

Nicolaas Joshua Botha

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*“ The Termination and Transfer of Franchise Agreements
within the Context of Section 197 of The Labour Relations Act:
Law and Policy”*

Dissertation Supervisor: Professor Alan Rycroft

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This research dissertation is presented for the approval by the Senate in fulfilment of part of the requirements for the LLM-Commercial Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

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1.Introduction:

Section 197 of the Labour Relations Act¹ has had a drastic impact on the way in which businesses interact and transact in the South African economic climate. The section deals with the transfer of businesses as a going concern. It purports to safeguard the interests of employees by ensuring their automatic transfer to a new employer upon meeting the required elements.² Mergers, acquisitions, outsourcing and secondary outsourcing transactions have all been held to fall within its scope. Due to the seriousness of the effects that the application of the section will have on the enterprise of a possible transferee, businesses have tried to structure their transactions in such a way so as to evade and avoid the application of section 197. This has prompted the courts to scrutinise such transactions carefully in order to get to the core and substance of such transactions. It is of utmost importance to determine what the transaction consists of at its core so as to provide protection to employees from dealings on the part of their employers in terms of which attempts are made to dispose of the workforce by structuring the transaction outside the provisions of section 197.

The fact that the requirements necessary to trigger the application of section 197 have been defined in broad terms have left the courts with somewhat of a discretion in relation to the interpretation of the section. The courts have however not been left to their own devices but have rather been requested to flesh out the requirements of section 197 by having regard to its underlying purpose when its provisions are to be interpreted. Through all of this the courts have fared well in canvassing the purpose of section 197; against which its requirements are to be interpreted and applied.³

A problem has however arisen that proposes to challenge the way in which courts view and apply the objective of section 197 in relation to the requirements contained therein. The mentioned problem refers to the situation in which a franchise agreement between a franchisor and franchisee is terminated, and

¹ Labour Relations Act 66 of 1995.

² N Smit 'Automatic Transfer of Employment Contracts and the Power to Object' (2003) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 465.

³ L Biggs 'The Application of Section 197 of The Labour Relations Act In An Outsourcing Context' (2005) 3 *Obiter* 656.

subsequent to the termination, the franchisor concludes a new agreement with a new franchisee so as to transfer the franchise. Upon the occurrence of such an event one is prompted to ask whether a business has been transferred as a going concern and whether section 197 deserves to be applied.

The Labour Appeal Court answered this question in the negative in the decision between *PE Pack 4100 CC v Sanders*.⁴ As stated, the sparse content of the definitional requirements contained in section 197 has placed a particular onus on the courts to expound on the substance of the requirements by having regard to the underlying purpose of the section. It will be contended that the court, in this particular case, failed to interpret the requirements contained in section 197 in accordance with its objective and purpose. It is further contended that the question at hand stands to be answered in light of the jurisprudence that surrounds the application of the section and its underlying objective and purpose.

The content that is to follow will therefore be focused on franchising as a business entity, the requirements contained in section 197 and the form of legislative interpretation that courts have followed in order to discern the objective and purpose of the particular provision. This framework will provide context and serve as the backdrop against which the *PE Pack* case will be discussed. Ultimately it will be asked whether section 197 allows a proprietor to use a franchise as a vehicle whereupon it could load employees and dump them when it wishes to sell its business as a going concern.⁵

⁴ (2013) 4 BLLR 348 (LAC).

⁵ *Aviation Union of SA on behalf of Barnes & Others v SA Airways (Pty) Ltd* (2009) 30 ILJ 2849 (LAC).

2.Franchising as a business:

2.1.Introduction:

In this chapter regard will be had to franchising as a business entity. This discussion will include an analysis of the nature, varieties, definitional elements, underlying relationships, reasons for, and regulation of franchising in South Africa. The South African legal system recognises franchising as a business entity and regulates it with a combination of case law and legislation.⁶ As a result of the embodiment of a franchise relationship within a commercial agreement, the South African law of contract has a large role to play as to the regulation of the mentioned relationship.⁷

2.1.1. Nature of Franchising:

A franchise agreement is a contract concluded between two parties, the franchisor and the franchisee, wherein the franchisee acquires the right to conduct its business within the pre-established framework of the franchisor. By virtue of this right the franchisee will earn the right to be associated with the trade or service marks of the franchisor, and the franchisor will have the concomitant right to receive remuneration or some monetary benefit from the franchisee for the pleasures that the franchisee enjoys under the agreement.⁸ This benefit was succinctly described as a 'royalty' in *De Beer v Keyser*.⁹ The intention of the parties will determine which rights and obligations should ensue from the agreement.

Both franchisors and franchisees could be either natural or juristic persons. According to the agreement and intention of the parties, the franchisor may grant a single unit, multi-unit or master franchise to the franchisee.¹⁰ A single unit franchise will usually be owned and operated by a single franchisee. Where a franchisee acquires the right to conduct a multi-unit franchise, it will be entitled

⁶With regards to legislation, the Consumer Protection Act treats franchisees as consumers and will therefor play a regulatory role in relation to franchising. Consumer Protection Act 68 of 2008.

⁷ T Woker *The Franchise Relationship Under South African Law* (2012).

⁸ Woker(2012) op cit (n7). The relationship between franchisor and franchisee cannot be classified as one of master and servant, see *Longhorn Group (Pty) Ltd v The Fedics Group (Pty) Ltd* (1995) 4 All SA 194 (W).

⁹ *De Beer v Keyser* (2002) 1 All SA 368 (A).

¹⁰ Woker (2012) op cit (n7).

to own and operate a number of establishments. Within the context of master franchises, the franchisee will have control over a specified geographical area wherein it will have the right to establish its own franchises or enter into direct franchise agreements with sub-franchisees. The duration of the franchise agreement will depend on the intention of the parties.¹¹ Although the franchisee will be buying its own independently owned business, it cannot expect to enjoy the use of the franchisor's intellectual property rights indefinitely.¹² Franchise agreements are predominantly structured in two forms¹³ namely; trade name or product distribution franchises, and business format franchises. A discussion of both forms will follow.

2.1.1.1. Trade name or product distribution franchises:

Trade name or product distribution franchises occur when the franchisor grants a non-exclusive right to the franchisee to sell and distribute the products of the franchisor and also to enjoy the right to use the franchisor's trade or service marks.¹⁴ The relationship between the parties is a limited one due to the fact that the franchisee operates its business within its own independent framework. As a result of the limited scope of the relationship between the parties, the agreement will usually be structured around the intellectual property rights of the franchisor.¹⁵ This is a popular mode of franchising for petroleum distributors and soft drink manufacturers. Companies like Coke and Pepsi have made use of this form of franchising successfully.

¹¹ *De Beer v Keyser supra* (n9). *Cash Converters Southern Africa (Pty) Ltd. v Rosebud Western Province Franchise (Pty) Ltd.* 2001 JOL 8041 (C).

¹² Woker (2012) *op cit* (n7).

¹³ Woker (2012) *op cit* (n7).

¹⁴ *Williams v Natural Life Health Foods Ltd* (1998) 2 All ER 577. The franchisor would be a product distributor while the franchisee will be a product retailer.

¹⁵ T Woker 'Establishing When A Franchise is Actually A Franchise – 'If it Looks Like A Duck, Smells Like A Duck And Quacks Like A Duck, it is Usually A Duck'(2010) *SA Mercantile Law Journal* 12. Also see *Cancun Trading v Seven-Eleven Corporation SA (Pty) Ltd.* (1999-2000) CPLR 173 (CT).

2.1.1.2. Business format franchising:

Business format franchising is more widely applied than product distribution franchises and also provides a better platform for franchisors to protect their trademarks. In this form of franchising the franchisee will conduct its business within the well-established framework of the franchisor and this will include: access to the franchisor's business know-how, transfer of certain skills and information, and on-going training and support that will be provided by the franchisor.¹⁶ This will invariably involve a close relationship between the parties.¹⁷

Included in this agreement will be an entitlement on the part of the franchisee to use the trade, service marks and other intellectual property of the franchisor. In return for this privilege, the franchisee will be required to make a payment to the franchisor in the form of a royalty. The royalties will usually be calculated using the gross monthly revenue of each franchise.¹⁸ Examples of business format franchises are fast food restaurants such as McDonald's and Burger King and convenience stores such as Pick 'n Pay, Spar and Checkers. This relationship will require a greater degree of control on the part of the franchisor as a result of the fact that its assets will be exposed to risk to a greater degree than product distribution franchises.¹⁹

2.1.2. Legislative Requirements:

As a result of the need on the part of the legislature to regulate franchising, a definition is called for so as to bring those relationships that exhibit the necessary characteristics into line with the applicable legislation. Woker²⁰ suggests that franchising can be defined from two different perspectives.²¹

¹⁶ <http://www.thebfa.org/about-franchising-key-facts> (Accessed on 14 March 2013).

¹⁷ Woker (2012) *op cit* (n7).

¹⁸ *De Beer v Keyser supra* (n9).

¹⁹ T Woker 'Franchising And Restraints of Trade-Restraining Ex-Franchisees From Competing With The Franchise Network' (2005) 26 *Obiter* 1.

²⁰ Woker (2012) *op cit* (n6).

²¹ T Woker 'Franchising-The Need for Legislation (2005) 17 *SA Mercantile Law Journal* 49.

Firstly there is the business owner's definition, which states that:

"Franchising is a method of market expansion utilized by a successful business entity wanting to expand its distribution of services through retail entities owned by independent operators using the trade or service marks, marketing techniques, and controls of the expanding business entity in return for the payment of fees and royalties from the retail outlet."²²

Secondly there is a definition of what the law considers to be a franchise.²³ In order to discern the applicable legislative requirements regard will be had to South African, American and English positions.

The Consumer Protection Act 68 of 2008 defines a franchise as:

"An agreement between two parties, being the franchisor and franchisee, respectively-

- a) In which, for consideration paid, or to be paid, by the franchisee to the franchisor, the franchisor grants the franchisee the right to carry on business within the all or a specific part of the Republic under a system or marketing plan substantially determined or controlled by the franchisor or an associate of the franchisor;
- b) Under which the operation of the business of the franchise will be substantially or materially associated with the advertising schemes or programs or one or more trade marks, commercial symbols or logos or any similar marketing, branding, labeling or devices, that are conducted, owned, used or licensed by the franchisor or an associate of the franchisor;
- c) That governs the business relationship between the franchisor and franchisee, including the relationship between them with respect to the goods or services to be supplied to the franchisee by or at the direction of the franchisor or an associate of the franchisor."²⁴

²² Woker (2012) *op cit* (n7).

²³ This is known as the legal definition of franchising.

²⁴ Consumer Protection Act 68 of 2008.

Although there is no statutory definition of a franchise in the UK, there is a code of conduct wherein franchising is defined.²⁵ It defines franchising as follows:

“Franchising is a system of marketing goods and/or services and/or technology, which is based upon a close and ongoing collaboration between legally and financially separate and independent undertakings, the franchisor and its individual franchisees. The franchisor grants its individual franchisees the right, and imposes the obligation, to conduct a business in accordance with the franchisor’s concept. The right entitles and compels the individual franchisee, in exchange for a direct financial consideration, to use the franchisor’s trade name, and/or trade mark and/or service mark, know-how, business and technical methods, procedural system, and other industrial and/or intellectual property rights. This is supported by the continuing provision of commercial and technical assistance, within the framework and for the term of a written franchise agreement, concluded between parties for this purpose.”²⁶

Similarly, the Federal and Trade Commission (FTC) of the United States of America requires the presence of three essential elements in order for a particular relationship to be classified as a franchise.²⁷ The three elements are: The franchisor must give its permission to the franchisee to use its trademark; secondly, the franchisor must exercise significant control over the franchisee’s operation or must offer significant assistance to the franchisee; and thirdly, the franchisee is required to make a payment to the franchisor.

If the legal definitions of franchising are considered and compared, three elements seem essential for a relationship to be considered as one of franchising. As mentioned, these elements are: Firstly, there must be a close relationship between the parties wherein the franchisor and the franchisee collaborate within a specific business framework and which is normally dictated by the franchisor who also exercises control over the relationship. Secondly, the franchisor must allow the franchisee to use its trade, service or other marks and entitle the franchisee to be associated with its advertising schemes or plans.

²⁵ The code of conduct is established by the British Franchise Association (BFA).

²⁶ <http://www.thebfa.org/about-bfa/code-of-ethics> (Accessed on 14 March 2013).

²⁷ <http://www.ftc.gov/os/2007/01/R511003FranchiseRuleFRNotice.pdf> (Accessed on 14 March 2013).

Thirdly, the franchisee must compensate the franchisor for the privileges that it has granted the franchisee.²⁸

2.1.3. Why franchise?

In order to be able to understand the dynamics of the relationships within a franchise, regard must be had to the policies and underlying reasons why franchisors decide to use franchises as a method to expand their business networks, and why franchisees decide to become part of this network.²⁹

Recent studies have shown that independently owned start-up business, when compared to new franchises, have a higher rate of failure.³⁰ Couple this with the fact that the franchisee will be plugging into a successful and proven business model, the reason why someone might decide to buy a franchise becomes more apparent. The fact that in some if not most of the business format franchises the franchisee will receive financial, technical and management training from the franchisor supports this statement.³¹

The reason why a franchisor might insist on undertaking to train the franchisee is to ensure the optimal success of the franchise, and essentially the network of franchises.³² This will be more prevalent in the context of business format franchises. The interdependent and reciprocal nature of the relationship between the parties is highlighted by this contention.³³

²⁸ Woker (2012) *op cit* (n7).

²⁹ *Silent Pond Investments CC v Woolworths (Pty)* (2007) JOL 20088 (D); 2007 JDR 0547 (D). T Woker 'The Franchise Relationship and the problem of Encroachment: *Silent Pond Investments CC v Woolworths (Pty) Ltd* (2008) *SA Mercantile Law Journal* 402.

³⁰ The U.S. Department of Commerce estimated that 95% of franchises succeed, compared to only 25-35 % of independently owned business.

³¹ *Pam Golding Franchise Services (Pty) Ltd v Douglas* (1997) JOL 378 (D).

³² http://www.franchising.com/articles/why_choose_franchising.html (Accessed on 14 March 2013).

³³ Woker (2012) *op cit* (n7).

Financing may also prove to be easier for cash-hungry franchisees when considering buying a franchise due to the fact that the prospects of default on a possible loan would appear to be less likely to a financier seeing the franchisee is associating itself with a successful business model.³⁴

Business entities might choose to expand their market share or distribution platforms by making use of the franchise business model. It is submitted that franchising may be one of the most powerful and leveraged ways that a business and operation can be scaled.³⁵ Scalable businesses earn greater valuations due to the fact that they yield faster growth and greater profitability. By making use of franchising, franchisors will gain access to capital without having to alter its debt or equity structure.³⁶ Another obvious reason why businesses choose to franchise a part of their operations is due to the fact that the franchisor places itself in a position to expand its business network without incurring any of the risks associated with the proposed expansion. It is the franchisee that will bear the risks in this particular instance.³⁷

2.1.4. Relationship dynamics within the franchise framework:

It is inevitable that the discussion above will serve to inform the relationship between the parties to a franchise agreement. Within the context of a franchise agreement, especially a business format franchise, the relationship between the parties is one of interdependence and intimacy.³⁸ If the franchisor is to maximize its profitability it should ensure that the franchisee is adequately trained and

³⁴ http://www.franchising.com/articles/why_choose_franchising.html (Accessed on 14 March 2013).

³⁵ A scalable business implies possible economic growth of the business as a result of the underlying business model. When resources are added to a system, it could render a business capable of increasing its output. Franchises could add to the resources of a business entity. <http://en.wikipedia.org/wiki/scalability> (Accessed on 14 March 2013). The royalty payments serve as the vehicle in terms whereof the franchisor will gain access to the low cost capital.

³⁶ Business entities might also prove to earn higher profits by franchising their businesses, as a result of the impetus by franchisee owned franchises. For example, MacDonald's franchises generate, on average, 20% higher profits than company-owned locations http://www.franchising.com/articles/why_choose_franchising.html (Accessed on 15 March 2013).

³⁷ The risk mentioned relates to the possible failure of the newly opened location.

³⁸ Woker (2012) *op cit* (n7).

properly integrated into the franchisor's business network. The franchisee must ensure that it complies with the franchisor's requests and take measures to incorporate the franchisor's training and business acumen into its independently owned franchise. Because franchise agreements are an example of a relational contract,³⁹ the parties to such long-term contracts should not frustrate their counterparts in the performance of their respective obligations.⁴⁰

Because the franchisee makes a substantial investment by buying the franchise it is placed in somewhat of a compromising position due to the fact that the protection of its investment lies partially in the hands of the franchisor.⁴¹ To prevent its rights, under the franchise agreement, from being revoked it must comply with the demands of the franchisor which might include paying increased costs such as increased amounts of royalties and increased amounts for advertising and marketing.

Because the franchisor's most valuable assets which is its trade, service and other marks, and accompanying goodwill, form part and emanate from the franchise agreement the franchisor must implement particular measures to protect these assets. Franchise agreements are therefore structured in such a way as to impose strict control over the franchisees.⁴²

The measures include, *inter alia*: controlling the franchise's operating hours, the quality of the products produced by the franchisees, the appearance of the employees and the locations where the franchises are to be situated.⁴³ If one accepts that franchisors want to maximize the profits of their business networks, including their franchise networks, it makes sense that franchisors would want to incorporate requirements regarding auditing, financial and

³⁹ A relational contract is one which requires an on-going relationship between the parties. L Hawthorne 'The First Traces of Relational Contract Theory – The Implicit Dimension of Co-operation' (2007) 19 *SA Mercantile Law Journal* 242.

⁴⁰ Hawthorne (2007) *op cit* (n39).

⁴¹ Woker(2012) *op cit* (n7), also see Woker (2005) *op cit* (n21).

⁴² T Woker 'Understanding The Relationship between Franchising and the Law of Competition' (2006) *SA Mercantile Law Journal* 110.

⁴³ Woker (2005) *op cit* (n21).

reporting procedures into their franchise agreements.⁴⁴ It is submitted that franchise agreements should be uniform and that no deviation from this form should be allowed. This is to protect the chain of franchises within the franchisors network. In the judgment of *Silent Pond Investments CC v Woolworths (Pty) Ltd and another*⁴⁵ this was confirmed. Here the court described the franchisors' master agreement as one founded upon a take-it-or-leave-it basis. The personal desires and any requests that potential franchisees might have will therefore not be considered when entering into the agreement.⁴⁶

2.1.5. Termination of the franchise agreement:

The termination of a franchise agreement could result in the happening of a host of consequences. Restraints of trade and the application of transfer provisions of various legislative sections loom large at this particular stage.⁴⁷

A franchise differs from an independently owned business in the sense that the intellectual property, business know-how, advertising and any possible patents belong to the franchisor and is not owned by the franchisee in relation to its independently owned business.⁴⁸ This is evidenced by the fact that once the franchise agreement is terminated the franchisee loses the right to use, or to be associated with the mentioned intellectual property provided by the franchisor. In order to protect their interests, franchisors will usually restrain franchisees from pursuing a similar trade for a duration subsequent to the termination of the agreement. A problem exists as to the goodwill of the franchise. The substance of the question relates to whom the goodwill belongs, the franchisor or the franchisee. A case can be made out for either party seeing as the franchisee provides capital in order to start and run the business, while the franchisor provides the required know-how and forms of intellectual property around which the business will be structured.

⁴⁴ Woker (2012) *op cit* (n7).

⁴⁵ *Supra* (n29).

⁴⁶ No negotiation with regards to the form and substance of the agreement will be allowed. Such measures will serve to protect the franchisor's entire franchise network from prejudice in those instances where a deviation from the standard form is allowed.

⁴⁷ See M Gouws 'The Injunction against vertical restraints in franchise agreements under The Consumer Protection Act' (2010) 504 *De Rebus* 32.

⁴⁸ Woker (2012) *op cit* (n7).

The South African courts have been divided on the issue of whether the goodwill of the independently owned franchise accrues to the franchisor or the franchisee. In *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd*⁴⁹ the court held that the goodwill is designed to protect the trademarks of the franchisor and that any goodwill built up by the franchisee will become the property of the franchisor or any new subsequent franchisee. Woker⁵⁰ contends that this question must be addressed by having regard to the business of the franchisor; namely the selling of franchisees. If one takes the perspective from a franchisor's point of view, this judgment appears to be correct. The franchise network is structured in such a way that the goodwill created by a franchisee in one location may prompt consumers to frequent the franchise of a different franchisee in a different location. In this sense, the franchisees work together to generate goodwill for all the franchisees that form part of the network under the umbrella provided for by the franchisor with its business method and intangible assets.⁵¹

The judgment in *U-Drive Franchise Systems Ltd v Drive Yourself Ltd*⁵² stands in contrast to the *Tamarillo* decision. In this case the court held that the customer connections that the franchisee had built up did not belong to the franchisor, although the court recognized the right of protection that the franchisor's trademarks enjoyed.

Franchisees are usually restricted with regards to the permissibility of transferring their independently owned franchises.⁵³ Because the success of the franchisor's business network relies upon the franchise network as a whole it is submitted that this practice is permissible.

⁴⁹ 1982 (1) SA 398 (A).

⁵⁰ Woker (2005) *op cit* (n19).

⁵¹ Woker (2005) *op cit* (n19).

⁵² 1976 (1) SA 137 (D), *Randeree & others v Belrex 647 CC* (2010) JOL 25376 (KZD).

⁵³ Woker (2012) *op cit* (n7).

The franchisee will be restricted in the sense that it will only be permitted to transfer the business to a specified person or entity. Such terms and restrictions will usually be incorporated into the franchise agreements by the franchisor.⁵⁴

A matter that deserves particular mention pertains to the business know-how of the franchisor and the effects of the termination of the franchise agreement with regard thereto. The business method advocated by the franchisor forms part of the franchisor's intellectual property.⁵⁵ In order to protect their property rights, franchisors introduce measures known as restraint of trade clauses into their franchisee agreements. Restraint of trade clauses serve to prevent contracting parties from undertaking a particular career, business or trade.⁵⁶ As stated, franchisors will use such clauses to protect their interests, whether it be their intellectual property rights or franchise networks.

In *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*⁵⁷ the court found restraint of trade clauses to be valid and enforceable. Restraint of trade clauses can be classified into two forms:

“(1) restraints that restrict franchisees from engaging in a similar trade, business or occupation that will compete with the franchise during the relationship, also referred to as in-term non-competition restraints; and (2) restraints restricting the franchisee from competing with the network for a period of time after their contracts are terminated, also referred to as post-term non-competing restraints.”⁵⁸

The nature of post-term non-competing restraints is such as to preclude the franchisee from entering the same field of enterprise as which it is familiar with after the termination of the franchise agreement.⁵⁹ This exclusion from the economy could prove to be problematic from a franchisee's point of view.⁶⁰ That is the reason why courts have made it onerous for franchisors to enforce such

⁵⁴ Woker (2012) *op cit* (n7).

⁵⁵ Klopper *Law of Intellectual Property in South Africa* (2011).

⁵⁶ Hutchison *The Law of Contract in South Africa* (2009).

⁵⁷ 1984(4) SA 874 (A).

⁵⁸ Woker (2012) *op cit* (n7).

⁵⁹ *Kwik Kopy (SA) (Pty) Ltd v Van Haarlem* (1998) All SA 362(W).

⁶⁰ The franchise agreement will be terminated, and the franchisees will not be entitled to participate in a similar field of the economy with regards to the businesses that were operated within the network of franchises.

restraints. Before a court will find a restraint to be enforceable a franchisor would have to prove that it has a protectable interest. Woker⁶¹ argues that a franchisor will be able to invoke such a clause due to the fact that the goodwill of its network of franchises will provide the required protectable interest.

⁶¹ Woker (2005)*op cit* (n19).

3. The Interpretation of the LRA:

At this stage it would be prudent to give an account, albeit briefly, of some of the theories that surround the interpretation of statutes. This account will serve to inform the discussion of how the courts have gone about in interpreting and applying the requirements contained in section 197. The two approaches that will be contrasted will be the literal and purposive approach to statutory interpretation.

The literal, text based approach to statutory interpretation holds that the plain meaning be given to the provision subject to interpretation.⁶² Only if the plain meaning of the words are ambiguous, vague or misleading or if such an interpretation would lead to an absurd result may the court deviate from the plain meaning.⁶³ A criticism to this approach to statutory interpretation is the fact that words of the text are equated with the intention of the legislature. Such an approach would not be able to take cognisance of the subtleties contained in a section such as 197 of the Labour Relations Act.

The text in context or, purposive approach, stands in direct contrast to the literal approach to statutory interpretation. In terms of this approach the interpreter will attempt to go give effect to the purpose of the legislator by taking account of the context of the legislation, certain political or policy directions and various social directions that surround the enactment of the legislation. As opposed to the literal approach, an interpreter will take account of the context of the legislation from the outset and not only in circumstances where the intention of the legislature is incapable of being deduced from the plain meaning of the words contained in the provision.

The enactment of the Constitution⁶⁴ has had a drastic effect on the way in which courts are required to interpret legislation.⁶⁵ The Constitution has effectively

⁶² Botha *C Statutory Interpretation An Introduction for Students* (2012).

⁶³ This is known as the 'golden rule' of statutory interpretation.

⁶⁴ The Constitution of the Republic of South Africa of 1996.

⁶⁵ D Davis 'How Many Positivist Legal Philosophers Can Be Made To Dance On The Head of A Pin? A Reply To Professor Fagan' (2012) 129 *SALJ* 59. D Davis 'The Importance of Reading: A Rebutter to the jurisprudence of Anton Fagan' (2013) 130 *SALJ* 52.

done away with the literal approach and confirmed the purposive approach as supreme.⁶⁶ Section 39(2) of The Constitution is a peremptory provision that requires courts to interpret legislation in light of the Bill of Rights contained in Chapter 2 of The Constitution. This, in accordance with a purposive approach, obligates the interpreter to have regard to factors outside the text of the provision so as to be able to give effect to the intention of the legislature.

The Labour Relations Act confirms the requirement that courts interpret its provisions in line with its underlying purpose. The Act states that it must be interpreted: To give effect to its primary objects; in compliance with the Constitution; and in compliance with the public international law obligations of the Republic.⁶⁷ This effectively imposes the obligation on any person applying the Act to interpret the provisions of the Act in a purposive manner.⁶⁸

Although there is a large degree of consensus within the courts and academics that a purposive approach should be followed when section 197 stands to be interpreted, there is some dissonance as to the ambit and scope of what the legislature intended to be governed by the provision. Bosch⁶⁹ argues for instance that the intention of the legislature is broad and that the section should be interpreted in a broad and expansive manner so as to give effect thereto.⁷⁰ Wallis⁷¹ however feels that the intention of the legislature was for the section to

⁶⁶ Botha C (2012) *op cit* (n62). Botha finds support for his contention in the fact that the Constitution is required to be interpreted in accordance its objects, spirit and purport.

⁶⁷ Section 3 of the Labour Relations Act 66 of 1995.

⁶⁸ The purpose of the Labour Relations Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of the Act. The primary objects of the Act include: To give effect to and regulate the fundamental rights conferred by section 27 of the Constitution; to give effect to the obligations incurred by South Africa as a consequence of its membership to the ILO; to provide a framework for collective bargaining and the formulation of industrial policy by trade unions, employers, and employers' organisations; and to promote orderly collective bargaining, collective bargaining at sectoral level, employee participation in decision-making and the effective resolution of labour disputes.

⁶⁹ C Bosch 'Of Business Parts and Human Stock: Some Reflections on section 197(1)(a) of the Labour Relations Act' (2004) *Industrial Law Journal* 641.

⁷⁰ Biggs (2005) *supra* (n3).

⁷¹ M Wallis 'Is Outsourcing In? An Ongoing Concern' (2006) *ILJ* 1.

be narrower in scope and to apply only to specific transactions.⁷² As will be seen in what is to follow, the courts have construed the intention of the legislature to be broad and therefore interpreted the provisions of the section in a broad and expansive manner.

⁷² M Wallis 'It's Not Bye-Bye to By': Some Reflections on Section 197 of the LRA' (2013) 34 *ILJ* 779.

4.Labour relations relevant to the transfer of undertakings:

4.1. Introduction:

This section will focus on section 197 of the Labour Relations Act which pertains to the transfer of a business as a going concern. Not only will regard be had to the particular provisions of the section, but also to the policy underlying the enactment of the section. This will be done by analysing the position of the common law before section 197 of the Act, and also by gleaning from the provisions the intention of the legislature. As stated, it is important that the underlying purpose of the section be borne in mind when interpreting the requirements contained in section 197.

4.2. The common law position:

The contract of employment is a *sui generis* contract and of a very personal nature.⁷³ Under such contracts, it is contended that it makes a substantial difference to the employee to whom its functions are to be rendered, and such contracts can therefore not be transferred without the consent of the employee concerned.

Because of the peculiar nature of the relationship that emanates from such contracts, the common law did not make provision for the automatic transfer thereof.⁷⁴

Although unusual, I will use the decision of the former Industrial Court in the *Ntuli & others v Hazelmores Group t/a Musgrave Nursing Home* case to set out the common law position.⁷⁵ It is important to note that neither the Labour Relations Act 28 of 1956 nor the common law provided for circumstances where a business or part thereof was transferred as a going concern. The facts of the *Ntuli* decision were as follows: The four applicants were employed by the Musgrave Nursing Home. The nursing home was then sold to the respondent, Hazelmores Nursing Homes. The applicants averred that their services were not terminated by Musgrave Nursing Homes prior or pursuant to the transfer. Within a week of the

⁷³ W Blackie F Horwitz 'Transfer of Contracts of Employment as a Result of Mergers and Acquisitions: A study of section 197 of The Labour Relations Act 66 of 1995 (1999) *ILJ* 1387.

⁷⁴ N Smit 'Should Transfer of undertakings be statutorily regulated in South Africa' (2003) *Stellenbosch Law Review* 205.

⁷⁵ (1998) 9 *ILJ* 709.

transfer, the applicants were notified that certain redundancies would have to be made, and that members of staff would be assessed to ascertain their suitability for positions in the business. In less than a month, the applicants were notified that their services were no longer needed and they were subsequently retrenched. The applicants did not consider their dismissal to have been fair, and approached the court for relief in this regard.

The court was asked to address various issues in this case, one of which was to ascertain the obligations of the transferor and transferee toward the employees of an undertaking upon the transfer thereof. The court made reference to the South African common law, South African legislation, and the provisions of foreign jurisdictions in order to address the particular question. Then presiding officer Landman M confirmed the position under common law to be that the transferor cannot transfer its obligations under a contract of service without the consent of the employee concerned. As stated, the reason for this lies in the personal nature of contracts of service. In order for such a contract to be transferred, a cession and delegation would have to take place, seeing as such a contract embodies both rights and obligations.

In support of this finding, Landman M placed reliance on the decision in *Nokes v Doncaster Amalgamated Collieries*⁷⁶ where it was said that a citizen is entitled to choose the employer for whom he is to work, meaning that the contract embodying his obligation to render his services may not be transferred without the consent of the particular employee. He affirmed the common law position that in the absence of an agreement between the transferor and transferee as to the continuity of employment, the contracts of service of the employees would come to an end. It was held that the standard practice in the ordinary course of business was for the transferor to terminate the contracts of service prior to the transfer of the business.⁷⁷

The court obliquely looked at the practice that is required to be followed by the transferor before terminating contracts of employment in the context of transfer

⁷⁶ 1940 AC 1014.

⁷⁷ Smit (2003) *op cit* (n74).

of undertakings, by making reference to the then ground breaking decision in *Kebeeni & Others v Cementile Products (Ciskei) (Pty) Ltd & Another*.⁷⁸ The court remarked that the obligations of the transferor of the undertaking, prior to terminating the contracts of employment, included (a) giving notice to the trade unions representing the employees so as to consult with them in order to discuss measures that will safeguard and protect the interests of the employees concerned, and (b) to give notice to the work-force as a whole of the proposed disposition of the business,⁷⁹ and (c) to incorporate measures into the agreement ensuring the protection of the work-force. One such measure was to incorporate a clause into the agreement providing for the contracts of employment to be transferred to the transferee of the business, much like the effect of section 197 of the current Labour Relations Act. The court, however, did not amend the common law by providing for the compulsory transfer of employment contracts in circumstances where an undertaking or part thereof had been transferred.

What can be elucidated from the above is the barren position left for the employees of an undertaking which is subject to a transfer.⁸⁰ The common law placed no obligations on transferors and transferees to make provision for the continuity of the employee's employment.⁸¹ Although the *Kebeeni* decision made certain remarks as to the duties of the transferor, very little was said about the obligations of the transferee.

Under common law, the transferor may notify the employee of the intended transfer and thereafter retrench the employee, or transfer the contract of employment to the transferee provided the transferee accepts to employ the transferee, and only if the employee accepts to be employed by the transferee.⁸² Because the management models, financial practices and business methods of

⁷⁸ 1987 (8) 442 (LC).

⁷⁹ In this regard see *Hoogenoeg Andolusite (Pty) Ltd v National Union of Mineworkers* 1992 13 ILJ 87 (LAC), where it was held that employers were under an obligation to inform its employees of the effect of a transfer, and also to consider the interests of those affected employees when negotiating the contract that would result in the transfer of the undertaking.

⁸⁰ M Wallis 'If Section 197 is the medium, what is the message?' (2000) *Industrial Law Journal* 1.

⁸¹ Smit (2003) *op cit* (n74).

⁸² Smit (2003) *op cit* (n74).

business owners differ, different preferences may be had as to the people to be employed by a particular undertaking. This will invariably influence the decision of the transferee to employ a particular person that had been employed by the transferor. An employee that is highly regarded by the transferor may be found to be inadequately equipped to perform a function by the transferee. Then, as to the undertaking itself, the transferee may want to downsize the particular undertaking, close it down to harvest the assets or restructure the undertaking before reselling it, resulting in redundancies of particular employees and rendering such employees unemployed.

Various other questions remained such as whether or not the transferee has committed an unfair labour practice by retrenching particular employees after the transfer, or the question of whether the transferor or transferee is liable to pay severance pay to the employees so retrenched. Such questions, although important, remain outside the ambit of this dissertation and will therefore not be discussed further.

4.3. Section 197 of the Labour Relations Act:

This section will comprise of a discussion of the current provisions of section 197 of the Labour Relations Act. Regard will be had to the effect of those provisions, also to the way in which the courts have gone about in applying them. Importantly, the intention of the legislature and policy underlying section 197 will be gleaned from this discussion. As will be seen, the underlying purpose of the provisions of section 197 has allowed the courts to adopt a purposive approach in interpreting the requirements contained in the section. This has resulted in the inclusion of a range of transactions that would not have normally attracted its application.

Section 197 is to be found in chapter eight of the Labour Relations Act which deals with unfair dismissals. The core of the section lies in subsection 2 and states that:

“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 employment contracts immediately in existence before the date of transfer:

- b) All the rights and obligations between the old employer and employee at the time of the transfer continue in force as if they were rights and obligations between the new employer and 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 the employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer."

It has been stated that section 197 purports to balance various competing interests that may be affected when an undertaking is transferred, such as; the employee's continuity of employment, its right to choose its employer, the reluctance of the transferee to comply with obligations that were created between the transferor and the employee, the transferor's interest in securing a smooth and successful transfer of his undertaking, and the transferee's interest in choosing the people to form part of his workforce.⁸³

The freedom of the employee to choose her employer is overridden by this section, due to the fact that the transferee is automatically substituted for the transferor.⁸⁴ The contracts of employment remain in force between the transferee and the employee and the employee can therefore enforce any provision of such a contract against the transferee. This results in a departure from the common law position where the employee's consent to be employed by a particular person was central to the continuity of its employment. It can be stated that the employee's freedom to choose his or her employer has been subjugated to the policy of ensuring the greater good for the entire work-force; the provision purports to ensure the continuity of the employment of the employees of the entire business, or part of the business that is subject to the transfer.

Apart from the criticisms attracted by the enactment of section 197, various advantages are attracted by its application. Firstly, the security of employment of the work force is ensured. Secondly, large transaction costs associated with the

⁸³ A Van Niekerk et al *Law @ Work* (2012). Smit (2003) *op cit* (n74).

⁸⁴ *Foodgro, A Division of Leisurennet Ltd. v Keil* (1999) 20 ILJ (LAC).

transfer of an undertaking and primarily borne by the transferor will be eliminated due to the fact that the transferor will be relieved from paying severance pay to retrenched employees. Thirdly, the transferee gains large commercial advantages by retaining experienced and trained employees.⁸⁵

4.3.1. Requirements of section 197:

It is important to determine when section 197 will apply, especially because of the peculiar effects that will ensue as a result thereof. A careful reading of the section reveals three requirements that have to be met in order for the section to be applicable.

The three requirements are: firstly, a transfer by one employer to another; secondly, the transferred entity must be the whole or part of a business, trade, undertaking or a service; and thirdly, the business must be transferred as a going concern.⁸⁶ Each of these requirements will be discussed in due course. Because of the complex nature of section 197 and the problems that arise with regards to its application to franchising agreements, reference will be made to foreign legislation and how the courts of those jurisdictions have gone about in applying its relevant provisions.⁸⁷

4.3.1.1. The meaning of Transfer:

Section 197 (1) (b) defines transfer to mean 'the transfer of a business by one employer (the old employer) to another employer (the new employer) as a going concern'. The section does not continue to specify instances in which a transfer will be deemed to occur and it is for this reason that case law must be approached to provide assistance.⁸⁸

From the face of it, it appears that at least two people must be involved in this transfer; the old and new employers respectively. Secondly the undertaking

⁸⁵ Van Niekerk (2012) *op cit* (n83).

⁸⁶ Van Niekerk (2012) *op cit* (n83).

⁸⁷ Biggs (2005) *op cit* (n3).

⁸⁸ Van Niekerk (2012) *op cit* (n83).

must be transferred between these parties as a going concern.⁸⁹ It has been suggested that 'transfer' refers to the method in which the business or undertaking is changed hands. Instances that spring to mind are transfers pursuant to the sale of a business or undertaking, mergers, acquisitions and other restructuring activities.

This is by no means a closed list especially when considering the positions of commentators and judicial decisions that call for a robust and wide definition of this concept.⁹⁰

What is not included in the list of instances are those circumstances where the ownership of a company is sold by way of a share transfer.⁹¹ The reason for its exclusion is the fact that the company is distinct in law from its members and that the identity of the employer will be the same as before the transfer.

In the *Schutte v Powerplus Performance (Pty) Ltd*⁹² it was held that the concept of 'transfer' goes beyond mere instances of sale and includes restructuring operations, mergers and take-overs. It was further held that such operations might take place by way of a donation or an exchange of assets and still constitute a transfer. The decision in the *Schutte* case can be categorised to form part of the larger choir singing the praises of a purposive interpretation of section 197. The decisions in *Tekwini Security Services CC v Mavana*,⁹³ and *Pexies Restaurant v Chelane Ephraim Moshela*⁹⁴ further attest to this proposition. In the *Tekwini* decision the absence of a contract between the transferor and transferee did not deter the court from finding that a transfer had occurred. In *Pexies*, a transfer was held to have occurred where the seller regained possession of an undertaking previously sold. In both of the above-mentioned decisions it was

⁸⁹ N Smit, G Mpedi 'An Update on Labour Law Developments from the South African Courts: May 2010-February 2012: Aantekeninge (2012) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 522.

⁹⁰ N Smit 'The Labour Relations Act and Transfer of Undertakings: The Notion of a Transfer (2003) *De Jure* 328. Also see *Schutte v Powerplus Performance (Pty) Ltd* (1999) 20 *ILJ* 655 (LC).

⁹¹ *Ndimas v Waverly Blankets Ltd* (1999) 20 *ILJ* 1563 (LC). *Long v Prism Holdings* (2010) *ILJ* 2110 (LC).

⁹² *Supra* (n90).

⁹³ 1999 20 *ILJ* 2721 (LC).

⁹⁴ Case No J651/99 judgment of 1999-02-26.

confirmed that regard must be had to the TUPE⁹⁵ regulations seeing as section 197 derives therefrom. It is for this reason that it will be necessary to reflect on the decisions relating thereto, albeit briefly. It will further be necessary to have regard to those decisions in which the European Community's Acquired Rights Directive⁹⁶ have been interpreted, seeing as it and the provisions of TUPE are inextricably linked with each other.

Section 197, the directive, and TUPE accept that employees stand to suffer prejudice in those instances where contracts of employment are to be transferred.⁹⁷If this is the *raison d'être* of those provisions, namely protection of the work force, it stands to reason that an interpretation must be called for that purports to protect the employee in transfer transactions. It is easily discernable from the following judgements that the wide and robust approach to the interpretation of section 197 is ascribable thereto. The judgments handed down by the European courts and the decisions of the South African Labour and Labour Appeal courts confirm this contention. There are commentators that argue, in addition to employee protection, that courts follow the broad and robust approach to prevent parties from structuring their transactions in such a way so as to circumvent the application of the relevant labour provisions; this also goes to the heart of these provisions which is to protect the work force.⁹⁸

Under the Acquired Rights Directive European courts have held a multiplicity of transactions to attract the application of the Directive. In the *Sophie Redmond Stichtung v Hendrikus Bartol* decision⁹⁹a transfer was held to have occurred

⁹⁵ Transfer of Undertaking (Protection of Employment) Regulations 1981, SI 1981/1794, as amended by TUPE Regulations of 2006. The TUPE regulations were created under British law to provide protection to affected employees within the transfer of undertakings. Similarly to the TUPE regulations, the Acquired Rights Directive serves to ensure that the terms and conditions of employment are maintained for employees that may be affected by the transfer of an undertaking. <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/acquiredrightsdirective.htm>. (Accessed on 4 October 2013).

⁹⁶ Directive 77/187, as amended by Directive 98/50/EC and as Consolidated by Directive 2001/23/EC.

⁹⁷ Smit (2003) *op cit* (90).

⁹⁸ Blackie (1999) *op cit* (n73).

⁹⁹ 1992 ECR 3189 (ECJ).

where a legal person ceased activities due to the loss of government subsidies to a competitive organisation with similar aims. In the decision between *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/C*¹⁰⁰ the cancellation of a lease agreement of a restaurant followed by the transfer of the management contract to another operator was held to constitute a transfer. Similarly in *Berg v Besselen*,¹⁰¹ The European Court of Justice held that the directive was applicable where a discotheque was transferred pursuant to a lease/purchase agreement, and that the directive was also applicable where the undertaking had to be transferred back to the lessor/seller as a result of an order made by the court terminating the contract between the parties.

An important question then stands to be answered. That is whether the approach followed by the European courts with regards to the meaning of a 'transfer' is wide enough to encompass transactions like outsourcing, second-generation outsourcing, compulsory tendering, and termination and transfer of franchise agreements.

The South African courts have held the provisions of section 197 to apply to outsourcing transactions.¹⁰² The notable decision of *NEHAWU v University of Cape Town*¹⁰³ stated that transactions where cleaning, gardening and maintenance services are outsourced they potentially fall within the ambit of section 197.¹⁰⁴ The decision in the *South African Municipal Workers Union and Others v Rand Airport Management Company (Pty) Ltd and Others*¹⁰⁵ confirms this position.¹⁰⁶

¹⁰⁰ Case 324/86 1988 ECR 739.

¹⁰¹ 1988 ECR 2559 (ECJ).

¹⁰² An outsourcing transaction takes place where services are put out to tender for a fee. The contractor to whom the services are tendered will then perform the services in return for a fee for a determined period of time.

¹⁰³ (2003) 24 ILJ 95 (CC).

¹⁰⁴ The court, however, declined to make an order specifically applying section 197 to the particular set of facts, and referred the matter back to the Labour Appeal Court.

¹⁰⁵ (2005) 3 BLLR 241 (LAC).

¹⁰⁶ If the transaction, outsourcing particular services, comply with all of the requirements posed by section 197, the consequences of section 197 will ensue.

Notably both of the above-mentioned judgments make reference to the decisions of the European courts. The importance of European case law is particularly relevant when it is asked whether section 197 is applicable to second-generation outsourcing transactions. The decision in *Dines v Initial Services*¹⁰⁷ prescribed a two-phased approach to determine if a second-generation outsourcing transaction fell within the ambit of the transfer provisions. It was held that the absence of a contractual relationship between the old and new employer is not a determinative criteria for ascertaining whether a transfer has taken place. A transfer will therefore be deemed to have taken place where a service is outsourced by an undertaking, the contract providing for such outsourcing cancelled, and thereafter issued and transferred to another service provider. This approach entails that upon the termination of the contract to outsource it is reverted back to the original employer/transferor and is therefore capable of being transferred when it is reissued to a different service provider. This decision was followed by the Labour Court in *COSAWU v Zikhethale Trade (Pty) Ltd.*¹⁰⁸ It was held that section 197 does not upon the plain reading of the provisions provide for the application to outsourcing and second-generation outsourcing contracts. However, the court followed a purposive interpretation of the provisions to include the transfer of contracts of service provided that the business remained the same after the transaction.

It is submitted that second-generation outsourcing should be included in the application field of section 197. It has been clearly established that first-generation outsourcing falls within the ambit of section 197, and rightly so, seeing as it complies with the requirements of section 197. If second and subsequent outsourcing contracts were to be excluded from section 197 commercial disparities and difficulties may arise.

Proprietors would want to enter into transactions at a stage later than the first generation of transfer and outsourcing contracts, seeing as this would entitle them to evade the costs and difficulties involved in a situation where all

¹⁰⁷ (1994) IRLR 336 (EAT).

¹⁰⁸ (2005) 9 BLLR 924 (LC).

contracts of employment are transferred to the transferee.¹⁰⁹ This will result in the employees involved in second-generation transactions to be less protected than those under the first transaction. Clearly this is unacceptable and goes against the rights of equality, fair labour practices, and non-discrimination that the South African Constitution provides for in the Bill of Rights.¹¹⁰

It is therefore submitted that a purposive interpretation of section 197 is capable of including second-generation outsourcing transactions within its purview. The only way in which such transactions are to be excluded is if they fail to meet the other substantive requirements of section 197.

The Constitutional Court confirmed this in the case between *Aviation Union of South Africa v SA Airways (Pty) Ltd*.¹¹¹ In delivering the judgement the majority of the Constitutional Court held that a transfer from one employer to another as opposed to by one employer to another was capable of constituting a transfer for the purposes of section 197. This essentially brought second-generation outsourcing transactions that complied with the requirements of section 197 to within its purview.

4.3.1.2. The meaning of a business:

Section 197 defines a business to mean the whole or any part of a business, trade, undertaking or service. It is important to place the enterprise that is subject to the transfer under the proverbial microscope to ascertain if it falls under the provisions of section 197, because only those entities transferred within the meaning of the section will enjoy its application.

Firstly the meaning of what constitutes a business, trade, service or undertaking will be considered, thereafter, attention will be paid to the question of what is meant by a part of a business, trade, undertaking or service. An important part of this section will be dedicated to the difficult task of determining whether a business has been transferred in outsourcing transactions.

¹⁰⁹ Van Niekerk (2012) *op cit* (n83).

¹¹⁰ The Constitution of The Republic of South Africa of 1996, hereinafter referred to as the 1996 Constitution.

¹¹¹ (2012) (2) BCLR 117 (CC).

It is under the section devoted to the study of what constitutes a part of a business where outsourcing transactions will be discussed.

Due to the lack of South African jurisprudence in this regard, guidance must be sought in the decisions of the European courts. Reference will therefore be made to relevant European decisions. In determining the nature of the transferred entity, guidelines exist as to factors that need to be considered. Such factors include: assets; goodwill of the undertaking; the employees involved; management staff; the way in which the work is organised; operational resources available to it, *etc.*¹¹²

It has been suggested that in order to determine the nature of the subject matter of a transfer, it must be asked what the transferor will be divested of and whether that can be typified as a business, trade or undertaking.¹¹³ One judgement of the Labour Court appears to shed some light on the evasive concept of a 'business'. In *National Union of Metalworkers of SA v Staman Automatic CC*¹¹⁴ the court reflected on the relationship between the employees and assets used by them in order to manufacture certain products for the benefit of the business. The respondent was a manufacturer of components for various industries such as that of: furniture; automotive; electronic; construction, *etc.* Machines were used and operated by the employees to bring forth the manufactured components. The respondent tried to transfer the employees to a temporary employment service. In asking the question of what the transferor was divested of, it was clear that it was only the employees affected. What was not transferred was a business. No manufacturing equipment or assets, apart from the employees were transferred, with the consequence that no components could be manufactured due to the fact that the employees did not possess the necessary equipment to produce it.

The court held that the transferor tried to transfer the services of the employees. It must not be understood that services are incapable of constituting a business.

¹¹² Van Niekerk(2012) *op cit* (n83).

¹¹³ Bosch (2004) *supra* (n69).

¹¹⁴ (2003) 24 *ILJ* 2162 (LC).

Section 197 clearly provides for this and has been interpreted to mean as much by the Labour Appeal Court in the *Rand Air* decision. What is important to deduce from the *Staman Automatic* case is that it is imperative to have regard to the particular undertaking as such. The particular business, service or undertaking provided must be ascertained, upon which it must be asked what assets are necessary to further the objectives of the particular entity.

If the undertaking requires assets of a particular nature to serve its purpose, there can clearly be no transfer if the employees are transferred without the necessary assets. Inversely, where an undertaking solely provides services and is then transferred without any assets, a transfer may occur if the employees that provide the services are transferred without any assets, provided that they consist over the capacity to perform the same functions and provide the same services after the transfer. Importantly, however, the services so provided must be ascertained by taking the whole package into account. It has been held by the European Court of Justice that the entity cannot be typified by merely having regard to the activity entrusted to it.¹¹⁵

Under the European Directives on the transfer of undertakings, the European Court of Justice has developed the concept of an 'economic entity' to determine if a business has been transferred. The judgment of *Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice*¹¹⁶ defined it to mean an organised grouping of people and assets, that work together to further a particular economic activity in accordance with the objectives of the undertaking involved. This position is clearly in accord with the approach followed by the *Staman Automatic* case, where the relationship between the function of the undertaking, the assets, and employees involved were emphasised in ascertaining whether the subject of the transfer was a business.

As stated, problems arise in situations where parts of businesses or undertakings are transferred.

¹¹⁵C Bosch 'Transfers of Contracts of Employment in the Outsourcing Context' (2001) *ILJ* 840.

¹¹⁶ (1997) *IRLR* 255 (ECJ).

In such circumstances it needs to be ascertained if it formed part of the transferors' business. The catalyst for the transfer of a part of a business, in most instances, takes the form of outsourcing transactions. Outsourcing pertains to the hiring of service providers outside the enterprise to take over a function or department of the transferor's enterprise. Non-core activities are usually involved in these transactions.¹¹⁷ Because the outsourced service must form part of the business, difficult questions are brought into the frame: such as whether the transferred entity formed part of the core business of the enterprise; if the transferred entity constituted a service; which assets, if any were needed to provide the service, *etc.*

From the outset, a distinction has to be made between the form and substance of the entity transferred. The *Rand Airport* decision illustrates this point succinctly. The Labour Appeal Court held that the outsourcing of gardening and security services constituted a part of a business for purposes of section 197. The court reached this finding by relying on the provisions of section 197 which states that business or part thereof includes the provision of a service. The court therefore placed reliance only on the inclusion of, a 'service', in the definition of a business in section 197. The investigation as to the relationship between the objective and purpose of the business, and how the employees contributed to the furtherance thereof had thus been disregarded.

In the *court a quo*, account was taken of a multiplicity of factors such as the goodwill, management structure, objective of making a profit, and whether it formed part of the core functions of the business. Upon taking those factors into account, it was found that a business was not transferred due to the fact that the services did not constitute a part of the transferors' business. This seems to be in accordance with the approach followed in the *Staman Automatic* case and the position of the European courts. Although the inclusion of services in the definition of a 'business' in section 197 is an important indication as to the nature of the enterprise, this has to be considered together with the other factors mentioned.

¹¹⁷ Bosch (2001) *op cit* (n115).

This position has been supported by the Constitutional Court in the *NEHAWU* decision where it was held that regard must be had to the substance of the transaction and that in order to ascertain what the substance is it must be asked if assets were transferred with the employees, among other things. If the enquiry is not done in such a manner, a very limited number of transactions will not attract the application of section 197.

In order for the part of a business to be covered by section 197, it must be an identifiable component of a business that is severable from the entire business.¹¹⁸ This will only be done if regard is had to the substance of the transaction, and the substance will only be ascertained if the particular functions provided, assets involved, management structure and purpose of “part” of the business is considered cumulatively. The Canadian courts support the idea of an identifiable and distinguishable part of a business. In *Transport Ducharme Inc*¹¹⁹ it was held that in order for an entity to qualify as a part of a business, it must be identifiable as a functioning entity that is viable in itself or sufficiently distinguishable to be severable as a whole.

The European Court of Justice has stated that a group of wage earners are capable of constituting an economic entity.¹²⁰ An economic entity, it was held, refers to an organised grouping of persons and assets and which pursues a specific objective. It must also be autonomous and sufficiently structured, and need not necessarily consist over significant assets, if any. If such a grouping of persons and assets are sufficiently organised, it will be capable of being clearly identified and severed from the business. It will therefore be capable of being classified as a part of a business, and therefore attract the application of section 197. It can thus be clearly discerned from the discussion above that the facts of the case, as seen in an objective light, will be determinative of whether the particular entity can be typified as a business or a part thereof under section 197.

¹¹⁸Wallis (2000) *op cit* (n80). Also see *Schutte v Powerplus Performance (Pty) Ltd supra* (n90).

¹¹⁹ (1983) 50 di 508.

¹²⁰ *Hernandez v Vidal SA v Perez C-127/96; Santner v Hoechst AG C-229/96; Montana v Claro Sol SA C-74/97*[1999] IRLR 132 (ECJ).

4.3.1.3. A 'going concern':

In this section, attention will be paid to the last requirement of section 197, namely that of a going concern. It has been suggested that a 'going concern' refers to a situation where a business was transferred and subsequent to the transfer, retained the same identity it had as before the transfer.¹²¹

The identity of the enterprise is of paramount importance in this regard and plays a central role as to the determination of whether a business has been transferred as a 'going concern'. The identity is composed of a multitude of facets such as: The employees, tangible assets like property, machinery, fixtures and fittings, contracts, book debts, *etc.* Intangible assets such as patents, trademarks and goodwill also form part of the above-mentioned 'identity'. The principles used to ascertain whether a 'business or part thereof' has been transferred have to be borne in mind at this stage. The particular relationship between the employees and any assets used by them to fulfil their obligations in order to further the objective and purpose of the business needs to be cognised when it is asked if the transferred business has retained its identity.¹²² If the business or part thereof comprised only of employees and human capital, it would have been transferred as a going concern provided that it has retained its identity after the transfer, regardless if assets were transferred along with the employees. Conversely, if assets were needed by the employees to fulfil their functions, the assets along with the employees will have to be transferred for the business to retain its identity.¹²³

In order to determine if the business retained its identity, attention must be drawn as to whether the new employer resumes the old employers operations with the same or similar activities. In order to come to a conclusion as to this question, the Constitutional Court has laid down a non-exhaustive list of criteria that have to be considered cumulatively. In the *NEHAWU* decision the following

¹²¹ Van Niekerk (2012) *op cit* (n83).

¹²² Bosch (2001) *op cit* (n115).

¹²³ In *Schmidt v Spar und Leihkasse der Fruheren Amter Bordelsholm, Kiel und Cronshagen* [1994] IRLR 302 (ECJ), it was held that assets, although useful when determining if a business was transferred as a 'going concern', is not determinative, particularly where the business consisted of the provision of services and included minimal usage of assets.

factors were held to be relevant: Whether or not assets, both tangible and intangible were transferred; whether or not the workers are taken over by the new employer; whether or not customers are transferred to the new employer; and whether or not the new employer carries on the same business as the old employer. The court also held that the application of these criteria would be capable of aiding in the ascertainment of whether the business remains the same but only in different hands, which is the ultimate question that needs to be answered.¹²⁴

By having regard to the above-mentioned factors cumulatively, courts will be able to get to the core and substance of transfer transactions so as to bring simulated transactions designed to evade the effects of section 197 into its purview. In the *Kgethe v LMK Manufacturing (Pty) Ltd*¹²⁵ it was held that regardless of the fact that the parties only intended to transfer assets of the transferors' business, the transaction was capable of falling under section 197. This conclusion was reached by having regard to factors like: The transferee took possession of the transferor's business premises; and the fact that the transferee continued with the operations of the transferor's business as if there was no change in the ownership of the business. On the face of it, it appears that the business remained the same but in different hands. This judgement therefore alludes, once again, to the willingness of our courts to adopt a purposive approach when interpreting the provisions of section 197.¹²⁶

The Labour court in the Schutte case confirmed this purposive approach. As stated, the court held that the substance and not the form of the transaction would be determinative of whether the transaction falls within the ambit of section 197. The court went on to state that in order to ascertain what the substance of the transaction is, factors that are indicative of a transfer of a business have to be weighed against those that are not.

¹²⁴C Bosch 'Balancing the Act: Fairness and Transfer of Businesses' (2004) *ILJ* 923.

¹²⁵ (1998) 19 *ILJ* 524 (LAC). In this regard, see *Maloba v Minaco Stone Germiston (Pty) Ltd* (2000) 21, *ILJ*, 1795 (LC).

¹²⁶ Bosch (2001) *op cit* (n115).

The cognised factors have to be rooted in the facts of the particular case and must be evaluated on a cumulative and comprehensive basis.

The British court's decision in *Kenmir v Frizzel*¹²⁷ supports the decision delivered in the *Schutte* case. Here it was held that regard must be had to the substance of the transaction and that in order to address this question all factors must be weighed cumulatively. For purposes of the court's weighing exercise, factors that pointed to the transfer of a business were weighed against those that erred in the opposite direction. It was held that a business would have been transferred as a going concern if the transferee were able to continue the business activities of the transferor without interruption. The European courts have dealt with the issue of a 'going concern' in a similar fashion.

In order for a business to be transferred as a going concern, the transferee must receive an undertaking that enables it to continue with the same or similar activities that the business conducted prior to the transfer.¹²⁸ The European courts have also found the identity of the transferred entity subsequent to the transfer as a conclusive criterion in addressing the question of whether a business was transferred as a going concern.¹²⁹

The approach followed by the Canadian courts strikes consonance with the approaches followed by the European and British courts. The Canadian position is to have regard to the identity of the entity transferred. Here too, attention is drawn as to whether the business retained substantial continuity of its operations, as before the transfer.¹³⁰ With regards to outsourcing transactions, section 197 will be applicable if the part of the business that was subject to the transfer was transferred as a going concern. This will be the case if the identifiable and severable part of business that was transferred, retained its identity after the transfer to the transferee. Questions like continuity will large loom and stand to be addressed by taking the factors mentioned in the *NEHAWU*

¹²⁷ [1968] 1 All ER (HL).

¹²⁸ *Bosch* (2001) *op cit* (n115).

¹²⁹ *Schmidt v Spar und Leihkasse der Fruheren Amter Bordelsholm, Kiel und Cronshagen* SUPRA (n97).

¹³⁰ *Blackie* (1999) *op cit* (n73).

decision into consideration. As stated, most instances of outsourcing transactions stand to attract the application of section 197.¹³¹

What appears to be problematic however, is second-generation outsourcing transactions. When an undertaking is transferred in a first-generation outsourcing transaction, the part of the business that is subject to the transfer will be deemed to have been transferred by the outsourcing employer to the new employer. This means that in order for a second-generation transaction to fall within the ambit of section 197, the transferor would also have to transfer a business or a part thereof to the new transferee as a going concern. The positions and methods that courts use to determine if a transfer attracts the application of section 197 will therefore have to be applied *ipso facto* to the second-generation outsourcing transaction so as to come to a finding on the applicability of section 197. In the context of what is meant by a 'going concern', the part of a business that was initially outsourced by the first employer must retain its identity as before the transfer to enjoy the application of section 197. Similarly, the entity transferred by the second transferor must retain the same identity that it enjoyed in the hands of it, before section 197 will be applied to the second-generation transaction. This means that although a service or part of a business is identifiable and severable from the 'main' entity, its identity must remain the same as before the transfer in order to be able to apply the provisions of section 197 to it.

It is important to determine if a business was transferred as a going concern in second-generation outsourcing transactions, seeing as the transferees of outsourced businesses are capable of altering the identity or composition of the businesses in such a way that section 197 will not be capable of being applied to the transaction.

Consider the following example: Party 1 outsources its cleaning services to Party 2 by virtue of an agreement to that effect. Upon the expiration of 2 years the agreement lapses. Party 1 then decides to allow Party 3 to continue with its cleaning services, however, Party 3 only receives 2 of the employees employed

¹³¹ Van Niekerk(2012) *op cit* (n83)

by Party 2 to perform the cleaning services. The question now arises of whether a transfer has occurred between Party 2 and Party 3. If a considerable amount of employees were involved in rendering the cleaning services to Party 1, then the transaction will not constitute a transfer as contemplated by section 197. This is because a part of a business has not been transferred to Party 3 as a going concern. The part of the business has not retained the same identity it had before the transfer. The part of the business was composed of a particular service to be rendered, along with the employees that were responsible for rendering those services. In the present example, Party 3 would have to appoint more employees to fulfil the functions and render the same services as before the transaction. The only thing that has been transferred is the right to render the cleaning services, but no business, and not as a going concern.

The European courts have heavily scrutinised second-generation outsourcing transactions.¹³²In *Oy Liikenne AB Liskojärvi and Juntunen*¹³³the court held that the mere transfer of a service is not sufficient to constitute the transfer of an 'economic entity'. In *Aviation Union of South Africa v SA Airways (Pty)*¹³⁴ the court held that in order to constitute a transfer as a going concern, components of the original business must be passed on to the third party. This will not be the case where a service provider is divested of the right to provide a particular service. In such an instance, the service provider retains its business and is therefore capable of providing the same services to different clients.

The ultimate question of whether a business has been transferred as a going concern will rest on the facts of each case and falls to be decided by the courts on an objective and case-by-case basis.¹³⁵

¹³² Van Niekerk (2012) *op cit* (n83).

¹³³ [2001] IRLR 171 (ECJ).

¹³⁴ *Supra* (n111).

¹³⁵ Bosch (2001) *op cit* (n115), also see Blackie (1999) *op cit* (n73).

4.3.1.4. The underlying purpose of section 197:

Section 3 of the Labour Relations Act stipulates that the provisions of the Act must be interpreted in a purposive approach that is in accordance with the Constitution and the rules of public international law. This ultimately obligates courts to take cognisance of the policies that underlie the provisions of the act.¹³⁶

The purpose and policy that underlies the enactment of section 197 should be apparent at this stage. Although various interests are safeguarded by the provisions of section 197, two are of a central importance. Firstly, that of employee protection in transfer transactions, and secondly, securing economic development. The Constitutional Court has held that a balance must be struck between those interests mentioned.¹³⁷ Regardless of what has been stated above, the courts have gone about in interpreting section 197 in an expansive fashion so as to afford affected employees protection in transfer transactions. This can be seen in seen in the *NEHAWU, Schutte, Thekwini, Aviation Union of South Africa* and *Pexies* decisions respectively.

The judgements handed down by the South African courts seem to strike consonance with those of the European and British courts. This is not surprising if one considers that section 197 is derived from the TUPE and Acquired Rights Directive. The courts in the European jurisdictions also seem to err in favour of employee protection, resulting in an expansive interpretation of the relevant transfer provisions.¹³⁸ The policy underlying section 197 will therefore be the key to the question of whether the provisions of section 197 can be stretched so as to include the termination and transfer of franchise agreements within its purview.

¹³⁶ Blackie (1999) *op cit* (73).

¹³⁷ *NEHAWU v University of Cape Town* supra (n103).

¹³⁸ Bosch (2004) *op cit* (n124).

5. PE Pack 4100 CC v Adam Sanders and Others:¹³⁹

5.1. Introduction:

In this section the PE Pack judgement will be evaluated in order to assess whether section 197 of the Labour Relations Act is applicable to the termination and transfer of franchise agreements. The facts of the case and finding of the courts will be discussed first, after which attention will be drawn to the jurisprudence pertaining to section 197 through which the above-mentioned judgement will be viewed.

5.2. The Facts:

Cell C is a franchisor specialising in the sale of airtime, cell phones and accessories, and concluding and renewing various contracts that relate to business in the market of telecommunications. Cell C used franchising as a vehicle for expanding its business network.

In order to effect the franchising of its operations business format franchises were used.¹⁴⁰ Cell C had entered into a franchise agreement with the third and fourth (the old franchisee) respondents which agreement was cancelled on the 30th of April 2010. Subsequent to the cancellation a new agreement was entered into between Cell C and the appellants (the new franchisee) which agreement took effect on the 1st of May 2010. The termination of the agreement and the conclusion of a new one was the movement that set into motion the chain of events that built up to the dispute. A dispute had arisen between an employee in the employ of the old franchisee and Cell C regarding the applicability of section 197 of the LRA. The employee contended that its contract of employment would be automatically transferred to the Appellant by virtue of section 197. Cell C contested this by denying the application of section 197 on the grounds that they were not buying back the franchise from the old franchisee but merely terminating the agreement and transferring it to a new franchisee.

The crisp question that the courts were requested to decide was whether a transfer of a business as envisaged by section 197 had occurred.

¹³⁹ *Supra* (n4).

¹⁴⁰ See section 2.1.1.2.

If this question were answered in the affirmative the employment contract of the employee would have been transferred to the new franchisee pursuant to which it would be in the employ of the new franchisee.

5.3. The Labour Court:

De Swardt AJ found that section 197 of the Labour Relations Act was applicable to the termination and transfer of a franchise agreement. In coming to his conclusion he used the 'snapshot test' created by Francis J.¹⁴¹ This test holds that a snapshot be taken of the business subject to the transfer before and after the transfer. If the business remained substantially the same after the transfer it would be possible to find that a transfer as a going concern had in fact occurred.

In applying the test, it was found that a business similar to that as before the transfer remained thereafter. Both before and after the transfer customers would find an outlet selling cell phone contracts, airtime and where customers could bring their cell phones for repairs. Further, the business remained in the same place, the telephone number remained the same and the nature of the business remained the same. All that was different was the fact that there were a few new faces behind the counter.

In coming to his finding De Swardt AJ relied on those judgments calling for a purposive interpretation of section 197. In order to support his contentions, reference was made to the decision between *NEHAWU v University of Cape Town*.¹⁴² As stated, the underlying purpose of section 197 is aimed to protect workers against the loss of employment in the event of the transfer of a business and to facilitate the sale of businesses as going concerns. Reference was further made to the decision of Zondo JP in *Aviation Union of SA on behalf of Barnes & Others v SA Airways (Pty) Ltd*¹⁴³ where it was held that the purpose of section 197 would not be served by an interpretation that entails that the employees moving with the work lose their jobs.

¹⁴¹ *FAWU v The Cold Chain (Pty) Ltd* (1020) 1 BLLR 49 (LC).

¹⁴² *Supra* (n103).

¹⁴³ *Supra* (n5).

As regards second generation outsourcing, De Swardt AJ held that it would be destructive to the purposes of section 197 if second generation outsourcing would not be included within the scope of section 197.

He juxtaposed the purposive approach with an approach calling for the words to be given their literal meaning in order to come to a finding as to which approach better served the purpose of section 197. It was held that upon the literal interpretation a transfer would not have occurred. All that would have taken place would have been a termination of the franchise agreement and the conclusion of a new one. According to De Swardt AJ, this would have been contrary to and defeated the purpose of section 197 as a result of the fact that the jobs of the employees would not be safeguarded. Such an approach would neither give effect to the right to fair labour practices nor be in accordance with the objectives of the Act.

What is interesting to note is the fact that he equates the termination and transfer of a franchise agreement with an outsourcing transaction. It was held that when Cell C entered into the franchise agreement with the franchisee it was outsourcing its business to the franchisee in order for it to conduct the business on behalf of the franchisor. This placed the particular case within the ambit of the outsourcing jurisprudence and therefore allowed the provisions of section 197 to apply to the particular case. This is correct if one considers the extent to which outsourcing transactions have been included in the purview of section 197.

5.4. The Labour Appeal Court:

From the outset it has to be noted that the court was divided in its judgment. The findings of the court will therefore be discussed in relation to the majority and minority judgments respectively. The decision of the majority will be discussed first.

The majority (Davis J) of the court found section 197 inapplicable to franchise agreements. It was held that Cell C was merely using its right to terminate the agreement which it was entitled to in terms of the franchise agreement.

This meant that the old franchisee would no longer be allowed to operate their business within the framework of that provided for by Cell C. It was held that when Cell C entered into a new franchise agreement with the new franchisee subsequent to the termination of the agreement between it and the old franchisee, it could not be said that a business was transferred as a going concern from the old franchisee to the new franchisee. Crucial to this finding was the fact that Cell C, the franchisor, held the core assets of the business both before and after the agreement. Because the assets remained vested in Cell C no business was capable of being transferred.

If regard is had to the three requirements necessary for the application of section 197, it can be elucidated from the majority judgment that the requirement of a 'transfer' as stipulated in section 197 has not taken place. Because there was no transfer it was unnecessary to enquire as to whether a business had been transferred as a going concern.

Davis J rejected the argument that the termination and transfer of a franchise agreement was capable of being equated with an outsourcing, particularly a second-generation outsourcing agreement. In support of this contention it was argued before the court that the termination of a franchise agreement was similar to the facts that gave rise to the decision of the European Court in *Carlito Abler and others v Sodexho MM Catering Gessellschaft GmbH*.¹⁴⁴ This judgement dealt with a second-generation outsourcing transaction. In this case a hospital entered into an agreement with a catering company for the supply of meals and beverages. In terms of the agreement the hospital allowed the catering company to use its premises and certain appurtenances. The hospital terminated this agreement and entered into a similar agreement with a different catering company. The court found that the Acquired Rights Directive was applicable to the case.

In jettisoning the argument the court placed reliance on the nature of the business model underlying franchising. This allowed the court to be able to distinguish between the *Carlito Abler* decision and the termination and transfer

¹⁴⁴ (2004) IRLR 168.

of franchising agreements. The court distinguished between the cases by finding that a franchise agreement gives rise to a joint venture between the franchisor and the franchisee. When the franchise agreement comes to an end the joint venture comes to an end and a new joint venture comes into being between the franchisor and the new franchisee when the new franchise agreement is concluded. Because of the dissolution of the joint venture and the formation of a new one there could be no transfer in terms of section 197. If this were not the case the termination of franchise agreements would be capable of being equated with second-generation outsourcing transactions that fall within the ambit of section 197.

As mentioned there was a discord between the presiding officers as to the applicability of section 197 to franchise agreements. In his dissenting judgment Landman J came to a different finding as the majority. He found that a stable economic entity changes hands when a franchise agreement is terminated. This conclusion was drawn from the purpose against which section 197 serves to operate. Particular reliance was placed on the decision of the Constitutional Court in *NEHAWU v University of Cape Town*.¹⁴⁵ Crucial to this is the statement by the court in the above-mentioned decision that workers need to be protected from unemployment in transfer transactions and that this objective needs to be met in both substance and in form.

The dissenting judgment reads to mean that if the requirements for the application of section 197 are interpreted in the light of the purpose for which the section was enacted it is possible to conclude that section 197 is applicable to franchise agreements.

With regards to the requirement of a 'transfer' by one employer to another he found that there was an indirect one in the sense that the franchisor fulfilled the role of conduit between the old and new franchisees. As for the requirement of a 'going concern' it was concluded that the identity of the business remained the same subsequent to the transfer regardless of whether tangible assets formed part of the transfer. In addressing this requirement it was considered what the

¹⁴⁵ *Supra* (n 103).

old franchisee would be divested of as a result of the termination of the franchise agreement. On this point it was found that the old franchisee would not take anything away so as to be able to continue its business as it did before the transfer. In order for it to be able to continue with its business it would have to enter into a new agreement with a different franchisor. Restraints of trade thus loomed large in this instance as it generally does on the sphere of franchising.

It is interesting to note that the perspective from which he views the termination and transfer of franchise agreements differ greatly from that taken by Davis J. Although both judges accept that the starting point in any franchise relationship is the business of the franchisor, they differ as to the effect of the granting of a franchise by a franchisor. This is the invariable foundation for the divergence of their findings. For Davis J the granting of a franchise by a franchisor is a mere allowance for the business of a franchisee to be plugged into the framework provided for by the franchisor. Due to this the franchisor remains vested with core assets of the franchise, and hence, when the agreement is terminated there can be no transfer because the franchisor has remained vested with the assets at all times. For Landman J the granting of a franchise agreement means the transfer and divestment of a part of franchisors business. Because the conclusion of the franchise agreement includes the transfer of a part of a business, the transaction is brought into the purview of section 197. This could be seen as the inverse of a situation where the franchisee is merely plugging into the framework of the franchisor for the duration of the agreement.

5.5. The majority and minority judgments of the Labour Appeal Court in the light of section 197 of the LRA:

This section will comprise of a discussion of the majority and minority judgments through the perspective of the jurisprudence pertaining to section 197. The objective of this section is to determine whether the judgment handed down by Davis J or Landman J is in accordance with the objective and purpose of section 197.

It is contended that not only does Davis J and Landman J differ as to the effect of the conclusion of a franchise agreement, but also to the interpretation that needs to be followed when the termination and transfer of a franchise agreement

stands to attract the application of section 197. With regard to the majority judgment there are two obstacles that prevent the termination of franchise agreements from passing the litmus test in order for the consequences of section 197 to ensue. Firstly the court held that there was no transfer as is envisaged by section 197. Secondly the court found the given case incomparable to a second-generation outsourcing transaction. The requirements contained in section 197 must be understood against the backdrop and purpose for which the section was enacted; namely employee protection. A purposive interpretation of the provisions of section 197 requires that protection be given to employees in those instances not specifically enunciated in section 197. As stated this has led outsourcing and second-generation outsourcing transactions to fall within the ambit of section 197.

Davis J found that when the franchise agreement was terminated the franchisor was merely exercising a contractual right to that effect. The reasoning that led to this finding is derivative of a literal interpretation of the facts of the case and the application of the provisions of section 197 thereto. As was stated by De Swardt AJ, when a literal approach is taken to the provisions of section 197, the franchisor was just exercising a right to cancel the contract. Being a contractual right to cancel the contract it stands to reason that the application of section 197 should not be triggered. However, this is in direct conflict with what is required when section 197 stands to be interpreted. It is accepted that upon following a literalist approach to the concept of a transfer the termination and transfer of a franchise agreement does not deserve to enjoy the application of the section. This would however be an ignorance of the objective of the section. Having regard to the underlying purpose of section 197 and the jurisprudence surrounding it makes it possible to stretch the concept of a transfer so as to include the transaction under consideration.

The termination of a franchise agreement is arguably more complex than it appears from face of it. It is not simply the exercise of a contractual right as argued by the majority.

In *Schutte v Powerplus Performance*¹⁴⁶ it was held that regard must be had to the substance of a transaction when it is asked whether the provisions of section 197 is capable of being applied to a particular case. Having regard to the substance of the transaction will serve as the key to the question of whether the particular transaction falls within the ambit of section 197. This is a useful foundation from which to depart in addressing the question as to whether a 'transfer' had occurred. The two parts that comprise the transaction under consideration must be understood in the light of and in terms of the objective of section 197. The first part of the transaction consists of the termination of the franchise agreement while the second part of the transaction comprises of the conclusion of a new franchise agreement between the franchisor and the new franchisee.

As regards the substance of the transaction, it is clear that a right to operate a Cell C franchise held by the third and fourth respondents (the old franchisee) was terminated. This right formed the foundation for their business in the form of a franchise. This was not all, however; after the termination the new franchisee acquired the right to operate the same business from the same premises and in the same form namely in the form of a franchise. The change of franchisees took place in a seamless manner.

If regard is had to the nature of a franchise it is possible to contend that a franchise consists of two components. The first component is the independently owned business of the franchisee. Secondly there are the intellectual property rights provided by the franchisor in terms of the franchise agreement.¹⁴⁷ One of the reasons that a franchisee would choose to buy a franchise is so that its independently owned business can be associated with the franchisor's trade and service marks.¹⁴⁸ The above-mentioned components are essential to the existence of a franchise. Without the right to use and be associated with the business model of the franchisor there would be no franchise. The effect of the termination of a franchise agreement is essentially to divest the franchisee of a part of its business due to the fact that the agreement in terms of which the

¹⁴⁶ *Supra* (n90).

¹⁴⁷ See section 2.1.1.

¹⁴⁸ See section 2.1.3.

franchisee enjoys the right to use and be associated with the business model of the franchisor will be terminated. This was confirmed by Davis J. Support for this can be found in the fact that the goodwill of the franchise and the assets used to further the business of the franchise remain with the franchisor. This contention is strengthened by the fact that a franchisee will ordinarily be restrained from pursuing a similar trade for a period subsequent to the termination.¹⁴⁹

Following a purposive approach to the definition of a transfer requires that the net be cast as wide as possible to bring transactions not initially contemplated within the purview of section 197. What is interesting to note is the fact that Davis J was a proponent for the inclusion of second-generation outsourcing within the ambit of section 197. He was a presiding officer in what can arguably be considered to be the case in which the concept of a 'transfer', as envisaged by section 197, was stretched to have the widest meaning possible; namely *Aviation Union of South Africa v SA Airways (Pty) Ltd*.

In this particular case the court interpreted the transfer of a business 'by' one employer to another to include a transfer of a business 'from' one employer to another. This made the section applicable to a second-generation outsourcing transaction where there was no contractual link between the transferor and transferee employers respectively. Zondo J stated that the purpose of section 197 would be frustrated if the word 'by' was to be given its ordinary meaning. If it were interpreted in accordance with its ordinary meaning, the section would only be applicable to first-generation outsourcing transactions and would leave those employees who need the protection of the Act the most unprotected.

Although the core assets remain vested in the franchisor, there is a transfer of the right to be associated with the intellectual property rights of the franchisor. This right will be transferred from the old franchisee to the new franchisee in terms of the agreement. If one accepts that this right formed part of the business of the old franchisee and will form part of the business of the new franchisee then clearly there has been a transfer of a part of a business.

¹⁴⁹ Woker (2005)*op cit* (n19).

This situation must be distinguished from the instance where the franchise agreement is concluded for the first time. In this instance there is still the agreement between the franchisor and franchisee in terms of which the franchisee will have the right to be associated with the intellectual property of the franchisor, however there will be no transfer of a business or part thereof. In this situation the franchisor will permit the franchisee to use its intellectual property rights and this will form part of the franchisees business. Differently though the franchisor will not be divesting itself of a part of its business. Subsequent to the conclusion of the franchise agreement the franchisor will still be vested with its intellectual property rights.

It would have just expanded the geographical penetration of its business model by allowing a franchisee to replicate it. As stated, the franchisor will allow a franchisee to replicate its business model in order to increase the value of its goodwill. It must be borne in mind that geographical limitations may be placed on the franchisor by concluding the agreement in as much as the franchisor may not open an entity bearing the same name, trade and service marks within a defined area. Of course, this will depend on the intention of the parties as is evidenced in their agreement. Although the franchisor may be geographically curtailed in the use of its intellectual property rights in such an instance, it will not be divested thereof so as to constitute a transfer.¹⁵⁰ Only once a franchise agreement has been concluded and thereafter terminated and transferred does the application of section 197 become relevant. Section 197 further requires that

¹⁵⁰ A franchisor will not always be geographically limited as to the use of its intellectual property rights. All will depend on the way in which the agreement is structured. For instance in the *Silent Pond* case the court found a clause in the agreement incapable of restricting the franchisor in the use of its intellectual property rights. A master franchise agreement is an example where a franchisor will be geographically curtailed in the use of the mentioned rights due to the fact that a franchisee will be granted with the opportunity to operate and conclude a number of franchise agreement within a specific area to the exclusion of others. This can be equated with a licensing agreement of certain trademarks. Where a trademark owner decides to issue a licence, the licensee will be allowed to use the trademark for a specific period within a specific area. The agreement may also provide that the licensee will have the exclusive or non-exclusive right to use the mentioned trademark. If it is an exclusive licence the trademark owner will be limited as to the use of its trademark for the duration and in the area as specified in the agreement. Klopper (2011) *op cit* (n55).

the transfer take place between the old and new employers respectively. According to Landman J there is an indirect transfer between the franchisee and the franchisor in their capacity of employers, with the franchisor fulfilling the role as a conduit.

His foundation for the argument lies in the fact that upon the conclusion and termination of a franchise agreement both old and new franchisees alike are aware of the fact that the franchisor reserves the right to transfer the franchise agreement in a seamless manner and at a particular stage in the relationship. The acquiescence of the franchisees to the termination and transfer of the agreement by the franchisor between the old and new franchisees can thus be construed to be the conduct on the part of the employer that is necessary to the transfer that which is required by section 197.

This contention is agreeable specifically if one considers that upon the conclusion of the franchise agreement the franchisee will be made aware of the fact that the franchise will be granted for specific period and that the agreement is subject to termination. By entering into the agreement the franchisee accepts that the franchisor may terminate the agreement in particular instances and transfer it to new or other franchisees.¹⁵¹ When the new agreement is entered into with the new franchisee it will in turn accept the rights contained in the agreement and those rights will therefore be transferred to it.¹⁵²

This construction is in accord with that provided for in the *Aviation Union of South Africa v SA Airways (Pty) Ltd* decision.¹⁵³ As stated, the effect of the above-mentioned judgment is to bring transfers from one employer to another within the purview of section 197.¹⁵⁴ Although the franchise was not transferred by a

¹⁵¹ Such instances include when the agreement lapses, when the franchisee is in breach of the agreement or when the franchisee is under-performing in relation to the expectations of the franchisor.

¹⁵² The rights under the franchise agreement will revert back to the franchisor for the interim period in which a new franchisee is sought and the franchisor will thereafter transfer it to the new franchisee.

¹⁵³ *Supra* (n111).

¹⁵⁴ As stated, if not for the purposive approach to the interpretation of section 197 the transaction would not have fallen within the ambit of section 197.

franchisee to another, it was transferred from one franchisee to another. Further support for the viability of the transfer can be found in the fact that the transferor need not be the owner of the assets transferred in order for the transfer to be valid.¹⁵⁵

If this is considered together with the dictum of the Constitutional Court in the *Aviation Union of South Africa* case there is clear support for the inclusion of the termination of a franchise agreement and transferral thereof within the ambit of section 197. By giving effect to the purpose of section 197 it is possible to stretch the meaning of a 'transfer' contained in section 197, so as to bring the termination and transfer of the franchise agreement to within its ambit.

It is thus submitted that a 'transfer' as contemplated within the context of section 197 had occurred. This conclusion is drawn from the minority judgment and jurisprudence in support of a purposive and expansive interpretation of the definition of a 'transfer'. The fact that there was no contractual relationship between the old and new franchisees would not derogate from the finding that a transfer had occurred.

The jurisprudence pertaining to section 197 and the Acquired Rights Directive does not require a contractual link between the old and new employers. In *Dines v Initial Services*¹⁵⁶ and *COSAWU v Zikhethale Trade (Pty) Ltd & another*¹⁵⁷ this was confirmed.

The majority of the court in the *PE Pack 4100 CC* case held that franchising is not capable of being equated with outsourcing because a franchise relationship gives rise to a joint venture between the franchisor and the franchisee. This essentially serves to avert a finding that section 197 stands to apply, especially if one considers that the court a quo found the particular case comparable to an outsourcing transaction.

¹⁵⁵ *Carlito Abler and others v Sodexho MM Catering Gesselschaft GmbH supra* (n127). Landman J confirmed this in his minority judgment.

¹⁵⁶ *Supra* (n107).

¹⁵⁷ *Supra* (n108).

The fact that a franchise agreement was capable of being equated with an outsourcing transaction is essentially what led the court *a quo* to find that section 197 was applicable. It is currently contended that a joint venture is comparable to a franchise agreement in a number of respects. A joint venture is defined to mean:

“an association of two or more natural or juridical persons to carry on as co-owners an enterprise, venture or operation for the duration of that particular transaction or a series of transactions or a limited time”¹⁵⁸

Contained within the relationship is the objective to realise a mutual profit.¹⁵⁹In order to further the objective contained within the relationship, both parties will ordinarily contribute to the venture in the form of property, services, capital and so on and so forth.¹⁶⁰In this sense there is a large degree of similarity between a franchise and a joint venture. Both of the business entities require each party to contribute to the relationship. In a franchise agreement a franchisor will provide the business know-how and intellectual property rights, and a franchisee will provide the necessary capital in order to be able to plug its independently owned business into the framework of the franchisor. The mutual objective of this relationship would be to realise a profit. Franchise agreements would normally be structured in such a way so that the franchisors profit would be predicated on the franchisees performance.¹⁶¹In this regard it can be stated that there is a large degree of co-operation necessary in order to actuate this goal, similar to that required for a successful joint venture.¹⁶²

¹⁵⁸ J Taubman ‘What Constitutes a Joint Venture’ 41 *Cornell L.Q.* 640 1955-1956.

¹⁵⁹ http://www.law.cornell.edu/wex/joint_venture. (Accessed on 27 August 2013).

¹⁶⁰ As is the case with the conclusion of a franchise agreement, various considerations may underpin the conclusion of a joint venture. These considerations include: The size of a particular project; the fact that the project requires specific skills, unwillingness on the part of a proprietor to bear the risk of a particular transaction.

<http://www.cidb.org.za/toolkit06/toolkitpages/module5/20supplementaryinformation/5s14%20pgd2-jv%20edition%201.0.pdf>. (Accessed on 27 August 2013).

¹⁶¹ The extent of the franchisees payable royalty would be calculated as a percentage of the franchises profits.

¹⁶² H Botha, Reyneke J International Joint Ventures and Multiculturalism: Business (2008) 24 *Management Today* 56.

Irrespective of the fact that the two entities are comparable it does not detract from the fact that a part of a business is transferred when a franchise agreement is terminated and new agreement concluded with a new franchisee. The reason for this lies in the transfer of the package that the franchisee would have been entitled to use in relation to its franchise. It is this package that formed a material part of the franchisees business, without which it would not have a business. Even if the joint venture comes to an end when the franchise agreement is terminated, the right to use the model of the franchisor which stood at the core of the joint venture will just be extrapolated and transferred to stand at the centre of the new joint venture between the franchisor and the new franchisee.

Viewed differently, when the franchise was granted by the franchisor it expanded its geographical market penetration and allowed the franchisee to be associated with it. Upon the termination of the agreement the franchise remained intact and so did the geographical expansion of its intellectual property and business model. The right to be associated with the geographical expansion had thus been transferred to the new franchisee regardless of whether the core assets vested with the franchisor.

It does not matter from which perspective one views the effect of the granting of a franchise the result remains the same. If the model followed by Davis J is followed a transfer occurs due to the fact that the right that forms part of a franchisees business will be revoked and transferred to a new franchisee. The franchisee loses the right to plug its business into the system provided by the franchisor. Inversely, when the model of Landman J is followed a transfer also occurs. The reason for this lies in the fact that a franchisor divests itself of a part of its business when granting a franchise. Once it has been established that there has been a transfer it must be ascertained if that which was transferred was in fact a business or a part thereof. In this instance, there will be no transfer of a business due to the fact that a franchise agreement is incapable of being construed to mean as much.

It is however possible to contend that the rights espoused by a franchise agreement are capable of constituting a part of a business.

The right to use the franchisor's business model, intellectual property and know-how forms a great part of the business of a franchisee. As Judges Davis and Landman pointed out, without the above-mentioned rights the old franchisee has no business. The fact that the assets that form the foundation to the franchise are incorporeal do not appear to present any problems. Irrespective of the nature of the part of the business¹⁶³ it is capable of being identified and separated from the franchise as is evidenced from the transferral of the franchise agreement.

As stated, the facts of each particular case will be determinative of whether a part of a business has been transferred. Franchising is an odd shaped beast that requires its own personal structure and that attracts its own peculiar consequences, it is however possible to draw from the jurisprudence pertaining to outsourcing and second-generation outsourcing. In the *Aviation Union of South Africa* decision Jafta J correctly held that the transfer of a mere contract would be insufficient to constitute a part of a business. In such an instance the entity entitled to the contract and the rights contained therein would still have its business subsequent to the transfer.¹⁶⁴ The entity entitled to provide the service would generally arrange for its own premises, employees and infrastructure to provide the service.¹⁶⁵ All that would be transferred is the contractual right to provide a particular service.

If a grouping of assets were however included in this contract and employees provided for to aid in the delivery of the services it would be likely that a part of a business had in fact been transferred. This succinctly illustrates the difficulties encountered when it has to be ascertained if a business or part thereof has been transferred.

¹⁶³ In this instance the nature of the part of the business will be the intellectual property rights mentioned earlier.

¹⁶⁴ In this context the right refers to the entitlement of a service provider to deliver a service or provide a function to the outsourcing party.

¹⁶⁵ *Aviation Union of South Africa v SA Airways (Pty) Ltd decision supra* (n111).

What is currently contended is that the franchise agreement containing the rights of the franchisee goes further than the mere transfer of an agreement to provide a service. Regard must be had to the substance of the transaction which includes having regard to the nature of a franchise. As stated, the nature of the franchise is such that without the rights contained in the franchise agreement the old franchisee would have no business subsequent to the termination of the agreement.

It is possible to draw certain parallels with an outsourcing transaction if one has regard to the judgment of the court *quo* and the perspective from which Davis J views the effect of the granting of a franchise. If one equates the business framework of the franchisor with the entity from which a proprietor proposes to outsource a part of its business the following is apparent: The franchisor is allowing a franchisee to plug into its framework to fulfil certain functions and to expand the existing framework of the franchisor. In this respect the franchisee is delivering a service to the franchisor such as an outsourcee would do in respect of the business of an outsourcer. It is somewhat fitting that the franchisor is equipping the franchisee with its trade and service marks and other intellectual property so as to put the franchisee in a position to expand the business network of the franchisor. Without the necessary intellectual property rights the franchisee would not be able to deliver the required 'service' to the franchisor.

If one accepts the position above, it becomes apparent that the franchisor is not simply transferring a mere contractual right to a franchisee to allow it to perform a specific function. The franchisor is transferring a contractual right with the required tools in order for the franchisee to fulfil its function. This is in accord with the judgment delivered in the *Aviation Union of South Africa case*. Even if the franchisor remains vested with the core assets, by transferring the franchise agreement it is transferring the right to provide a specific service to the franchisee and equipping the franchisee with the tools to execute its obligations.

Further, it is possible to draw certain distinctions between the transfer of a franchise agreement and an agreement to outsource. In order to illustrate this the facts of the *Aviation Union of South Africa case* will be used.

South African Airways outsourced certain non-core activities to LGM in order to reduce their maintenance costs. In terms of this agreement particular assets were sold to LGM on the condition that they be sold back to SA Airways upon the termination of the agreement. The services provided in terms of the outsourcing agreement would also be transferred back to SA Airways or a nominated third party upon the termination of the agreement. Upon the conclusion of the contract the employees of SA Airways were transferred to LGM.

The first transaction in terms of which the services, employees and assets were transferred clearly falls within the ambit of section 197 and deserves its application. If section 197 is to be applicable upon the termination of the agreement will require an enquiry as to whether LGM transferred a business or part thereof to SA Airways. In order for this to be the case the requirements contained in section 197 and its surrounding jurisprudence would have to be applied. What this illustrates is that when an outsourcer transfers a part of its business it is in fact divesting itself of a part of its business. Similarly when the transferee is required to transfer the outsourced business back to the original transferor it will be divesting itself of a part of its business. The core assets to the business will be transferred back and forth between the transferor and the transferee.

If regard is had to the granting of a franchise and the termination thereof it is clear that the franchisor remains vested at all times with the intellectual property rights which form the basis of the franchise. However, when the franchise agreement is terminated the franchisee will be divested of a part of its business. Thus, although the franchisor is not divesting itself of a part of its business when granting a franchise, it is granting a contractual right to a franchisee to form part of its business network. Along with the contractual right to fulfil the required functions the franchisor will provide the franchisee with the necessary assets to do so. When this relationship comes to an end the franchisor will be divesting the franchisee of a part of its business. The franchisee will be no longer be allowed to delivered the service that it was entitled to in terms of the franchise agreement and it will not consist over the assets required to do so.

There is an overlap between an outsourcing transaction and the termination and transfer of a franchise agreement at this very stage. When the outsourcing agreement is terminated, the outsourcee will lose the right to deliver the service that it was required to in terms of the outsourcing agreement. If assets were provided to the outsourcee, a transfer in terms of section 197 will occur if the outsourcee is required to transfer the assets along with the right to deliver the mentioned service. The same holds true for the termination of a franchise agreement. The franchisee loses the right to expand the network of the franchisor and also loses the right to use the assets required to do so.

It does not matter from which perspective one views the termination and transfer of a franchise agreement. Whether one equates a franchise with a joint venture, outsourcing or something completely different, the termination of the agreement and conclusion of a new agreement constitutes a transfer as envisaged by section 197.

With regard to the requirement of a 'going concern' it is submitted that when a franchise agreement is terminated and transferred a part of a business will be transferred as a going concern. If consideration is given to the facts of the *PE Pack 41 CC* decision it becomes apparent why. Although the majority judgment did not pay consideration to this requirement, it was dealt with eloquently in the minority judgment and judgement of the court *a quo*.

Subsequent to the termination of the franchise agreement and the transfer thereof the business remained the same. It is possible to contend that the business remained the same but in different hands.¹⁶⁶ This is in large part due to the nature of a franchise. In terms of the franchise agreement the franchisor will ensure that the franchise owned by the new franchisee complies with the business model of the franchisor. The same intellectual property rights will be used, the appearance of the business will be the same and the way in which the business functions will be the same.

¹⁶⁶ *NEHAWU v University of Cape Town supra* (n103).

Subsequent to the transfer the clients will return to the same business that provides the same service and that is dressed in the same get-up as before the transfer. This will be the case due to the fact that franchise agreements are drafted in such a way so as to induce the belief on the part of customers that they are dealing with the franchisor.¹⁶⁷ Due to the homogenous way in which franchise agreements are drafted and structured, the framework into which the new franchisee will plug its business will be the same and on the same terms as that of the old franchisee. This position is neatly captured by the snapshot test applied by De Swardt in the court *a quo*.

If a comparison is made between the judgments of the court *a quo* and the majority and minority judgments of Davis J and Landman J, it appears that Davis J is out of touch with the underlying purpose of section 197. His finding that the franchisor was exercising a mere contractual right is evident of a literal interpretation of section 197. Such an approach is not advocated nor required when the requirements of section 197 stand to be interpreted. In drawing his distinction between the termination and transfer of a franchise agreement with an outsourcing transaction, no reference was made to the *locus classicus* of *NEHAWU v University of Cape Town*. The failure to refer to the decision in which the objects and purpose of section 197 were set out is evidence in support of a narrow and literal approach to the interpretation of section 197.

The approach followed by South African courts with regards to the application of section 197 has been largely coherent.¹⁶⁸ The judgment of Landman J and De Swardt AJ accord perfectly with the existing position, especially if one considers that De Swardt AJ equated the transaction under consideration with one of outsourcing. In both of the judgments, explicit reference was made to the purposive approach that needs to be followed when interpreting the requirements contained in section 197. Similarly, both Judges based their findings as to the purpose of section 197 on the *NEHAWU* decision. As stated, this is the approach required by the provisions of section 197.

¹⁶⁷ A franchisor would decide to use franchising as a form of expanding its business network as a result of the fact that it will not be incurring the risk of default by a location or store.

¹⁶⁸ Biggs (2005) *op cit* (n3).

6. Conclusion:

What has been apparent from the discussion throughout is the prevalent role of the courts when required to interpret the provisions of section 197. This role has been largely necessitated by the bare nature of the substantive requirements found in section 197. In dealing with this *lacuna*, the courts have sought for assistance in the underlying purpose and object of the section. The jurisprudence around the application of section 197 indicates that the courts have cast the net wide in finding section 197 applicable to a host of transactions. It is against this that the *PE Pack* case has been canvassed and as stated, found to be incompatible with what the courts and academics have found to be the ambit of section 197.

Franchising is an odd shaped beast that needs to be addressed in its own light and context. Before finding that a transaction falls within the ambit of the section one has to have regard to its substance. This done in light of the nature of a franchise it seems apparent that a transfer had occurred as a going concern.

It has not been argued what the ambit and underlying purpose of section 197 should be. The status quo has just been provided so as to scrutinise whether the approach followed by Davis J is in accord with that. As stated, this has not been the case. Proponents of the narrow approach such as Wallis have suggested that the underlying purpose of section 197 should be narrower in scope and that the ambit of transactions that are to fall within this scope should be lessened. This would have the effect of leaving certain classes of employees unprotected. Although such an approach might appear to fly in the face of the Constitutional right to fair labour practices, he circumvents any such arguments by holding that the sections other than 197 in the Labour Relations Act provide sufficient security and protection to those affected employees. This contention will obviate the courts from trying to stretch the meaning of the words contained in section 197 so as to provide protection to affected employees.¹⁶⁹

On policy reasons that might be a sound argument to make, it is however not a view accepted widely by the courts. The decision of Davis J the *PE Pack* case

¹⁶⁹ Wallis (2013) *op cit* (n72).

might be indicative of a movement within the bench that section 197 should be construed more narrowly. If a comparison is made between the judgments of Davis J in the *Avian Union of South Africa* and *PE Pack* cases respectively, this contention appears to be apparent. On the one side was a judgment calling for a wide and robust approach to the interpretation of the requirements contained in section 197, and on the other, a judgment calling for literal interpretation of its concepts. It is not surprising to find that Davis J contributed to an article written by Wallis wherein the argument was made that section 197 should be construed more narrowly.¹⁷⁰

It is however contended that a large amount of turbulence would be needed in order to stop what has been left in the wake of the *NEHAWU* decision. That considered, there is still a large amount of room for proponents of the narrow approach to provide their input in order to effect a change going forward. In that respect it is suggested that legislative intervention would be prudent in providing clarity as to the current position. Clearly this is not the end of the tale and a large amount of jurisprudence in this regard is to be expected.

Leaving that aside, the framework surrounding section 197 provides clear room for its application to the problem of franchising and based on the current state of affairs should be applied thereto.

¹⁷⁰ Wallis (2013) *op cit* (n72).

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