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Outsourcing and s197 of the LRA

Going concerns, employment contracts and the transfer of a business or service

by P.A.K. Le Roux

Section 197: the context

From a commercial perspective there are two broad ways in which the control of a business can be transferred.

The first arises if the business is situated in or operated by a company. In this case it is possible for a person to purchase the company's shares. By acquiring sufficient shares in a company the purchaser can acquire a say, subject to the provisions of the Companies Act, 71 of 2008, in the affairs of the company. This type of transaction does not directly affect the employment relationship between the company and its employees. The fact that there is a change in shareholding does not mean that the company ceases to operate its business or that it ceases to be the employer of its employees. See in this regard *Ndima & others v Waverley Blankets Ltd* [1999] 6 BLLR 577 (LC) and *Long v Prism Holdings Ltd & another* [2012] 7 BLLR 672 (LAC).

The second arises if the company (or an individual) sells the assets of the business it operates. For example, mining Company A, which owns and operates several small quarries, sells one of its quarries to Company B. In terms of common law principles this sale will also not directly or immediately affect the contractual relationship between Company A and the employees who work at the quarry. They will continue to be employed by Company A even though there is no work for them to do. Company A will have to pay them, find them alternative work or terminate their employment by giving notice of termination. There is no obligation on Company B to employ them; similarly, the employees are not obliged to work for Company B. Whether the employees will work for Company B, and, if so, their terms and conditions of employment, will have to be agreed to between the employees and Company B.

It is in this second situation that the provisions of the Labour Relations Act, 66 of 1995 (LRA) kick in and override common law principles. Firstly, the employees concerned may be able to argue that the termination of their employment by Company A constitutes an unfair dismissal. It will then be for Company A to justify the dismissals on the basis of its operational requirements. Secondly, the employees may be able to argue that they cannot be dismissed

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by Company A, because they are no longer employed by Company A. This is because s197 of the LRA applied to the sale of the quarry. This section provides that if a business is transferred from one employer to another employer as a 'going concern' the contracts of employment of the affected employees are automatically transferred from the 'old employer' (Company A) to the 'new employer' (Company B). Furthermore, if Company A envisaged that the transfer would constitute a going concern transfer and decided to dismiss the quarry employees to make the purchasing of the quarry more attractive to Company B these dismissals could be automatically unfair because of the provisions of s187(1)(g). This provides that a dismissal will be automatically unfair if the reason for the dismissal was a transfer of a business as a going concern or a reason related thereto.

It is the operation of s197 in this second context that will be discussed in this contribution. The decisions of our courts dealing with the question of what constitutes a going concern transfer, and in particular whether outsourcing arrangements can constitute going concern transfers as envisaged in s 197, will be discussed. But, in order to provide some context, it is necessary to summarise briefly what the consequences of a going concern transfer are.

The effect of a section 197 transfer

At the heart of s 197 is s 197(2). It provides that if a transfer of a business as a going concern takes place:

- the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;
- all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;
- anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and
- the transfer does not interrupt an employee's continuity of employment and an employee's contract of employment continues with the new employer as if it were the old employer.

The new employer in effect replaces the old employer. Provided that there is, objectively speaking, a going concern transfer, the transfer of employment takes place automatically irrespective of whether or not the two employers characterising the transfer as a going concern transfer. Employees are transferred without their consent. If the employee does not want to be employed by the new employer the employee can resign.

The above principle is qualified in three ways.

- Firstly, the abovementioned consequences of a transfer can be amended by agreement. This agreement must be between either the old employer, the new employer or both of them acting jointly on the one hand, and any appropriate body or person referred to in s189 of the LRA. This is either a trade union representing employees or the employees themselves. This agreement can take various forms. For example, it can be agreed that the employee will not be transferred or that the employee will be transferred on terms and conditions of employment less favourable to those that the employee enjoyed under the old employer.
- Secondly, the new employer will be deemed to have complied with the above requirement if the employees are transferred on terms and conditions of employment that are on the whole not less favourable to the employees than those on which they were employed by the old employer. However, this does not apply if employees' conditions of employment are determined by a collective agreement.

- Thirdly, special arrangements are made with regard to pension, provident and retirement funds.

Also of relevance is s197(5) which provides that the new employer is bound by a collective agreement or arbitration award that bound the old employer in respect of the transferred employees. Section 197 also makes provision for the joint and several liability of the old and new employers in certain circumstances.

Finally, it is necessary to make the point that where a going concern transfer takes place in the context of insolvency, s197A regulates the terms on which a transfer takes place.

Outsourcing as a going concern transaction.

From a commercial viewpoint, the typical context in which a going concern transfer will occur is when A sells or otherwise transfers a business to B.

In the context of labour law, however, the more important issue has been whether the outsourcing of a function can fall within the ambit of s 197. The question whether the outsourcing of a function or activity previously performed 'in-house' by an employer could constitute a going concern transfer as envisaged in s 197 was first considered by the Labour Court in *Schutte & others v Powerplus Performance (Pty) Ltd & another* [1999] 2 BLLR 169 (LC).

The applicants in this case were employed by a company known as Super Rent. Its business consisted of the leasing of vehicles to customers. As part of its business it employed the applicants at three workshops where its vehicles were maintained and serviced. During the course of 1998 it decided to sell the workshops to Powerplus Performance. A dispute arose as to whether the sale constituted a going concern transfer and whether, as a result, the employees employed in the workshop were transferred to the employment of Powerplus Performance. The Court came to the conclusion that s 197 was capable of being applied to outsourcings transactions such as this. Its arguments in favour of such a finding were threefold.

The first was that s 197 was enacted primarily for the benefit of employees.

The second was that -

> *'[31] … the provisions of s 197 give effect to the constitutional right to fair labour practices in situations of business restructuring and reorganisation of employment and must be interpreted in this context.'*

The third was that such an approach was supported by European Law and English law as set out in the Acquired Rights Directive, 77/187/EEC ('the Directive') enacted in terms of European Community Law and the Transfer of Undertakings (Protection of Employment) Regulations, 1981 ('TUPE') respectively.

It then considered the circumstances of the transfer and found that there had been a transfer of a business as a going concern.

Given the potential impact of s 197 on the practice of outsourcing it was inevitable that the Constitutional Court would have to consider this issue. It did so in *National Education Health & Allied Workers Union v University of Cape Town & others* (2003) 24 *ILJ* 95 [CC.] In this case the University of Cape Town decided to outsource certain of its cleaning, maintenance and sports ground maintenance functions to four contractors. The National Education Health and Allied Workers Union (NEHAWU) argued that the outsourcing would constitute a going concern transaction. When the University refused to concede this point NEHAWU approached the Labour Court for various orders including one to the effect that the outsourcing constituted a going concern transfer. The Labour Court refused to grant the order. See *NEHAWU v University of Cape Town & others (1)* [2000] 7 BLLR 803 (LC).

NEHAWU appealed to the Labour Appeal Court

(LAC). The majority decision of the LAC also rejected the idea that an outsourcing arrangement could constitute a going concern transaction. See *NEHAWU v University of Cape Town & others* [2002] 4 BLLR 311 (LAC). It interpreted s 197 (as it was then formulated) to mean that transfers of employment only took place if the two employers decided that there should be a going concern transaction which involved the transfer of employees. The agreement between the two employers triggered the automatic transfer. The employees were protected from the possible unfavourable consequences of this automatic transfer by the requirement that they would be transferred on the same terms and conditions of employment. The majority LAC decision was based on its interpretation of s 197 as it was then formulated and had very little to say about what constituted a going concern transfer. The minority decision took the view that a purposive interpretation of the section that reflected the constitutional imperative to entrench the right to fair labour practices and buttressed by international legal standards in this regard meant that outsourcing arrangements could constitute going concern transfers.

NEHAWU then sought leave to appeal to the Constitutional Court. The Court held that s 197 could, in principle, apply to outsourcing transactions. It rejected the view that the effect of s 197 (as then formulated) only had the result that employees where automatically transferred from one employer to another if these two employers had agreed to such a transfer. It concluded that such a transfer would take place automatically if and when the transfer of a business as a going concern took place. Once again, support for its argument was found in the need to buttress the constitutional right to fair labour practices and international practice as reflected in European law.

It referred the matter back to the LAC with the direction that the LAC decide whether, on the facts of the case, such a going concern transaction had taken place. It provided some guidelines for the LAC to follow in this regard. It appears that the LAC was never called upon to consider whether there had in fact been a transfer of a going concern in the *University of Cape Town* case. The matter was settled.

The first time that the LAC was required to decide this type of case 'on the merits' was in *SAMWU & others v Rand Airport Management Company (Pty) Ltd & others* [2005] 3 BLLR 241 (LAC).

The employer in this case was facing financial difficulties and proposed to its workers that, as an alternative, the cleaning, gardening and security services be outsourced. In due course letters of retrenchment were issued to the employees concerned. At this time an agreement had been signed in terms of which the gardening function would be transferred to an outside contractor but had not yet been implemented. A draft agreement in terms of which the security function would be transferred to an outside contractor had been prepared but had not yet been signed.

This then led to the applicant union approaching the Labour Court for an order declaring that the planned outsourcing of the gardening and security functions constituted transfers of businesses as a going concern. The Labour Court refused to grant such an order in respect of the security function because no outsourcing agreement had yet been entered into. It also refused to grant such an order in respect of the gardening services on the basis that the facts disclosed that there had been no transfer of a business as a going concern.

The union then appealed to the LAC. The LAC found that the contract entered into in terms of which the gardening function would be transferred to an outside contractor would give rise to the transfer of a business as a going concern if it was in fact implemented. Similarly, the draft agreement in terms of which the security function would be transferred to an outside contractor would also give rise to the transfer of a busi-

ness as a going concern if it was signed an implemented. Unfortunately these findings were not motivated in any detail. Whilst it is clear that the LAC endorsed the approach formulated by the Constitutional Court in the *University of Cape Town* decision, there is no reference to any of the factors mentioned in that case. In respect of the gardening services agreement it simply found the parties had agreed to the contractor taking over certain functions from the employer, that these functions constituted a 'service' as envisage in the definition of a 'business' found in s 197 and that this was a transfer within the ambit of s 197. Why the transfer of the service necessarily constituted a transfer within the meaning of s 197 is not motivated. A similar approach seems to have been adopted in respect of the draft contract to transfer the security function.

Since then there have been various decisions where an outsourcing arrangement has been found to constitute a going concern transaction.

Second generation outsourcing

If the outsourcing of a function by an employer to a contractor can amount to a going concern transfer, the next question is what the position will be if, at a later date, the employer decides to cancel the outsourcing agreement with the original contractor and to enter into an agreement with another contractor to perform the same function; often colloquially referred to as a 'second generation' outsourcing.

The heart of the controversy surrounding this question is the definition of a transfer found in s 197(1) itself. It reads as follows –

> *' .. the transfer of a business **by** one employer ('the old employer') **to** another employer (the 'new employer') as a going concern.'*

Those decisions which expressed the view that second generation outsourcing could not constitute a transfer of a business as a going concern placed emphasis on the word 'by'. They argued that if A outsourced certain services to B and then later terminated the contract with B and contracted with C to provide these services, there was no transfer of a business **by** B to C. B did not transfer anything. All that occurred was that A terminated its contract with B and entered into a new contract with C. No automatic transfer of B's employees to C could take place. Others took the view that a purposive approach, that rejected a literal interpretation of the section, should be applied. The issue was finally resolved by the Constitutional Court in *Aviation Union of SA & another v SA Airways (Pty) Ltd & others* [2012] 3 BLLR 211 (CC). It decided that second generation transfers did fall within the scope of s 197.

When does an outsourcing or second generation transfer constitute a transfer of a going concern?

In the *NEHAWU* decision the Constitutional Court provided the following guidelines for determining whether a business has or will be transferred as a going concern.

- The term 'going concern' must be given its ordinary meaning.
- What is transferred must be 'a business in operation' so that '*…the business remains the same but in different hands'*.
- Whether there has been such a transfer is a matter of fact to be determined objectively in the light of the circumstances of each transaction.
- In determining this question regard must be had to the substance of the transaction and not its form.
- A number of factors will be relevant in determining whether there has been a transfer of a business as a going concern. These are: whether tangible or intangible assets were transferred, whether any employees were taken over by the new employer, whether customers were transferred and whether the same business was being carried on by the new employer. This list is not exhaustive and

> none of them is individually decisive. They must all be considered in the an overall assessment and should not be considered in isolation.

This approach reflects the views expressed in various decisions of the English and European courts interpreting and applying the Acquired Rights Directive and TUPE. For example, the Court referred to the decision in *Spijkers v Gebroeders Benedik Abbatoir v Alfred Benedik en Zonen* [1986] 2 CMLR 296 where it was stated that the decisive criterion was whether the transferred entity 'retained its identity'. It also stated that it was necessary to consider whether, having regard to all the facts, the business 'continued or resumed under the new employer'.

The element of continuity is emphasised. The *NEHAWU* decision, and the approach adopted therein, has been referred to on numerous occasions as providing the basic principle in determining whether there has been a going concern transfer.

The Constitutional Court was again called upon to consider this issue in the *SA Airways* decision referred to above. In this case SA Airways had utilised its own employees to perform certain functions. During the course of 2000 it considered the outsourcing of these functions. It reached agreement with its recognised unions that this would take place and that the outsourcing arrangement would constitute a transfer of a business as a going concern in terms of s 197 of the LRA. It was also agreed that the contracts of employment of the employees involved in the performance of the outsourced functions would be transferred to a company by the name of LGM SA.

Thereafter SA Airways entered into an agreement with LGM SA to give effect to the outsourcing. This agreement also provided that s 197 applied to the transaction. It was agreed that the agreement would run from 1 April 2000 to 31 March 2010. Upon the expiry of the agreement SA Airways retained the option to renew it for a further five years. Certain of the assets and inventory of SA Airways relating to the transferred functions were sold to LGM SA. However it was also agreed that, upon termination of the agreement, SA Airways would be entitled to repurchase the assets and inventory. LGM SA was afforded the access it reasonably required to render the functions. Access was granted to office space, workshops, the airport apron, computers and the IT network at SA Airways' facilities at various airports. The agreement was to be administered by a joint executive committee comprising of representatives of SA Airways and LGM SA. Finally, the agreement provided that SA Airways retained the right to transfer certain services and/or functions back to itself or to a third party.

The agreement was implemented until 2007 when SA Airways gave LGM SA notice of the termination of the outsourcing agreement. When the Aviation Union of South Africa (AUSA) learnt of this development it approached SA Airways to ascertain how this affected its members. In particular it sought certainty from SA Airways that if SA Airways took over the functions again, their employment would transfer back to SA Airways. Similarly, it sought an undertaking that if there was a second generation outsourcing to another company, they would be employed by this company. SA Airways refused to give such an undertaking.

AUSA then approached the Labour Court for various orders which would, in effect, confirm that any transfers of the outsourced functions back to SA Airways or to another service provider would constitute a going concern transfer. The decisions of the Labour Court, the LAC and the Constitutional Court primarily dealt with the issue of whether second generation outsourcing was covered by s 197 – see the discussion above. However, there was some discussion of

what type of outsourcing transaction would in fact, constitute a going concern transfer.

The decision of the Constitutional Court consisted of a minority and a majority decision. Both decisions accepted that, in principle, second generation outsourcing could constitute going concern transactions. Where they differed was in the findings on the merits.

The minority decision was of the view that a finding in this regard could not be made on the facts before it and that the matter should be referred back to the Labour Court which would then canvass the facts to decide whether a going concern transfer had taken place.

The majority decision found that the facts indicated that a going concern transfer had taken place. In coming to this conclusion it referred to clause 27 of the agreement between SA Airways and LGM SA. This clause dealt with the consequences of the cancellation of the contract. The Court posed the question whether this section contemplated the 'outsourcing of a service' or the 'the transfer of the business operation that delivered the service'. It came to the conclusion that the cancellation of the agreement would lead to a transfer of a business, either back to SA Airways or to another company. In coming to this decision it was primarily influenced by the fact that assets would be transferred and that LGM SA would lose the right to use these assets.

The distinction between the transfer of a service and the transfer of a business that supplies the service was also drawn by the minority decision. The following excerpt from minority decision illustrates this point –

> '*[52] Although the definition of business in section 197(1) includes a service, it must be emphasised that what is capable of being transferred is the business that supplies the service and not the service itself. Were it to be otherwise, a termination of a service contract by one party and its subsequent appointment of another service provider would constitute a transfer within the contemplation of the section. That this is not what the section was designed to achieve is apparent from its scheme, historical context and its purpose. The context referred to here is the alteration of the common law consequences on employment contracts, when the ownership of a business changes hands.*
>
> *[53] Consistent with this approach is the fact that the operation of the same business by the transferee is in and of itself not determinative of the question whether a transfer as a going concern has taken place. There must be other indicators that support the conclusion that when a business passed to the new owner, it was transferred as a going concern. These indicators include whether assets, employees or customers were taken over by the new owner.'*

The first reported decision in which the Labour Court was called upon to consider the *SA Airways* decision was that in *Harsco Metals South Africa (Pty) Ltd & another v Arcelomittal South Africa Ltd & others* [2012] 4 BLLR 385 (LC). Harsco had, for some forty years, been contracted to provide various services to various operations conducted by Arcelormittal. Arcelomittal decided to put these services out for a competitive tender. The outcome of this process was that Harsco lost most of its contracts with Arcelormittal. A dispute appears to have arisen between Harsco and the two companies that had been the successful tenderers as to whether certain Harsco employees would transfer to the successful tenderers. Harsco then approached the Labour Court for a declaratory order to the effect that the termination of its contracts with Arcelormittal and the awarding of new contracts to the successful tenderers would constitute a going concern transfer.

The Labour Court accepted the view expressed in the *SA Airways* decision to the effect that 'speaking generally' the mere termination of one service contract and the awarding of a new contract to another service provider does not

constitute a transfer as envisaged in s 197. The service provider whose contract has been terminated loses a contract but retains its business. Some components of the business must be transferred .

As far as the requirement that there must be a transfer of a business is concerned, the Court followed European law in this regard and accepted that a business must consist of

> *'…an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective.. '*

It stated that the question whether the business that has been identified as existing prior to the transfer will be, or has been, transferred as a going concern will depend on whether, after its transfer, it 'retains its identity'. In determining this question the Court accepted that the factors referred to in the decision of the Constitutional Court in the *NEHAWU* decision were relevant. It then embarked on an evaluation of what had occurred when Harsco's contract had been terminated and two other contractors had been appointed to perform the services it had performed. It came to the conclusion that a transfer of a going concern had taken place. This was based on findings to the effect that: the majority of the Harsco employees were to be transferred to the two new contractors; Arcelormittal remained the 'client' of the new contractors; the two new contractors would perform substantially similar services to those performed by Harsco; and, that significant assets would be sold to Arcellormittal and that these would then be made available to the new contractors.

Although not strictly relevant to its decision it is clear that the Court had concerns about the fact that many outsourced functions are labour intensive and that the initial outsourcing and any further transfers would not necessarily involve the transfer of ownership of significant assets. Nor would they require the transferee to take over the contracts of employment of the transferor's employees in order to enable the transferee employer to provide a service to the client. Both these factors seem to have been considered important by the Constitutional Court in the *SA Airways* decision.

Think, for example, of the situation when a new company is appointed to provide cleaning or gardening services. Can one say that an economic entity has been transferred?

The Court suggested that, in this type of situation it would be preferable to refer to an 'activity' rather than an economic entity that is transferred. But it took the matter no further because it was of the view that the LAC decision in *SAMWU* was authority for the principle that labour intensive activities such a gardening and security services were businesses capable of being transferred. After referring to various European decisions it expressed the following view -

> *'[27] Useful as these authorities are, in South Africa, in relation to the definition of a "business" for the purposes of section 197, the judgment of the Labour Appeal Court in SAMWU & others v Rand Airport Management Co (Pty) Ltd & others remains the authority by which I am bound. In that case, the court concluded that the outsourcing of gardening and security functions at an airport managed by the employer were businesses capable of being transferred in terms of section 197, despite the fact that it did not appear that any assets, goodwill, operational resources or workforce were to be transferred. No distinction was drawn between a business that is largely employee-reliant, as opposed to an asset-reliant business. Nor was it suggested that in the former, greater weight ought to be attached to the number of employees transferring as opposed to the latter instance, in which the number of assets transferring might attract greater weight. If, as in that case, a grouping of relatively unskilled employees and the work they perform, with no assets appearing to be the subject of any transfer, comprises a "business" for the purposes of section 197, then it is difficult to conceive, in the context of an outsourcing transaction, of an economic entity that*

would not be capable of transfer in terms of the section.' (Footnote omitted)

This was taken a step further in *Unitrans Supply Chain Solutions (Pty) Ltd & another v Nampak Glass (Pty) Ltd & others* (2014) 35 *ILJ* 2888 (LC).The first respondent in this matter, Nampak, manufactures various glass products. During the course of 2011 Nampak entered into an agreement with Unitrans, the applicant in this matter, in terms of which Unitrans would provide a warehousing service to Nampak. After the glass products had been manufactured by Nampak they would be transported to Nampak's warehouse which was managed and controlled by Unitrans employees; there the products would be stored with the eventual aim of being sold and delivered to Nampak clients. Unitrans employed managers, logistics specialists, forklift operators and warehouse staff to perform its obligations in terms of the agreement. It also utilised Nampak's assets to perform the warehousing function; including the warehouse itself and Nampak's IT systems.

During October 2013 Unitrans informed Nampak that it did not intend to submit a bid for the renewal of the contract when it expired in January 2014. Nampak then contracted with TMS Group Industrial Services to perform the same function that Nampak had performed. The question then arose whether the termination of the contract with Unitrans and the appointment of TMS to perform the same service constituted a going concern transfer?

An important factor in this assessment was that no assets or employees transferred from Nampak to TMS. The Labour Court found that despite this, there was such a transfer. It found that the warehousing service provided to Nampak constituted an 'economic entity' or an 'organised grouping of resources'. These comprised of 'at least' the contractual right to provide the services to Nampak, the assets owned by Nampak but used by the relevant employees, the employees themselves and the activities performed by them. The key element was that there was a transfer of *the right of the use of the 'infrastructural assets'* belonging to Nampak. The Court's approach is succinctly stated in the following excerpt –

'[29] In short: the warehousing service provided by the first applicant to Nampak constituted an economic entity, or, put another way, an organized grouping of resources. This comprises, at least, the contractual right to perform the services, the assets owned by Nampak but used by the affected employees, the specific activities performed by the affected employees and the employees themselves. This economic entity constitutes a service for the purposes of s 197(1).

[30] To the extent that the contractual right to provide warehousing services now vests in TMS, the same assets are used to provide those services and the activities conducted at Nampak's behest are substantially the same as those performed by the first applicant prior to 1 February, the business performed by the first applicant has transferred as a going concern to TMS. To use the language of the warehousing agreement, the infrastructure that passed to the first applicant when it assumed obligations in terms of the contract reverted to Nampak, and has been made over to TMS. This is not unlike the situation in Allen & others v Amalgamated Construction Co Ltd [2000] IRLR 119 (ECJ), where the ECJ affirmed the principle that the fact that ownership of the assets required to run an undertaking does not pass to the transferee is not decisive, and does not preclude a transfer for the purposes of the directive. The comprehensive right of use of the infrastructure and the assumption of control over that infrastructure are the key triggers.'

This approach was confirmed by the LAC in *TMS Group Industrial Services (Pty) Ltd t/a Vericon v Unitrans Supply Chain Solutions (Pty) Ltd & others* [2014] 10 BLLR 974 (LAC) but perhaps with one additional feature. This was its reference to the element of an 'economic

activity' rather than an 'economic entity' that was transferred. It referred to the decision of the New Zealand High Court in *CIR v Smith's City Group Ltd* (1992) 14 NZTC 9 where the requirement for a transfer of a going concern was described as follows –

> *'The activity must be one which is handed over to the transferee in such a state that it may be carried on by the transferee if he so wishes.'*

The LAC then went on the state that -

> *'[32] This dictum is particularly illuminating in the present case. The activity which was carried on by first respondent flowed from the relationship entered into between appellant and third respondent. The necessary facilities were handed over to the appellant in a state in which appellant was able to carry on the very same activity which had previously been conducted by first respondent. It performed these services on the premises of third respondent. It employed third respondent's computer systems and other equipment and carried on the same activity of warehousing described in the evidence provided by virtue of third respondent's Mr Van Esch. This evidence justifies the conclusion that there was a transfer of a business as a going concern from the old employer to a new employer.'*

A similar view also seems to have been expressed in *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd & others* [2014] 10 BLLR 945 (LAC) where the Court accepted that a going concern transfer could take place where there was a transfer of a defined set of activities which represents an identifiable business undertaking.

Comment

When one considers the above decisions it seems that most outsourcing transactions, and the second generation transfers that flow therefrom, could fall within the ambit of s 197. The fact that no assets transfer and that no provision is made for the transfer of employees is of less importance.. The Labour Court decision in the *Unitrans* decision found that a going concern transfer could take place where the right **to use** (as opposed to ownership of) the 'infrastructural assets' of the client transferred from one contractor to another. The emphasis placed on the activities carried on also supports such an approach. But this liberal approach must have its limits and this is where the difficulties lie. Take, for example, the situation where a pension fund decides to terminate its contract with its administrator or auditor and to utilise the services of another administrator or auditor. It is submitted that most people would be surprised if these changes were to be considered as going concern transfers. One feature that may distinguish this situation from that in the *Unitrans* matter is that there would be very little use of the infrastructural assets of the pension fund and that there is therefore no going concern transaction; but this is not a foregone conclusion .

Also of interest is the continuing and increasing reliance by the Courts on principles of European law. But what is also interesting is that the LAC has realised that too liberal an approach, influenced by European law, could cause problems. In the *Grinpal* decision the LAC found that, in accordance with the principles discussed above, the employees of a contractor providing services to a local authority had been transferred to the local authority when the contract in terms of which the services were provided was terminated.

The Court accepted that this could place 'significant financial burdens' on local authorities who were confronted with financial constraints in providing services to residents. It suggested that consideration should be given to the amendment of s197 in this context and indicated that a copy of its decision would be sent to the Minister of Labour for her consideration. ■

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