

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

**UNIVERSITY OF CAPE TOWN****FACULTY OF LAW****2013****TITLE: A MICROSCOPIC ANALYSIS OF S 197 IN THE  
OUTSOURCING CONTEXT**

STUDENT NAME: TAMYN HELEN SHEEN  
STUDENT NUMBER: SHNTAM001  
STUDENT EMAIL: tamyn.sheen@gmail.com  
COURSE CODE: CML5606W  
SUPERVISOR: PROFESSOR ROCHELLE LE ROUX  
WORD COUNT: 22 271 (including bibliography, excluding footnotes,  
front cover, declarations, abstract and table of contents)

**Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the LLM in Commercial Law in approved courses and a minor dissertation/ research paper. The other part of the requirement for this qualification was the completion of a programme of courses.**

**I hereby declare that I have read and understood the regulations governing the submission of LLM in Commercial Law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.**

Tamyn Sheen

21 March 2013

Signed

Dated

<b>PLAGIARISM DECLARATION</b>
-------------------------------

1. I know that plagiarism is wrong. Plagiarism is to use another's work and to pretend that it is one's own.
2. I have used the footnote convention for citation and referencing. Each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been acknowledged through citation and reference.
3. This dissertation is my own work.
4. I have not, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.

Tamyn Sheen

Signature

21 March 2013

Dated

University of Cape Town

<b>ABSTRACT</b>
-----------------

Outsourcing is a growing modern method of conducting business. The reach of s 197 of the Labour Relations Act in outsourcing has sparked debate and controversy in the legal community. Albeit settled that s 197 may apply to initial outsourcing transactions, a lengthy litigation battle resulted in the recent seminal Constitutional Court judgment of *Aviation Union of South Africa and other v South African Airways (Pty) Ltd*. The Constitutional Court pronounced on the application of s 197 to second generation outsourcing. This judgment is not without limitation and presents interpretational issues that will affect the scope and application of s 197 in the outsourcing context and which may undermine the purpose of s 197.

The enquiry as to whether there is a transfer as a going concern as provided in s 197(1)(b) of the Labour Relations Act, and as interpreted by the Constitutional Court in *National Education Health and Allied Workers Union v University of Cape Town and Others*, creates a reasoning anomaly when applied in the outsourcing context.

A theoretical examination of the implementation of the provisions of s 197 when applied in the outsourcing sector questions the suitability of such provisions. The structure of s 197 fails to account for the economic realities and the dynamics of the legal relationships which define an outsourcing transaction. The practical difficulties associated with the implementation of s 197 can negatively impact the growth of the outsourcing marketplace. These practical difficulties need to be resolved through the amendment of s 197 in order to ensure that the application of s 197 in the outsourcing business arena becomes an accepted and quantifiable commercial risk.

## TABLE OF CONTENTS

CHAPTER 1: INTRODUCTION .....	7
1.1. OUTSOURCING AND S 197 .....	7
1.2. CHAPTER CONTENT .....	9
1.3. TERMINOLOGY .....	10
1.4. INTERNATIONAL INSIGHT .....	12
1.4.1. COMPARABLE FOREIGN LEGISLATION .....	12
1.4.2. THE EU DIRECTIVE .....	13
1.4.3. TUPE AND TUPE (2006) .....	14
CHAPTER 2: THE APPLICATION OF S 197 TO SECOND GENERATION OUTSOURCING .....	16
2.1. INITIAL OUTSOURCING AND S 197 .....	16
2.2. TESTING THE WATERS - <i>COSAWU V ZIKHETHELE TRADE (PTY) LTD AND ANOTHER</i> .....	16
2.2.1. BACKGROUND .....	16
2.2.2. THE COURT'S FINDINGS .....	17
2.2.3. THE APPLICATION OF S 197 .....	18
2.2.4. ACADEMICS RESPOND TO <i>COSAWU</i> .....	19
2.2.5. THE UPRISE OF LITIGATION FOLLOWING <i>COSAWU</i> .....	20
2.3. THE SECOND GENERATION OUTSOURCING BATTLE .....	22
2.3.1. DETERMINING THE LAW .....	22
2.3.2. THE FACTS OF <i>SAA</i> .....	23
2.3.3. CASE LAW HISTORY .....	24
2.4. THE APPLICATION OF <i>SAA</i> .....	26
2.5. ANALYSIS OF <i>SAA</i> .....	27
2.5.1. THE HISTORY OF THE TRANSACTION .....	28

2.5.1.1. THE ISSUE.....	28
2.5.1.2. THE ARGUMENT .....	29
2.5.1.3. THE ANALYSIS .....	30
2.5.2. THE MAJORITY JUDGMENT’S TWO STAGE TRANSFER TEST... 32	
2.5.2.1. THE MINORITY JUDGMENT’S TRANSFER ASSESSMENT ... 38	
2.5.3. THE ROLE OF EMPLOYEES.....	39
2.5.3.1. ‘A GOING CONCERN’ - THE CAUTIONARY ROLE OF EMPLOYEES .....	39
2.5.3.2. HEEDING <i>SAA</i> ? .....	40
2.6. CONCLUDING REMARKS .....	44
CHAPTER 3: THE ONGOING CONCERN OF A GOING CONCERN IN THE OUTSOURCING CONTEXT .....	46
3.1. INTRODUCTION.....	46
3.2. SECTION 197 (1)(B): THE MEANING OF ‘A GOING CONCERN’ .....	46
3.2.1. THE GOING CONCERN ENQUIRY .....	46
3.2.2. A COMPARABLE ENQUIRY – THE ECJ’S EXPERIENCE .....	47
3.2.2.1. LIMITATIONS OF THE <i>SPIJKERS</i> JUDGMENT .....	49
3.3. THE APPROPRIATENESS OF THE ‘GOING CONCERN’ ENQUIRY IN THE CONTEXT OF SECOND GENERATION OUTSOURCING.....	50
3.3.1. CIRCULAR REASONING – THE IMPLICATIONS OF <i>HARSCO</i> .....	50
3.3.2. ‘A GOING CONCERN’ IN THE OUTSOURCING CONTEXT .....	51
3.4. THE MOTIVE CRITERION AS A POSSIBLE SOLUTION.....	53
3.4.1. THE MOTIVE CRITERION .....	53
3.4.2. THE MOTIVE CRITERION UNDER TUPE .....	53
3.4.3. THE PRACTICAL APPLICATION OF THE MOTIVE CRITERION..	54
3.5. MIRRORS IN REASONING: <i>SÜZEN</i> AND <i>HARSCO</i> .....	56

3.6. LESSONS FROM <i>SÜZEN</i> .....	58
3.6.1. THE SCOPE OF THE APPLICATION OF <i>SÜZEN</i> .....	58
3.6.2. ‘...A MAJOR PART OF THE WORKFORCE, IN TERMS OF THEIR NUMBERS AND SKILLS, ASSIGNED BY HIS PREDECESSOR TO THE PERFORMANCE OF THE CONTRACT...’ .....	59
3.6.2.1. CHERRY PICKING .....	59
3.6.2.2. ‘...IN TERMS OF THEIR NUMBERS AND SKILLS...’ .....	60
3.6.3. ‘... OF SIGNIFICANT TANGIBLE OR INTANGIBLE ASSETS...’... ..	61
3.7. SOLVING THE CIRCULAR REASONING.....	61
3.7.1. THE MOTIVE CRITERION.....	61
3.7.2. A MINIMUM NUMBER OF FACTORS.....	62
3.7.3. AMENDMENT TO LEGISLATION .....	62
3.8. CONCLUDING REMARKS.....	63
CHAPTER 4: PRACTICAL IMPLICATIONS OF THE APPLICATION OF S 197 IN THE OUTSOURCING CONTEXT .....	64
4.1. INTRODUCTION.....	64
4.2. PRACTICAL IMPLICATIONS .....	65
4.2.1. EMPLOYEE INFORMATION AND COMPETITIVE TENDERING ..	65
4.2.2. SECTION 197(6) OF THE LRA .....	72
4.2.3. THE IMPACT ON SMALL BUSINESS DEVELOPMENT .....	72
4.2.4. A MANIPULATION OF THE MARKET .....	74
4.3. LACK OF EMPIRICAL INFORMATION .....	81
4.4. ACCOUNTING FOR THE ECONOMIC CONTEXT IN WHICH S 197 OPERATES.....	81
4.5. CONCLUDING REMARKS .....	84
CHAPTER 5: CONCLUSION .....	87

## CHAPTER 1: INTRODUCTION

### 1.1. OUTSOURCING AND S 197

The practice of outsourcing is an increasingly growing modern method of business delivery both globally and locally.<sup>1</sup> This statement finds support and is highlighted through various surveys conducted by Pricewaterhouse Coopers, Norton Rose and KPMG. Drawing on the results from a 2008 global outsourcing survey, Pricewaterhouse Coopers emphasized the increased role of outsourcing in a company's agenda.<sup>2</sup> In 2011 a survey conducted by Norton Rose noted that the economic recession had positively impacted the growth of the outsourcing market in both private and public sectors.<sup>3</sup> In 2012 a survey conducted by KPMG concluded that the demands of the global market place have spurred organisations '...to transform the way they deliver their businesses and manage costs...' through inter alia outsourcing.<sup>4</sup> It further confirmed that outsourcing is on the up-rise in the South African market.<sup>5</sup>

The trend to outsource and its growing role in the modern economy highlights the importance of a critical examination of the application of s 197 of the Labour Relations Act<sup>6</sup> to outsourcing transactions and the suitability of the current provisions in facilitating an outsourcing transaction subject to s 197.

---

<sup>1</sup> Carolyn Sutherland and Joellen Riley 'Industrial Legislation in 2009' (2010) 50 *Journal of Industrial Relations* 275 at 284; Trent D Sebbens 'Wake, O Wake - Transmission of Business Provisions in Outsourcing and Privatisation' (2003) 16 *Australian Journal of Labour Law* 133 at 133-134 and 140-141 and Manoj Dias-Abey 'Industrial Protection in the Era of Outsourcing' (2009) 22 *Australian Journal of Labour Law* 161 at 161.

<sup>2</sup> See the executive summary in Pricewaterhouse Coopers 'Global Outsourcing: Outsourcing comes of age: The rise of collaborative partnering' (2008), available at <http://www.pwc.com/gx/en/operations-consulting-services/outsourcing-comes-of-age.jhtml>, accessed on 16 January 2013.

<sup>3</sup> See the executive summary in Norton Rose 'A smart approach to outsourcing', available at <http://www.nortonrose.com/files/a-smart-approach-to-outsourcing-ii-57727.pdf>, accessed on 16 January 2013.

<sup>4</sup> KPMG 'KPMG South Africa Sourcing Advisory 2Q12 Pulse Survey' at 3, available at [www.kpmg.com/ZA/en/IssuesAndInsights/ArticlesPublications/General-Industries-Publications/Documents/Sourcing%20survey%20Launch.pdf](http://www.kpmg.com/ZA/en/IssuesAndInsights/ArticlesPublications/General-Industries-Publications/Documents/Sourcing%20survey%20Launch.pdf), accessed on 16 January 2013.

<sup>5</sup> Ibid.

<sup>6</sup> Act 66 of 1995. (hereinafter referred to as the LRA)

Section 197 regulates the transfer of employment contracts when there is a transfer of a business as a going concern.<sup>7</sup> If a transfer triggers s 197, the workforce of the transferring business automatically transfers to the ‘new employer’.<sup>8</sup> The ‘new employer’, subject to certain mechanisms made available within the section, essentially steps into the shoes of the ‘old employer’, assuming all liabilities and obligations associated with the transferred workforce.<sup>9</sup>

Section 197 was a response to correct the deficiencies under the common law, in which employees of a transferring business received no security of employment.<sup>10</sup> In the event of a transfer their employment terminated.<sup>11</sup> The introduction of s 197 gave content to the right to fair labour practice<sup>12</sup> enshrined in s 23 of the Constitution of the Republic of South Africa.<sup>13</sup>

In a judgment interpreting the original s 197, as was subsequently amended in 2002, the Constitutional Court in *National Education Health and Allied Workers Union v University of Cape Town and Others*<sup>14</sup> (hereinafter referred to as *UCT*) held that the purpose of s 197

... is to protect the employment of the workers and to facilitate the sale of businesses as going concerns by enabling the new employer to take over the workers as well as other assets in certain circumstances. The section aims at minimising the tension and the resultant labour disputes that often arise from the sales of businesses and impact negatively on economic development and labour peace. In this sense, section 197 has a dual purpose; it facilitates the commercial transactions while at the same time protecting the workers against unfair job losses.<sup>15</sup>

---

<sup>7</sup> Section 197(1).

<sup>8</sup> Section 197(2). The terminology ‘new employer’ and ‘old employer’ is used in s 197(1) (b).

<sup>9</sup> Section 197 (2) read with subsecs (3), (6) and (7).

<sup>10</sup> Lynn Briggs ‘The Application of Section 197 of the Labour Relations Act in an Outsourcing Context’ (Part 1) 2008 *Obiter* 425 at 429-430.

<sup>11</sup> *Ibid.*

<sup>12</sup> *National Education Health and Allied Workers Union v University of Cape Town and others* (2003) 24 ILJ 95 (CC) paras 33-43.

<sup>13</sup> NO. 108 of 1996. (hereinafter referred to as the Constitution)

<sup>14</sup> *Supra* note 12.

<sup>15</sup> *Ibid* para 53.

Furthermore this dual purpose reflects the conflicting tensions between

... on the one hand, the employer's interest in the profitability, efficiency or survival of the business, or if need be its effective disposal of it, and the worker's interest in job security and the right to freely choose an employer on the other hand.<sup>16</sup>

The employer's interest is heightened in the context of a modern economy where businesses are under extreme pressure to remain competitive and flexible in a global market to ensure their longevity and survival.<sup>17</sup>

At first glance s 197 appears uncomplicated. As long as there is a transfer of a business as a going concern, employees of the transferring entity will automatically transfer. Its appearance is deceiving.<sup>18</sup> As will become evident since its inception this section has intrigued and perplexed both judges and commentators as to its intended interpretation and scope. Despite an amendment in 2002, its interpretation has continued to generate uncertainty.<sup>19</sup> This paper focuses on the controversy that has followed its potential application in the outsourcing business arena, with specific reference to second generation outsourcing in light of the recent Constitutional Court judgment of *Aviation Union of South Africa and other v South African Airways (Pty) Ltd.*<sup>20</sup> (hereinafter referred to as *SAA*).

## 1.2. CHAPTER CONTENT

**Chapter two** discusses the judgment of *COSAWU v Zikhethale Trade (Pty) Ltd*<sup>21</sup> (hereinafter referred to as *COSAWU*) that sparked the second generation outsourcing controversy. It continues to critically analyse the Constitutional Court judgment of *SAA* by critiquing the reasoning of the majority, and identifying interpretational issues that have arisen in its subsequent application in the case of *Harsco Metals*

---

<sup>16</sup> Ibid para 52. Also see ibid para 70. This tension is acknowledged in respect of comparable provisions in foreign jurisdictions. See for example commentary on Australia's comparable provision in Trent D Sebbens op cit note 1 at 165 and Manoj Dias-Abey op cit note 1 at 169.

<sup>17</sup> Trent D Sebbens op cit note 1 at 164 and Manoj Dias-Abey op cit note 1 at 169.

<sup>18</sup> Chris Todd, D'Arcy du Toit and Craig Bosch *Business Transfers and Employment Rights* (2004) at 24.

<sup>19</sup> Ibid.

<sup>20</sup> 2012 (1) SA 321 (CC).

<sup>21</sup> (2005) 26 ILJ 1056 (LC).

*South Africa (Pty) Ltd and Another v Arcelormittal South Africa Ltd*<sup>22</sup>(hereinafter referred to as *Harsco*). The chapter draws the conclusion that *SAA* may not be as final as commentators expected.

**Chapter three** focuses on the problematic application of the test of a going concern, required by s 197(1) (b), and as defined by *UCT*, with consideration to the reasoning in *Harsco*. Drawing on commentary based on comparable foreign jurisprudence, the chapter concludes that the test of a going concern, in light of the reasoning as adopted in *Harsco*, is deficient and can ultimately undermine the aim of s 197 and negatively impact the outsourcing market.

**Chapter four** addresses whether outsourcing should fall within the scope of s 197. It tackles this issue by examining the practical implications of s 197 in the outsourcing context and the potential effect it has on the competitiveness and viability of the outsourcing sector.

**Chapter five** highlights the uncertainty that still hangs over the application of s 197 in the outsourcing context and calls for proactive intervention by the courts and the Legislature.

### 1.3. TERMINOLOGY

Reference to the following terms will have the assigned meaning, unless indicated otherwise:-

- **Initial outsourcing or first generation outsourcing** shall refer to when a company, which has previously employed its own workforce to perform designated services, ceases to carry out such designated services and in so doing contracts with an external service provider to perform those same designated services.

---

<sup>22</sup> (2012) 33 ILJ 901 (LC).

- **Second generation outsourcing** shall refer to when an initial outsourcing arrangement between a company and a service provider is terminated or expires and the company, once putting the services out to tender, replaces the outgoing service provider with a new service provider.<sup>23</sup>
- **Future generation outsourcing** shall refer to any subsequent outsourcing arrangement that follows a second generation outsourcing arrangement.
- **Outsourcing** shall refer to the collective generations of outsourcing.
- **Insourcing** shall refer to when a company terminates a contracting out agreement with a service provider and resumes the designated service itself.
- **Client** shall refer to the company that:-
  - a) benefits from the service of the service provider with which it concludes an outsourcing contract, or
  - b) will be the beneficiary of the tendered contracted out service;
 whichever the context indicates.

The followings terms will be referred to interchangeably:

- An **initial service provider** shall be referred to interchangeably as the **old employer** or **outgoing contractor** or **transferee**, whichever is the most suitable term within the given context.
- A **new service provider** shall be referred to interchangeably as the **new employer** or **incoming contractor** or **transferor**, whichever is the most suitable term within the given context.

---

<sup>23</sup> Supra note 21 para 27. This term is also referred to by academic commentators as 'second generation contracting out'.

## 1.4. INTERNATIONAL INSIGHT

### 1.4.1. COMPARABLE FOREIGN LEGISLATION

The following were selected as the primary sources of foreign comparison where applicable:

- The Acquired Rights Directive <sup>24</sup>(hereinafter referred to as the EU Directive or Directive);
- The Transfer of Undertakings (Protection of Employment) Regulations 1981, as amended (hereinafter referred to as TUPE), and
- The Transfer of Undertakings (Protection of Employment) Regulations 2006 (hereinafter referred to as TUPE (2006)).

Their selection was determined on the similarity of their counterpart provisions to that of s 197. Furthermore the Constitutional Court has recognised the value of such foreign jurisprudence.<sup>25</sup>

Commentary and case law governing the application of the EU Directive, TUPE and TUPE (2006) in the context of outsourcing has been relied on to:-

- forecast potential issues and practical implications that may arise in light of recent local case law developments in the sphere of second generation outsourcing, and
- whether foreign experience produces viable solutions to potential problems that may arise through the application of s 197 to the outsourcing context which will be identified and discussed in the chapters to follow.

---

<sup>24</sup> The Acquired Rights Directive (also referred to as ARD) refers to Council Directive 77/187, amended by Directive 98/50/EC and consolidated in Directive 2001/23. See Amie Jasmine Ahanchian 'Reducing the Impact of the European Union's Invisible Hand on the Economy by Limiting the Application of the Transfer of Undertakings Provision' (2002) 2 *The Journal of International and Comparative Law at Chicago-Kent* 29 at 51 for a brief discussion of the amendment and consolidation of the Directive.

<sup>25</sup> Supra note 12 paras 47- 51. Also see commentary in op cit note 18 at 23-24.

### 1.4.2. THE EU DIRECTIVE

The EU Directive was first adopted in 1977.<sup>26</sup> It was subsequently amended in 1998<sup>27</sup> and finally consolidated in 2001.<sup>28</sup> The EU Directive is ‘an approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.’<sup>29</sup> It regulates, inter alia, the automatic transfer of employment contracts in the event of transfer of a business.<sup>30</sup>

The EU Directive places an obligation on member states of the European Union to transpose the Directive into its national law.<sup>31</sup> In clarifying the scope and intent of the EU Directive, and in informing the national laws of the member states, the European community seeks clarification on the interpretation of the EU Directive from the European Court of Justice (hereinafter referred to as the ECJ). This process involves referring a question of interpretation to the ECJ, which results in an opinion by an Advocate General, which is either confirmed or overruled by the ECJ.<sup>32</sup> Advocate Generals have the same status as that of the judges of the ECJ and their opinions have an influencing role on the decisions of the ECJ.<sup>33</sup> This ECJ process is mentioned as certain seminal ECJ cases and Advocate General opinions, which have impacted the scope of the EU Directive in the outsourcing context, have been referred to in this paper due to their instructive content.<sup>34</sup>

The comparable s 197 provision of the 2001 consolidated version of the EU Directive<sup>35</sup> is found in Article 1 (a) and (b). It states that:

---

<sup>26</sup> Council Directive 77/187 of 14 February 1977.

<sup>27</sup> Directive 98/50/EC of 29 June 1998.

<sup>28</sup> Directive 2001/23 of 12 March 2001. See commentary in Simon Deakin and Gillian S Morris *Labour Law* (2012) at 234 -235 for a discussion as to the history and purpose of the EU Directive.

<sup>29</sup> See title of Directive 2001/23 supra note 28.

<sup>30</sup> Ibid at chapter II, article 3(1).

<sup>31</sup> Ibid at chapter IV.

<sup>32</sup> Peter Curwen ‘Prospects for Acquired Rights’ (1999) 77 (3) *Public Administration* 599 at 600.

<sup>33</sup> Malcolm Wallis ‘Judges: Servants of Justice or Civil Servants?’ (2012) 129 (4) *South African Law Journal* 652 at 661 and fn 35 at 661.

<sup>34</sup> Op cit note 32 at 600.

<sup>35</sup> Directive 2001/23 supra note 28.

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

(b) Subject to subparagraph (a) and the following provisions of this Article, there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.<sup>36</sup>

### 1.4.3. TUPE AND TUPE (2006)

Where applicable commentary surrounding the application of TUPE and TUPE (2006), by both foreign and local academics, has been referred to and applied by analogy. TUPE was, and TUPE (2006) is, the product of the United Kingdom's implementation of the EU Directive. Therefore the aims and purposes are aligned.<sup>37</sup> Notably TUPE (2006) has replaced TUPE in its entirety.<sup>38</sup> Nevertheless, the interpretation of TUPE, and its associated commentary, remains relevant in the context of this paper.<sup>39</sup>

The scope of TUPE (2006) extends further than the scope of the EU Directive and TUPE.<sup>40</sup> It aims to address the uncertainties that had arisen in the application of TUPE, as reflected in both local and EU case law, specifically with regard to the outsourcing context.<sup>41</sup> In so doing TUPE (2006) incorporates a service provision change clause.<sup>42</sup>

A service provision change occurs when there is an initial outsourcing transaction or a second generation outsourcing transaction or the insourcing of

---

<sup>36</sup> See the similar provision in *supra* note 27 at chapter II, article 3(1).

<sup>37</sup> See explanatory note of TUPE (2006). Also see Deakin and Morris *op cit* note 28 at 241.

<sup>38</sup> John McMullen 'Service Provision Change Under TUPE: Not Quite What We Thought' (2012) 14 (4) *Industrial Law Journal* 471 at 472 and John McMullen 'An Analysis of the Transfer of Undertakings (Protection of Employment) Regulations 2006' (2006) 35 (2) *Industrial Law Journal* 113 at 114.

<sup>39</sup> *Op cit* note 18 at 23-24.

<sup>40</sup> John McMullen (2012) *op cit* note 38 at 473 and John McMullen (2006) *op cit* note 38 at 114-115.

<sup>41</sup> *Ibid.*

<sup>42</sup> See reg 3(1) (b), read with reg 3(3) and reg 4.

services.<sup>43</sup> TUPE (2006) specifically excludes the ‘supply of goods for the client’s use.’<sup>44</sup> On the occurrence of a service provision change the employment contracts of the workforce automatically transfer to the transferee.<sup>45</sup> The provision is subject to the proviso that prior to the service provision change ‘an organised grouping of employees’ are based in Great Britain ‘which has as its principal purpose the carrying out of the activities concerned on behalf of the client’ and that it is the intention of the client that the after the service provision change the services will ‘be carried out by the transferee other than in connection with a single specific event or task of short-term duration.’<sup>46</sup>

The service provision change clause in TUPE (2006) circumvents the application of the assessment as to whether there is

... a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity.<sup>47</sup>

The latter is comparable to that of s 197. A similar provision existed under TUPE.<sup>48</sup> Despite the seemingly unambiguous wording of the service provision change clause, its application has been a far reach from the vision of certainty which propelled its creation.<sup>49</sup>

---

<sup>43</sup> Regulation 3(1) (b).

<sup>44</sup> Regulation 3(3) (c).

<sup>45</sup> Regulation 4 (1).

<sup>46</sup> Regulation 3(3) (a).

<sup>47</sup> Regulation 3(1) (a), read with reg 3(2). In the event that the elements that comprise a service provision change in reg 3(3) are not filled, the transaction will be subject to the transfer of a undertaking test in reg 3(1)(a). For commentary see Giuseppe Santoro- Passarelli ‘The Transfer of Undertakings: Striking a Balance between Individual Workers Rights and Business Needs’ (2007) 23 (3) *The International Journal of Comparative Labour Law and Industrial Relations* 311 at 345

<sup>48</sup> Vivien Shrubsall ‘Competitive Tendering, Out-sourcing and the Acquired Rights Directive’ (1998) 6(1) *The Modern Law Review* 85 at 85.

<sup>49</sup> See generally John McMullen (2012) op cit note 38 which discusses the interpretational problems associated with the application of the service provision change clause since its introduction.

## **CHAPTER 2: THE APPLICATION OF S 197 TO SECOND GENERATION OUTSOURCING**

### **2.1. INITIAL OUTSOURCING AND S 197**

It is generally accepted that s 197 may apply to an initial outsourcing transaction insofar as the elements of s 197 are satisfied.<sup>50</sup> The latest debate in the applicability of s 197 to outsourcing transactions has centred on its application to second generation outsourcing and by implication that of future generations. The reference to such terms such as initial outsourcing and second generation outsourcing has been criticized by commentators and most recently by the Constitutional Court as being artificial and as misleading the nature of the enquiry.<sup>51</sup> Despite such criticisms, for the sake of convenience, these terms shall be referred to with the meanings as assigned in chapter one.

This chapter shall discuss and critique the relevant jurisprudence that has given content to the debate surrounding the application of s 197 to second generation outsourcing.

### **2.2. TESTING THE WATERS - *COSAWU V ZIKHETHELE TRADE (PTY) LTD AND ANOTHER***

#### **2.2.1. BACKGROUND**

The case of *COSAWU* was the first reported case pronouncing on the application of s 197 to second generation outsourcing.<sup>52</sup>

---

<sup>50</sup> See cases such as *UCT* supra note 12, *SA Municipal Union and others v Rand Airport Management Co (Pty) Ltd and others* (2006) 26 ILJ 67 (LAC), *Buys v Impala Distributors and another* (2008) 29 ILJ 641 (LC). Also see *Aviation Union of SA and others v SA Airways (Pty) Ltd* (2008) 29 ILJ 331 (LC) paras 23 and 32. For commentary see PAK Le Roux ‘Outsourcing and the LRA: When it is the transfer of a “going concern”?’ (2004) 14 (5) *Contemporary Labour Law* 41 and PAK Le Roux ‘Outsourcing and the transfer of a business as a going concern’ (2007) 17 (4) *Contemporary Labour Law* 31.

<sup>51</sup> Supra note 20 para 105. Malcolm Wallis ‘Is Outsourcing in? An ongoing concern’ (2006) 27 *ILJ* 1 at 4.

<sup>52</sup> Supra note 21 paras 1 and 27.

The facts of the case were briefly as follows:<sup>53</sup> Fresh Produce Terminals (FPT) outsourced its terminal and stevedoring services to Khulisa.<sup>54</sup> This constituted the initial outsourcing arrangement.<sup>55</sup> FPT terminated its contract with Khulisa (the outgoing contractor), and following a tendering of the services, awarded the contract to Zikhethele Trade (the incoming contractor).<sup>56</sup> Following the appointment of Zikhethele, the applicant, being the registered trade union representing 181 employees of Khulisa, sought an urgent declaratory order that s 197 applied to the outsourcing transaction appointing Zikhethele.<sup>57</sup>

### 2.2.2. THE COURT'S FINDINGS

The Labour Court held that second generation transfers fell within the ambit of s 197.<sup>58</sup> Adopting a purposive approach to the language of s 197,<sup>59</sup> it determined that the language of s 197(1) (b) did not preclude second generation transfers being subject to s 197.<sup>60</sup> The court accepted that 'by' in the phrase '...transfer of a business by one employer (the old employer) to another employer (the new employer) as a going concern'<sup>61</sup> should be read as 'from'.<sup>62</sup> It held that such an approach avoided any anomaly that s 197 applied to protect employees of an initial outsourcing transaction and not employees of a second generation outsourcing transaction.<sup>63</sup> The court's construction of the language was an attempt to circumvent the argument that the language of s 197 (1)(b) exempts second generation outsourcing as the nature of such transaction precludes there being a transfer of a business which is effected 'by

---

<sup>53</sup> For a comprehensive summary of the intricate facts of the case see PAK Le Roux 'Outsourcing and the transfer of employees to another employer: what happens in the "second Generation" Transfer?' (2005) 14 (12) *Contemporary Labour Law* 111 at 112-113.

<sup>54</sup> Supra note 21 para 11. The entity Khulisa was a result of a merger of three different entities which initially supplied the outsourced services to FPT. The merger occurred on the recommendation of FPT. See supra note 21 para 10.

<sup>55</sup> Ibid para 8.

<sup>56</sup> Ibid para 13.

<sup>57</sup> Ibid para 5.

<sup>58</sup> Ibid para 35.

<sup>59</sup> Ibid para 29.

<sup>60</sup> Ibid para 35.

<sup>61</sup> Section 197 (1) (b).

<sup>62</sup> Supra note 21 para 29.

<sup>63</sup> Ibid.

the old employer'.<sup>64</sup> In other words, such an argument purports that the transfer is effective by the client, who is not the old employer, and not by the outgoing contractor, who is the old employer.<sup>65</sup> If it was further accepted that the absence of a contractual link between the old employer and the new employer does not preclude the possible application of s 197.<sup>66</sup>

Relying on EU jurisprudence,<sup>67</sup> the court formulated a two stage transfer test.<sup>68</sup> Such a construction contemplated a transfer from the outgoing contractor to the client which precedes a transfer from the client to the incoming contractor.<sup>69</sup> In the court's opinion this formulation of a transfer, in combination with the interpretation of 'by' to mean 'from', brought the tripartite relationship structure associated with second generation outsourcing within the scope of a 'transfer' as envisaged by s 197(1)(b).<sup>70</sup> Shifting the enquiry away from the mode or method of transfer, the court held that the main issue for determination was whether 'what is transferred is a business in operation so that the business remains the same but in different hands.'<sup>71</sup>

### 2.2.3. THE APPLICATION OF S 197

Having determined the possible application of s 197 to a second generation outsourcing arrangement, the court proceeded to investigate whether the facts triggered s 197, namely whether there was a transfer of a business as a going concern.<sup>72</sup> The following facts were pertinent to the court's finding:

- the incoming and outgoing contractors shared the same managing director who, in addition, had a controlling interest in both entities;
- Zikhethle took over the majority of Khulisa employees;

---

<sup>64</sup> Ibid para 28.

<sup>65</sup> Craig Bosch 'Aluta Continua, or Closing the Generation Gap: Section 197 of the LRA and its Application to Outsourcing' 2007 *Obiter* 85 at 86.

<sup>66</sup> Supra note 21 para 28.

<sup>67</sup> Ibid paras 30-35.

<sup>68</sup> Ibid paras 29 and 35.

<sup>69</sup> Ibid para 29.

<sup>70</sup> Ibid para 35.

<sup>71</sup> Ibid. The same line of reasoning was adopted in supra note 12 para 56.

<sup>72</sup> Ibid paras 36 and 40.

- Zikhethele used the same premises, fittings and equipment which were at Khulisa's disposal;
- Khulisa utilised some of Zikhethele's suppliers;
- the client was the major incorporeal asset of both entities; and
- there was similarity in their corporate structures.<sup>73</sup>

Accepting that a two stage transfer had occurred,<sup>74</sup> the court drew on the above listed facts to conclude that the facts triggered s 197.<sup>75</sup> Specifically a comparison of the two entities before and after the award of the tender resulted in the business retaining '...its identity to a sufficient degree as to constitute a transfer of a business.'<sup>76</sup>

#### **2.2.4. ACADEMICS RESPOND TO *COSAWU***

Le Roux regarded *COSAWU* as authority for two propositions.<sup>77</sup> First that the word 'by' does not limit the application of s 197 to second generation outsourcing. Secondly that outsourcing does not automatically trigger s 197 but rather the facts are subject to a s 197 enquiry.<sup>78</sup> Bosch commended the case in its attempt at furthering the right to fair labour practices, the purpose of the LRA and specifically s 197.<sup>79</sup>

Despite such flattery the case was subjected to severe criticism.<sup>80</sup> In particular the two stage transfer test was regarded as unnecessary. It was argued that the court's interpretation of 'by' to mean 'from' was suffice to conclude the application of s 197 to second generation outsourcing.<sup>81</sup> Coupled with the court's comments as to the irrelevancy of the mode or method of transfer left how the transfer occurred of no significance.<sup>82</sup> The two stage transfer test was deemed an artificial construction

---

<sup>73</sup> Ibid para 36.

<sup>74</sup> Ibid para 40.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid para 37.

<sup>77</sup> Op cit note 53 at 114 -115.

<sup>78</sup> Ibid.

<sup>79</sup> Op cit note 65 at 87.

<sup>80</sup> Op cit note 53 at 115 and Wallis op cit note 51 at 11-18.

<sup>81</sup> Op cit note 65 at 88 and op cit note 53 at 115.

<sup>82</sup> Supra note 21 para 35 and op cit note 65 at 88.

which lacked factual relevance and contradicted the court's reasoning.<sup>83</sup> In applying the two stage transfer test the client would become the old employer and the incoming contractor would become the new employer despite the court concluding that the transfer occurred between the outgoing and incoming contractor.<sup>84</sup>

Wallis, inter alia, critiqued the court's re-interpretation of the word 'by'. He regarded it as unnecessary without an in-depth investigation.<sup>85</sup> He argued that the court had changed the intended meaning of the Legislature from a transferor taking positive action to affect a transfer, to a passive transferor permitting a transfer out of helpless compliance or inadvertence.<sup>86</sup> Despite the appeal of a purposive approach to interpretation,<sup>87</sup> Wallis suggested that it is reasonable to accept that the Legislature intended to exclude transactions such as second generation outsourcing from the scope of s 197.<sup>88</sup> Furthermore he was of the opinion that the facts of the case did not justify the court's interference with the plain meaning of the language.<sup>89</sup> Wallis advocated a constitutional challenge as the appropriate means to develop the application of s 197.<sup>90</sup>

#### **2.2.5. THE UPRISE OF LITIGATION FOLLOWING *COSAWU***

The judgment of *COSAWU* was tested in the Labour Court case of *Aviation Union of SA and others v SA Airways (Pty) Ltd*.<sup>91</sup> (hereinafter referred to as *SAA LC*) *SAA LC* dealt with the applicability of s 197 to second generation outsourcing. *COSAWU* was distinguished and not followed. Despite acknowledging the value in the purposive approach taken by *COSAWU*, the Labour Court deemed it to be unwarranted.<sup>92</sup> It stated:

---

<sup>83</sup> Op cit note 53 at 115.

<sup>84</sup> Supra note 21 paras 36-37. Also see op cit note 53 at 115.

<sup>85</sup> Wallis op cit note 51 at 12-13.

<sup>86</sup> Ibid at 10-13.

<sup>87</sup> Op cit note 53 at 115.

<sup>88</sup> Wallis op cit note 51 at 13.

<sup>89</sup> Ibid at 13-17

<sup>90</sup> Ibid at 16.

<sup>91</sup> *Aviation Union of SA* supra note 50.

<sup>92</sup> Ibid para 32.

Whilst I am in agreement with Murphy AJ [the judgment of *COSAWU*] that workers affected by a second generation transfer may well equally be in need of protection, I am not persuaded that, in the light of the express and unambiguous wording of s 197(1)(b), it would be appropriate to interpret s 197(1)(b) also to apply to a transfer 'from' one employer to another as opposed to a transfer by the 'old' employer to the 'new' employer. I am of the view that it should be left to the legislature to extend the ambit of s 197(1) (b) to apply also to the so-called second generation transfers.<sup>93</sup>

The Labour Court's rejection of a purposive approach was motivated by a lack of ambiguity in the wording of s 197. The lack of ambiguity was indicative of the intention of the Legislature to exclude second generation outsourcing.<sup>94</sup> The judgment however failed to expand on and explain the basis of its absolute certainty as to the Legislature's intention.<sup>95</sup> A conclusion which curtails the reach and purpose of a statutory provision, the importance of which is recognised by the court, requires explanation and justification rather than a mere declaration.

The effect of the judgment was that it created a blanket exception to s 197 in respect of second generation outsourcing.<sup>96</sup> Notably the two stage transfer test of *COSAWU* was not referred to. The judgment appears inconsistent at times. First, despite the court rejecting the application of second generation outsourcing, it nonetheless recognises the limited value of *COSAWU*. This implies, due to the nature of the transaction involved in *COSAWU*, a limited application of s 197 to second generation outsourcing.<sup>97</sup> The judgment omits to explain why the limited reach of *COSAWU* does not apply to the facts of the case.<sup>98</sup> Secondly, the court appears to entertain the application of an insourcing transaction on the facts without distinguishing it from the appointment of a new service provider or ascertaining its

---

<sup>93</sup> Ibid.

<sup>94</sup> Ibid paras 30-31.

<sup>95</sup> Craig Bosch 'Section 197 of the Labour Relations Act: the new generation' in Kitty Malherbe and Julia Sloth-Nielson (eds) *Labour Law into the Future: Essays in Honour of D'Arcy du Toit* (2012) at 162.

<sup>96</sup> *Aviation Union of SA* supra note 50 paras 30-31.

<sup>97</sup> Ibid para 32.

<sup>98</sup> Ibid para 33.

application within s 197.<sup>99</sup> Thirdly, the court accepted that there can be a transfer of a going concern in the absence of a contractual nexus between the transferor and transferee.<sup>100</sup> Bosch argues that in light of such a determination, the court failed to apply its own reasoning by simply not applying the test as to whether there was a transfer of a business as a going concern.<sup>101</sup>

This judgment was taken on appeal. It proceeded to the Labour Appeal Court which in applying a purposive approach held that s 197 was applicable to second generation outsourcing.<sup>102</sup> This judgment was taken on appeal to the Supreme Court of Appeal which applied a literal approach and held that s 197 was not applicable to second generation outsourcing.<sup>103</sup> Finally the matter reached the Constitutional Court which led to the pronouncement that s 197 may apply to second generation outsourcing.<sup>104</sup> The details of this litigation battle will be discussed in the section to follow.

## **2.3. THE SECOND GENERATION OUTSOURCING BATTLE**

### **2.3.1. DETERMINING THE LAW**

Following a trilogy of conflicting decisions dealing with the permissibility of s 197 to second generation outsourcing arrangements, the Constitutional Court in *SAA* pronounced that second generation outsourcing may fall within the ambit of s 197.<sup>105</sup> The Constitutional Court confirmed that the meaning of ‘transfer’ does not preclude second generation transfers triggering s 197, conversely it does not mean that second generation transfers will automatically trigger s 197.<sup>106</sup> Discarding generation labels assigned to transactions, it held that what is relevant is whether the facts of a

---

<sup>99</sup> Ibid para 37. See commentary op cit note 95 at 163.

<sup>100</sup> *Aviation Union of SA* supra note 50 para 36.

<sup>101</sup> Op cit note 95 at 163

<sup>102</sup> *Aviation Union of South Africa and others v South Africa Airways (Pty) Ltd and others* 2010 (4) SA 604 (LAC). (hereinafter referred to as *SAA LAC*)

<sup>103</sup> *South African Airways (Pty) Ltd v Aviation Union of South Africa and others* 2011(3) SA 148 (SCA). (hereinafter referred to as *SAA SCA*)

<sup>104</sup> Supra note 20.

<sup>105</sup> Supra note 20 paras 44 and 105.

<sup>106</sup> Ibid paras 44 and 105.

particular case satisfy the elements embodied in s 197, namely whether there is ‘transfer’, of a ‘business’, ‘as a going concern’, triggering the application of the section.<sup>107</sup>

It is notable that the minority judgment, written by Jafta J and the majority judgment, written by Yacoob J, concurred on the legal issue as to whether s 197 applied to second generation outsourcing. They differed as to whether the court could engage in a s 197 enquiry prior to the transfer actually occurring and whether the facts presented were sufficient to conclude the application of s 197. The minority held that an order as to the application of s 197 on the facts was premature as the facts presented were insufficient and ‘did not cover the events that occurred after the date on which the outsourcing agreement was terminated.’<sup>108</sup> It was of the opinion that the matter be remitted back to the labour court.<sup>109</sup> The majority differed in that it did not require that a transfer ‘must have already taken place’<sup>110</sup> before making a s 197 order or that the facts presented were insufficient.<sup>111</sup> It held that there was a transfer of a business as a going concern following an analysis of the effects of the relevant provisions of the outsourcing agreement which existed between the client and the outgoing contractor.<sup>112</sup>

### **2.3.2. THE FACTS OF SAA**

In assessing the impact and scope of *SAA* regard must be given to the context in which the case was decided.

South African Airways (SAA) transferred its facilities management operations to LGM.<sup>113</sup> SAA employees linked to the management operations were transferred to

---

<sup>107</sup> Ibid.

<sup>108</sup> Ibid paras 75-77.

<sup>109</sup> Ibid para 77.

<sup>110</sup> Ibid para 82.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid para 124.

<sup>113</sup> Ibid para 6.

LGM.<sup>114</sup> Salient features of the outsourcing agreement concluded between SAA and LGM in respect of the management operations included, inter alia:-

- LGM would enjoy the use of ‘the office space, workshops, airport aprons, computers and the SAA network at all designated airports’;<sup>115</sup>
- The assets and inventory associated with the management operations was sold to LGM, and which SAA on termination of the agreement would be entitled to repurchase;<sup>116</sup>
- On termination of the agreement, ‘SAA would be entitled to have the services transferred back to it or to a third party and obtain assignment of all third party contracts from LGM’<sup>117</sup> and
- LGM was required to develop a handover plan to effect the cancellation.<sup>118</sup>

SAA prematurely, and lawfully, cancelled the outsourcing agreement due to a change in ownership in LGM. Failing confirmation from either SAA or LGM that its members’ employment would be safeguarded, Aviation Union sought a declaratory order and interdictory relief securing their members’ employment following the termination under s 197.<sup>119</sup>

### 2.3.3. CASE LAW HISTORY

The *SAA LC* decision has been discussed in detail in a prior section of this chapter. For sake of clarity the Labour Court declared a blanket exemption against second generation outsourcing applying to s 197.<sup>120</sup>

Taken on appeal, the Labour Appeal Court<sup>121</sup> rejected and criticized the literal approach of the *SAA LC*.<sup>122</sup> In applying a purposive approach it determined that

---

<sup>114</sup> Ibid para 9.

<sup>115</sup> Ibid para 8.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid para 65.

<sup>119</sup> Ibid paras 12 and 13.

<sup>120</sup> *Aviation Union of SA* supra note 50 para 32.

<sup>121</sup> Supra note 102.

<sup>122</sup> See *ibid* paras 57, 59-60 and 63 in respect of the judgment of Judge Davis. Also see the judgment of Zonda JP. He engages in an in-depth discussion of the purposive approach and the literal approach

second generation outsourcing was within the scope of s 197, and specifically within the facts of the case.<sup>123</sup> Rejecting the Labour Court's assertion that the word 'by' requires a positive role by the transferor, it argued that such a literal interpretation had excluded a range of meanings associated with the word 'by'.<sup>124</sup> The related meanings countered the necessity for a positive actor and permitted the inference of the word 'from'.<sup>125</sup> It held that a purposive approach promoted the purpose of s 197 and prevented employers circumventing the application of s 197.<sup>126</sup> It concluded that there existed no barrier to the application of s 197 to second generation outsourcing.<sup>127</sup>

It is noteworthy that in 2010, after the judgment of *SAA LAC*, the Department of Labour published by way of General Notice the Labour Relations Amendment Bill, 2010.<sup>128</sup> The Bill sought, inter alia, to amend s 197 (1) (b) by deleting the word 'by' in the phrase transfer '...by one employer ('the old employer') to another employer ('the new employer')...' and the inserting the word 'from'. The purpose of such amendment was to bring second generation transfers within the ambit of s 197.<sup>129</sup> The change was however never effected.<sup>130</sup>

---

and the effect of each approach on the application and purpose of s 197. See specifically his preference for the purposive approach at *ibid* paras 31-32.

<sup>123</sup> *Ibid* paras 61-62.

<sup>124</sup> See *ibid* paras 56-57 where the court stated that:-

The word 'by' holds a number of different meanings, including 'indicating the medium, means, instrument or agency, of circumstance, condition, manner, cause, reason' (the *Shorter Oxford English Dictionary* vol 1). An examination of the multiple meanings of the word 'by' indicates that the confident assertion that the literal interpretation of this section precludes any possible extension to second-generation transfers is *not justified linguistically*. The wording of the section does not necessarily and inevitably support the exclusive connotation that the transferor has to play an immediate, positive role in bringing about the transfer. [*own emphasis added*]

<sup>125</sup> *Ibid* para 57. Also see John Grogan 'Section 197 and Outsourcing: No magic to the 'generation'' (2012) 28 (3) *Employment Law* 4 at 5.

<sup>126</sup> See *supra* note 103 paras 59 and 64 where Judge Davis provides an example of the possible circumvention of s 197.

<sup>127</sup> *Ibid* paras 63 and 64.

<sup>128</sup> General Notice No.33873, available at <http://www.info.gov.za/view/DownloadFileAction?id=137361>, accessed on 11 March 2013.

<sup>129</sup> *Ibid*.

<sup>130</sup> No comparable amendment to s 197 is present in the Labour Relations Amendment Bill, 2012, available at <https://www.labour.gov.za/downloads/legislation/bills/proposed-amendment-bills/lraamendmentbill.pdf>, accessed on 11 March 2013.

Notwithstanding the proposed amendment, the Labour Appeal Court's judgment was taken on appeal to the Supreme Court of Appeal.<sup>131</sup> The majority reverted to a literal approach as to the interpretation of s 197, as advanced by the Labour Court. It accepted that the word 'by' requires positive action by the transferor which is lacking in second generation outsourcing.<sup>132</sup> It held that the decision of the Labour Appeal Court had distorted the intended meaning of the word 'by' in equating it with the word 'from', and overemphasised the potential for abuse where none existed on the facts.<sup>133</sup> It is noted that dismissing the abuse argument due to a lack of evidence on the facts is narrow sighted in it ignores the broader application of the judgment.

The minority judgment, adopting a purposive approach to s 197,<sup>134</sup> avoided the debate surrounding the interpretation of the word 'by'. It deemed it unnecessary in light of the facts of the case.<sup>135</sup> It focused on the fact that there existed a contract that created a positive obligation on the transferor to 'positively assist' in effecting a transfer.<sup>136</sup>

#### **2.4. THE APPLICATION OF SAA**

The first judgment to apply the Constitutional Court decision of *SAA* was that of *Harsco Metals South Africa (Pty) Ltd v Arcelormittal South Africa Limited* (hereinafter referred to as *Harsco*).<sup>137</sup> The facts are briefly as follows. The applicant, Harsco Metals (HM), provided slag management and processing services (the Services) to Arcelormittal SA (AMSA) subject to six service agreements (the Agreements).<sup>138</sup> Their relationship resulted from a joint venture between the two

---

<sup>131</sup> Supra note 103.

<sup>132</sup> Ibid paras 31-32.

<sup>133</sup> Ibid para 32.

<sup>134</sup> Ibid para 49.

<sup>135</sup> Ibid para 47.

<sup>136</sup> Ibid paras 47-48.

<sup>137</sup> Supra note 22. For a discussion of *Harsco* and its application of *SAA* see John Grogan 'Applying Aviation Union: Another case of second-generation outsourcing' (2012) 28 (3) *Employment Law* 12 at 12-16.

<sup>138</sup> Supra note 22 para 7.

companies.<sup>139</sup> In discharging the Services, HM employed 445 employees and deployed its services from four sites and operated related plants.<sup>140</sup>

Prior to the expiry of five of the Agreements AMSA commenced the tendering process for the Services.<sup>141</sup> The second respondent (Phoenix) and the third respondent (Tube City) were appointed to provide the Services to AMSA at specific sites, to the exclusion of HM.<sup>142</sup>

Following the termination of the relevant Agreements, AMSA was to purchase certain assets from HM, which excluded HM's plants, part of which it was to retain for itself and part of it which it was to sell on to Phoenix and Tube City. It was common cause that Phoenix and Tube City were willing to employ 300 of HM's 445 employees, which excluded HM's head office staff and two site managers.<sup>143</sup>

HM sought an urgent declaratory order to confirm the application of s 197 to the continuation of the Services by Phoenix and Tube City.<sup>144</sup> The court had to decide whether there would be a transfer of a business as a going concern from HM to Phoenix and Tube City due to the termination of the relevant Agreements and the subsequent appointment of Phoenix and Tube City. The application was opposed by AMSA, Phoenix and Tube City.<sup>145</sup>

The *Harsco* judgment brings to the forefront critical interpretation issues of *SAA* which are discussed in the section to follow.

## 2.5. ANALYSIS OF *SAA*

The below discussion identifies and discusses three interpretational issues associated with *SAA* which has arisen through the judgment's application in *Harsco*. The three identified issues are: - the role of the history of the transaction, the application of the majority's transfer test and the role of the take over of employees.

---

<sup>139</sup> Ibid para 17.

<sup>140</sup> Ibid paras 6 and 7.

<sup>141</sup> Ibid para 8.

<sup>142</sup> Ibid.

<sup>143</sup> Ibid para 9.

<sup>144</sup> Ibid paras 1 and 2.

<sup>145</sup> Ibid para 2.

## 2.5.1. THE HISTORY OF THE TRANSACTION

### 2.5.1.1. THE ISSUE

Yacoob J, writing on the behalf of the majority in *SAA*, made the following observation:-

The final general observation is that, in determining whether contracting out amounts to the transfer of a business as a going concern, the substance of the initial transaction, more specifically whether what is outsourced is a business as a going concern rather than the provision of an outsourced service remains significant during subsequent transfers. If the outsourcing institution from the outset did not offer the service, that service cannot be said to be part of the business of the transferor. What happens here is simple contracting out of the service, nothing more, nothing less.<sup>146</sup>

There is no transfer of the business as a going concern. The outsourcee is contracted to provide the service, and becomes obliged to do so. And it is the outsourcee's responsibility to make appropriate business infrastructure arrangements. These may include securing staff, letting appropriate property for office or other work space, and acquiring fixed assets, machinery and implements, computers, computer networks and the like. Cancellation of the contract in these circumstances entails only that the outsourcee forfeits the contractual right to provide the service. The whole infrastructure for conducting the business of providing the outsourced service would ordinarily remain the property of the outsourcee. As we shall see, that is not what happened here, either when the initial outsourcing contract was concluded between SAA and LGM, or when SAA cancelled it.<sup>147</sup>

If, on the other hand, the first outsourcing exercise is really a transfer of part of the business of the outsourcer who has been carrying on the business of the provision of the service until transfer, the question whether the subsequent transfer is merely the transfer of the right to provide the outsourced service or the transfer of a business as

---

<sup>146</sup> *Supra* note 20 para 106.

<sup>147</sup> *Ibid* para 107.

a going concern would arise. And that would require an analysis of the terms of the transaction that gives rise to the subsequent event.<sup>148</sup>

The debate arose in *Harsco* as to whether the above observation of the majority qualifies the possible application of s 197 to a second generation outsourcing transaction. In other words is it a prerequisite that the initial outsourcing transaction was a s 197 transfer, failing which the second generation outsourcing transaction will amount to a ‘simple contracting out of the services’. The cancellation of which would not constitute a s 197 transfer.<sup>149</sup>

### 2.5.1.2. THE ARGUMENT

In *Harsco*, the first respondent, namely AMSA, argued in favour of an interpretation that qualifies the application of s 197.<sup>150</sup> It argued that the application of s 197 to a second generation outsourcing transaction is qualified by the prerequisite that the initial outsourcing transaction constitutes a s 197 transfer. It argued that in the absence of an initial s 197 outsourcing transaction between AMSA and Harsco (the basis of their relationship was that of a joint venture),<sup>151</sup> the cancellation of the Service Agreements amounted to a mere change of service provider.<sup>152</sup>

Judge Van Niekerk rejected<sup>153</sup> and highlighted the implications of AMSA’s interpretation of *SAA*.<sup>154</sup> The details of which are discussed below. Notwithstanding the court dismissing AMSA’s argument, it distinguished the facts of the case from that detailed in Judge Yacoob’s observation.<sup>155</sup> The facts in *Harsco* were distinguishable in that it did not amount to a ‘simple contracting out’ as contemplated

---

<sup>148</sup> Ibid para 108.

<sup>149</sup> Ibid para 106.

<sup>150</sup> See support for such contention in Kaylan Massie ‘From Clarity to Confusion: *Harsco Metals South Africa v Acerlormittal South Africa*’ unpublished paper (2012) at 5 and 7. Also see Lance Witten ‘Second Generation Transfers: The Final Word’ Norton Rose Employment and Labour Law Seminar, 11 October 2012, available at <http://www.nortonrose.com/files/za-second-gneration-transfers-72235.pdf>, accessed on 21 January 2013.

<sup>151</sup> See supra note 22 para 17 for details of the joint venture relationship between AMSA and Harsco.

<sup>152</sup> See ibid para 18 for AMSA’s argument.

<sup>153</sup> Ibid para 20.

<sup>154</sup> Ibid.

<sup>155</sup> Supra note 20 para 107.

by Judge Yacoob.<sup>156</sup> The consequence of the termination of the Service Agreements did not involve Harsco losing only a right to provide the service but resulted in a movement of assets and employees that irrespective of the history of the transaction required examination.<sup>157</sup>

### 2.5.1.3. THE ANALYSIS

It is submitted that the above detailed observation of the Constitutional Court is merely intended to define and detail the effects of a cancellation of a ‘simple contracting out’ of services, in principle, to contrast it against the factual scenario presented in *SAA*.<sup>158</sup> The history of the initial outsourcing transaction is ‘significant’, the adjective used by the court, and not decisive,<sup>159</sup> insofar as it red flags the background of the outsourcing arrangement. The background may trigger an investigation into any possible contractual obligations or undertakings, such as in *SAA*, that may or may not impact the elements that may trigger s 197.<sup>160</sup> This line of reasoning is compatible with the facts of *SAA* where contractual provisions stemming from the initial outsourcing relationship triggered the application of s 197.<sup>161</sup> The observation should be interpreted as to clarify the enquiry in the context of the facts of *SAA*.<sup>162</sup>

Admittedly the Constitutional Court’s observation lacks clarity in contextualising the observation and the scope of its application. Nonetheless this paper supports the reasoning and conclusion of Judge Van Niekerk who dismissed AMSA’s interpretation as it failed to not only account for the purposive interpretation of the majority judgment, but countered previous decisions of the

---

<sup>156</sup> Supra note 22 para 21.

<sup>157</sup> Ibid.

<sup>158</sup> Ibid para 19.

<sup>159</sup> Ibid.

<sup>160</sup> The below quotation at supra note 20 para 118 reflects the majority’s application of this approach:-  
The question for determination now is whether the provisions of the agreement relative to cancellation, *interpreted in the light of the transfer of a business as a going concern which had already taken place*, contemplate the transfer of a business as a going concern. [*own emphasis added*]

<sup>161</sup> Ibid para 124.

<sup>162</sup> Supra note 22 para 19.

Labour Appeal Court and Constitutional Court which advocated a transaction specific examination in the assessment of whether s 197 applied.<sup>163</sup>

It is argued that if an initial outsourcing agreement were a prerequisite to launching a s 197 enquiry the reasoning of the Constitutional Court's judgment would be nonsensical. Both the majority and minority judgment in *SAA* disregard the use of 'labels' in a given transaction, preferring substance over form.<sup>164</sup> Creating an exception to the applicability of s 197 by determining the exception based on the occurrence of an initial outsourcing transaction places form over substance. This leaves the transaction exempt from scrutiny due to its classification/labelling.

In rejecting the labelling of generations of outsourcings and focusing the true nature of the enquiry as to whether there is a transfer of a business as a going concern,<sup>165</sup> the majority judgment of *SAA* went on to state that:-

A transfer of business may not be covered by section 197 even if it is a 'first generation' contracting out. On the other hand, even a 'fifth generation' outsourcing could be caught by the section if it is in reality the transfer of a business as a going concern.<sup>166</sup>

The above quotation highlights the inadequacy of AMSA's argument in *Harsco* that the majority's observation in *SAA* creates a qualification.<sup>167</sup> If AMSA's submission were correct then a fifth generation outsourcing transaction can only be caught by s 197 if the first generation outsourcing transaction triggered s 197. This outcome contradicts the above quoted statement of the majority. The above quote of the majority clearly expresses the idea that a first generation outsourcing transaction may escape s197, yet a fifth generation outsourcing may be caught by s197. This is because the true nature of the enquiry is whether there has been a transfer of a

---

<sup>163</sup> Ibid para 20.

<sup>164</sup> Supra note 20 paras 44 and 105.

<sup>165</sup> Ibid para 105.

<sup>166</sup> Ibid.

<sup>167</sup> Supra note 22 para 16.

business as a going concern.<sup>168</sup> Therefore the very words and reasoning of the majority indicate it did not intend any qualification by its observation.

In summation the absence of an initial s 197 outsourcing transaction should not elevate a transaction above the safeguards imposed by s 197. To do so would contradict the reasoning applied in *SAA*. It is respectfully submitted that such an exception if intended would have been unambiguous and expressly justified. Following the reasoning of Judge Van Niekerk's in *Harsco* there appears to be no justification to allow a transaction, irrespective of its facts, to escape a s 197 enquiry based on the arbitrary condition that there exists an initial s 197 outsourcing transaction.<sup>169</sup> It remains to be seen whether this issue will be the subject of further litigation in an attempt by employers to circumvent the application of s 197 in the second generation outsourcing context.

### **2.5.2. THE MAJORITY JUDGMENT'S TWO STAGE TRANSFER TEST**

The majority judgment in *SAA* characterised the main issue in dispute as 'whether the transfer was one by an old employer to a new one'.<sup>170</sup> In other words, who was effecting the transfer?<sup>171</sup> This stemmed from the heated debate surrounding the word 'by' in s 197(1) (b) that occurred in the labour court, labour appeal court and the supreme court of appeal, as previously discussed.

The majority in *SAA* held that the concepts of old employer and new employer were not static in application.<sup>172</sup> The old employer in an initial outsourcing transaction does not remain the old employer throughout successive outsourcing transactions. The identity of the old and new employer is to be applied within the context of a given transaction. Having introduced the dynamic application of the identity of old and new employers, the majority fleetingly determined that the word 'by' be assigned its ordinary meaning.<sup>173</sup> The majority then proceeded to establish a

---

<sup>168</sup> Supra note 20 para 105.

<sup>169</sup> Supra note 22 para 20.

<sup>170</sup> Supra note 20 para 102.

<sup>171</sup> Ibid para 102.

<sup>172</sup> Ibid paras 103-104.

<sup>173</sup> Ibid paras 81 and 113. At ibid para 81 the Court held:-

test as to whether there is a transfer by an old employer to a new employer.<sup>174</sup> In establishing whether there is a transfer, a two stage enquiry was devised. It stated the following:-

Does the transaction concerned create rights and obligations that require one entity to transfer something in favour or for the benefit of another or to another? If so, does the obligation imposed within a transaction, fairly read, contemplate a transferor who has the obligation to effect a transfer or allow a transfer to happen, and a transferee who receives the transfer? If the answer to both these questions is in the affirmative, then the transaction contemplates transfer by the transferor to the transferee. Provided that this transfer is that of a business as a going concern, for purposes of section 197, the transferee is the new employer and the transferor the old. The transaction attracts the section and the workers will enjoy its protection.<sup>175</sup>

In the above enquiry the transferor is the old employer and the transferee is the new employer.<sup>176</sup> Furthermore provided that there is a transferor, the identity of the transferee is of no relevance.<sup>177</sup> This type of enquiry departs from the wide scope of a transfer preferred by the minority in *SAA*.<sup>178</sup> It permits the court to interpret rights and obligations flowing from a transaction or an agreement prior to the actual transaction being implemented.<sup>179</sup> Despite the majority determining there was a transfer by an old employer to a new employer on the facts of case, the application of this two stage transfer test to the facts of the case is not clearly reflected in the judgment.

The question that naturally follows is how will this two stage transfer test be applied in future cases? *Harsco* failed to bring the majority's two stage transfer test

---

This judgment holds broadly that a permissible meaning of the word 'by' inevitably leads to the construction of the section favoured by the Labour Appeal Court (LAC), and that it is unnecessary to equate the word 'by' with 'from' and conclude that a transfer from one person or entity to another suffices for purposes of section 197.

<sup>174</sup> Ibid para 113.

<sup>175</sup> Ibid.

<sup>176</sup> Ibid para 114.

<sup>177</sup> Ibid para 124.

<sup>178</sup> Ibid para 46.

<sup>179</sup> Ibid paras 114-115.

to life. Judge Van Niekerk adopted the minority's interpretation as to the establishment of a transfer.<sup>180</sup> Therefore the scope and implications of the majority's two stage transfer test needs to be examined in theory.

Applying the transfer test to the facts of *SAA* the scope of the first question needs to be assessed.<sup>181</sup> In *SAA* the outsourcing agreement between SAA and LGM created a contractual obligation that LGM would inter alia transfer assets and develop a handover plan to either SAA or the appointed service provider. Therefore the first stage of the transfer test is answered in the affirmative. Considering the second stage of the transfer test,<sup>182</sup> the facts contemplate LGM as a transferor and SAA or a third party as the transferee. The ultimate identity of the transferee being irrelevant. As both questions are answered in the affirmative, in terms of the two stage transfer test there is a transfer by the old employer to the new employer.

In the case of *Harsco* there existed no obligation, contractual or otherwise, on HM or any other party to transfer 'something in favour or for the benefit of another or to another'.<sup>183</sup> HM willingly sold part of its assets to AMSA. It was under no obligation to do so as a result of the cancellation of its outsourcing agreement with AMSA nor did AMSA have any right to the assets. There further existed no obligation on HM to deliver anything to or in favour of or for the benefit of the incoming contractors. The assets sold to AMSA were not sold to them for the purpose of resale to benefit the incoming contractors – such assets become the property of AMSA to dispose of as it desired. It is argued that the facts of *Harsco* fail at the first question of the two stage transfer test. As such there exists no transfer by an old employer to a new employer. This conclusion contradicts the finding of the Judge Van Niekerk, who relied on the minority's determination as to a transfer. It is

---

<sup>180</sup> Supra note 22 paras 22-24.

<sup>181</sup> Supra note 20 para 113, where forsake of clarity, the first stage of the transfer tests asks, 'Does the transaction concerned create rights and obligations that require one entity to transfer something in favour or for the benefit of another or to another?'

<sup>182</sup> Ibid, where forsake of clarity, the second stage of the transfer tests proceeds to asks, 'If so, does the obligation imposed within a transaction, fairly read, contemplate a transferor who has the obligation to effect a transfer or allow a transfer to happen, and a transferee who receives the transfer?'

<sup>183</sup> Ibid.

arguable that had Judge Van Niekerk applied the two stage transfer test of the majority it would have resulted in the s 197 enquiry terminating as this point.

The case of *Crossroads Distribution (Pty) Ltd t/a Jowells Transport v Clover SA (Pty) Ltd* (hereinafter referred to as *Jowells*)<sup>184</sup> provides a further useful illustration as to the application of the two stage transfer test in the context of second generation outsourcing. Clover provided transport and logistics services to a client, Woodlands.<sup>185</sup> Clover terminated the contract between it and Woodlands.<sup>186</sup> Woodlands appointed Crossroads as the new service provider. Clover sought a declaratory order that s 197 applied to the appointment of Crossroads while Woodlands sought a declaratory order that s 197 was not applicable.<sup>187</sup> In order to provide the services Crossroads purchased additional milk tankers and as a result of the growth of its business, employed additional drivers, some of which were from Clover.<sup>188</sup> Crossroads purchased certain items and structures from Clover and utilised one common place of business to that of Clover.<sup>189</sup> Crossroads and Clover did not have any obligations, contractual or otherwise, to each other.<sup>190</sup>

The facts of *Jowells* represent a second generation outsourcing transaction – an outgoing contractor is being replaced by an incoming contractor. The court in *Jowells* held that the facts amounted to change in service provider which was excluded from the scope of s 197.<sup>191</sup> The court's conclusion seemingly based on its determination that s 197 did not apply to second generation outsourcing,<sup>192</sup> despite its comment that where 'the second business is so closely aligned to the first business that it is fact identical, s 197 may be applicable.'<sup>193</sup>

---

<sup>184</sup> (2008) 29 ILJ 1013 (LC).

<sup>185</sup> Ibid para 3.

<sup>186</sup> Ibid.

<sup>187</sup> Ibid paras 1-2.

<sup>188</sup> Ibid paras 3 and 5.

<sup>189</sup> Ibid para 6.

<sup>190</sup> Ibid para 16. Also see comments by John Grogan op cit note 125 at 11.

<sup>191</sup> Supra note 184 para 15.

<sup>192</sup> Ibid para 14. Also see op cit note 95 at 164.

<sup>193</sup> Supra note 184 para 14.

Disregarding the criticisms levelled against *Jowells*,<sup>194</sup> the facts of the case applied to the two stage transfer test yield the same end result as that of the *Jowells* judgment.<sup>195</sup> There seemingly existed no contractual obligation on Clover to transfer anything to Crossroads or Woodlands on termination of the outsourcing arrangement, nor did the latter parties have a right to receive transfer of anything. As such the first stage of the transfer test would fail. Accordingly the facts of *Jowells* would escape s 197 on the application of two stage transfer test.<sup>196</sup>

It remains to be seen how generously phrases such as ‘in favour’ and ‘for the benefit of’, which are used in the first stage of the majority’s transfer test, will be interpreted to satisfy the enquiry to catch outsourcing transactions that at first glance appear to fall outside the scope of the transfer test.

The above discussion of the majority’s two stage transfer test highlights the contextual background against which the transfer test is cast. *SAA* concerned an initial outsourcing transaction which was subject to s 197. There existed an outsourcing contract which imposed unambiguous contractual obligations on the outgoing contractor, and rights on the client and potential incoming contractor on the termination of the outsourcing agreement.<sup>197</sup> It is argued that the majority’s transfer test is limited in that it is tailored to such facts. In the context of second generation outsourcing, and arguably future generations, there seldom exists a relationship between an outgoing and an incoming contractor that creates rights and obligations to satisfy the first stage of the transfer enquiry.<sup>198</sup> Therefore the two stage transfer test may narrow the potential application of s 197 to ‘conventional’ second generation outsourcing transactions which are distinguishable from the facts of *SAA*.<sup>199</sup>

---

<sup>194</sup> An analysis of *Jowells* is not within the scope of this paper. For further commentary see op cit note 95 at 164.

<sup>195</sup> John Grogan op cit note 125 at 11.

<sup>196</sup> Ibid.

<sup>197</sup> Ibid.

<sup>198</sup> Ibid.

<sup>199</sup> Ibid. Also see op cit note 95 at 169 -170.

Bosch proposes a further criticism against the majority's two stage transfer test.<sup>200</sup> He argues that the test fails to clarify 'when will the transferor have done enough that it can be said that the transfer was by such person?'<sup>201</sup> In other words, is it required that the outgoing contract transfer just some of the elements of his business, irrespective of their value and relevance, or does he have to transfer significant or even all of the elements of his business.<sup>202</sup> The majority's transfer test provides no guidance and is vague in its reference to '...transfer *something* in favour...' <sup>203</sup>[*own emphasis added*] Bosch argues that debate will arise as to the preferred approach - a broad approach requiring something, irrespective of value and purpose, to transfer or a narrow approach requiring assets of importance and/or value to transfer.<sup>204</sup> There will be additional challenges to such debates in ensuring courts and academics to not fall victim to '...a highly artificial debate about degree and proportion',<sup>205</sup> leading to the manipulation of the application of s 197 and preferring form over substance.<sup>206</sup>

Consequently Bosch argues that the majority has failed to settle when a transfer occurs by an old employer.<sup>207</sup> He argues that the majority's formulation as to when there is a transfer by an old employee to a new old employee as embodied in the two stage transfer test has the potential to limit the scope of s 197.<sup>208</sup> Arguably the majority's transfer test could be seen as an attempt to intentionally limit the scope of s 197 within second generation outsourcing.

The above discussed issues associated with the majority's transfer test in *SAA* has the potential to lead to protracted and conflicting litigation in the pursuit of clarity and certainty.

---

<sup>200</sup> Op cit note 95 at 169.

<sup>201</sup> Ibid.

<sup>202</sup> Ibid.

<sup>203</sup> Supra note 20 para 113.

<sup>204</sup> Op cit note 95 at 168-169 for a discussion of the pros and cons of a broad versus a narrow approach.

<sup>205</sup> Ibid at 168.

<sup>206</sup> Ibid at 168-169.

<sup>207</sup> Ibid at 169.

<sup>208</sup> Ibid at 170.

### 2.5.2.1. THE MINORITY JUDGMENT'S TRANSFER ASSESSMENT

Judge Van Niekerk applied the transfer approach of the minority judgment in *SAA*.<sup>209</sup>

The minority of *SAA* held that:-

For the section to apply the business must have changed hands, whether through a sale or other transaction that places the business in question in different hands. Thus the business must have moved from one person to the other. The breadth of the transfer contemplated in the section is consistent with the wide scope it is intended to cover. Therefore, confining transfers to those effected by the old employer is at odds with the clear scheme of the section.<sup>210</sup>

Furthermore,

But whether a transfer as contemplated in section 197 has occurred or will occur is a factual question. It must be determined with reference to the objective facts of each case.<sup>211</sup>

and,

For a transfer to be established there must be components of the original business which are passed on to the third party.<sup>212</sup>

The minority's statement on the transfer element glanced over the interpretation of 'by' in requiring only a 'change of hands' to effect a transfer.<sup>213</sup> It adopted a broad and purposive interpretation of the language of s 197, unconfined by technical interpretations.<sup>214</sup> Bosch supports the minority's interpretation of the transfer test as it shifts the focus from the identity of the transferor, the central issue that the majority deemed to be relevant,<sup>215</sup> to whether the business has transferred as

---

<sup>209</sup> See *ibid* at 169-170 where Bosch prefers the approach of the minority judgment in *SAA* in determining the transfer element of the s 197 enquiry.

<sup>210</sup> *Supra* note 20 para 46.

<sup>211</sup> *Ibid* para 47.

<sup>212</sup> *Ibid* para 48.

<sup>213</sup> *Ibid* para 46. Also see John Grogan *op cit* note 125 at 7.

<sup>214</sup> *Supra* note 20 para 46.

<sup>215</sup> *Ibid* para 102.

a going concern.<sup>216</sup> This Bosch argues supports the purpose of s 197 and the attainment of the right to fair labour practices.<sup>217</sup> Bosch's argument supports the views expressed in Todd et al which suggest it is irrelevant how the transfer occurred, what matters is whether the transaction concerns the transfer of a business as a going concern.<sup>218</sup> This reasoning is in line with that in *COSAWU*.<sup>219</sup> Despite the advantages of the minority determination of a transfer, the interpretation and application of the majority's transfer test remains relevant and of importance in determining the scope of the application of s 197 in outsourcing transactions.

### **2.5.3. THE ROLE OF EMPLOYEES**

#### **2.5.3.1. 'A GOING CONCERN' - THE CAUTIONARY ROLE OF EMPLOYEES**

Judge Yacoob, in the majority judgment in *SAA* reaffirmed the test provided in *UCT* for what constitutes 'a going concern' within the phrase 'transfer of a business as a going concern'.<sup>220</sup> In accordance with the *UCT* test, 'whether or not the employees are taken over by the new employer' (the employee factor) is one factor, amongst others, used in the determination of 'a going concern',<sup>221</sup> with no one single factor being regarded as determinative.<sup>222</sup>

Judge Yacoob cautioned against the weight to be attached to the employee factor in 'a going concern' test.<sup>223</sup> He stated that the purpose of s 197 is to compel the automatic transfer of employees when the business is transferred without its employees.<sup>224</sup> Should a new employer take over the employees, on same or similar terms of employment, s 197 would have no application.<sup>225</sup> He held that the weight to

---

<sup>216</sup> Op cit note 95 at 170.

<sup>217</sup> Ibid.

<sup>218</sup> Op cit note 18 at 25.

<sup>219</sup> Supra note 21 para 35.

<sup>220</sup> Supra note 20 para 111.

<sup>221</sup> Supra note 12 para 32.

<sup>222</sup> Ibid.

<sup>223</sup> Supra note 20 para 112.

<sup>224</sup> Ibid para 112.

<sup>225</sup> Ibid. Also see John Grogan op cit 125 at 8.

be assigned to the transfer of employees by the new employer in the determination of a going concern may be limited and depend on the facts.<sup>226</sup>

### 2.5.3.2. HEEDING SAA?

With respect this flagging by Judge Yacoob eluded Judge Van Niekerk in *Harsco*. Judge Van Niekerk held that there was a transfer of a business as a going concern on the facts of the case. In assessing the criteria of a going concern, Van Niekerk referred to the test proposed in *UCT*, as reaffirmed by Judge Yacoob in *SAA*. Relying on EU jurisprudence and that of *COSAWU*,<sup>227</sup> Judge Van Niekerk determined that the following factors were determinative of ‘a going concern’, namely:-

- the degree of similarity of the activity before and after transfer,
- the type of undertaking and
- whether or not a majority of employees had been taken over.<sup>228</sup>

Judge Van Niekerk determined that there was ‘a going concern’ based on the accumulative weight that:-

- the majority of HM’s employees would be employed by Phoenix and Tube City after the termination of the service agreements and
- that the services performed by Phoenix and Tube City for AMSA were substantially similar to the services previously carried out by HM.<sup>229</sup>

He assigned value to such factors based on the nature of the undertaking which he regarded as providing,

...some useful indication of the weight to be attached particularly to the transfer of assets and whether any workers are taken over by the new employer, and if so, the number and significance of each.<sup>230</sup>

---

<sup>226</sup> Supra note 20 para 112.

<sup>227</sup> Supra note 22 para 37.

<sup>228</sup> Ibid para 37. Notably the type of undertaking informed the weight of the factors and was not one of the decisive grounds.

<sup>229</sup> Ibid.

<sup>230</sup> Ibid para 32.

As mentioned above Judge Van Niekerk concluded that the employees' employment status and the similarity of services were decisive in reaching its conclusion that there is a going concern. It is submitted that in second generation outsourcing the services performed by the incoming and outgoing contractor will always be similar. As such Judge Van Niekerk's dependence on the role of employees is the one factor on which his decision is based. This is contrary to the *UCT* test where no one factor is decisive and thus reduces the objectivity of the test. In his concluding remarks Judge Van Niekerk stated:-

It remained open to Phoenix and Tube City to employ none of Harsco's employees, and to decline to take transfer of any or of Harsco's assets. In this event, my conclusion would have been different, and there would I think have been no more than the termination of one contract and the beginning of another. But that is not what is to occur.<sup>231</sup>

This comment cements the undue weight assigned to the transfer of employees. Judge Van Niekerk reasoned that had there not been a take over of employees, albeit with the transfer of assets which will be discussed below, there would not have been a transfer of a business as a going concern. This line of reasoning creates a loophole.<sup>232</sup> It denies employees the protection of s 197 when their fate is sealed based on the transferee's silence or unwillingness to take over part of the transferor's employees.<sup>233</sup> Section 197 cannot be applicable only when the transferee elects to take over the employees. Deciding whether employees should be transferred cannot be based on asking if they have in fact been taken over or if there is an intention to take them over.<sup>234</sup>

---

<sup>231</sup> Ibid para 38.

<sup>232</sup> John Grogan op cit note 137 at 16.

<sup>233</sup> See Kaylan Massie op cit note 150 at 5; John Grogan op cit note 125 at 8 and op cit note 95 at 183. Notably an analogous situation presented itself in EU Law which will be discussed in the next chapter.

<sup>234</sup> Stephen Hardy and Richard W Punter 'The New Acquired Rights Directive and its Implications for European Employee Relations in the Twenty First Century' (1999) 6 *Maastricht Journal of European and Comparative Law* 366 at 369.

This line of reasoning allows unscrupulous employers to be competitive in price by cutting labour costs when services are put out to tender.<sup>235</sup> As the transaction is devised to avoid the conclusion that there is a going concern, the incoming contractor would not be obliged to take over any of the outgoing contractor's employees. In the context of unskilled workers the new employer would suffer no prejudice in not taking over such employees as they are easy to replace.<sup>236</sup> The outgoing contractor's employees would be vulnerable to being made redundant by the outgoing contractor or in desperation for job security agree to less favourable terms and conditions.<sup>237</sup> This illustration clearly creates a situation which s 197 was intended to prevent.

The reasoning of Judge Van Niekerk subverts the aim of s 197, as expressed by Judge Yacoob, at compelling the transfer of employees when they are not transferred with the business. Second generation outsourcing is arguably the type of scenario where Judge Yacoob's comment regarding the relevance of whether the employees are transferred 'may be limited and may depend on the circumstances of the case' deserves the necessary attention.<sup>238</sup>

Applying Judge Yacoob's cautionary observation, and in an attempt to avoid the setting of a precedent enabling employers to circumvent s 197, the facts of *Harsco* should arguably not have amounted to a transfer of a going concern. To amount to a s 197 transfer the facts would need to support, independently of the transferee taking over part or all of the employees, other contributory and compelling factors upon which to conclude that there is transfer of a business as going concern. It is arguable whether there existed other contributory factors of material influence which could have determined that there was a transfer of a going concern.

While the above argument has focused on the role of employees, one cannot ignore the relevance of the assets introduced in Judge Van Niekerk's comment that in

---

<sup>235</sup> Richard W Painter and Stephen Hardy 'Business transfers, employers' strategies and the impact of recent case law' (1999) 21 (4) *Employee Relations* 378 at 380.

<sup>236</sup> *Ibid.*

<sup>237</sup> *Op cit* note 48 at 87-88.

<sup>238</sup> *Supra* note 20 para 112.

absence of a transfer of assets and take over of employees, there would not have been a transfer of a business as going concern.<sup>239</sup> Judge Van Niekerk elevates the relevance of the transfer of assets, albeit via the client, in his comment under discussion. This contradicts the basis of his finding of a going concern in which the transfer of certain movable assets were regarded as ‘not entirely insignificant’ and which failed to play any determinative role in his conclusion that there was a transfer of a going concern. Despite the inconsistency in his reasoning, Grogan argues that the *Harsco* permits the circumvention of s 197 through the simple avenue of a transferee not taking over the workforce and accepting none of the assets of the transferor.<sup>240</sup>

*Harsco* reflects the uncertainty at the weight to be attached to the various factors – individually and in combination – proposed in *UCT*, and the implications on the reliance of the nature of the undertaking in the context of outsourcing.<sup>241</sup> Uncertainty breeds the danger that judges may subjectively assess the weight of the factors.<sup>242</sup> At the same time the considerations relevant to the determination of a going concern need to remain flexible to accommodate the nuances that each transaction presents. Creating a rigid list with assigned relevance would allow employers to potentially identify avenues to circumvent the application of s 197.<sup>243</sup> Evidently there exists a vicious cycle. An extensive debate into how to break such circular reasoning is not within the scope of this paper.

The application of a going concern enquiry requires consideration as to avoid the anomaly *Harsco* has created. Assigning weight to factors based on the nature of undertaking in determining whether there is a going concern within the outsourcing context has exposed a loophole.<sup>244</sup> This is especially problematic in scenarios where

---

<sup>239</sup> Supra note 22 para 38.

<sup>240</sup> John Grogan op cit note 125 at 8.

<sup>241</sup> Ronald M Beltzer ‘The Transfer of Undertakings and the Importance of Taking Over Personnel – A Vicious Circle’ (2007) 23 (1) *The International Journal of Comparative Labour Law and Industrial Relations* 139 at 141.

<sup>242</sup> Ibid.

<sup>243</sup> Ibid at 142.

<sup>244</sup> Ibid at 143 -144.

the businesses subject to transfer are asset reliant or labour intensive.<sup>245</sup> At the very least *Harsco* confirms that when the transferee has expressed a desire or willingness to take over the majority of employees in the context of an outsourcing arrangement, and the employees are deemed to be a significant aspect of the business, the transferee will be compelled to take over the remainder of the employees.<sup>246</sup>

The above discussion highlights unique considerations that apply due to the nature of second generation outsourcing in the determination of a going concern. This will be canvassed in the chapter to follow.

## 2.6. CONCLUDING REMARKS

The Constitutional Court has pronounced that second generation outsourcing (and subsequent outsourcing) may depending on the facts of the case be subject to the application of s 197. Nevertheless the reasoning of the majority brings to the fore further issues that require clarification in order to prevent the *SAA* judgment, and the application of s 197 in the outsourcing context, from being manipulated to circumvent the implications of s 197.

This chapter has identified and discussed three interpretational issues associated with *SAA* and its application in *Harsco*. First the uncertainty surrounding the role of the history of an outsourcing relationship. Secondly the potentially narrow application of the majority's two stage transfer test. Thirdly the role of the take over of employees in the determination of a transfer of a going concern. Despite the above discussed issues, at the minimum *SAA* is conclusive authority that s 197 will apply if an original outsourcing agreement places an obligation on the outgoing contractor to transfer something back to the client or a third party.<sup>247</sup> In addition, the occurrence of second generation outsourcing does not automatically imply nor does it automatically exclude the application of s 197.<sup>248</sup> Without doubt the judgment has

---

<sup>245</sup> Ibid.

<sup>246</sup> Ibid.

<sup>247</sup> John Grogan op cit note 125 at 10.

<sup>248</sup> Ibid

hugely benefited the legal community in clarifying the potential application of s 197 in the context of outsourcing.

## **CHAPTER 3: THE ONGOING CONCERN OF A GOING CONCERN IN THE OUTSOURCING CONTEXT**

### **3.1. INTRODUCTION**

The fundamental proposition of this chapter is that the phrase ‘going concern’, within s 197(1) (b), as interpreted by *UCT* and applied in *Harsco*, is not suitable in the outsourcing context. Comparable ECJ case law and associated commentary are referenced to confirm reasoning problems associated with *Harsco*, and are used to project further potential pitfalls in the application of the going concern enquiry in the outsourcing context. The viability of possible solutions proposed by various commentators and their applicability in the South African context are examined.

### **3.2. SECTION 197 (1)(B): THE MEANING OF ‘A GOING CONCERN’**

#### **3.2.1. THE GOING CONCERN ENQUIRY**

In defining the phrase ‘going concern’ within s 197(1) (b), the Constitutional Court in *UCT* held that:-

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

decisive individually. They must all be considered in the overall assessment and therefore should not be considered in isolation.<sup>249</sup> [*own emphasis added*]

The aim of the going concern enquiry is to ascertain whether the pre-transfer identity and post transfer identity of the business under examination remains the same. This is assessed by applying suggested guiding factors, which do not amount to a closed list. The above quoted extract has repeatedly been referred to in subsequent case law as framing the test for whether there is a transfer as a going concern under s 197(1) (b).<sup>250</sup>

### 3.2.2. A COMPARABLE ENQUIRY – THE ECJ’S EXPERIENCE

Neither the EU Directive or TUPE or TUPE (2006) contain the phrase ‘going concern’. Nevertheless a comparable concept was introduced by the ECJ in the case of *Spijkers v Gebroeders Benedik Abattoir CV etc Alfred Benedik en Zonen BV* (hereinafter referred to as *Spijkers*).<sup>251</sup> *Spijkers* interpreted Article 1(1) of the 1977 version of the EU Directive with reference to the phrase ‘transfer of an undertaking’. The facts presented amounted to a second generation outsourcing transaction. The court in *Spijkers* held that the decisive criterion in assessing whether there is a ‘transfer of an undertaking’, within the scope of the EU Directive, is whether the business has retained its identity following the transfer.<sup>252</sup> Such an examination

---

<sup>249</sup> Supra note 12 para 56.

<sup>250</sup> For examples see supra note 20 para 50 and supra note 22 para 29.

<sup>251</sup> (1986) European Court Reports 01119, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61985J0024:EN:HTML>, accessed on 16 January 2013. The following three questions, presented in para 4 of the judgment, were referred to the ECJ:

1. Is there a transfer within the meaning of Article 1(1) of the Council Directive no 88/187 where the buildings and stock are taken over and the transferee is then enabled to continue the business activities of the transferor and does in fact subsequently carry on the business activities of the same kind in the buildings in question?
2. Does the fact that at the time when the buildings and stock are sold the business activities of the vendor had entirely cease and that in particular there was no longer any goodwill in the business prevent there being a ‘transfer’ as defined in question 1?
3. Does the fact that the circle of customers is not taken over prevent there being such a transfer?

<sup>252</sup> Ibid para 11.

required assessing ‘...whether the business was disposed of as a going concern...’<sup>253</sup>

The court held that:-

In order to determine whether those conditions are met, it is necessary to consider all the facts characterizing the transaction in question, including the type of undertaking or business, whether or not the business’s tangible assets, such as the buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred and the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended. It should be noted, however, that all those circumstances are merely single factors in the overall assessment which must be made and cannot be considered in isolation.<sup>254</sup>

and,

It is for the national court to make the necessary factual appraisals, in the light of the criteria for interpretation set out above, in order to establish whether or not there is a transfer in the sense indicated above.<sup>255</sup>

Therefore for there to be a transfer of an undertaking under the EU Directive the business must have retained its identity pre and post transfer, which occurs when there is transfer of a going concern. This is comparable to the ‘transfer of a *going concern*’ [*own emphasis added*] requirement in s 197(1) (b).

The assessment in *Spijkers* as to whether there is a going concern is comparable to the test proposed in *UCT*.<sup>256</sup> In assessing whether the undertaking or business has retained its identity, both *Spijkers* and *UCT* propose the consideration of a non-exhaustive list of similar factors.

---

<sup>253</sup> Ibid para 12.

<sup>254</sup> Ibid para 13.

<sup>255</sup> Ibid para 14.

<sup>256</sup> Ibid para 56.

### 3.2.2.1. LIMITATIONS OF THE *SPIJKERS* JUDGMENT

Beltzer addresses the limitations of *Spijkers*. Beltzer argues that *Spijkers* provides no insight into the weighting of its guiding factors, either individually or in combination.<sup>257</sup> This causes concern that courts can interpret the factors subjectively, despite the objective fact-finding exercise *Spijkers* promotes.<sup>258</sup>

*Spijkers* advocates that all the factors are of equal relevance in the enquiry.<sup>259</sup> The ECJ in the case of *Christel Schmidt v Spar- und Leihkasse der früheren Ämter Bordesholm, Kiel und Cronshagen* (hereinafter referred to as *Schmidt*),<sup>260</sup> in applying *Spijkers*, determined that a lack of transferred assets when there existed other satisfied factors did not preclude the application of the EU Directive.<sup>261</sup> This was seen as an attempt to clarify that all factors proposed by *Spijkers* are of equal relevance.<sup>262</sup> In practice this is challenged.<sup>263</sup> Beltzer argues that there is a tendency for the nature of the undertaking (the first of the listed factors in *Spijkers*)<sup>264</sup> to invariably influence the role of the remaining factors.<sup>265</sup> This paper proposes that such a conclusion is logical. The nature of the undertaking assists in identifying the defining components of the business being investigated. These defining components, which inform the identity of the business, would unintentionally be assigned importance in ascertaining whether the identity of the business is retained pre- and

---

<sup>257</sup> Op cit note 241 at 141.

<sup>258</sup> Ibid at 141-142.

<sup>259</sup> Supra note 251 para 13.

<sup>260</sup> (1994) European Court Reports I-01311, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61992CJ0392:EN:HTML>, accessed on 16 January 2013.

<sup>261</sup> Ibid para 16.

<sup>262</sup> Ibid, in which the court stated that:-

The fact that in its case-law the Court includes the transfer of such assets among the various factors to be taken into account by a national court to enable it, when assessing a complex transaction as a whole, to decide whether an undertaking has in fact been transferred does not support the conclusion that the absence of these factors precludes the existence of a transfer. The safeguarding of employees' rights, which constitutes the subject-matter of the directive, as is clear from its actual title, cannot depend exclusively on consideration of a factor which the Court has in any event already held not to be decisive on its own (judgment in Case 24/85 *Spijkers v Benedik* [1986] ECR 1119, at paragraph 12).

See commentary in op cit note 241 at 143.

<sup>263</sup> Op cit note 241 at 143.

<sup>264</sup> Supra note 251 para 13.

<sup>265</sup> Op cit note 241 at 143.

post-transfer. If the business under consideration is prominently labour driven, the labour element is a major component in maintaining the identity of the business. The take over, or lack thereof, of employees would play an influential role in establishing that the identity of the business, more so than for example whether or not assets have been taken over and if there is a similarity in services.<sup>266</sup> The remaining factors would assume a secondary, supporting role.<sup>267</sup> Failing the take over of employees, the defining element that informs the identity of the business is lacking. The same reasoning would apply if the business is asset-reliant.<sup>268</sup>

However logical such reasoning may be, treating the nature of the undertaking as an umbrella factor allows transacting parties to circumvent the application of the EU Directive. Parties are able to structure the transaction to avoid the EU Directive by ensuring that the defining components of the business intended for transfer are not satisfied.<sup>269</sup> As discussed in the previous chapter, the reasoning in *Harsco* as introduced these concerns into the South Africa context.

### **3.3. THE APPROPRIATENESS OF THE ‘GOING CONCERN’ ENQUIRY IN THE CONTEXT OF SECOND GENERATION OUTSOURCING**

#### **3.3.1. CIRCULAR REASONING – THE IMPLICATIONS OF *HARSCO***

As highlighted in chapter two, *Harsco* brings to the forefront a reasoning anomaly caused by attaching too much weight to the role of employees in the determination of whether there is a transfer of a going concern.

In the absence of clear guidance as to the weight assigned to the various factors proposed by in *UCT* in respect of the going concern enquiry, Judge Van Niekerk regarded the nature of the business as the guiding consideration in his determination as to the relevance of each factor he identified on the facts.<sup>270</sup> Judge Van Niekerk

---

<sup>266</sup> Ibid at 143-144.

<sup>267</sup> Ibid at 146.

<sup>268</sup> Ibid at 143-144.

<sup>269</sup> Ibid at 147.

<sup>270</sup> Supra note 22 para 32.

regarded the employees as a significant component of the business operation.<sup>271</sup> As was canvassed in chapter two, in regarding the take over of a majority of employees as one of the two determining factors in the establishment of a business as a going concern, Judge Van Niekerk created a reasoning conundrum.<sup>272</sup> Allowing a transferee's willingness to take over a majority of the outgoing contractor's employees to determine the application of s 197 results in an employee's right to transfer subject to the whim and control of the transferee.<sup>273</sup> The taking over of employees cannot be a 'criterion and a legal consequence'<sup>274</sup> of s 197. This circular reasoning undermines the aim of s 197 to compel the transfer of employees when they are in fact not taken on and the protection afforded to employees by s 197.<sup>275</sup>

### 3.3.2. 'A GOING CONCERN' IN THE OUTSOURCING CONTEXT

In light of Beltzer's arguments against *Spijkers*, and considering the impact of the reasoning in *Harsco* in undermining s 197, it is critical to examine the suitability of the going concern enquiry in the outsourcing context.

For the purpose of this examination it is important to recap the guiding list of factors proposed by *UCT* in the determination as to whether there is a transfer as a going concern, namely:-

- a) The transfer or otherwise of assets both tangible and intangible;
- b) Whether or not the workers have been taken over by the new employer;
- c) Whether consumers are transferred, and

---

<sup>271</sup> Ibid para 33.

<sup>272</sup> Applying the argument by analogy see para 62 of the opinion of Advocate General Trstenjak delivered on 26 October 2010, Clece SA, Case C - 463/09, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CC0463:EN:HTML>, accessed on 7 January 2013.

<sup>273</sup> Ibid para 63. Also see John McMullen 'TUPE Transfers: The Cracks Still Show' (2001) 30 *Industrial Law Journal* 396 at 397, and para 80 of the opinion of Advocate General Geelhoed delivered on 19 June 2003, Abler and Others, Case C-340/01 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001CC0340:EN:PDF>, accessed on 7 January 2013.

<sup>274</sup> Op cit note 272 para 62.

<sup>275</sup> See cautionary comments by Yacoob J as to the role of employees in supra note 20 para 112.

- d) Whether or not the same business is being carried out by the new employer.<sup>276</sup>

In the context of outsourcing, point c) would in all likelihood be answered in the affirmative due to its inherent nature in the outsourcing context<sup>277</sup> (but for instances where the outgoing contractor may have a multitude of clients). Point d) is an intrinsic feature of an outsourcing transaction therefore would be answered in the affirmative. As observed by Beltzer, the Dutch Supreme Court disregarded this factor due to its inherent nature in changes of service providers in the outsourcing service sector.<sup>278</sup> Other potential factors such as carrying on the business in the same location and premises would also inevitably be satisfied.<sup>279</sup> Therefore points a) and b) are the only variable factors left of the going concern test in the outsourcing context.<sup>280</sup> Arguably the business will not be able to retain its identity pre- and post-transfer without its major identifying features. The major identifying features, as previously argued, of the business are informed, albeit it problematic, by the nature of the business concerned. Therefore in a labour intensive business the existence of the take over of a sufficient portion of the employees will ensure that pre- and post-transfer the business retains its identity. This would lead to a transfer of a business as going concern. If no employees are taken over, a labour intensive business will arguably not retain the essence of its identity. Consequently in a labour intensive outsourcing sector significant weight would by implication be assigned to the take over of the employees. As argued this would undermine s 197 due to the resultant circular reasoning.<sup>281</sup> This same argument would apply to asset-reliant businesses.

This theoretical position is what played out in *Harsco*. The court regarded the workforce as an important component of the business operations being transferred.<sup>282</sup> Ultimately while other factors such as the transfer of assets and the similarity of the

---

<sup>276</sup> Supra note 12 para 56.

<sup>277</sup> Advocate General Geelhoed op cit note 273 para 86.

<sup>278</sup> Op cit note 241 at 152.

<sup>279</sup> Ibid at 146.

<sup>280</sup> Ibid.

<sup>281</sup> Op cit note 47 at 343.

<sup>282</sup> Supra note 20 para 33.

services were acknowledged, they played an ancillary role to the take over of a majority of the employees.

The above analysis highlights that the going concern enquiry is not suitable within the outsourcing context. The potential over-reliance on the take over of employees and transfer of assets will lead to the perpetuation of the circular reasoning in *Harsco*, and the danger that employers will take advantage of the loophole that such reasoning exposes by structuring their transactions to circumvent the application of s 197.

### **3.4. THE MOTIVE CRITERION AS A POSSIBLE SOLUTION**

#### **3.4.1. THE MOTIVE CRITERION**

In an attempt to prevent employers deliberately abusing the going concern enquiry in the outsourcing context, Bosch suggests that the courts should have regard to the motives of the transaction parties.<sup>283</sup> Should the court find that the potential new employer deliberately structured the transaction as to avoid the application of s 197, it would be permitted to examine the facts as though the deception had not occurred.<sup>284</sup> In essence, the court would be entitled to conclude that there is a transfer of business as a going concern despite the existence of actual factors.<sup>285</sup> Therefore an incoming contractor who intentionally does not take over the workforce of the outgoing contractor in order to avoid the implications of s 197 will nonetheless be assumed to having taken over the workforce for the purposes of s 197.

#### **3.4.2. THE MOTIVE CRITERION UNDER TUPE**

Bosch relied on the English decision of *ADI (UK) Ltd v Willer*<sup>286</sup> (hereinafter referred to as *ADI*) in support of his proposal of the motive criterion.<sup>287</sup> *ADI*

---

<sup>283</sup> Op cit note 95 at 183.

<sup>284</sup> Ibid at 184.

<sup>285</sup> Ibid.

<sup>286</sup> (2001) IRLR 542 (CA). (hereinafter referred as *ADI*) The facts of the case were briefly as follows: In terms of an outsourcing transaction, ADI provided security services to a client, namely Hillier Parker. ADI cancelled its agreement with the client. A new service provider was appointed, namely Firm Security. Firm Security failed to offer employment to ADI's employees. The resultant litigation centred on whether there was a transfer under TUPE. See comprehensive facts at *ADI* para 2. This case

approved the motive criterion<sup>288</sup> first introduced by the Employment Appeal Tribunal in the case of *ECM (Vehicle Delivery Service Ltd) v Cox* (hereinafter referred to as *ECM*).<sup>289</sup> The EAT in *ECM* held that a transferee who intentionally avoids the application of TUPE cannot rely on the fact that the employees are not taken over as a factor determining that there is no transfer as contemplated by TUPE.<sup>290</sup> *ECM* was confirmed in the Court of Appeal<sup>291</sup> which approved, inter alia, that the intention of a transferee to avoid the application of TUPE is one of the relevant factors in the determination as to whether there was a TUPE transfer.<sup>292</sup> Both the judgments of *ECM* and *ADI* expressly advance a purposive approach to the application of TUPE in advocating the motive criterion.<sup>293</sup>

### 3.4.3. THE PRACTICAL APPLICATION OF THE MOTIVE CRITERION

*Bosch* neglects to canvass the practical application of the motive criterion. European commentators, critiquing the motive criterion, highlight the issues of proof

---

is referred to in op cit 95 at 183. For commentary on the case law informing the motive criterion see John McMullen 'TUPE - Sidestepping *Süzen*' (1999) 28 *Industrial Law Journal* 360.

<sup>287</sup> Notably the minority in *ADI* supra note 286 paras 78-79, 81-83 rejected the application of the motive criterion as the judge failed to, inter alia, reconcile permitting a transfer when on the facts no transfer had occurred.

<sup>288</sup> *ADI* supra note 286 para 35-37, 40 and 59 where the court, inter alia, held that that there would be a transfer of an undertaking on the facts of the case if it was shown that the transferee, namely Firm Security, had intentionally avoided the application of TUPE by not taking over the workforce. The matter was referred back to the employment tribunal to consider the intention of the transferee.

<sup>289</sup> (1998) IRLR 416 (EAT) at paras 19, 24-26. The case dealt with the interpretation of TUPE reg 3(1). On the facts of the case Axial had an outsourcing contract with a client, namely VAG Ltd. Axial provided drivers which delivered vehicles from two docks. The provision of the services from each dock was governed by two separate agreements. Axial lost one of the contracts. *ECM* was appointed in its place. The employees of Axial in respect of the terminated contract were not transferred to *ECM*. In the proceedings before the employment tribunal *ECM* had intentionally not taken over the employees of Axial in order to avoid the application of the TUPE and the threats by the employees on the basis of the TUPE. See *ECM* para 24.

<sup>290</sup> *Ibid* paras 24-25. Also see the discussion of *ECM* in *ADI* supra note 286 paras 12-13.

<sup>291</sup> *ECM (Vehicle Delivery Service Ltd) v Cox* (1999) IRLR 559 (CA).

<sup>292</sup> *Ibid* para 23 where the Court of Appeal held that:-

The tribunal was entitled to have regard, as a relevant circumstance, to the reason why those employees were not appointed by *ECM*. The Court of Justice has not decided in *Süzen* or any other case that this is an irrelevant circumstance or that the failure of the transferee to appoint any of the former employees of the transferor points conclusively against a transfer.

Also see commentary by John McMullen (1999) op cit note 286 at 363.

<sup>293</sup> *ADI* supra note 286 paras 53-54 and 58 and supra note 289 para 25. Notably the minority in *ADI* supra note 286 para 82 rejected the purposive approach followed by the majority.

associated with its application.<sup>294</sup> What will be regarded as sufficient proof of the new employer's intentional motive?<sup>295</sup> Unscrupulous employers would surely ensure their true intentions are well hidden knowing their intentions can be subjected to the courts scrutiny. This would leave the motive factor with limited application in cases where trade union or employee representatives have been privy to slip-ups made by the employers in the transaction. The evidentiary difficulty in establishing motive is heightened in assessing the motive prior to the intended transfer.<sup>296</sup>

Assuming the transferee deliberately avoids s 197, the court would be speculating, in the absence of fact, as to the portion of employees that would have been taken over had the deception not occurred.<sup>297</sup> Therefore what hypothetical portion of employees will be deemed sufficient? Will it suffice that a majority of employees in number would have transferred but for the deception, as was persuasive in *Harsco*, or will it be sufficient that key employees would have been transferred? Furthermore, what will happen when some employees are taken over, albeit not significant, and others are not?

Lord Justice May in *ADI* determined that 'if the reason or principle reason' for the transferee not taking over the employees is to circumvent the application of TUPE, there would be a TUPE transfers on the facts.<sup>298</sup> The motive criterion seemingly allows a court to examine the business reasons behind the structure of the transaction. Courts would have to be cautious in not concluding that legitimate business decisions, which move the transaction outside the scope of s 197, are not regarded as being a deliberate circumvention of s 197. Arguably there would be a fine line in assessing whether a deliberate circumvention was been disguised as a legitimate business decision.

---

<sup>294</sup> Op cit note 234 at 400; op cit note 235 at 381 and John McMullen (1999) op cit note 286 at 362.

<sup>295</sup> Op cit note 234 at 370; op cit note 235 at 381; John McMullen (2001) op cit note 273 at 400 and John McMullen (1999) op cit note 286 at 362.

<sup>296</sup> John McMullen (1999) op cit note 286 at 363.

<sup>297</sup> This point is made in an earlier article by Bosch in Craig Bosch 'Transfers of Contracts of Employment in the Outsourcing Context' (2001) 22 *ILJ* 840 at 852.

<sup>298</sup> *ADI* supra note 286 para 37.

The above practical considerations flag that the motive criterion should be approached with caution in determining whether it is a viable solution to the issues associated with the application of the going concern enquiry in the outsourcing context.

### 3.5. MIRRORS IN REASONING: *SÜZEN* AND *HARSCO*

The motive criterion in *ECM* was in response to the argued narrowing application of the *Spijkers* factors introduced by the ECJ case of *Ayşe Sützen v Zehnacker Gebäudereinigung GmbH Krankenhausservice*.<sup>299</sup> (hereinafter referred to as *Sützen*) The facts of *Sützen* concerned a change of service provider, in the second generation outsourcing context, in the cleaning sector.<sup>300</sup> No ‘tangible or intangible business assets were transferred’<sup>301</sup> and the employees of the outgoing contractor were dismissed prior to the change of service provider.<sup>302</sup> Applying *Spijkers*, *Sützen* stated, and as cited by Bosch,<sup>303</sup> that:-

...[I]n assessing the facts characterizing the transaction in question, [the National Court] must take into account among other things the type of undertaking or business concerned. It follows that the degree of importance to be attached to each criterion for determining whether or not there has been a transfer within the meaning of the directive will necessarily vary according to the activity carried on, or indeed the production or operating methods employed in the relevant undertaking, business or part of a business. Where in particular an economic entity is able, in certain sectors, to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction affecting it cannot, logically, depend on the transfer of such assets.<sup>304</sup>

---

<sup>299</sup> (1997) European Court Reports I-01259, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61995CJ0013:EN:PDF>, accessed on 16 January 2013. See supra note 289 paras 8-10, 19-20 and 25. See commentary John McMullen (1999) op cit note 286 at 362.

<sup>300</sup> *Sützen* supra note 299 para 3.

<sup>301</sup> Ibid para 6.

<sup>302</sup> Ibid para 3.

<sup>303</sup> Op cit note 95 at 183.

<sup>304</sup> *Sützen* supra note 299 para 18.

In its findings *Süzen* specifically excluded from the scope of the EU Directive the possibility that a change of service provider can invoke the application of the EU Directive.<sup>305</sup> It held that there existed no transfer under the EU Directive, in the context of a second generation transaction,

...if there is no concomitant transfer from one undertaking to the other of significant tangible or intangible assets or taking over by the new employer of a major part of the workforce, in terms of their numbers and skills, assigned by his predecessor to the performance of the contract.<sup>306</sup>

The relationship between the transfer of assets and employees in the above quoted extract was regarded as ambiguous.<sup>307</sup> The court's wording appeared indifferent to the presence of either.<sup>308</sup> The impact of the subsequent judgment of *Oy Liikenne v Pekka Liskjarvi and Pentti Juneunen*<sup>309</sup> in applying *Süzen* clarified the relationship between the two criteria of assets and employees in the outsourcing context.<sup>310</sup> The transfer of assets was of relevance when the business subject to the enquiry required significant assets in combination with the employees.<sup>311</sup> In a labour intensive business the take over of a major part of the transferor's employees, in their number and skills, would be determinative of a transfer.<sup>312</sup>

It is argued that *Harsco* is the South African equivalent of *Süzen*. *Harsco*, albeit its confusing concluding remarks, places weight on the factors of assets and employees in the outsourcing context in the determination of a going concern.<sup>313</sup> This is comparable to that in *Süzen*. The implications that stem from *Süzen* are comparable to that of *Harsco*. Both judgments through their circular reasoning highlight the loophole that permits transferees in the outsourcing context to avoid the

---

<sup>305</sup> Ibid para 16.

<sup>306</sup> Ibid para 23.

<sup>307</sup> Paul Davies 'Transfers - The UK will have to Make Up Its Own Mind' (2001) 30 *Industrial Law Journal* 231 at 232.

<sup>308</sup> Ibid. Notably see supra note 289 para 19 and 25 where the court in *ECM* held there is nothing in the judgment of *Süzen* which prevents the consideration of the motives of the transferee.

<sup>309</sup> (2001) IRLR 171 (ECJ).

<sup>310</sup> For a discussion of the judgment see op cit note 307 at 232-233.

<sup>311</sup> Ibid at 233.

<sup>312</sup> Ibid and John McMullen (2006) op cit note 38 at 119.

<sup>313</sup> Supra note 22 para 38.

application of the Directive and s 197 respectively. By implication the arguments levied against *Süzen* are applicable to *Harsco*.

### **3.6. LESSONS FROM SÜZEN**

As argued previously the findings of *Süzen* are comparable to the findings of *Harsco* insofar as priority is attached to the transfer of the majority of employees and the transfer of assets. With *Süzen* decided in 1999, the below section seeks to draw on experiences from the United Kingdom and ECJ in assessing the potential future difficulties that awaits our courts.

#### **3.6.1. THE SCOPE OF THE APPLICATION OF SÜZEN**

The *Süzen* judgment has been interpreted to extend beyond the second generation context, in which it was decided, to all outsourcing arrangements.<sup>314</sup> In light of *Süzen*, Shruballs argues that irrespective of the generation of an outsourcing transaction, a transfer of a service will only become a business capable of being transferred if in a labour intensive sector there is the take over of the majority of the workers and in an asset-reliant entity there is a take over of significant assets. This is nothing in the wording, Shruballs argues, to conclude that the *Süzen* principle is limited to second generation outsourcing.<sup>315</sup>

There is nothing to prevent such a finding within the South African context. The implications of the circular reasoning present in *Harsco* and the possible circumvention of s 197 may have a broader impact than to the confines of the facts of the case to second generation outsourcing. This widening scope allows the client and the first contractor in an initial outsourcing contract to collude to ensure that the client is able to dispose of its unwanted employees, subject to retrenchment payments. The initial contractor is able to tender at a competitive price through

---

<sup>314</sup> Op cit note 48 at 89 and fn 17 at 89.

<sup>315</sup> Ibid at 89-90.

recruiting new staff at lesser terms of employment, insofar as they structure their transaction ‘correctly’ to not invoke the application of s 197.<sup>316</sup>

**3.6.2. ‘...A MAJOR PART OF THE WORKFORCE, IN TERMS OF THEIR NUMBERS AND SKILLS, ASSIGNED BY HIS PREDECESSOR TO THE PERFORMANCE OF THE CONTRACT...’<sup>317</sup>**

The phrase ‘...a major part of the workforce, in terms of their numbers and skills, assigned by his predecessor to the performance of the contract...’<sup>318</sup> generates practical concerns.<sup>319</sup>

**3.6.2.1. CHERRY PICKING**

Shrubsall argues that the reference to ‘...a major part...’ allows a transferee to pick and choose certain staff in so long as they are not deemed to constitute a ‘major’ part of the outgoing contractor’s workforce.<sup>320</sup> Such a narrowed down workforce will not be subject to the protection of the EU Directive. The consequence being that a transferee would often prefer skilled employees that it can cherry pick, leaving easily replaceable unskilled workers jobless. This defeats the purpose of the EU Directive in protecting job security, especially as it applies to vulnerable unskilled workers.<sup>321</sup>

The reasoning in *Harsco* relied on the fact that the majority of the workforce transferred.<sup>322</sup> The ‘majority’ refers to the majority in number of employees, which is supported in the judgment’s dismissal of AMSA’s contention to adopt a qualitative approach in that key managers had been left behind. AMSA argued that leaving behind key managers overrode the fact that 70 per cent of the workforce was taken over by the two incoming contractors.<sup>323</sup> The court in dismissing such an argument held that the ‘operation of the physical infrastructure by skilled and semi-skilled

---

<sup>316</sup> See the example provided in *ibid* at 90.

<sup>317</sup> *Süzen* supra note 299 para 23.

<sup>318</sup> *Ibid*.

<sup>319</sup> *Op cit* note 48 at 91.

<sup>320</sup> *Ibid* at 92.

<sup>321</sup> *Ibid*.

<sup>322</sup> *Supra* note 22 paras 33 and 37.

<sup>323</sup> *Ibid* para 33.

employees' was 'a significant component of the business operation ...'<sup>324</sup> Applying the argument of Shruballs detailed above, the reasoning in *Harsco* would allow employers to cherry pick employees, arguably skilled employees, insofar as the selection falls below the majority of employees in number. This leaves unskilled workers unprotected by s 197.

### 3.6.2.2. '...IN TERMS OF THEIR NUMBERS AND SKILLS...'

*Süzen* required that for there to be a transfer based on the workforce, it must be major in terms of headcount and in skill. Advocate General Trstenjak interpreted the relationship between the two components as such:<sup>325</sup> the 'number' of employees taken over plays a role of its own by the word 'and', yet is paired with 'skills', therefore they are linked.<sup>326</sup> For a new employer to benefit from staff, their quality is relevant, hence the reference to skill.<sup>327</sup> Evidently more is required than the take over of a majority of the workforce in number. The practical application of the two components questions whether a transaction will be subject to the EU Directive if all the skilled workers are transferred but they fail to constitute a majority in terms of total number of employees that are associated with the transferring entity.<sup>328</sup> The implications of *Süzen* may also involve the court undertaking 'some sort of skills evaluation exercise.'<sup>329</sup>

As discussed the *Harsco* judgment requires a majority of employees in terms of number. No reference is made to skill. If the element of skill is introduced for whatever reason, its relationship with that of the majority in number needs to be clarified to prevent unskilled workers being denied the protection of s 197. This issue is linked to the cherry picking concern as discussed previously.

---

<sup>324</sup> Ibid.

<sup>325</sup> Op cit note 272 paras 70-72.

<sup>326</sup> Ibid para 70.

<sup>327</sup> Ibid.

<sup>328</sup> Op cit note 48 at 92.

<sup>329</sup> Ibid.

### 3.6.3. ‘... OF SIGNIFICANT TANGIBLE OR INTANGIBLE ASSETS...’

*Süzen* requires the transfer of significant tangible or intangible assets.<sup>330</sup> The *Harsco* judgment is vague as to the role of the assets. The judgment up until the concluding remarks<sup>331</sup> did not assign any apparent weight to the transfer of the assets in reaching its decision. It made passing remarks such as ‘not in itself an overriding factor’<sup>332</sup> and ‘not entirely insignificant’<sup>333</sup> in respect of the lack of the transfer of plants and the transfer of other assets respectively.

This issue draws on Bosch’s argument, canvassed in chapter two, in respect of a deficiency within *SAA*. Bosch’s concern raises the question ‘when will a transferor have done enough that it can be said that the transfer was by such person?’<sup>334</sup> As such it is sufficient that some form of assets are transferred or that the main assets are transferred.<sup>335</sup> *Harsco* does not clarify this issue. It could at a stretch be argued that based on its concluding remarks, in combination with its previous statements as to the role of the assets, it did not require the transferred assets to be significant. This paper however argues that the same concluding remarks considered in light of its earlier dismissal of the determinative role of the asset muddies the role of the assets. As such no inference can be drawn from the court’s reasoning. The above remains to be clarified.

## 3.7. SOLVING THE CIRCULAR REASONING

### 3.7.1. THE MOTIVE CRITERION

The motive criterion has not met with success within the European legal community.<sup>336</sup> Its application has not been applied consistency in case law. Some

---

<sup>330</sup> Ibid.

<sup>331</sup> Supra note 22 para 38.

<sup>332</sup> Ibid para 37.

<sup>333</sup> Ibid. See *ibid* para 32 where Judge Van Niekerk refers to the nature of the business as determining the weight to be attached to the transfer of assets and whether or not there is a takeover of employees, ‘and if so, the number and significance of each.’ The relationship of the reference to ‘the number and significance of each’ to the transfer of assets and takeover of employees is unclear.

<sup>334</sup> *Op cit* note 95 at 169.

<sup>335</sup> Ibid at 168.

<sup>336</sup> *Op cit* note 307 at 234-235.

judgments have applied *Süzen* qualified by the motive factor while others applying *Süzen* unqualified by the motive factor.<sup>337</sup>

### 3.7.2. A MINIMUM NUMBER OF FACTORS

Bletzer suggests that the courts could require that a minimum number of factors be present before a transfer is a going concern.<sup>338</sup> It is argued that this solution is artificial. First, as previously argued the factors proposed in *UCT* will in most instances in the outsourcing context be satisfied. Therefore there would arguably also be more than one factor that is achieved. Secondly, upon which basis would the courts determine a minimum number without it being arbitrary and accommodating the nature of any type of transaction?

### 3.7.3. AMENDMENT TO LEGISLATION

It was argued that *Süzen* created an ‘inefficiency’ in the operation of the law.<sup>339</sup> The British Government’s solution to the uncertainty and loopholes in the application of the EU Directive, and accordingly the application of TUPE, was the introduction of TUPE (2006).<sup>340</sup> The changes brought about by TUPE (2006) were canvassed in chapter one. TUPE (2006) regards a change in service provider as automatically amounting to a transfer.<sup>341</sup> It is submitted that this solution is not viable in light of *SAA*. The type of amendment envisaged by TUPE (2006) would involve a departure from a factual analysis of the facts as to whether there is a transfer of a business as a going concern.<sup>342</sup> A critical analysis of the relevant provisions of TUPE (2006) and its suitability within South Africa is not within the scope of this paper. As mentioned

---

<sup>337</sup> John McMullen (2006) op cit note 38 at 121-122 and John McMullen (2001) op cit note 273 at 397-398.

<sup>338</sup> Op cit note 241 at 152.

<sup>339</sup> Op cit note 47 at 344.

<sup>340</sup> See the introductory commentary in chapter one. Also see John McMullen (2006) op cit note 38 at 121-122 and John McMullen (2012) op cit note 38 at 472.

<sup>341</sup> Regulation 3(1) (b) read with reg 3(3) of TUPE (2006).

<sup>342</sup> *Supra* note 20 para 105.

in chapter one, the application of TUPE (2006) has not been without its own problems.<sup>343</sup>

### 3.8. CONCLUDING REMARKS

The above analysis serves to highlight the issues, both present and future, that may arise through the application of going concern enquiry, in the context of outsourcing, as showcased in *Harsco* and comparative foreign case law. Despite highlighting further interpretational concerns, a comparative investigation does not provide any viable solutions to the issues that may present itself in the South African outsourcing sector if the *Harsco* reasoning is too readily adopted.

---

<sup>343</sup> See commentary in John McMullen (2012) op cit note 38 which addresses the interpretational problems associated with the application of the service provision change clause since its introduction.

## CHAPTER 4: PRACTICAL IMPLICATIONS OF THE APPLICATION OF S 197 IN THE OUTSOURCING CONTEXT

### 4.1. INTRODUCTION

The Constitutional Court in *SAA* is commendable for its advancement of the protection of job security. Nonetheless it is respectfully submitted that it overlooked an opportunity to identify and evaluate the practical difficulties and economic implications of its decision in the outsourcing context. This could have affected its judgment and, as will be argued, at very least initiated the possible amendment of s 197.

Prior to the judgment various commentators have acknowledged the practical difficulties which may arise should s 197 apply to outsourcing transactions.<sup>344</sup> Consequently the theoretical impact of such a decision is not an unrealistic expectation, especially considering the Constitutional Court functions as a court of final instance,<sup>345</sup> and is consequently the architect of ‘policy and principle’.<sup>346</sup> This is not to suggest that outsourcing should be excluded from the scope of s 197 due to the existence of practical difficulties. However had the Constitutional Court considered the practical implications, and consequently the commercial impact of its decision, it would have observed that the present formulation of s 197 fails to account for the nuanced economic context and relationship dynamics associated with an outsourcing arrangement.

Applied without regard to considerations unique to the outsourcing context, s 197 disproportionately pursues the social rights of employees at the expense of the business interest of employers.<sup>347</sup> It is argued that the provisions of s 197 are

---

<sup>344</sup> PAK Le Roux (2004) op cit note 50 at 44; op cit note 53 at 116; op cit note 65 at 90-91; op cit note 95 at 185-187 and Lynn Briggs ‘The Application of Section 197 of the Labour Relations Act in an Outsourcing Context’ (Part 2) 2009 *Obiter* 656 at 672.

<sup>345</sup> Ian Currie and Johan de Waal *The Bill of Rights Handbook* (2005) at 110.

<sup>346</sup> Arguing by analogy from Trent D Sebbens op cit note 1 at 164.

<sup>347</sup> Para 40 of the opinion of Advocate General Geelhoed, delivered on 27 September 2001, TEMCO, Case C-51/00, available at <http://eur->

unsuitable for application in the outsourcing sector.<sup>348</sup> The broader impact of the current situation is the possible negative effect it may have on the economic growth of the South African outsourcing sector.

This chapter addresses the practical implications of the application of s 197 in the outsourcing sector by considering the tendering process associated with an outsourcing transaction, the structure of the contractual relationships, and the dynamics between the parties directly and indirectly impacted by s 197 against the current provisions that comprise s 197.

## **4.2. PRACTICAL IMPLICATIONS**

### **4.2.1. EMPLOYEE INFORMATION AND COMPETITIVE TENDERING**

Section 197 has the effect that the liabilities of the employees of the old employer are transferred over to the new employer.<sup>349</sup> The new employer in turn can potentially reduce such employee liabilities by, inter alia, negotiating with the old employer that it indemnifies the new employer against such liabilities.<sup>350</sup> Alternatively the new employer can factor the potential employees' liabilities into the purchase price of a business with the insight gained from a due diligence process. If s 197 can potentially apply to a second generation outsourcing transaction, the problem presents itself that while the incoming contractor knows it will assume responsibility of employees and the associated liabilities, the determination of the extent of that liability remains problematic.<sup>351</sup> It is argued that permitting second generation outsourcing, and future generation outsourcing, to potentially fall within the present formulation of s 197 affects the competitive tendering process associated with the outsourcing sector.

---

*lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62000CC0051:EN:PDF*, accessed on 7 January 2013.

<sup>348</sup> Arguing by analogy from Manoj Dias-Abey op cit note 1 at 170.

<sup>349</sup> Section 197(2).

<sup>350</sup> Op cit note 53 at 116 and op cit note 95 at 186.

<sup>351</sup> N C Johnson and K Williams 'Transferring employment between the public and private sectors in the United Kingdom: acquired rights and revising TUPE' (2007) Sheffield Hallam University Research Archive (SHURA) 1 at 20, available at <http://shura.shu.ac.uk/707/>, accessed on 16 January 2013.

Potential contractors will find it difficult to ‘plan and budget’ for the potential contracting opportunity.<sup>352</sup>

To contextualise the issue: In the case of sale or merger of a business which triggers s 197, the prudent purchaser would go through an acquisition checklist. A critical part of the process would be performing a due diligence on the business.<sup>353</sup> This would include a due diligence on the employees and associated obligations.<sup>354</sup> The financial implications of which would influence the purchase price of the business. Therefore the take over of employees is a normal and calculated commercial risk associated with the transaction.<sup>355</sup>

In delineating and assigning a financial value to the obligations it would be assuming, and in assessing whether it can comply with the terms and conditions of employment of the seller,<sup>356</sup> the purchaser would request employee information such as:-

- specifics of the employees to be transferred;
- employees length of employment and cost to company;
- the accrued benefits owing to each employee at time of intended transfer (for example leave or bonuses earned but not paid out);
- details as to the retirement fund, medical aid scheme of the employees or made available to the employees;
- specifics of any non-standard employment terms;
- a list and details of any present or potential disputes between the present employer and an employee; and

---

<sup>352</sup> Op cit note 4 at 10.

<sup>353</sup> Carole A Spink and Ute Krudewagen ‘From Acquired Rights to Reverse TUPE: Employment Law Issues in Global Outsourcing Transactions’ (2009) 9 *Chicago-Kent Journal of International and Comparative Law* 46 at 92.

<sup>354</sup> Susan Stelzner, Stuart Harrison Brian Patterson and Zahida Ebrahim ‘South Africa: Legal Compliance in South Africa’ in Salvador del Rey and Robert J Mignin (eds) *International Labour and Employment Compliance Handbook* (2010) at 26.

<sup>355</sup> Op cit note 347 para 39.

<sup>356</sup> Section 197(3) (a).

- ‘confirmation of compliance with all relevant labour legislation and that any required levies are up to date (for example Unemployment Insurance, Compensation for Occupational Injuries and Diseases, Employment Equity Reports)’.<sup>357</sup>

The importance of conducting a due diligence is of no less value in the outsourcing context.<sup>358</sup> On the termination of an outsourcing contract, irrespective of its generation, the client would generally invite third parties to submit tenders in response to its request for proposals in respect of the service.<sup>359</sup> This is referred as a competitive tendering process.<sup>360</sup> It is argued that the ability of a tenderer or an incoming contractor to conduct a due diligence, and in so doing receive the necessary employee information, is constrained due to the dynamics of the relationships that exists between the parties involved in an outsourcing transaction.<sup>361</sup>

It is the position of this paper that the due diligence process should occur when a third party is deliberating whether to tender.<sup>362</sup> Admittedly, such position is not without implications. Commentators argue that an outgoing contractor would be hesitant to release confidential information,<sup>363</sup> and/or obstructive if the outgoing contractor is tendering for the contract or is disgruntled, to provide employee information to its competitors who may or may not be successful in the tender.<sup>364</sup> There is evidently no incentive to release such information. In addition the possibility of the outgoing contractor indemnifying the incoming contractor against any employee associated liability would be very slim.<sup>365</sup> Without conducting a due diligence and the extraction of the required information, competitive tenders cannot be submitted to the client. The potential incoming contractor will not be able to

---

<sup>357</sup> Op cit note 354 at 26.

<sup>358</sup> Op cit note 353 at 92.

<sup>359</sup> Ibid at 91.

<sup>360</sup> Ibid.

<sup>361</sup> Arguing by analogy from Malcolm Sargeant ‘New Transfer Regulations’ (2002) 31 *Industrial Law Survey* 35 at 44. Also see op cit note 351 at 20.

<sup>362</sup> Op cit note 353 at 92.

<sup>363</sup> Malcolm Sargeant op cit note 361 at 44.

<sup>364</sup> Op cit note 53 at 116; op cit note 65 at 90 and op cit note 95 at 186.

<sup>365</sup> Op cit note 53 at 116 and op cit note 95 at 186.

precisely determine whether the contracting opportunity is financially viable and the costing accuracy of its submitted tender.<sup>366</sup> This could possibly reduce the number of tenders submitted.<sup>367</sup> It is argued that the labour force component, especially in labour intensive services, is the major component of the contract price and thus a determinative factor in the commercial viability of a contracting opportunity.<sup>368</sup> These considerations undermine the competitiveness of the tendering process in the outsourcing context.

Bosch argues that regulation 11 of TUPE (2006) provides a possible solution in respect of compelling disclosure of employee information.<sup>369</sup> Regulation 11 of TUPE (2006) compels the transferor to, inter alia, provide the transferee with what is collectively referred to as ‘employee liability information.’<sup>370</sup> The transferor must comply ‘...not less than fourteen days before the relevant transfer...’<sup>371</sup> Regulation 11 is of limited assistance. It admittedly creates an obligation to disclose clearly defined and required information. Despite same the time period introduced by TUPE (2006) is of limited value. The statutory time frame imposed is of no assistance to a potential contractor who requires information in order to assess the commercial viability of the contracting opportunity. TUPE (2006) seemingly requires that the transferee has been selected.

It is argued that to ensure a viable and competitive tender the employee information should be disclosed before the submission of the tenders. Support of such timing does however exacerbate the potential problem that the outgoing contractor will be unwillingly to supply the necessary information. The point in time in which the employee information is theoretically required sparks the potential

---

<sup>366</sup> Malcolm Sargeant op cit note 361 at 44.

<sup>367</sup> Ibid.

<sup>368</sup> Op cit note 347 at para 35. Also see Amie Jasmine Ahanchian op cit note 24 at 57 where the author discusses the impact of labour costs in the service-related sector.

<sup>369</sup> Op cit note 95 at 187.

<sup>370</sup> Regulation 11(2) details such ‘employee liability information’ as meaning, inter alia, the identity and age of the employee, the particulars of employment of each employee, details as to disciplinary procedures against the employee or grievance procedures taken by the employee; details as to any court or tribunal case.

<sup>371</sup> Regulation 11(6).

confidentiality concerns of the outgoing contractor.<sup>372</sup> If the incoming contractor is selected, the disclosure of the necessary information and performance of a due diligence would arguably be less of an issue to the outgoing contractor.

Bosch further argues that the client, through a contractual obligation in the outsourcing agreement, could compel the outgoing contractor to disclose the required employee information and allow a due diligence in the event of a s 197 transfer.<sup>373</sup> It is argued that this solution, while it has value in theory, may have limited practical value. First, Bosch's argument assumes that the client in such an instance has sufficient negotiating power over the contractor to include such a contractual term. Secondly, there exists no incentive for the outgoing contractor to agree and adhere to such a contractual obligation considering it would have already lost the contract, and if the contract was terminated due to its breach, it would be unlikely that it would be tendering or be a successful tenderer.

Bosch further proposes that 'trade unions and relevant employees' could be sources of the necessary employee information.<sup>374</sup> This proposal, commendable for the attempt to seek solutions to the problem, has limited practical value. Bosch's proposal involves a potentially burdensome administrative process and a piece-meal extraction of the information. The accuracy and completeness of certain aspects of the type of information required would be hard to verify by such parties, for example details as to the compliance with labour legislation and present or potential disputes.<sup>375</sup> The incoming contractor may be surprised by obligations it did not factor in or factored in incorrectly.

In the event that employee information is not furnished within a reasonable time prior to the submission of tenders, or the transfer date, should tenderers or contractors not have the right to modify their pricing structures after submission of

---

<sup>372</sup> Malcolm Sargeant op cit note 361 at 44.

<sup>373</sup> Op cit note 95 at 187.

<sup>374</sup> Ibid.

<sup>375</sup> Op cit note 354 at 26.

the tenders or after its appointment?<sup>376</sup> Permitting such an adjustment prior to the closing of tenders would allow vindictive outgoing contractors to frustrate the tendering process. Allowing the price to be adjusted post selection could prejudice the client who may have appointed such contractor on the basis of the pricing structure.<sup>377</sup> The selected incoming contractor could abuse such an opportunity to inflate its profits. Prohibiting the adjustment outright would in turn prejudice the tenderer or incoming contractor who in good faith determined its pricing on the available information. This is a debate which s 197 does not even remotely entertain. Assuming that employee information is delivered, s 197 further omits to place an onus on the old employer to notify the new employer of any subsequent changes to information it may have already submitted.<sup>378</sup>

Regulation 12 of TUPE (2006) gives teeth to regulation 11 of TUPE (2006). It provides that a transferee, within a certain time period, may apply to the employment tribunal to force the transferor to comply with the provisions regulating the timely and complete submission of employment liability information.<sup>379</sup> In the event the tribunal regards the claim as having merit, it can order the transferor to pay the transferee 'just and equitable' compensation.<sup>380</sup> In determining the amount of compensation the tribunal must have regard to:-

[A]ny loss sustained by the transferee which is attributable to the matters complained of; and

the terms of *any contract between the transferor and the transferee* relating to the transfer under which the transferor may be liable to pay any sum to the transferee in

---

<sup>376</sup> Malcolm Sargeant op cit note 361 at 44.

<sup>377</sup> Accordingly to the Outsourcing Institute in a 1998 survey, it determined that the objective to 'reduce and control operating costs' was the top reasoning why companies outsource. Whether it has this intended benefit in practice is debatable. See, The Outsourcing Institute 'Top Ten Outsourcing Survey 1998', available at [http://www.outsourcing.com/content.asp?page=01b/articles/intelligence/oi\\_top\\_ten\\_survey.htm](http://www.outsourcing.com/content.asp?page=01b/articles/intelligence/oi_top_ten_survey.htm), accessed on 4 January 2013. Also see commentary in op cit note 353 at 47-48.

<sup>378</sup> John McMullen (2006) op cit note 38 at 136.

<sup>379</sup> Regulation 12(1), read with reg 12(2).

<sup>380</sup> Regulation 12(3), read with reg 12(4).

respect of a failure to notify the transferee of employee liability information. [*own emphasis added*]<sup>381</sup>

The compensation awarded can be no less than £500 per employee.<sup>382</sup> Despite same the tribunal can issue a lower amount if it is ‘just and equitable.’<sup>383</sup> This arguably undermines the very point of having a minimum fine. Regulation 12 further requires the transferee to mitigate its loss.<sup>384</sup>

Can a comparable provision apply in the context of s 197 in the outsourcing context? First, TUPE (2006) introduces punitive measures after the appointment of the contractor. Addressing the lack of information post event is problematic. As argued previously, tenderers require the employee liability information to determine whether it will pursue the opportunity. Absent a mechanism to compel disclosure in the tendering process, the competitiveness of the tendering process will be undermined. Secondly, in making an award of compensation that is just and equitable, TUPE (2006) assumes the existence of a contract between the incoming contractor and the outgoing contractor.<sup>385</sup> As has been discussed this is seldom the case in an outsourcing transaction where the contractual obligation would inevitably exist between the client and incoming service provider.<sup>386</sup> Thirdly, imposing a predetermined statutory fine would clearly not accommodate the financial implications that may arise in every situation. The fine would arguably have to be proportionate to the prejudice that the incoming contractor would suffer, and more than just an inconsequential financial hiccup to the previous contractor. Imposing liability assumes the capability of the transferor to pay. Finally, seeking compensation means litigation. Litigation means expense and time. This is an inconvenience for a new employer.

---

<sup>381</sup> Regulation 12(4).

<sup>382</sup> Regulation 12(5).

<sup>383</sup> Regulation 12(5).

<sup>384</sup> Regulation 12(6).

<sup>385</sup> Regulation 12(4) (b).

<sup>386</sup> It is notable that our courts do not require there to be a contractual link between the transferor and the transferee in order for the transfer to trigger s 197. See *supra* note 22 para 24.

The above discussion addresses the uncertainties that underlie the securement of employment information and the conducting of a due diligence in the outsourcing sector when s 197 applies. These considerations are likely to discourage suitable contractors from tendering.

#### **4.2.2. SECTION 197(6) OF THE LRA**

Section 197(6) permits the conclusion of an agreement to vary the consequences of s 197. This agreement can be concluded between both the old employer and the new employer with the employees' representative, or between either the old employer or the new employer and the employees' representative. This agreement introduces the element of flexibility to alleviate the financial onus placed on the new employer.<sup>387</sup>

Bosch argues that the incoming contractor may have difficulty in concluding an agreement envisaged in s 197(6).<sup>388</sup> He argues that before the transfer the tendering contractor will not have access to the employees' representative, and following its appointment, after the transfer it would have lost its negotiating power with the employees' representatives.<sup>389</sup> Bosch, in a separate article, seemingly counters this argument by focusing on s 197(6) permitting a new employer, without the involvement of an old employer, to conclude an agreement with the employees' representative to vary the terms and conditions after the transfer but before the service commences.<sup>390</sup> This does not however change the position that absent an agreement the new employer has to meet the terms and conditions of employment no less favourable than that of the old employer. It seems unlikely that the trade union would want to negotiate any lesser terms post transfer.

#### **4.2.3. THE IMPACT ON SMALL BUSINESS DEVELOPMENT**

The growth of small, medium and micro-enterprises (SMMEs) are at risk due to the potential application of s 197 in the outsourcing context. There are various reasons

---

<sup>387</sup> Op cit note 65 at 91.

<sup>388</sup> Ibid and op cit note 95 at 186.

<sup>389</sup> Op cit note 65 at 91.

<sup>390</sup> Ibid.

why SMMEs play an important role in the economy.<sup>391</sup> For the purposes of this paper their role in creating job opportunities for the unskilled labour force, their function as a platform for innovation and entrepreneurship, and their resilience to economic depression is of relevance.<sup>392</sup> It has been determined that South Africa's SMMEs would be stimulated through 'links with the large corporate sector and government'<sup>393</sup> with subcontracting regarded as an essential link.<sup>394</sup> This would in turn promote job creation.<sup>395</sup>

It is argued that underpinning s 197 is the assumption that the incoming contractor has the same capabilities and resources as the outgoing contractor.<sup>396</sup> This blanket assumption is incorrect.<sup>397</sup> Section 197 potentially raises the costs of employment for SMMEs.<sup>398</sup> SMMEs with limited start-up capital arguably have limited financial resources.<sup>399</sup> In the outsourcing context, the potential viable contracting opportunities for SMMEs may be limited by s 197. It is probable that SMMEs would not be able to meet the financial obligations imposed by labour costs

---

<sup>391</sup> John Luiz 'Small Business Development, Entrepreneurship And Expanding The Business Sector In A Developing Economy: The Case Of South Africa' (2011) 18 (2) *Journal of Applied Business Research* 53 at 54-56.

<sup>392</sup> Ibid.

<sup>393</sup> Ibid at 66.

<sup>394</sup> Ibid.

<sup>395</sup> Ibid.

<sup>396</sup> Trent D Sebbens op cit note 1 at 166 and 170.

<sup>397</sup> Arguing by analogy from *PP Consultants Pty Ltd v Finance Sector Union* [2000] HCA 59; 201 CLR 648; 75 ALJR 191; 101 IR 103; 176 ALR 205 para 40, available at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2000/59.html?stem=0&synonyms=0&query=FCA%201999%201251%20or%201999%20FCA%201251>, accessed on 7 January 2013, where the minority judgment held that:-

Whilst it may be accepted that a purpose of the provision is to prevent evasion of obligations by employers who do succeed to a business or part thereof, there is another policy consideration which bears on this case. The legislation, it may be inferred requires a common identity of a business or part thereof, into whose hands it falls, on the assumption that a successor will have the same and continuing capacity to meet the obligations arising under an award as the former operator of the business. No such assumption may safely be made about a different business.

This decision was determined in the context of the Workplace Relations Act 1996 (Cth). Notably the promulgation of the Fair Work Act 2009 (Cth) has overruled this decision. See commentary in Trent D Sebbens op cit note 1 at 164-166; Sutherland and Riley op cit note 1 at 284 and Manoj Dias-Abey op cit note 1 at 170-172.

<sup>398</sup> See op cit note 391 at 65 which broadly address the obstacles and challenge that impede the growth of SMMEs. Also see Amie Jasmine Ahanchian op cit note 24 at 45.

<sup>399</sup> Op cit note 391 at 54 and Amie Jasmine Ahanchian op cit note 24 at 45.

of a more established, larger contractor capable of offering terms more favourable than the SMME's can afford.<sup>400</sup> While they might be able to submit competitive tenders in the sense that they have lower labour costs, they might not be able to compete in terms of complying with offering terms not less favourable than those offered by the old employer when the contracting opportunity is potentially triggered by s 197. The broader impact of such line of reasoning is that the growth of SMMEs are stifled, this affects the economic growth of South Africa which is of importance in the present economic recession,<sup>401</sup> and the role of SMMEs as a source of job creation, innovation and entrepreneurship.

#### 4.2.4. A MANIPULATION OF THE MARKET

In the context of outsourcing it is possible for a contractor to manipulate the competitiveness of the market in which it operates. Bosch argues that a contractor who offers its employees excessively favourable terms and conditions will place a potentially insurmountable financial burden on its competitors in the event of a change in service provider amounting to a s 197 transfer.<sup>402</sup> In the event that a new contractor is awarded the tender, the labour costs imposed via s 197 can potentially affect the sustainability of its business.<sup>403</sup>

It can be argued that the new employer can counter the outgoing contractor's attempt to manipulate the market, and tender despite the onerous labour costs, by utilising s 197(6). Section 197 (6) permits, inter alia, the new employer to enter into negotiations with trade unions<sup>404</sup> to, inter alia, vary the onerous terms and conditions of the employment.<sup>405</sup> Nevertheless one must be mindful that the s 197(6) does not compel negotiation and is premised on variation by consensus.<sup>406</sup> In the absence of

---

<sup>400</sup> Op cit note 391 at 66 insofar as the article refers to the lack of financial backing of tenderers.

<sup>401</sup> Op cit note 353 at 47.

<sup>402</sup> Op cit note 65 at 90 and op cit note 95 at 186-187.

<sup>403</sup> Kristen Carson 'TUPE or Not too TUPE?: The Impact of Labor Regulations on Business Transfers: A Comparative Case Study Approach to Labor Laws in the UK v US' (2008) VII *Undergraduate Research Journal* 37 at 41.

<sup>404</sup> Trade Unions are referred to for sake of simplicity but should be read to encompass any appropriate body as referred to in s 189(1), as provided in s 197(6).

<sup>405</sup> Section 197(2) read with s 197 (6). Also see op cit note 18 at 43 and 70.

<sup>406</sup> Op cit note 18 at 85-87.

the trade union being compelled and a consensual agreement, the consequences of s 197 remain unaffected.<sup>407</sup> Despite such a mechanism available to the new employer to mitigate against onerous labour costs, in his capacity as a tenderer he will be taking a commercial risk which cannot properly be quantified. The outcome of such a mechanism will be unknown at the tendering stage. In addition, as argued previously, the tenderer's access to the trade unions pre-transfer, and the assistance of the outgoing contractor, is limited in the competitive tendering process.<sup>408</sup>

A further argument to counter the market manipulation is the potential ability of the new employer to dismiss the employees due to operational requirements. Despite s 187(1) (g) of the LRA, which states that:

A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is... a transfer, or a reason related to the transfer, contemplated in section 197 or s 197(A),

it is recognised that genuine operational requirements may exist that necessitate the possible dismissal of parts of the acquired workforce.<sup>409</sup> Recognising such an exception to s 187(1) (g) balances the employee's right to job security and the right of a business to make commercial decisions ensuring its productivity and efficiency.<sup>410</sup> When a dismissed employee that has been subject to a s 197 transfer claims an automatically unfair dismissal under s 187(1)(g) and '...the employer

---

<sup>407</sup> Ibid at 87.

<sup>408</sup> Op cit note 65 at 90.

<sup>409</sup> *Van der Velde v Business and Design Software (Pty) Ltd and another* (2006) 27 ILJ 1738 (LC) at 1749 which was upheld on appeal in *Business & Design Software (Pty) Ltd and another v Van der Velde* (2009) 30 ILJ 1277. See *Adams v Dcd- Dorbly Marine (Pty) Ltd* (2011) 32 ILJ 2472 (LC) and *Viney v Barnard Jacobs Mellet Securities (Pty) Ltd* (2008) 29 ILJ 1564 (LC). For commentary see Craig Bosch 'Operational Requirements Dismissals and Section 197 of the Labour Relations Act: Problems and Possibilities' (2002) 23 ILJ 641 at 646.

<sup>410</sup> See comments by Judge Van Niekerk in *Van der Velde (2006)* supra note 409 at 1746 and 1747-1749. Also see Bradley Workman-Davies 'The Right of Employers to Dismiss Employees in the Context of Business Transfers - an Analysis of the Automatically Unfair Dismissal Provisions of the Labour Relations Act (2007) 28 ILJ 2133 at 2173.

relies on a fair reason related to its operational requirements...’,<sup>411</sup> the Labour Court,<sup>412</sup> supported by academic commentators,<sup>413</sup> have applied a

...two-stage test of factual and legal causation to determine whether the true reason for dismissal was the transfer itself, or a reason related to the employer's operational requirements.<sup>414</sup>

It comprises two main questions:

- a) Factual Causation: Would the dismissal have occurred if there was no transfer in terms of s 197?<sup>415</sup> If the answer is yes, the enquiry proceeds to the second question.<sup>416</sup> If the answer is no, the dismissal is not automatically unfair and the court must examine the fairness of the dismissal in terms of s 188 read with s 189 of the LRA.<sup>417</sup>
- b) Legal Causation: Was the transfer or a reason related to it the dominant, proximate or most likely cause of the dismissal?<sup>418</sup> If the answer is yes,

---

<sup>411</sup> *Van der Velde (2006)* supra note 409 at 1749.

<sup>412</sup> Ibid.

<sup>413</sup> Op cit note 18 at 166; Craig Bosch op cit note 409 at 646; Bradley Workman-Davies op cit note 410 at 2146-2148 and Nicole Smit ‘A Chronicle of Issues Raised in the Course of Dismissals by the Transferor and/or Transferee in Circumstances Involving the Transfer of an Undertaking (2005) 26 *ILJ* 1853 at 1873.

<sup>414</sup> *Van der Velde (2006)* supra note 409 at 1749. This two stage test is an adapted test from the case of *SACWU V Afrox Ltd* (1999) 20 *ILJ* 1718 (LAC) and is commonly referred to as the ‘Afrox Test.’ See commentary at op cit note 18 at 166.

<sup>415</sup> *Van der Velde (2006)* supra note 409 at 1749.

<sup>416</sup> Ibid.

<sup>417</sup> Ibid.

<sup>418</sup> In respect of the question of legal causation, Judge Van Niekerk in *Van der Velde (2006)* supra note 409 at 1749 notably held that:

If the test for factual causation is satisfied, the test for legal causation must be applied. Here, the court must determine whether the transfer is the main, dominant, proximate or most likely cause of the dismissal. This is an objective enquiry. The employer's motive for the dismissal, and how long before or after the transfer the employee was dismissed, are relevant but not determinative factors.

If the reason for dismissal was not the transfer itself (because, for example, it was a dismissal effected in anticipation of a transfer and in response to the requirements of a potential purchaser of the business) the true reason may nonetheless be a reason related to the transfer.

To answer this question (whether the reason was related to the transfer) the court must determine whether the dismissal was used by the employer as a means to avoid its obligations under s 197. (This is an objective test, which requires the court to evaluate any

the dismissal is automatically unfair in terms of s 187(1) (g). If the answer is no, the court must examine the fairness of the dismissal in terms of s 188 read with s 189 of the LRA.<sup>419</sup>

Despite this available remedy, its application in the outsourcing context is still relatively untested and lacks uniformity in its application.<sup>420</sup> These realities by implication expose the incoming contractor to the possibility of litigation. The uncertainty associated with such a mechanism may result in a reduction of tenders.

If a new employer successfully dismisses based on operational requirements it will be liable for severance costs. These severance costs may put the new employer's financial health at risk. However s 197 (7)<sup>421</sup> compels the old employer to agree with

evidence adduced by the employer that the true reason for dismissal is one related to its operational requirements, and where the employer's motive for the dismissal is only one of the factors that must be considered.)

If in this sense the employer used the dismissal to avoid its s 197 obligations, then the dismissal was related to the transfer.

Also see Bradley Workman-Davies op cit note 410 at 2146.

<sup>419</sup> *Van der Velde (2006)* supra note 409 at 1749.

<sup>420</sup> Bradley Workman-Davies op cit note 410 at 2171. To illustrate, the case of *Van der Velde (2006)* supra note 409 concerned an employee's retrenchment in light of a management buy-out. *Adams (2011)* supra note 409 concerned an employee's retrenchment in light of the merger of two companies. *Viney (2008)* supra note 409 concerned an employee's retrenchment in light of the merger of two companies. *SA Municipal Workers Union (2005)* supra note 50 concerned an outsourcing arrangement which occurred prior to the full development of the two stage enquiry test as set out in *Van der Velde (2006)* supra note 409. *Buys (2008)* supra note 50 concerned an employee's retrenchment in the outsourcing context. The facts did not permit a finding that there was a transfer of a going concern, or assuming otherwise, that the dismissal fell with the ambit of s 187(1) (g). The judgment failed to account for the two stage enquiry test. *Business and Design Software (Pty) Ltd (2009)* supra note 409 upheld the Labour Court's findings, namely that of *Van der Velde (2006)* supra note 409, and acknowledged the thorough judgment yet did not expressly or clearly apply the two stage test.

<sup>421</sup> Section 197(7) provides that:

The old employer must -

- (a) agree with the new employer to a valuation as at the date of transfer of -
  - (i) the leave pay accrued to the transferred employees of the old employer;
  - (ii) the severance pay that would have been payable to the transferred employees of the old employer in the event of a dismissal by reason of the employer's operational requirements; and
  - (iii) any other payments that have accrued to the transferred employees but have not been paid to employees of the old employer.
- (b) conclude a written agreement that specifies -
  - (i) which employer is liable for paying any amount referred to in paragraph (a), and in the case of the apportionment of liability between them, the terms of the apportionment; and

the new employer as to, inter alia, the value of the severance costs had the transferred employees been dismissed for operational requirements as of the date of the transfer. Section 197(8) regulates the non-compliance with s 197 (7). Failure to comply will cause the old employer to be jointly and severally liable with the new employer, for a period of up to 12 months from the date of transfer, for severance costs owing to an employee due to his dismissal based on, inter alia, the new employer's operational requirements.<sup>422</sup> Todd et al argue that such a mechanism prevents an old employer from disposing of its workforce into 'an unviable entity'<sup>423</sup> in an attempt to avoid its liabilities to such employees had it retrenched them.<sup>424</sup>

Bosch, in extracting an argument from an article by Wallis,<sup>425</sup> proposes that an outgoing contractor could obstruct an agreement envisaged in s 197(7).<sup>426</sup> The penalty imposed by s 197(8)<sup>427</sup> to compel compliance by the old employer is insufficient as it is most likely that the retrenched employees would pursue such an action against the new employer.<sup>428</sup> Wallis postulated such an argument against the application of s 197 to outsourcing.<sup>429</sup> Wallis argued that the type of agreement envisaged in s 197(7) is premised on a consensual contractual relationship between the new employer and old employer.<sup>430</sup> In the context of second generation

- 
- (ii) what provision has been made for any payment contemplated in paragraph (a) if any employee becomes entitled to receive a payment;
  - (c) disclose the terms of the agreement contemplated in paragraph (b) to each employee who after the transfer becomes employed by the new employer; and
  - (d) take any other measure that may be reasonable in the circumstances to ensure that adequate provision is made for any obligation on the new employer that may arise in terms of paragraph (a).

<sup>422</sup> Section 197(8). See commentary in op cit note 18 at 89-90.

<sup>423</sup> Op cit note 18 at 90.

<sup>424</sup> Ibid.

<sup>425</sup> Wallis op cit note 51 at 13

<sup>426</sup> Op cit note 95 at 187.

<sup>427</sup> Section 197(8) provides that:-

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

<sup>428</sup> Wallis op cit note 51 at 13 and op cit note 95 at 187.

<sup>429</sup> Wallis op cit note 51 at 13.

<sup>430</sup> Ibid.

outsourcing it is unrealistic to expect a ‘disgruntled contractor, which has just lost a valuable contract to a competitor’<sup>431</sup> which, unlike in a sale of business is not financially benefiting from the appointment, to actively and willingly conclude an agreement which essentially seeks to apportion liability of payment between it and the new employer in respect of certain benefits that may accrue to the workforce from which it no longer derives any benefit.<sup>432</sup> Based on such reasoning, Wallis argues that s 197 (7) flags the Legislature’s intention that transactions that triggers s 197 are limited to where the new and old employers agree to bring about a change of ownership in the business, which is not the case in the outsourcing context.<sup>433</sup>

Bosch clarifies the context in which Wallis’s above argument must be assessed.<sup>434</sup> Section 197(7) is not discretionary.<sup>435</sup> Despite the proposed reliance on the new employer for severance pay, old employers are still at risk and therefore it is in their interests to comply. In addition, in the event of non-compliance, the section could possibly be enforced by the Labour Court in terms of its general powers in s 158(1)(b) and (j) of the LRA.<sup>436</sup> Despite Bosch’s latter observation, a new employer and even the employees<sup>437</sup> may still have a litigation battle in compelling an obstructive old employer to comply with the obligations imposed by s 197(7).

It is argued that in the case of outsourcing, the outgoing contractor will be willing to enter into such an agreement that transfers all liability to the new employer, especially in the case of a ‘disgruntled contractor’ or contractor that purposively manipulated the market. Arguably the new employer would for commercial reasons want to hold the old employer liable for a portion of the liabilities as accommodated in s 197(7), especially in a situation proposed above where there is a manipulation of the market. Due to diverging interests and in the

---

<sup>431</sup> Ibid.

<sup>432</sup> Ibid.

<sup>433</sup> Ibid.

<sup>434</sup> Op cit note 95 at 186.

<sup>435</sup> Ibid.

<sup>436</sup> Ibid at 186. Op cit note 18 at 193.

<sup>437</sup> Employees are included in light of the fact that s 197(7) aims to protect the employees. See op cit note 18 at 193 where the point is made that the enforcement of s 197(7) may mainly be at the instance of the employees.

absence of consensus, s 197 fails to provide a mechanism to compel agreement. Even if the Labour Court can force the old employer to enter into such agreement it cannot determine the details of the agreement.<sup>438</sup> Todd et al argue that the new employer could possibility compel the old employer by way of a court order to bona fide make an effort to reach agreement.<sup>439</sup> This arguably would entail legal costs and in no way guarantees any positive outcome as to the terms of the agreement.

In the absence of agreement s 197(8) would automatically apply.<sup>440</sup> As was argued by Wallis, there may be a tendency for employees to pursue the claim against the new employer without regard to the old employer.<sup>441</sup> Conversely if the new employer's financial viability is at risk, it would be more probable that an informed employee would pursue the claim against the old employer. Nevertheless the new employer is still potentially liable.

The above reflects the limited application of the potential mechanisms to counter the practical implication of a manipulation of the market by an old employer. Despite the possible remedies available to the new employer to mitigate against onerous labour costs, in his capacity as a tenderer he will be taking a commercial risk which cannot properly be quantified as the outcome of such remedies available by s 189, s 197(7) and s 197(8) will be unknown at that stage.

Without certain and effective countering mechanisms, a contractor can dominate the market in which it operates, leaving the client stuck with the same contractor indefinitely (unless it insources and absorbs the associated costs),<sup>442</sup> or, if proven to be prolific in practice, can reduce the trend of outsourcing. This type of market manipulation it is submitted would be financially sustainable by larger outsourcing business, compared to that of SMMEs. This type of practice contributes to the suppression of the growth of SMMEs.

---

<sup>438</sup> Ibid.

<sup>439</sup> Ibid.

<sup>440</sup> Ibid.

<sup>441</sup> Wallis op cit note 51 at 13.

<sup>442</sup> Op cit note 65 at 90.

### 4.3. LACK OF EMPIRICAL INFORMATION

The above practical implications reflect a common theme – the negative impact on the competitiveness and viability of the outsourcing sector by eroding fair competition. In countering such a theme Bosch argues that no evidence has emerged from comparable provisions in other countries to warrant the credibility of such a conclusion.<sup>443</sup> It is respectfully submitted that this is not a sufficient basis on which to dismiss the possible effects of s 197 in the outsourcing sector in the South African context. South Africa is a third world economy. It is plausible that the effects of s 197 in the outsourcing context in South Africa will not be comparable to its counterparts in developed economies. That is not to dismiss the need for a comprehensive investigation into the perceived vs actual implications of s 197. However to reduce the credibility of the potential implications without considering the South African context in which it operates seems to be a convenient reliance on the fact that there is lack of empirical evidence in other jurisdictions.

### 4.4. ACCOUNTING FOR THE ECONOMIC CONTEXT IN WHICH S 197 OPERATES

It is respectfully submitted that it not unreasonable to have expected the Constitutional Court in *SAA* to have examined the suitability of the nature of the outsourcing business relationship prior to its pronouncement that s 197 may be applicable to second generation outsourcing. The Labour Appeal Court in the 2013 case of *PE Pack 4100CC v Adam Sanders, Cell C Provider Company (Pty)* (hereinafter referred to as *PE Pack*)<sup>444</sup> pronounced on the application of franchising agreements to s 197.<sup>445</sup> The issue of law before the Labour Appeal Court was

---

<sup>443</sup> Ibid.

<sup>444</sup> Unreported case no: PA 08/10 of 22 January 2013, available at <http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZALAC/2013/1.html&query=sanders>, accessed on 2 February 2013.

<sup>445</sup> The facts of the case are briefly that that Cell C lawfully terminated its franchise agreements with two franchisees, x and y. It subsequently concluded an agreement with a new franchisee. The employee approached the Labour Court for an order that the appointment of the new franchisee triggered s 197. See the court at quo decision of *Sanders v Cell C Provider Co (Pty) Ltd & others* (2010) 31 *ILJ* 2722 (LC). The Labour Court upheld the employee's application. The matter was taken on appeal. See supra note 444 paras 1-5.

whether s 197 applied to franchise agreements.<sup>446</sup> The Court's decision was influenced by the nature of the business model of a franchise undertaking. It determined that franchising agreements were excluded from the scope of s 197 based on the specific relationship structure that comprise a franchising agreement.<sup>447</sup>

The facts of the case are briefly as follows:-<sup>448</sup> Cell C, operating its business by means of a franchise model, cancelled franchise agreements concluded between it and the third and fourth respondents.<sup>449</sup> It concluded a franchising agreement with the appellant, a new franchisee.<sup>450</sup> The latter franchise agreement related to the same infrastructure and services that formed the subject matter of the terminated franchise agreements.<sup>451</sup> On the facts Cell C held the leases in respect of the business premises, which it subleased to its franchisees.<sup>452</sup> Cell C further owned the fittings and furniture within the shops.<sup>453</sup> Franchisees of Cell C in turned owned the stock in store and were responsible for the supply of related customer services.<sup>454</sup> On the facts the exiting franchisees retained ownership of their stock.<sup>455</sup>

In essence, the Cell C stores which were previously run by the third and fourth respondents were, following the termination of their franchise agreements, being run by the appellant. The employment contracts of the employees of the third and fourth respondents were not taken over by the appellant.<sup>456</sup>

Following the appointment of the appellant, an employee of the third and fourth respondents sought an order in the court a quo<sup>457</sup> that the takeover of the business of the third and fourth respondents by Cell C or the new franchisee

---

<sup>446</sup> Supra note 444 para 7.

<sup>447</sup> Ibid paras 8, 15, 21 and 24.

<sup>448</sup> An in-depth case analysis is not within the preview of this paper.

<sup>449</sup> Supra note 444 para 1.

<sup>450</sup> Ibid.

<sup>451</sup> Ibid para 8.

<sup>452</sup> Ibid para 2. *Sanders (LC)* supra note 445 at 2725E-F.

<sup>453</sup> Supra note 444 para 2.

<sup>454</sup> *Sanders (LC)* supra note 445 at 2725F-H.

<sup>455</sup> Supra note 444 para 2.

<sup>456</sup> Ibid para 3.

<sup>457</sup> *Sanders (LC)* supra note 445.

constituted a s197 transfer.<sup>458</sup> The court a quo, adopting a purposive approach,<sup>459</sup> held inter alia that the takeover of the business of the exiting franchisees by the new franchisee amounted to a s 197 transfer.<sup>460</sup> It found that the business remained the same pre and post transfer.<sup>461</sup>

Taken on appeal, *PE Pack* defined the ambit of the dispute as whether s 197 applies to franchise agreements.<sup>462</sup> The judgment centred on the nature of the franchise business model.<sup>463</sup> The court identified deeming characteristics of a franchise relationship,<sup>464</sup> the prominent feature being the limited autonomy of the franchisee due to the high level of control exercised by the franchisor.<sup>465</sup>

In upholding the appeal,<sup>466</sup> the court determined that there was no transfer of a business as a going concern.<sup>467</sup> It held that no business had transferred. There was only a termination of a license to operate a business.<sup>468</sup> The franchisor retained ownership of the entire infrastructure at the time of termination of the franchise agreement and at the time of the appointment of the appellant.<sup>469</sup> As the ownership of the assets remained intact there could not be a transfer of a business as a going concern.<sup>470</sup> As such the nature of the franchise agreement excluded the application of s 197.

---

<sup>458</sup> Ibid at 2724.

<sup>459</sup> Ibid at 2727E-H, 2728D-2729E.

<sup>460</sup> Ibid at 2729H-I.

<sup>461</sup> Ibid at 2728F-2729B.

<sup>462</sup> Supra note 444 para 7.

<sup>463</sup> Ibid paras 13, 15-18, 21 and 25.

<sup>464</sup> Ibid paras 15 and 25.

<sup>465</sup> Ibid paras 16-17 and 21.

<sup>466</sup> Ibid para 27. See the minority judgment of Landman AJA. Landman AJA, arguably applying a purposive approach, dismissed the appeal with costs in his determination that s 197 applies to franchise agreements. See in this regard ibid paras 44-46. In applying the test for a going concern in light of *UCT* and *Spijkers* he held at para 42 that ‘... a stable economic entity changes hands when a franchise is terminated. It reverts to the franchisor.’ See ibid paras 36-42. Furthermore, he regarded there to be an indirect transfer of an undertaking in a franchising context. See ibid para 43.

<sup>467</sup> Ibid paras 18 and 27.

<sup>468</sup> Ibid para 18.

<sup>469</sup> Ibid.

<sup>470</sup> Ibid paras 18 and 21.

The court cautioned against applying ‘outsourcing ‘jurisprudence’<sup>471</sup> to the franchising sector.<sup>472</sup> In considering the relationship dynamics within a franchising arrangement, specifically with reference to the dominant and controlling role of the franchisor, and the retention of ownership of the infrastructure by the franchisor, the court distinguished the franchise arrangement to that of the outsourcing facts of *SAA*.<sup>473</sup>

In taking cognisance of the relationship dynamics and commercial structures which define a franchising arrangement, *PE Pack* reflects a shift in approach by the Labour Appeal Court. *PE Pack* moves away from a purposive approach as applied not only by the court a quo, but as readily adopted by other courts including the Constitutional Court.<sup>474</sup> Instead it has adopted an approach that has capped the application of s 197 on account of the commercial dynamics and realities of a transaction in the determination of the possible application of s 197. This type of approach which accounts for the nuances of a type of transaction as opposed to an outright purposive approach to s 197, in isolation of the economic context in which it operates, is what is required in order to accommodate the implications of the application of s 197 to outsourcing transactions.

#### **4.5. CONCLUDING REMARKS**

Law is dynamic. The business environment is constantly evolving to the needs of the modern commercial world. In the context of outsourcing, the formulation of s 197 needs to be responsive to the nuanced business structures of the modern economy. If s 197 fails to evolve, however insurmountable that task may seem, the protection it provides for short term job security can undermine the long term protection of job

---

<sup>471</sup> Ibid para 21.

<sup>472</sup> Ibid paras 18 and 21.

<sup>473</sup> Ibid para 21.

<sup>474</sup> See for example supra note 12 paras 41-43 and 62; Supra note 20 paras 35 – 38, supra note 21 para 29 and supra note 102 para 31.

security and stunt the contributory role of the outsourcing sector in South Africa's economic growth.<sup>475</sup>

This chapter is by no means deemed an exhaustive list of the practical problems associated with the application of s 197 in the outsourcing context. Its purpose is to draw attention to the limitations of the application of the provisions in s 197, in the outsourcing context, specifically second generation and future generation outsourcing transactions, and the broader economic implications of such limitations. These limitations hinder the smooth transition of a business for an old employer to a new employer. Such an outcome counters the intended dual purpose of s 197 as stated in *UCT*.<sup>476</sup> Consequently such a failure negatively impacts s 197's delicate balancing act of regulating conflicting interests, namely the business interests of employers and the employee's interest in job security.<sup>477</sup>

The 'type and characteristics' of the market in which s 197 operates should have been accounted for in *SAA*.<sup>478</sup> The Constitutional Court's omission in examining the specific relationship structures that exists in a second generation outsourcing relationship has resulted in a failure to judicially recognise the unsuitability of certain identified assumptions that appear to underlie the implications and remedies of and within s 197. For example, the assumption that an incoming contractor will have the same financial capabilities of the outgoing contractor, and the assumption that there exists a consensual and cooperative outgoing contractor despite the absence of any contractual obligation or incentive. At the very least such an acknowledgement by *SAA* would have focused attention on the practical implications of s 197 to the outsourcing industry and incentivised the Legislature to begin the process to amend s 197. The current state of affairs creates a controversial

---

<sup>475</sup> Trent D Sebbens op cit note 1 at 164 and Amie Jasmine Ahanchian op cit note 24 at 59.

<sup>476</sup> Supra note 18 para 53.

<sup>477</sup> Ibid.

<sup>478</sup> Op cit note 347 para 45.

imbalance between the economic rights and concerns of the contractors and the right of employees to job security.<sup>479</sup>

University of Cape Town

---

<sup>479</sup> Stephen Hardy and Nick Adnett ‘Entrepreneurial Freedom Versus Employee Rights’: the Acquired Rights Directive and EU Social Policy Post – Amsterdam’ (1999) 9 *Journal of European Social Policy* 127 at 135 in which the authors make a similar comment in respect of the ETO defence within the European community in the context of the Directive.

## CHAPTER 5: CONCLUSION

The words of Advocate General Geelhoed,<sup>480</sup> in his examination of the applicability of the EU Directive to the outsourcing context in light of *Süzen*, succinctly encapsulate the concerns addressed in this paper:

On account of the heterogeneous and dynamic nature of [outsourcing], the Court must, in my view, be reticent in regard to the application of the directive in the case of changes of contract. The dynamics of the market might be disrupted if the existence of a transfer within the meaning of the directive were assumed too readily. The obligation to respect the rights of all the members of staff of a company solely on the basis of the take over of a contract and the take over of a proportion of existing staff will give a potential new contractor less incentive to pick up the contract. Undertakings might even be deterred from competing for the contract. All this could lead to the ossification of markets.<sup>481</sup>

and,

... if the service provider is required too readily to take over the entire staff, the objective of the directive will become disproportionate in relation to the principle of freedom of contract and of freedom to engage in business activities.<sup>482</sup>

As has been argued in chapter two there are identifiable interpretational issues in the judgment of *SAA* that may possibly affect the scope of the application of s 197 to second generation outsourcing, and future outsourcing. These issues will undoubtedly be subject to future litigation. Chapter three focused on the reasoning anomaly when applying the going concern enquiry in the context of outsourcing. This presents an ironic situation. *SAA* sought to promote the purpose of s 197 by the potential application of s 197 to an outsourcing transaction.<sup>483</sup> However the application of a court approved enquiry in *UCT* has the ability to undermine the very purpose which *SAA* sought to promote. Chapter four highlighted the practical

---

<sup>480</sup> Op cit note 347.

<sup>481</sup> Ibid para 38.

<sup>482</sup> Ibid para 40.

<sup>483</sup> Supra note 20 para 35.

implications of the present formulation of s 197 in the outsourcing business environment. It was shown how the dynamics within and the structure of an outsourcing relationship is incompatible with the mechanisms provided in s 197 which neglect to subtly cater and account for the new employer's business needs. This discord fails to achieve the dual purpose of s 197 in facilitating '...commercial transactions while at the same time protecting the workers against unfair job losses'.<sup>484</sup> The purpose of protecting job security overrides the commercial considerations within the outsourcing context. If the dual purpose of s 197 is not achieved, there is arguably no consideration of the conflicting tensions which the dual purpose delicately balances, namely the

... clash between, on the one hand, the employer's interest in the profitability, efficiency or survival of the business, or if need be its effective disposal of it, and the worker's interest in job security and the right to freely choose an employer on the other hand.<sup>485</sup>

It is argued that intervention by the courts and Legislature is required. The courts need to address the reasoning anomalies present in the outsourcing context. The Legislature needs to intervene and amend s 197 to account for the economic context in which second generation outsourcing, and future generation outsourcing, operates. It is the opinion of this paper that s 197 will become user-friendly once the deficiencies in the going concern enquiry are addressed, and the business structure and relationship dynamics associated with outsourcing are accommodated within s 197. In the face of certainty its application to outsourcing will become an accepted and quantifiable commercial risk associated with outsourcing and not one shrouded in controversy.

---

<sup>484</sup> Supra note 12 para 53.

<sup>485</sup> Ibid.

## BIBLIOGRAPHY

<b>Primary Sources</b>
------------------------

### **South African Legislation**

- Constitution of the Republic of South Africa 1996
- Labour Relations Act 66 of 1995

#### Proposed amendment bills and memorandums

- Explanatory Memorandum, Labour Amendment Bill, 2010
- General Notice No.33873
- Labour Relations Amendment Bill, 2012

### **Foreign Legislation**

- Council Directive 77/197 of 14 February 1977
- Directive 98/50/EC of 29 June 1998
- Directive 2001/23 of 12 March 2001
- Transfer of Undertakings (Protection of Employment) Regulations 1981
- Transfer of Undertakings (Protection of Employment) Regulations 2006
- Workplace Relations Act 1996 (Cth)
- Fair Work Act 2009 (cth)

### **South African Case Law**

- *Adams v Dcd-Dorbly Marine (Pty) Ltd* (2011) 32 ILJ 2472 (LC)
- *Aviation Union of SA & others v SA Airways (Pty) Ltd and others* (2008) 29 ILJ 331 (LC)
- *Aviation Union of South Africa and others v South Africa Airways (Pty) Ltd and others* 2010 (4) SA 604 (LAC)
- *Aviation Union of South Africa and other v South African Airways (Pty) Ltd* 2012 (1) SA 321 (CC)

- *Business & Design Software (Pty) Ltd and another v Van der Velde* (2009) 30 ILJ 1277 (LAC)
- *Buys v Impala Distributors & another* (2008) 29 ILJ 641 (LC)
- *COSAWU v Zikhethale Trade (Pty) Ltd* (2005) 26 ILJ 1056 (LC)
- *Crossroads Distribution (Pty) Ltd t/a Jowells Transport v Clover SA (Pty) Ltd & others* (2008) 29 ILJ 1013 (LC)
- *Harsco Metals SA (Pty) Ltd & another v Arcelormittal SA Ltd & others* (2012) 33 ILJ 901 (LC)
- *National Education Health and Allied Workers Union v University of Cape Town and others* (2003) 24 ILJ 95 (CC)
- *PE Pack 4100 CC v Sanders and Others (PA 08/10) [2013] ZALAC*, unreported case no: PA 08/10 of 22 January 2013, available at <http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZALAC/2013/1.html&query=sanders>, accessed on 28 January 2013
- *SA Municipal Union and others v Rand Airport Management Co (Pty) Ltd and others* (2006) 26 ILJ 67 (LAC)
- *SACWU V Afrox Ltd* (1999) 20 ILJ 1718 (LAC)
- *Sanders v Cell C Provider Co (Pty) Ltd & others* (2010) 31 ILJ 2722 (LC)
- *South African Airways (Pty) Ltd v Aviation Union of South Africa and others* 2011(3) SA 148 (SCA)
- *Van der Velde v Business & Design Software (Pty) Ltd and another* (2006) 27 ILJ 1738 (LC)
- *Viney v Barnard Jacobs Mellet Securities (Pty) Ltd* (2008) 29 ILJ 1564 (LC)

### **Foreign Case Law**

- *ADI (UK) Ltd v Willer* (2001) IRLR 542 (CA)
- *Ayşe Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice* (1997) European Court Reports I-01259, available at <http://eur->

*lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61995CJ0013:EN:PDF*, accessed on 16 January 2013

- *Christel Schmidt v Spar- und Leihkasse der früheren Ämter Bordesholm, Kiel und Cronshagen* (1994) European Court Reports I-01311, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61992CJ0392:EN:HTML>, accessed on 16 January 2013
- *ECM (Vehicle Delivery Service Ltd) v Cox* (1998) IRLR 416 (EAT)
- *ECM (Vehicle Delivery Service Ltd) v Cox* (1999) IRLR 559 (CA)
- *Jozef Maria Antonius Spijkers v Gebroeders Benedik Abattoir CV et Alfred Benedik en Zonen BV* (1986) European Court Reports 01119, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61985J0024:EN:HTML>, accessed on 16 January 2013
- *Oy Liikenne v Pekka Liskjarvi and Pentti Juneunen* (2001) IRLR 171 (ECJ)
- *PP Consultants Pty Ltd v Finance Sector Union* [2000] HCA 59; 201 CLR 648; 75 ALJR 191; 101 IR 103; 176 ALR 205, available at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2000/59.html?stem=0&synonyms=0&query=FCA%201999%201251%20or%201999%20FCA%201251>, accessed on 7 January 2013

### **Opinions of Advocate Generals from the European Court of Justice**

- Opinion of Advocate General Geelhoed, delivered on 27 September 2001, TEMCO, Case C-51/00, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62000CC0051:EN:PDF>, accessed on 7 January 2013
- Opinion of Advocate General Geelhoed delivered on 19 June 2003, Abler and Others, Case C-340/01, available at [http://eur-](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003CC0340:EN:PDF)

*lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001CC0340:EN:P*  
*DF*, accessed on 7 January 2013

- Opinion of Advocate General Trstenjak delivered on 26 October 2010, Clece SA, Case C - 463/09, available at *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CC0463:EN:H*  
*TML*, accessed on 7 January 2013

University of Cape Town

<b>Secondary Sources</b>
--------------------------

**Books: South African**

- Bosch, Craig ‘Section 197 of the Labour Relations Act: The new generation’ in Kitty Malherbe and Julia Sloth-Nielson (eds) *Labour Law into the Future: Essays in Honour of D’Arcy du Toit* (2012) Juta, Cape Town
- Currie, Ian and de Waal, Johan *The Bill of Rights* (2005) Juta, Cape Town
- Todd, Chris and du Toit D’Arcy and Bosch, Craig *Business Transfers and Employment Rights* (2004) LexisNexis, Butterworths, Durban
- Stelzner, Susan and Harrison Stuart and Patterson, Brian and Ebrahim, Zahida ‘South Africa: Legal Compliance in South Africa’ in Salvador del Rey and Robert J Mignin (eds) *International Labour and Employment Compliance Handbook* (2010) Kluwer Law International BV, Netherlands

**Books: Foreign**

- Deakin, Simon and Morris, Gillian S *Labour Law* (2012) Hart Publishing Ltd, Oxford

**Journal Articles: South African**

- Bosch, Craig ‘Transfers of Contracts of Employment in the Outsourcing Context’ (2001) 22 *ILJ* 840
- Bosch, Craig ‘Operational Requirements Dismissals and Section 197 of the Labour Relations Act: Problems and Possibilities’ (2002) 23 *ILJ* 641
- Bosch, Craig ‘*Aluta Continua*, or Closing the Generation Gap: Section 197 of the LRA and its Application to Outsourcing’ 2007 *Obiter* 84
- Briggs, Lynn ‘The Application of Section 197 of the Labour Relations Act in an Outsourcing Context’ (Part 1) 2008 *Obiter* 425
- Briggs, Lynn ‘The Application of Section 197 of the Labour Relations Act in an Outsourcing Context (Part 2) 2009 *Obiter* 656

- Grogan, John ‘Section 197 and Outsourcing: No magic to the ‘generation’’ (2012) 28 (3) *Employment Law* 4
- Grogan, John ‘Applying Aviation Union: Another case of second-generation outsourcing’ (2012) 28 (3) *Employment Law* 12
- Le Roux, PAK ‘Outsourcing and the LRA: When it is the transfer of a “going concern”?’ (2004) 14 (5) *Contemporary Labour Law* 41
- Le Roux, PAK ‘Outsourcing and the transfer of employees to another employer: What happens in the “second generation” transfer?’ (2005) 14 (12) *Contemporary Labour Law* 111
- Le Roux, PAK ‘Outsourcing and the transfer of a business as a going concern’ (2007) 17 (4) *Contemporary Labour Law* 31
- Luiz, John ‘Small Business Development, Entrepreneurship And Expanding The Business Sector In A Developing Economy: The Case Of South Africa’ (2011) 18 (2) *Journal of Applied Business Research* 53
- Smit, Nicole ‘A Chronicle of Issues Raised in the Course of Dismissals by the Transferor and/or Transferee in Circumstances Involving the Transfer of an Undertaking’ (2005) 26 *ILJ* 1853
- Wallis, Malcolm ‘Judges: Servants of Justice or Civil Servants?’ (2012) 129 (4) *South African Law Journal* 652
- Wallis, Malcolm ‘Is Outsourcing in? An ongoing concern’ (2006) 27 *ILJ* 1
- Workman- Davies, Bradley ‘The Right of Employers to Dismiss Employees in the Context of Business Transfers – an Analysis of the Automatically Unfair Dismissal Provisions of the Labour Relations Act’ (2007) 28 *ILJ* 2133

### **Research Paper**

- Kaylan Massie ‘From Clarity to Confusion: *Harsco Metals South Africa v Acerlormittal South Africa*’ unpublished paper (2012)

### **Journal Articles: Foreign**

- Ahanchian, Amie Jasmine ‘Reducing the Impact of the European Union’s Invisible Hand on the Economy by Limiting the Application of the Transfer of Undertakings Provision’ (2002) 2 *The Journal of International and Comparative Law at Chicago-Kent* 29
- Beltzer, Ronald M ‘The Transfer of Undertakings and the Importance of Taking Over Personnel – A Vicious Circle’ (2007) 23 (1) *The International Journal of Comparative Labour Law and Industrial Relations* 139
- Carson, Kristen ‘TUPE or Not too TUPE?: The Impact of Labor Regulations on Business Transfers: A Comparative Case Study Approach to Labor Laws in the UK v US’ (2008) VII *Undergraduate Research Journal* 37
- Curwen, Peter ‘Prospects for Acquired Rights’ (1999) 77 (3) *Public Administration* 599
- Davies, Paul ‘Transfers - The UK Will Have to Make Up Its Own Mind’ (2001) 30 *Industrial Law Journal* 231
- Dias-Abey, Manoj ‘Industrial Protection in the Era of Outsourcing’ (2009) 22 *Australian Journal of Labour Law* 161
- Hardy, Stephen and Punter, Richard W ‘The New Acquired Rights Directive and its Implications for European Employee Relations in the Twenty First Century’ (1999) 6 *Maastricht Journal of European and Comparative Law* 366
- Hardy, Stephen and Adnett, Nick ‘“Entrepreneurial Freedom Versus Employee Rights’: the Acquired Rights Directive and EU Social Policy Post – Amsterdam’ (1999) 9 *Journal of European Social Policy* 127
- Johnson N C and Williams, K ‘Transferring employment between the public and private sectors in the United Kingdom: acquired rights and revising TUPE’ (2007) Sheffield Hallam University Research Archive (SHURA) 1, available at <http://shura.shu.ac.uk/707/>, accessed on 16 January 2013
- McMullen, John ‘TUPE - Sidestepping *Süzen*’ (1999) 28 *Industrial Law Journal* 360

- McMullen, John 'TUPE Transfers: The Cracks Still Show' (2001) 30 *Industrial Law Journal* 396
- McMullen, John 'An Analysis of the Transfer of Undertakings (Protection of Employment) Regulations 2006' (2006) 35 (2) *Industrial Law Journal* 113
- McMullen, John 'Service Provision Change Under TUPE: Not Quite What We Thought' (2012) 14 (4) *Industrial Law Journal* 471
- Painter, Richard W and Hardy, Stephen 'Business transfers, employers' strategies and the impact of recent case law' (1999) 21 (4) *Employee Relations* 378
- Santoro- Passarelli, Giuseppe 'The Transfer of Undertakings: Striking a Balance between Individual Workers Rights and Business Needs' (2007) 23 (3) *The International Journal of Comparative Labour Law and Industrial Relations* 311
- Sargeant, Malcolm 'New Transfer Regulations' (2002) 31 *Industrial Law Survey* 35
- Sebbens, Trent D 'Wake, O Wake - Transmission of Business Provisions in Outsourcing and Privatisation' (2003) 16 *Australian Journal of Labour Law* 134
- Shruballs, Vivien 'Competitive Tendering, Out-sourcing and the Acquired Rights Directive' (1998) 6 (1) *The Modern Law Review* 85
- Spink, Carole A and Krudewagen, Ute 'From Acquired Rights to Reverse TUPE: Employment Law Issues in Global Outsourcing Transactions' (2009) 9 *Chicago-Kent Journal of International and Comparative Law* 46
- Sutherland, Carolyn and Riley, Joellen 'Industrial Legislation in 2009' (2010) 50 *Journal of Industrial Relations* 275 at 284

### **Other Internet Sources**

#### Articles

- Witten, Lance 'Second Generation Transfers: The Final Word' Norton Rose Employment and Labour Law Seminar, 11 October 2012, available at

*<http://www.nortonrose.com/files/za-second-generation-transfers-72235.pdf>,  
accessed on 21 January 2013*

### Surveys

- Pricewaterhouse Coopers ‘Outsourcing comes of age: The rise of collaborative partnering’ 2008, available at *<http://www.pwc.com/gx/en/operations-consulting-services/oursourcing-comes-of-age.jhtml>*, accessed on 16 January 2013
- Norton Rose ‘A smart approach to outsourcing’, available at *<http://www.nortonrose.com/files/a-smart-approach-to-sourcing-ii-57727.pdf>*, accessed on 16 January 2013
- KPMG ‘KPMG South Africa Sourcing Advisory 2Q12 Pulse Survey’, available at *[www.kpmg.com/ZA/en/IssuesAndInsights/ArticlesPublications/General-Industries-Publications/Documents/Sourcing%20survey%20Launch.pdf](http://www.kpmg.com/ZA/en/IssuesAndInsights/ArticlesPublications/General-Industries-Publications/Documents/Sourcing%20survey%20Launch.pdf)*, accessed on 16 January 2013
- The Outsourcing Institute ‘Top Ten Outsourcing Survey 1998’, available at *[http://www.outsourcing.com/content.asp?page=01b/articles/intelligence/oi\\_top\\_ten\\_survey.htm](http://www.outsourcing.com/content.asp?page=01b/articles/intelligence/oi_top_ten_survey.htm)*, accessed on 4 January 2013