argument is best combined with the developments in the common law. In the LAC majority judgment in *NEHAWU*, MLAMBO J argued that Section 197 LRA only changed the common law position as far as it expressively stated a different legal outcome; for that it was silent on the agreement between employers was therefore a strong indication that it “was not statutorily amended”.<sup>382</sup> In his view, the silence of Section 197 LRA towards the definition of *a going concern* and the influence of the agreement between the employers left the common law position in force that without an agreement, there would be no going concern and no transfer of employment. In 1987 the Industrial Court stated in its decision of *Kebeni v Cementile*

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<sup>379</sup> C Bosch (2009) 30 *ILJ* 2253 at 2256.

<sup>380</sup> C Bosch (2009) 30 *ILJ* 2253 at 2260.

<sup>381</sup> N Smit (2001) at 301.

<sup>382</sup> *NEHAWU* (LAC) para 8.

*Products*,<sup>383</sup> that an information and consultation process is required to fulfil fair labour practices when transferring a business. The question that has to be answered is: did Section 197 LRA overrule this dictum, regulating the whole aspect, or leave it unregulated and it is still in force? The latter option does not seem to be accurate, as the courts have stated that all aspects are now regulated in Section 197 LRA. In *NUTW v Braitex*,<sup>384</sup> another case of the Industrial Court, the information requirements established that the employees have to be 'informed well in advance of the intended transfer'.<sup>385</sup> This was supposed to provide an environment for negotiations about the transfer. Since the Industrial Court did apply the common law and generally all employment contracts would terminate in the event of a transfer, one could argue those information obligations are now included in the dismissal sections of the LRA. Furthermore, they do not apply after the implementation of Section 197 LRA because employees do not need to negotiate for employment continuation. On the other hand, were those principles installed to inform each employee about upcoming changes, which should be reviewed jointly and were also applied in the instance that the employers contemplated achieving a tripartite transfer agreement?<sup>386</sup> The rights gained on the side of the employee through Section 197 LRA do not suggest that all former rights have to be lost.<sup>387</sup> The employees gained the continuation of employment in all transfer cases, compared to termination in most cases before, but also compared to information in all cases, especially the ones that contemplated an agreement for continuation.<sup>388</sup>

Although this comparison between the two situations of transfer regulation, *ante* and *post* Section 197 LRA, might be a weak argument, it still points out that information

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<sup>383</sup> *Kebezi v Cementile Products (Ciskei)* (1987) 11 ILJ 442 (IC).

<sup>384</sup> *NUTW v Braitex* (1987) 8 ILJ 794 (IC).

<sup>385</sup> B Jordaan (1991) 12 ILJ 935 at 944.

<sup>386</sup> In those situations the employees could not complain of retrenchment if they refused a reasonable new contract with the transferee. *Ntuli v Hazelmere Group* at 719 G-H; *Young v Lifegro Assurance* (1990) 11 ILJ 1127 (IC) B Jordaan (1991) 12 ILJ 935 at 946 criticizes under another aspect that the court rejected the idea that the common law principle of freedom to choose one's employer 'justifies the need for a prior consultation with the employee'. The question is in how far Section 197 LRA has really overthrown this principle.

<sup>387</sup> Once again one might make a connection to the *NEHAWU* judgment of the LAC. If their view upon the interpretation of Section 197 had been correct, the employees would have had the rights of the common law, lost the rights of the fair labour judgments of the IC and only would have gained the perspective that if the employers chose to transfer the employees the terms and conditions and accrued rights were perpetuated. Section 197 LRA would not have been a big step in labour protection.

<sup>388</sup> Todd et al (2004) at 88 point out that it is hard to rely on this argument since Section 197 removed the right to choose the employer. Under the common law the employment either terminated or had to transfer; in both cases the employees had to be informed or consulted.

and consultation is a great aspect regarding fair labour practices. Another aspect that might influence information disclosure in this regard comes from a development regarded in the case *Murray v Minister of Defence*.<sup>389</sup> There the Supreme Court of Appeal establishes a duty of fair dealing.<sup>390</sup> Although only concerned with a claim outside the LRA, the court states that ‘...the common law of employment must be held to impose on all employers a duty of fair dealing at all times with their employees – even those the LRA does not cover’. From the perspective of the Labour Courts it is rather more surprising that the High Court applies this common law rule to employees under the protection of the LRA, and if the judgment will establish a second jurisdiction in labour cases and the probability of ‘forum-shopping’ remains to be seen.<sup>391</sup> However, the interpretation has been denied in a later judgment, *SA Maritime Safety Authority v McKenzie*.<sup>392</sup> It seems that at least a general two-way litigation would not be rewarding. Still, the reappearance of common law rules in the context of labour law is in general accepted and welcomed.<sup>393</sup> Though to avoid a two-way-jurisdiction, the Labour Courts would be advised to achieve a continuous answer to the information obligations before a transfer.<sup>394</sup> If their decisions do not live up to a fair amount, the employees may approach the civil courts the next time.

Nevertheless, in the context of information disclosure the analysis must be distinguished from the application requirements referred to *supra*.<sup>395</sup> While it was obvious that Section 197 LRA covered the *application* exclusively and any constitutional challenge would have to be directed at the wording of the section itself, section 197 LRA on the other hand is silent on any obligations for the employer concerning the information disclosure, and it may be disputed how one should proceed. If the provision has not enclosed the issue, the general duty of fair dealing might be applicable. The question is therefore closely connected to the idea of an analogy, since both times one must prove that the current legislation has not

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<sup>389</sup> *Murray v Minister of Defence* (2008) 29 ILJ 1369 (SCA) (*Murray*).

<sup>390</sup> *Murray* para 5.

<sup>391</sup> P Benjamin ‘Braamfontein versus Bloemfontein: The SCA and Constitutional Court’s Approaches to Labour Law’ (2009) 30 ILJ, 757 at 765.

<sup>392</sup> *SA Maritime Safety Authority v McKenzie* (2010) 31 ILJ 529 (SCA).

<sup>393</sup> T Cohen (2010) 22 SA Merc LJ 420 at 425.

<sup>394</sup> T Cohen (2007) ‘When common law and labour law collide - some problems arising out of the termination of fixed-term contracts’ 19 SA Merc LJ 26 at 44; ‘Implying Fairness into the Employment Contract’ (2009) 30 ILJ 2271.

<sup>395</sup> At Chapter 2.3.1.5.

already covered the subject. In regard to the conclusion *supra*, the legislation has intentionally disregarded an information duty on the employer, hence it would not leave room for a common law rule of fair dealing.

Nevertheless the duty of fair dealing as an obligation to fairness, when an employer makes changes affecting the employee, could represent another argument in favour of an information process. An employer who does not provide information or even neglects any consultation may very well be charged with damages.<sup>396</sup>

The arguments supporting an information process, the new findings of a right to fair conduct for every employee based on Section 23 of the Constitution, and the common law applied inside and outside the scope of the LRA all strongly support the existence of information and to a certain amount consultation obligations on the employer.

#### 3.2.1.5. Information details

If one were to accept that South Africa does provide for a minimum amount of information prior to a transfer out of an analogy of statutes, the common law background or the right to fair labour practices, the next step would be to establish the facts the employer has to provide to fulfil his obligation. The decisions of the Industrial Court, before the implementation of Section 197 LRA in 1995, required the disclosure of as much information needed to provide the employees with the knowledge about the future of their employment relationship.<sup>397</sup> This information would mainly include the date of the transfer, the name and description of the new employer and the schedule of the transfer process. The question is whether the employees or their representatives or unions are entitled to more insight of the upcoming transaction to have enough background when attempting consultations or negotiations.<sup>398</sup> Regarding the decisions made towards this subject and the comparison to foreign jurisdictions, the present rights of information or consultation can only be supported to a minimum amount. Section 197 LRA obviously lays the decision to transfer a certain business to a new owner into the hands of the old employer. The obligations placed upon the employers are exclusive and set out a

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<sup>396</sup> C Bosch (2009) 30 *ILJ* 2253 at 2267 who focuses on the obligation to consult as a requirement for fair dealing if unsubstantial but nevertheless noticeable changes occur.

<sup>397</sup> *NUMSA v Metkor Industries (Pty) Ltd* 1990 11 *ILJ* 1116 (IC) 1124A.

<sup>398</sup> As proposed by N Smit (2001) at 304, 5.

strict set of rules. This includes the possibility to approach the employees and change the legal consequences to a more individual outcome. Only through subsection (6) of the statute are the employees involved in the process of restructuring the business. The sale of a business is an economic decision that itself should not be influenced by labour law regulations but rather is left up to the entrepreneurial freedom of the owner. Nevertheless, to pay respect to the value and stake of each employee, the salient facts of the transfer should be disclosed to him. Otherwise the employers regard the workforce as not more than any other tangible asset to be sold, disrespecting the personal consequences that can be connected to a transfer.

#### 3.2.1.6. Concluding remarks to the South African regulation

Section 197 LRA does not entail any obligations to disclose information about the transfer prior to its execution. This only applies to information about the transfer itself and not information regarding any dismissals or work forum consultations. Still, the South African system of fair labour practices and constitutional rights of workers point towards a minimum amount of information disclosure. Although the recent court decisions have not regarded this as an enforceable right so far, it should be considered as an obligation to ensure the employees' protection. Every employer, old or new, should keep in mind the relations between him and his employees. Either the new employer who will take over the workforce should request an early information process by the old employer, or should be allowed to approach the employees himself. The essential facts of the transfer help not only the employees to adjust to the process. They also protect the employers from unnecessary litigation and later objections, or a slower process of integration into the new company.

#### 3.2.2. Comparative Approach - European background

The European Directive in its first draft of 1977 contained an obligation of information disclosure on the employer. However, it provided the member states in Article 6 (5) ARD with the possibility to circumvent that responsibility for all businesses that did not '*fulfil the conditions for the election or designation of a collegiate body representing the employees*'. Subsection (6) constrained this exception again, through recommending ('may') at least the disclosure of the date of the transfer to the employees. The new draft of 1998 and its final version of 2001 changed insofar as it still distinguishes between businesses with or without employee

representation, but made it mandatory ('shall') to provide a minimum amount of information, which includes not only the date of the transfer but also the reasons and implications of the transfer as well as the measures it will have upon the employees.

*Article 7*<sup>399</sup>

*6. Member States shall provide that, where there are no representatives of the employees in an undertaking or business through no fault of their own, the employees concerned must be informed in advance of:*

- *the date or proposed date of the transfer,*
- *the reason for the transfer,*
- *the legal, economic and social implications of the transfer for the employees,*
- *any measures envisaged in relation to the employees.*

The conversion in the member states was given a broad extent of national influence. Hence England and Germany adopted the requirements differently concerning the content of the obligations, and also in regard to the amount of time needed to adopt the parameters. It was not until 1995 that England had fulfilled all requirements according to the standards expected by the European Commission and the European Court of Justice.

#### 3.2.2.1. TUPE Regulations – England:

Before examining the current information obligations in England it is noteworthy to view the development of the TUPE regulations in this issue. After 1981, the English legislature reluctantly implemented the first version of transfer of undertakings regulations in 1981. It was soon obvious that not all requirements set out by the Council Directive of 1977 were met. These controversies cumulated in 1994, when the European Commission approached the European Court of Justice about the conversion of the Directive in the United Kingdom. The main issues raised have already been mentioned *supra*,<sup>400</sup> but the decision also regarded the English regulation concerning the information disclosure. Until the amendments in 1995,<sup>401</sup> an employer in England only had to consult with Trade Unions that he recognized. Although the directive did provide for an exception if no employee representatives were established, the English regulation failed to convert the directive properly. Another aspect was the absence of any penalty that would enforce the employers to obey their information obligations. Both deficiencies were revised in 1995, and the

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<sup>399</sup> Directive 2001.

<sup>400</sup> At Chapter 2.4.4.1.

<sup>401</sup> The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995, Act No 2587.

English TUPE regulations provided an extended information process and reasonable retribution if the employees were left out.

This background shows again how, over the process of the last 30 years, the legislature, either in Europe or England, paved the way for more employee information. The TUPE Regulations of 2006 concern the issue of information and consultation in the Sections 13 – 15. The most basic requirements are laid down in Section 13 Subsection (2):

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

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

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

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

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

In the excerpt shown above, the four basic requirements of the European Directive are implemented. The fact (or reason), the date, the implications and the measures of the transfer are the least information which has to be disclosed. Additionally, the English regulation integrates the way the information has to be delivered and that it has to take place in due course before the transfer, subsection. The second main focus lies upon the consultation process if any measures on the employees are taken. The proposed measures have to be laid out, and the representatives of the employees can deliver their opinions and recommendations about the plans.

The obligations are on the employer in England to provide any individual employee with sufficient information to adapt to an upcoming transfer. Changes that might affect him will not then come as a surprise, and measures can be taken. The loss of confidentiality is subservient to the rights of each employee.

### 3.2.2.2. Germany

The German regulation mainly repeats the requirements set out in the directive. Due to the strong employee representation and participation in the workplace, § 613a

BGB is closely connected to the BetrVG.<sup>402</sup> Any consultation that is required after the employees have initiated a works council is regulated outside of § 613a BGB. The German Labour Law regulations are spread over vastly different statutes, and the BGB only contains the most profound individual labour regulations. Therefore § 613a BGB provides the single employee with the basic amount of information he needs to get accustomed to a transfer. The subsection regarding the disclosure of information reads as follows:

*§ 613a BGB*

*(5) The previous employer or the new owner must notify employees affected by a transfer in text form prior to transfer:*

- 1. of the date or planned date of transfer,*
- 2. of the reason for the transfer,*
- 3. of the legal, economic and social consequences of the transfer for the employees, and*
- 4. of measures that are being considered with regard to employees.*

The German legislature incorporated the requirements set out in the European Directive under Article (3) Section (6). Every single employee will be informed beforehand about the facts that concern him, and have the changes he will need to get accustomed to explained to him. This subsection was inserted into § 613a BGB in 2002 after the European Directive latest redraft. The German Labour Courts had previously ruled on the amendment that the employers had a duty to inform the affected employees.<sup>403</sup> The difference to the former judicially implemented duty to the new provision is that the employers not only lose rights if they do not inform the employees,<sup>404</sup> but the employees have, according to the requirement of the directive, an enforceable right to this information.<sup>405</sup>

The draft of subsection (5) of the German legislature has been described as overly ambitious.<sup>406</sup> With the outset provided by collective representation and the obligations put upon employers through these statutes, the German law provides the standard required by the European Directive. The new subsection (5) could only

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<sup>402</sup> Works Council Constitution Act.

<sup>403</sup> Federal Labour Court 22 April 1993 – 2 AZR.

<sup>404</sup> See *infra* in connection with the German right to object at Chapter 3.3.3.

<sup>405</sup> HJ Willemsen (2011) at 908: In the German language a difference is made between duty and obligation (Obliegenheit and Pflicht), meaning that not fulfilling a duty would lead to a loss of rights, but the duty itself cannot be enforced by the other party or could it claim damages, an obligation on the other hand gives the other party an enforceable right and can lead to damages.

<sup>406</sup> HJ Willemsen (2011) at 909.

have been aimed at businesses that do not exceed the limit for workers councils, or have not arranged for one yet. The problems that derive from this overregulation are multiple information obligations on employers that lead to redundant administration, and can even have disadvantages for the employees.<sup>407</sup> Although the German legislature tried to carry out a structured and balanced system of employee information, due to the intertwining with collective labour law statutes, it did not have the expected effect.

Germany, as well as England and the European Directive, provides for the minimum standard of information disclosure. While this is provided for every individual employee through § 613a (5) BGB, the German legislature did not align these obligations perfectly with information and consultation provisions of the collective labour law.

### 3.3. Safeguarding the information process

The question that arises is how far the obligations of information disclosure affect the employers and which rights of the employees safeguard their compliance. Two ideas can be found in Europe. On the one hand, the English solution provides the employee with a claim for compensation if the employer does not conform to the standards set out to inform his employees. A different approach has been set out by the German legislature, where the employers are confronted with a different right on the side of the employees. According to Section (6) of § 613a BGB, every employee has the right to refuse his automatic transfer to the new employer. This right may also be valid in England and South Africa, but with the different consequence of concurrent resignation of the employment. In Germany the employment continues with the old employer.

#### 3.3.1. England

England has established a punitive system that gives each employee the right to file a claim against either employer if they did not provide substantial information. Regulation 15 TUPE provides the employees or their representatives with a complaint to the employment tribunal if the employer fails to fulfil his obligations

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<sup>407</sup> HJ Willemsen (2011) at 909: The employer provides information to the employees' representatives and the employees at the same time, while the workers council can still consult the employers on the measures being taken and change them, the worker might already have objected to the transfer due to the 'wrong' information he was given.

laid out in regulation 13 TUPE. The English solution to safeguard the employee's information and consultation is therefore based on a damages claim. If the employers did not stick to their obligations, the court can order them to pay appropriate compensation. The amount is limited in regulation 16 (3) to 13 weeks' pay, which ought to be paid unless mitigating circumstances justify a reduction.<sup>408</sup>

### 3.3.2. German Position and the connection to the right to object

In Germany it has been accepted since its first implementation that the objection of an employee maintains the employment relationship to the old employer.<sup>409</sup> Even if that former employer cannot provide further work for the employee, he has to formally dismiss him. The result under German law is that their former employment relationship is still valid, and if the former employer wants to retrench them he has to do it with a fair reason, § 1 KSchG.<sup>410</sup> As this will in most cases be due to operational requirements, the German law requires the establishment of a 'Sozialauswahl' (social selection) with a point system, for which all employees of the same entity have to be valued on different criteria (age, alimony/child support, length of employment) in § 1 (3) KSchG. The employees with least points on the list are the first to be dismissed. An employee who objects to a transfer may not be retrenched at all.

The connection to the information disclosure arises in the instance where the old employer did not meet his obligations according to subsection (5) of § 613a BGB. The time limit to object the automatic transfer is one month after the date of its implementation. If the old employer does not provide an employee with the correct information, the time limit to object the transfer does not commence. The hedge for the employees' information is implemented in subsection (6):

*(6) The employee may object in writing to the transfer of the employment relationship within one month of receipt of notification under subsection 5. The objection may be addressed to the previous employer or to the new owner.*

As requested by the European Directive, the German statute obligates the employer to inform the employee about the essential facts of the transfer. Although the provision is kept short in wording, the Federal Labour Court has established a guideline of necessary information the employer has to provide to fulfil the

<sup>408</sup> *Sweetin v Coral Racing* [2006] IRLR 252, EAT.

<sup>409</sup> Federal Labour Court, 2 October 1974 – 5 AZR 504/73.

<sup>410</sup> Employment Protection Law (Kündigungsschutzgesetz – KSchG).

'notification under subsection 5' that causes the one month expiration period to begin.<sup>411</sup>

Due to the connection of the information disclosure and subsection (6), the power to object to the transfer is only limited as long as the employer complies with all requirements of subsection (5). Due to the short wording of the information requirements and high demands of the Federal Labour Courts, employers often did not comply with subsection (5), and therefore failed to commence the period in subsection (6). Those cases created the possibility for employees that worked for the new employer to transfer back to their former employer months after the transfer had been finalized. The compliance with the requirements of subsection (5) of § 613a BGB have led to new litigation, where former employees tried to claim their way back into the company of their old employer. The only safeguard for the employers is if the court ascertains the forfeiture of the employee's rights, which is accepted only under strict requirements.<sup>412</sup>

### 3.3.3. *BenQ* and *Siemens* – Objection example

A recent major case that displayed this problem is the case of Siemens selling his mobile business *COM MD* to *BenQ*. In 2005 the German technology company Siemens decided to retract its ambitions in the mobile communications market. The unit Siemens Mobile was sold to *BenQ*, a Taiwanese company, whose newly found German daughter *BenQ Mobile GmbH & Co OHG* bought *COM MD*, the mobile unit of Siemens, as a going concern.<sup>413</sup> Because the business had not been profitable and was indebted, Siemens had to pay 350 million Euros for *BenQ* to take over the entity. Sadly, only two years later the acquisition *BenQ Mobile* had to file for bankruptcy. They had been unsuccessful in turning the business around, and as most of the valuable patents had been transferred to the mother company in Taiwan, most creditors, including the workers, were left behind. That gave rise to a great amount of litigation, when former Siemens employees objected to their transfer more than a year after its implementation. The employees based their argument on the information they were provided and that it did not fulfil the requirements of § 613a (5) BGB. The Federal Labour Court ruled in favour of most claims and agreed with

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<sup>411</sup> Federal Labour Court, 23 July 2009 – 8 AZR 538/08, *NZA* 2010, 89.

<sup>412</sup> Federal Labour Court 24 February 2011 – 8 AZR 469/09, see *infra* Chapter 3.3.3.

<sup>413</sup> That was not disputed.

their still being employed by Siemens. The result under German law is that their former employment relationship was still valid, and their former employer had to regard the criteria explained *supra* when contemplating retrenchments due to operational requirements. An employee who objected to the transfer may not be dismissed at all, and was paid his outstanding salaries.

There were some claims, though, where the German Labour Courts denied the objection of the employee. As *BenQ Mobile* tried to downsize the business it arranged for agreements of termination, with high leave payments. Those employees therefore forfeit their right to object to the transfer, because they triggered the *Umstandsmoment* (element of circumstance) through negotiating on the basis of an employment contract with *BenQ Mobile*. With the time that had passed since the transfer, the *Zeitmoment* (element of time), the German jurisdiction ascertained the forfeiture of their right to object.

In conclusion, the only penalty under German Law is the extension of the time limit for the transferred employees to object to the transfer. The German construction differs much from the English position mentioned above. However, the right of an employee to object has been described as neatly linked with the obligation of disclosure by the employer to employees of the information required under Article 7 (1) of the ARD.<sup>414</sup> It is questionable which approach can be described as favourable in an overall assessment. However, as the power to object has been connected through the information process in Germany, the difference in penalty leads to a different view on objection in England, as well as in South Africa. Only after regarding their approach to the right to object can a comparative evaluation display advantages of the different ideas.

#### 3.3.4. The English position on objecting employees

The European directive does not provide a right to object to the transfer of an undertaking. Hence when the first TUPE regulations were drafted, the main consensus was that if the common law position was given up, employer and employee should equally be restricted.<sup>415</sup> As for the employer, he had to obey the restricting system of automatic transfers with or without his agreement. On the other

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<sup>414</sup> J McMullen 'The 'Right' to Object to Transfer of Employment Under TUPE' (2008) IRLR at 175.

<sup>415</sup> *Premier Motor Medway Ltd v Total Oil Great Britain Ltd* [1983] IRLR 471 at 473 by reason of mutuality of obligation.

hand, as the protection of employees grew, they had to give up their right to choose their employer. This was in context with the concept of statutory novation. Whereas in common law novation the employee has to be informed about the transfer, the identity of the employer and give his consent, the statutory novation is automatic.<sup>416</sup>

Nevertheless, the European Court of Justice acknowledged in 1993 in the case of *Grigorios Katsikas v Konstantinidis*,<sup>417</sup> that employees may choose to object to their transfer. The ECJ based its findings on the fundamental right of an employee not to be obliged to work for a certain employer, but rather choose him freely.<sup>418</sup> From then on it was obvious that the compulsory transfer was only unilaterally binding for the employers.<sup>419</sup>

The court did not mention further consequences after an employee made use of that right. Hence, the employees were dependent on the varying dismissal law of the member states.<sup>420</sup> The harsh impact on the sensitive issue of dismissal law was suggested as the main reason for the courts' earlier reluctance in this area.<sup>421</sup> The judgment affected the amendments the English Government made in 1993,<sup>422</sup> and a right to object still remains in the TUPE regulations 2006, nowadays under Regulation 4 (7):

*„(7) Paragraphs (1) and (2) shall not operate to transfer the contract of employment and the rights, powers, duties and liabilities under or in connection with it of an employee who informs the transferor or the transferee that he objects to becoming employed by the transferee”.*

*(8) Subject to paragraphs (9) and (11), where an employee so objects, the relevant transfer shall operate so as to terminate his contract of employment with the transferor but he shall not be treated, for any purpose, as having been dismissed by the transferor.*

The statute from then on provided the employee with the right to object to the transfer, which can only be evaluated in context with its consequences. It is obvious that an employee, in general,<sup>423</sup> can quit his employment relationship with any employer at any time, given a notice period. Without the right to object to the transfer the employee could still have resigned if he chose not to work for the new

<sup>416</sup> Deakin & Morris (2009) at 206, 3.76; *Secretary of State for Trade and Industry v Cook* [1997] IRLR 150, EAT.

<sup>417</sup> *Grigorios Katsikas v Konstantinidis* (1993) IRLR 179 (*Katsikas*).

<sup>418</sup> *Katsikas* at 183.

<sup>419</sup> P Davies (1996) 25 *ILJ* (UK) 247 at 252.

<sup>420</sup> J McMullen (2008) IRLR 169 at 171.

<sup>421</sup> S Laulom in *Labour Law in the Courts: National Judges and the ECJ* (2001) 145 at 173.

<sup>422</sup> TURERA 1993.

<sup>423</sup> Disregarding fixed time contracts.

employer. Therefore one has to regard the different consequences each possibility leaves for the employee. Regulation 4 (7) prohibits the transfer of the employee's contract of employment, and regulation 4 (8) then regards the objection as the termination of his contract with the transferor and establishes that it cannot be regarded as a dismissal under any circumstance. The employee is not entitled to any rights that normally would arise if he were dismissed. The right to object does not seem to be any different from a normal resignation.

Nevertheless, differences occur as in the case of *New ISG Ltd v Vernon and Others*,<sup>424</sup> when the objections were announced only after the transferee's mother company was revealed and all employees moved to a competitor. The transferee saw a breach of contract because the employees were already involved with the specifics of their new employer, but the High Court denied this argument. It rather stated that the objection reverted back to the date of the transfer and the new employer had not yet been entitled to any rights. This purposive interpretation of Regulation 4 (7) TUPE shows one case which is in favour of the employees, especially when they want to be released from a restrictive covenant.<sup>425</sup> As long as the transferor does not inform the affected employees about the identity of their new employer, the transfer may have taken place, but the right to object can still be exercised. Despite this particular employee friendly interpretation, it will be an exception in transfer case law. The description of the English right to object to the transfer as 'worthless, as no compensation from the transferor is applicable at all',<sup>426</sup> seems more appropriate. In general a right to object equates to an employee's resignation.

On the other hand the employees may rely on their rights in regulation 4 (9) TUPE, which states that in the case of a substantial change in working conditions the employee may be treated as having been (unfairly) dismissed by the employer and further rights arise.<sup>427</sup> This solution was first ascertained by the European Court of Justice in the case of *Albert Merckx and Patrick Neuhuys v Ford Motors Belgium SA*.<sup>428</sup> Anfo Motors had held the dealership for Ford in Brussels and when Ford decided to assign the dealership to Novarobel, some of the employees were offered

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<sup>424</sup> *New ISG Ltd v Vernon and Others* (2008) IRLR 115.

<sup>425</sup> J McMullen (2008) IRLR at 174.

<sup>426</sup> J McMullen (2008) IRLR at 176.

<sup>427</sup> Deakin & Morris (2009) at 206, 3.76.

<sup>428</sup> *Albert Merckx and Patrick Neuhuys v Ford Motors Belgium SA* [1996] IRLR 467 hereinafter abbreviated as *Merckx*.

new positions at Novarobel, but the plaintiffs disagreed with the transfer. Although the salaries and working conditions would have been similar, there was a major difference in the commissions paid for each sold car. The case primarily dealt with the application of the ARD in the situation, and despite the arguments of the plaintiffs the ECJ agreed to a transfer. Still, it helped the employees when it stated that they could exercise a right to object, which had to be treated as a wrongful dismissal by their old employer due to a substantial change of employment.<sup>429</sup>

It followed after that preliminary judgment at the ECJ that the English courts had to review their interpretation of regulation 5 (4B).<sup>430</sup> The connection between regulation 4 (7) and (9) TUPE 2006 is more closely connected than may appear at first glance. Although duties, seniority and all other contractual rights stayed in accordance, and the complaint of the plaintiffs was not a contractual one, the different arrangements for commission were enough to trigger regulation 4 (2) of the directive. The English courts had followed a different approach so far,<sup>431</sup> but not only a breach of contract by the transferee but also an employee objection based on reasonable grounds from then on made the transferor liable.<sup>432</sup> After *Merckx* it was necessary to regard the reasons for an employee's objection to the transfer. They might reveal a substantial difference in terms and conditions between the two employers, and this could lead to a termination assigned to the transferor. The new TUPE regulations 2006 regard this issue in regulation

*4. (9) Subject to regulation 9, where a relevant transfer involves or would involve a substantial change in working conditions to the material detriment of a person whose contract of employment is or would be transferred under paragraph (1), such an employee may treat the contract of employment as having been terminated, and the employee shall be treated for any purpose as having been dismissed by the employer.*

Although implementing the European Directive almost word for word, another dispute had arisen in 2002 through the case of *Rossiter v Pendragon plc*.<sup>433</sup> The court found that for a constructive dismissal claim based upon regulation 5 (4B) TUPE 1981 a repudiatory breach of contract was necessary. While it has been argued that this assertion still applies,<sup>434</sup> it seems more reliable to interpret the new TUPE

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<sup>429</sup> *Merckx* para 37.

<sup>430</sup> Now regulation 4 (9) TUPE 2006.

<sup>431</sup> *Western Excavating v Sharp* [1978] ICR 221.

<sup>432</sup> P Davies (1996) *ILJ* (UK) 247, at 254.

<sup>433</sup> [2002] IRLR 483, CA.

<sup>434</sup> N Selwyn (2008) at 289.

regulations as an explicit reversion of the decision.<sup>435</sup> The explanatory memorandum does not consider the case itself, but refers to the amount of litigation and uncertainty regarding the requirements for substantial changes and a constructive dismissal.<sup>436</sup> Rather clearly, regulation 4 (11) TUPE points out that the rights in 4 (7), (8) TUPE are separated from any other ‘*right arising apart from these Regulations to terminate his contract of employment without notice in acceptance of a repudiatory breach of contract by his employer*’. Contrary to the former regulation 5 (5), TUPE 1981 just preserved the common law right to constructive dismissal if the employer’s repudiatory breach made a change to the contract.<sup>437</sup>

The term ‘substantial change to working conditions’ in the consequence of *Merckx* not only includes apparent contractual changes but non-contractual, environmental or even moral concerns of the employee.<sup>438</sup> Nevertheless, the insertion of ‘*material*’,<sup>439</sup> in contrast to the former TUPE 1981 regulations, in combination with the requirement of substantial changes, sets focus on an objective examination and omits trivial changes.<sup>440</sup>

The English position has undergone a development that provides, through regulation 4 (7-9) TUPE 2006, a reliable protection for the employees. If the employers offer the same terms and conditions and a similar working environment, an objection to the transfer amounts to an employee resignation. In the case where an employee is exposed to substantial changes through the transfer, which do not have to amount to a repudiatory breach of contract, he may resign and be treated as being constructively dismissed.

### 3.3.5. The South African position on objecting employees

In South Africa the question of an objection to the automatic transfer has not made its way to the Labour Courts. Various labour law academics, though, have examined

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<sup>435</sup> Deakon & Morris (2009) at 207.

<sup>436</sup> Explanatory Memorandum to the Transfer of Undertakings (Protection of Employment) Regulations 2006, No. 246 at 7.2. and 7.7.

<sup>437</sup> Sweet & Maxwell *Transfer of Undertakings* (2012) at 4.105.

<sup>438</sup> Sweet & Maxwell (2012) at 2.126.

<sup>439</sup> The European Directive does not make use of a similar word and the courts might as well have to interpret it wider and in accordance with the ARD, but as this is a circumstantial fact it is for the national court to decide, Sweet & Maxwell (2012) at 4.110 regarding *Europièces SA v Sander* 2001 1 CMLR 25, ECJ.

<sup>440</sup> Sweet & Maxwell (2012) at 2.126.

the consequences in theory.<sup>441</sup> When regarding the foreign law it becomes obvious that the question of whether either the transfer is compulsory or the workers have a right to object depends on one's view and is therefore 'highly political'.<sup>442</sup>

As a starting point Section 197 LRA should not be regarded, but rather the Constitution and the Bill of rights.<sup>443</sup> Section 13 and 18 of the Bill of rights prohibits forced labour and instead guarantees the right to freedom of association. If Section 36 of the Bill of Rights is not fulfilled, providing reasonable limitations of the aforementioned rights,<sup>444</sup> an employee cannot be compelled to work for a new employer.<sup>445</sup> Two matters have to be distinguished before further examining the employee's right to object. The right to object does not in any way provide insights on the consequences that arise after an employee has made use of it. Secondly, the right to object only has significance if it is different from resigning with either the old or the new employer.

What the South African Constitution, and most constitutions, provide is the prohibition of slavery or forced labour. Every South African has the right to resign from his employment at any time.<sup>446</sup>

Section 197 LRA now provides for automatic transfers without either the employers' or employees' consent, but rather an evaluation based on facts. It does not include a right to object. Only through the employees' representatives in Section 189 is it possible to find an agreement in terms of Section 197 (6) LRA not to transfer them. When the possibility to object was examined in court, it was regarded only in an *obiter dictum*, stating that the objection would not constitute a resignation but rather a refusal to work, giving the employer a reason to dismiss.<sup>447</sup>

The possible consequences are open for discussion, as no precedents have been set or a guideline has been established among labour lawyers. They range from least favourable to most favourable for the objecting employee. The English position,

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<sup>441</sup> N Smit (2001) at 175.

<sup>442</sup> N Smit 'Automatic Transfer of Employment Contracts and the Power to Object' (2003) *TSAR* 465 at 480.

<sup>443</sup> N Smit (2003) *TSAR* 465 at 483.

<sup>444</sup> Section 35 of the Constitution: limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.

<sup>445</sup> N Smit (2003) *TSAR* 465 at 483 points out again the difference between a servant and a serf.

<sup>446</sup> Limitations are cases of fixed-time employment contracts or notification periods, but all contracts can be terminated immediately for extraordinary reasons.

<sup>447</sup> N Smit (2003) at 223 with reference to *Fourie v Iscor Ltd*, [2000] 21 *ILJ* 2018 (LC) para 8.16.

regulation 4 (7), an objection leading to termination of employment and no claim for leave pay, is the least favourable position. A more favourable position would be if the employee just stayed on with his former employer. Thereafter the old employer may still provide work for the objecting employee or retrench him fairly. This position is more similar to the German approach. Both solutions must be regarded in connection with dismissal regulations.

*186. Meaning of dismissal and unfair labour practice*

(1) *"Dismissal" means that-*

(f) *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.*

Section 186 (1)(f) LRA makes the connection between the transfer of undertaking regulation Section 197 LRA and employees, who because of unsatisfying new working conditions decide to 'object' the transfer. The wording of Section 186 LRA uses 'terminated' as the reason for the employees' end of his employment contract.

Section 186 (1)(f) LRA only applies if the new conditions are implemented on the commencement of the new employment, leaving any later amended changes uncovered.<sup>448</sup> Furthermore, the Section provides a very broad application regarding not only conditions, which can be less favourable, but also circumstances, which can include everything from the employee's status in the company to the view in his office.<sup>449</sup> Two limitations, though, omit an endless use of the provision: the changes have to be substantial and provided, meaning actively influenceable,<sup>450</sup> by the employer. The substantiality requires more than a simple disadvantage but rather considerable changes to several conditions or circumstances, indicated by the plural form in the wording.<sup>451</sup>

A problem that arose in the German statute and was considered as bad legislative drafting has been prevented in the South African regulation.<sup>452</sup> The employee's termination can only be regarded as a dismissal in the sense of Section 186 (1)(f) LRA if there is a causal link between the conditions and circumstances and his

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<sup>448</sup> Todd et al (2004) at 160.

<sup>449</sup> Todd et al (2004) at 161.

<sup>450</sup> Todd et al (2004) at 161.

<sup>451</sup> Todd et al (2004) at 161.

<sup>452</sup> Diverging views upon the transfer between the individual and a collective council may result in disadvantageous decisions of the employee.

resigning.<sup>453</sup> Although this already implies that if those differences were reached through an agreement of Section 197 (6) LRA, an employee cannot rely on Section 186 (1)(f) LRA, it becomes more obvious by pointing out that the less favourable terms were not provided by the employer but rather through negotiations.<sup>454</sup> A South African employee therefore cannot on the one hand be bound through collective representation and on the other hand what seems more advantageous individually.

Despite the similarities to the European regulations, in South Africa Section 186 LRA only defines a dismissal, but as Section 186 (1)(f) LRA is not automatically unfair, Sections 188 – 189 A LRA have to be involved. Neglecting the opinion that a Section 186 (1)(f) LRA dismissal ever can be fair,<sup>455</sup> the employer will have a hard time to prove his changes as being fair. Alternatively, the employees have two other options. They can either rely on Section 197 LRA alone through a declaratory order compelling the new employer to certain terms and conditions, or make use of Section 186 (1)(e) LRA, which provides a dismissal if the employer's conduct becomes intolerable.<sup>456</sup> These options, though, provide for a different situation than that being examined in this context. The right to object that has been scrutinized in this thesis focuses on the situations where the employee does not find sufficient remedy in the clauses of his employment contract, but rather is opposed to changes that are only indirectly connected to it or only appear in practice.<sup>457</sup> As Section 186 (1)(f) can be put in accordance to the TUPE regulation 4 (9) and the European Article 4 (2) and although being slightly different, the other options provided for the employees show a similar field of protection if an employee does not agree with his new employer's working conditions. Although, in practice, the South African Law still does not provide a right to object. The comparison to England demonstrates that such a right would not entail further protection. Regulation 4 (7) TUPE 2006 has only once shown to include more than the general right to resign when the right to object had retroactive consequences. More important, in those instances, is the right to claim a constructive dismissal based on Section 186 (1)(f) LRA. The reason for an objection most certainly falls within the changes that the new employer applies. A difference

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<sup>453</sup> Todd et al (2004) at 162.

<sup>454</sup> Todd et al (2004) at 163.

<sup>455</sup> PAK Le Roux in Cheadle et al *Current Labour Law* (2001) at 9.

<sup>456</sup> Todd et al (2004) at 163.

<sup>457</sup> Similarly the TUPE 2006 regulations make it clear that in contrast to the judgment in *Rossiter v Pendragon plc* [2002] IRLR 483 no repudiatory breach of contract is necessary for the constructive dismissal claim, Deakin & Morris (2009) at 207.

from the English provision occurs when the old and new employer are in different financial situations. In England the old employer is liable. In South Africa if an employee relies on Section 186 (1)(f) LRA and terminates his employment, he must claim unfair dismissal against the new employer.<sup>458</sup>

The protection in South Africa is still sufficient because the employee can either rely on Section 197 (7) LRA and joint liability or, if he was exposed to the new employer's being a 'bankrupt shell,' might pierce the corporate veil. The proceedings of the German statute do not find any indication in the South African law, and based on the common law background, seem implausible.<sup>459</sup> It would have to be for the legislature to amend the provision in order to establish a similar solution. The present law only leaves room for termination of employment and a dismissal claim. However, as the comparison to England has shown, it represents sufficient protection.

Section 197 LRA does not explicitly give the employees a right to object to the transfer. If they terminate their employment relationship on the date of the transfer or a period afterwards, which will still be regarded as a reason related to the transfer, they probably can rely on Section 186 (1)(f) LRA. As in most cases the objection to the transfer is due to disadvantageous working conditions, the employee will be compensated by the new employer. On the other hand, the employee does not have the right to object and then stay on with his old employer. This relationship ends in the case of a transfer. In contrast to the German solution, the South African employees only have the right to object but not the right to remain (with the old employer). The position, although not expressively stating it, is similar to the English regulation and provides the employees with a sufficient amount of rights while securing the employer's intentions to change the ownership of a (complete) business.

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<sup>458</sup> J Grogan (2012) Section 197 dismissals; disregarding the procedural differences and obstacles, which have been described as complicating due to specific rules and time period, P Benjamin (2005) *LDD* 2005, 169 at 176.

<sup>459</sup> N Smit (2003) *TSAR* 465 at 488 argues in favour of the opposite position. If the constitutional framework does not provide for a substantive right to object, the employee should be able to decline the transfer and remain with the transferor if the objection is made on reasonable grounds. This purposive approach is not necessary if the other options provide the employee with enough protection in the sense of compensation. For the employee to remain with the transferee will mainly be based on the hope of higher and secure compensation.

### 3.3.6. Comparative Summary

Germany stands on different grounds regarding the objection to a transfer. The German approach will most likely provide the employee with work even if he objects to the transfer. In England and South Africa, on the other hand, he will be unemployed. Here again it is interesting to focus the question on the reason for the different opinion. Based on the common law background and a high respect towards employee freedom and choice of his contractual partner, it seems contradictory that the civil law system of Germany still provides its employees with such a right. The German reason lies in the basic right of Article 2 I Grundgesetz (GG) of Germany. This right provides for the employee's right of personality, and found one special shaping in the right of objection.<sup>460</sup> Though all three countries derive from a similar background and are on similar terms and conditions for the application and most of its consequences, they implemented or developed a different solution to the problem of employee information and the consequences of an employee's objection to the transfer. If one were to put the power to object in the context of the whole purpose of all provisions, it seems that the German result provides the employee with more protection than necessary. Based on the idea that a business in operation should be kept together, that would include all employees that are assigned to it. If in any business, asset-reliant or labour-intensive, the result after a transfer is the automatic takeover of *all* employees then the business has been identified as a coherent grouping including *all* its employees. Either way the old or new employer will have to retrench employees if the business has to be downsized to be more profitable, and it should not allow the objecting employee to opt out of the pool of possible retrenchment. Additionally, another point in the German regulation should be regarded, as for any operational dismissals the employer has only to regard all employees of the same undertaking. If in both senses undertaking would have the same meaning, and it should if the transferred undertaking (even only as a part of it) has been transferred as a business in operation, there would be no undertaking (or part thereof) left at the old employer as to which the employee could be assigned and compared with.

In England and South Africa, on the other hand, an employee who does not agree with his new employer and does not want to resign from his old employer only has

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<sup>460</sup> Weiss & Schmidt (2008) at 328.

the chance of approaching the courts for an interdict that the transfer did not fall within the ambit of TUPE or Section 197 LRA. That way he can prove that the transfer did not involve a coherent grouping, which would be operated similarly to the previous employer, and circumvent his automatic transfer.

Another difference arises in the person of the liable employer. In England the objection omits a transfer and all claims can only be pursued against the old employer. In South Africa the situation is contrary, due to the lack of a right to object. If the conditions have changed substantially, the employee has to enforce all his rights against the new employer. This seems to be a logical approach, as the old employer is not involved any longer and only a role as a substitute debtor would be possible for him. This is already regulated for the case of insolvency in Section 197 (9) LRA. The English fiction of giving the objection, if announced after the transfer, a retroactive effect, raises the question whether the old employer is the right opponent for any pecuniary claims. For it is the new employer who does not provide him with the same working conditions. Any contractual rights that are not satisfied could be enforced through the employment contract. The substantial changes therefore appear in the everyday practice instead of on paper. The only reason for the old employer to be liable is that he has not ensured that the new employer provides similar conditions to those the employees enjoyed primarily.

Although the European model opts for another solution, the South African regulations cover all probabilities and provide enough protection for an employee whose working conditions have been severely changed to compensate his damage.

#### 3.4. Conclusion

The comparison has shown that the matter of information, consultation and a right to object to the transfer has only partly been resolved similarly in all countries. For the information obligation, the European approach is statutorily regulated and similar in England and Germany. Although South Africa has not implemented those requirements into Section 197 LRA, the constitutional background and general interpretation demands of the LRA and the common law support the argument that information disclosure is mandatory beforehand. An employer not providing the basic facts of such a change would be walking on thin ice and might be sued for damages.

A consultation duty with the individual employee has not been implemented in any regulation. It seems adequate that consultations are entailed between the employers and the employee representatives. Whether, additionally, a consultation with each individual employee should take place,<sup>461</sup> seems to be rather a question of good labour relations than labour rights. The possibility to change terms and conditions insubstantially, Section 197 (3) LRA, is a matter of fact and to consult with each employee beforehand would put disproportionate restraints on the employer.

This is best demonstrated in connection to a right to object to the transfer. If the transfer does not amount to substantial changes, the employee cannot claim a constructive dismissal. The transfer regulations have applied because a business in operation has been taken over. Although two employers are part of the transaction, the regulations circumvent disadvantageous changes affecting the employment or the employees. Since the employers are restricted not to subjectively alter the business through the transaction, they should not be burdened with subjective opinions of individual employees. The employers provide substantially the same working conditions, and the employees therefore cannot choose their preferred employer. As one employer might change working conditions or non-contractual elements of the employment relationship, so should two employers during a transfer be able to. The idea is to safeguard the rights but not improve the employees' position. Therefore the changes do not have to be consulted on or a right to object be established, as long as a single employer could have applied them. If the changes are substantial and they were not agreed upon, the employee might claim a constructive dismissal. The German right to object does not fit into the overall idea of transfer regulation, for it preserves a right that is based on arguments that are not contemporary any more. The freedom to choose one's employer has been proven out-dated in the modern business world and has opened the way for automatic transfers. The German solution provides the employee with benefits from both worlds. The protection is guaranteed through the English and South African solution and still in accordance with political and economical balance that regulates business transfers.

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<sup>461</sup> Favoured by C Bosch (2009) 30 *ILJ* 2253 at 2264, 5.

#### 4. Chapter Four – Conclusion, problems and final results

This thesis regarded two major fields of transfer of undertaking regulations in South Africa and their comparison to Europe, England and Germany. Although extensive research and scientific evaluation has already been placed upon the similarities and differences of the jurisdictions among each other, as well as the advantages and disadvantages of certain characteristics, it seemed constructive to place them in a bigger picture. Under the newest, and hopefully last, Constitutional Court judgment and the still relevant findings in *NEHAWU*, the South African regulation has found its scope of application. The comparison has shown that the edges of each provision are the reason for new and increasing litigation. To prevent exploitation of the regulation by the employees and their representatives, limitations are necessary, while at the same time the role of the employers should always be played in a fair manner.

The first part and the findings assessing the application process should help employers, contractors and employees find answers as to where they stand in a business transaction. If an employer contemplates a transfer in terms of Section 197 LRA, chapter three provided an assessment on which information and consultation responsibilities or rights are assigned to the parties, and whether employees are compelled to transfer. More than part one, the second part of the thesis shows that the development in South Africa might not be over yet. Compared to Germany and England, other solutions seem to be possible, and in terms of fairness more appropriate. Although the courts have disagreed with certain proclaimed rights so far, the view could change based upon rights not directly contained in Section 197 LRA.

##### 4.1. Controversies in the transfer environment

The interpretation of *a going concern*, the application to share sales, the disclosure of information, consultation and the consequences of employee objection would come to mind as present controversies. However, the regulations of transfer of undertakings are problematic on other levels as well. Combination of pension funds,

inequality between old and new workforce,<sup>462</sup> and the question of the affected employees are only a few other subjects that still have to be addressed. Nevertheless, it cannot only be left for the courts to decide on these subjects. Scientific research should evaluate future developments.

As far as this thesis tried to outline the similarities and differences between South Africa and Europe, it should help to guide some upcoming questions in the future. It can only provide some insights about the development in Europe, England and Germany.

Any regulation in the field of transfer of undertakings represents a piece in the bigger picture of labour law. South Africa and Europe decided to increase employee rights over the last century and rejected the at-will employment status of the United States. They established a very accurate and intertwined system of unfair dismissals. To achieve that protection of employment, other ways of retrenchment had to be circumvented, and the transfer of undertaking regulations plays one part in the picture. The examined countries chose those regulations not only to prevent dismissals, but also for economic reasons, i.e. to keep down transaction costs and minimize litigation. The latter is hoped to have increased to a greater extent by the implementation of service provision changes in England. However, all regulations have the problem of not being able to empirically verify their positive input on society and economy. This led to direct criticism from the American point of view, when the Acquired Rights directive was labelled as an example for constraining economies in Europe, especially Germany, because of the inflexible labour market.<sup>463</sup> However, as in many fields of law, theory has to hold up to the arguments presented. The European countries based their transfer regulations on reasonable purposes, and still left enough freedom to entrepreneurial decisions. If it is easy to

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<sup>462</sup> Wynn-Evan, Charles 'The Acquired Rights Directive and changes to contracts of Employment' (1996) ILJ (UK) 230 at 232 points out the harmonization as a serious practical problem and sees the different employment levels as a significant restraint on sales of business. This argument, presented quite often, is arguable. The payments have been calculated into either a sales or outsourcing agreement. Inequalities are a common situation in every company and every employer has to deal with it when structuring his workforce. The transfer itself should not be used to approach changes concerning those aspects. One of the two employers should rather try to achieve improvements through collective bargaining or operational requirements.

<sup>463</sup> AJ Ahanchian 'Reducing the Impact of the European Union's Invisible Hand on the Economy by Limiting the Application of the Transfer of Undertakings Provision' (2002) *Chicago-Kent Journal of International and Comparative Law*, 29 at 57.

determine what has been sold or outsourced and who is transferred, the regulations save the employer paperwork and litigation. The provisions preserve the *status quo*.

On the other hand, it became apparent that in Europe through the ECJ, as well as in South Africa through the Constitutional Court, the purposive approach has gained momentum. Although a change with the zeitgeist and with reality, while based on the values of a constitution or a supranational treaty, is necessary and desirable, courts cannot omit the minimum amount of certainty every legal practitioner deserves. An inconsistent or overly protective construction can lead to short-sited protection, but long-term disadvantages. That would be a result no legislature had in mind when drafting employee protection bills.

#### 4.2. Where will the road lead South Africa?

It is submitted that with its current wording, Section 197 LRA does not have the wide scope its English counterparts has. The TUPE regulations explicitly state that *service provision changes* are covered, and this subsection is applicable despite questions about the transfer of a going concern. Even if the subsection of service provision changes does not cover the facts of a case, still the basic transfer definition might incur the consequences of the TUPE regulations.

Although South Africa may derive more from the common law background of England in this area of Labour Law, its present position stands closer to the European Court of Justice and the directive's approach than the English TUPE regulations. Although no reliable statistical information is available to evaluate the advantages or disadvantages of each system, it is still important to analyse the differences and the society they are used in. The question is whether the differences are due to a distinct political and social background or practical legal facts. In South Africa, the majority of workers are still semi-skilled or unskilled, and the country suffers from a high unemployment rate.<sup>464</sup> The possibility of exploitation of workers or their easy substitution on the labour market seems to be a higher risk than in Germany or England. This might support a wider scope of Section 197 LRA. The courts will have to develop a reliable case law in this area, which can be achieved through homogenous decisions and legal certainty.

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<sup>464</sup> <http://www.statssa.gov.za/keyindicators/keyindicators.asp>.

### 4.3. The impact on employers and employees

If one compares the common law or *ante* Section 197 LRA situation to the present regulation, the new employer is the party losing most of his leverage. While he was able to bargain on how many employees he would take over beforehand, he is bound nowadays to take over all workers (if the requirements are met). The employees gained job security, and an even finer grid of dismissal protection. On the other hand, they lost the right of consultation that the Industrial Court had established in his judgments based on fair labour practices. Still, to exchange consultation without enforceable rights for the new job protection seems to be far more valuable. The old employer does not have to retrench employees anymore. He does not have to consult with the employees anymore and was relieved of the requirements set out by the Industrial Court. He has to calculate the employees into the price of the transfer though, and abide with the requirements of Section 197 LRA, and may still be liable after the transfer. If the former retrenchment and transaction costs weigh heavier than the difference in the price and the gain in confidentiality, the old employer may very well be regarded a winner of Section 197 LRA. Cases may show that the regulations can be restrictive or helpful. However, the result of transfer of undertakings regulation can only be summarized as an improvement for the situation described in the introduction. Each regulation provides protection for employees while minimizing the effect on entrepreneurial decisions. Labour Law implications of transfers are reduced, while still providing a field friendly to any fashion of restructuring and lowering operational costs. The idea is that the occurrence of a transfer will not be recognized; that the asset deal appears as a shared deal. There will be a new management that implements changes while respecting the existing rights of the parties involved. This has effectively been summarized by saying that Section 197 LRA is ‘...preventing two employers from doing what one cannot do’.<sup>465</sup>

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<sup>465</sup> P Benjamin (2005) *LDD* 169 at 170.

#### 4.4. Final Conclusion:

A variety of influences, constant change and legal certainty, the involved parties' and each employer's and employee's interests, present a difficult environment for an overall satisfying statute. Yet the legislature and the judiciary have to achieve this goal. Although not every interest can be fulfilled, through constant development and regard to supranational influences it is possible to cope with the changes and pace of globalisation so no party is left behind in the transfer situation. South Africa itself has to value the interests according to its political views. Transfer of undertakings regulation is an example for any other labour law provision, which is placed between the two opposing interests of employer and employee. It is therefore left up to the legislation to decide if the path taken values investors' interests enough to provide an environment that stimulates economic growths. The wide scope of English TUPE regulation might be reasonable in an economy as the British but not suitable for a still developing country like South Africa. Despite different growth in domestic product and infrastructure, the countries have a different skilled workforce. The similarities to Germany, on the other hand, show that the domestic standard correlates to European law. It could only be to the disadvantage of the employees if South Africa decided to narrow the scope of Section 197 LRA in order to stimulate foreign investment.

However, these questions cannot be answered in this thesis, as they are highly political and economically questionable. On the other hand, one fact has been proven to the disadvantage of all parties. The legislature and the courts have to provide a certain amount of legal certainty, at least through consistent case law, in order to minimize economically disadvantageous effects. The look to Europe provided that.

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