

The transfer of enterprises and the protection of employment benefits in South and Southern Africa¹

DARCY DU TOIT

Professor of Law, University of the Western Cape

1 INTRODUCTION

The era of globalisation has brought sweeping change to the workplace. Transfers, mergers, outsourcing and an erosion of employment security have been among the consequences. In a country with an inadequate social security network, such as South Africa, many employees are crucially dependent on employment-related benefits such as retirement funds and medical aid. If they lose their jobs, they lose their benefits as well.

This article deals with some of the implications, from an employee's point of view, of the transfer of the transfer of a business. The Labour Relations Act,² following European precedent,³ provides for the transfer of employees' contractual and other employment rights from the old to the new employer if a business is transferred as a "going concern". In addition, the Constitution⁴ provides for the horizontal application of fundamental rights,⁵ thus creating scope for the enforcement of socio-economic rights as between employer and employee. Employment benefits, it will be argued, fall into this category.

Particular attention is given to retirement benefits, for which special provision is made in European as well as South African legislation. The article also surveys the law applicable to the transfer of enterprises in other Southern African countries.⁶

2 THE CASE OF MRS X

Let us take an imaginary case study. Mrs X, a single parent, has worked as a cleaner at a university for 15 years. Along with her modest salary she

1 I am indebted to Dawn Hurling for research assistance in the preparation of this paper.

2 Act 66 of 1995; referred to as the LRA below: see ss 197-197B.

3 Directive 77/187/EEC, subsequently replaced by Directive 2001/23EC. For discussion of European and North American precedent, see Blackie & Horwitz "Transfer of Contracts of Employment as a result of Mergers and Acquisitions: A Study of Section 197 of the Labour Relations Act 66 of 1995" (1999) 20 *Ilj* 1387 at 1390-1394.

4 Constitution of the Republic of South Africa Act 108 of 1996.

5 S 8(2), Constitution: see 88-90 below.

6 See Appendix A. For this, the research carried out by Anne Scheithauer during the first part of 2002 is gratefully acknowledged.

has enjoyed fairly generous medical aid and pension benefits as well as the right to a 75% discount on tuition fees for her children.⁷ These benefits are important to her because her son needs chronic medication and her daughter has started studying law. Then, one day, the university announces that it is planning to outsource its cleaning service to a private company. In order to concentrate on its core business of providing quality education, it explains, operating costs in non-core areas must be reduced. The good news is that cleaning staff will be offered jobs by the new company. The bad news is that they will lose most of their benefits.

The common law offers them no protection. In Roman-Dutch law, transfer of a business terminates existing employment contracts and the new employer may elect whether or not to offer re-employment to the employees. If so, it may be on different terms and conditions.⁸

Mrs X and her colleagues, being unable to afford legal fees, turn to their trade union for advice. The union's legal officer will be able to offer them some hope. If a business or service or any part of it is transferred as a "going concern", section 197 of the LRA provides *inter alia* that:

- (a) the new employer is automatically substituted for the old employer in respect of all contracts of employment in existence immediately before the date of transfer, and
- (b) all the rights and obligations between the old employer and its employees at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employees.⁹

However, this protection only applies if the transaction falls within the ambit of a "transfer" as contemplated in section 197. And looking at recent court decisions, the union legal officer would have to add, it is uncertain whether an outsourcing transaction will, in fact, be regarded as a "transfer" of "part of a business".¹⁰

Mrs X and her colleagues are likely to be anxious and indignant. What is the good of section 197, they may ask, if it allows outsourcing operations to happen regardless of the effect on employees?

7 A sizeable body of case law has developed around alleged unfairness by employers in the provision of benefits to employees, by which the content of such rights as well as the rules relating to their enforcement are illustrated. See *Schoeman & Another v Samsung Electronics SA (Pty) Ltd* [1997] 10 BLLR 1364 (LC); *Gaylard v Telkom South Africa Ltd* [1998] 9 BLLR 942 (LC); *Northern Cape Provincial Administration v Hambidge NO & others* [1999] 7 BLLR 698 (LC); *Heynsen v Armstrong Hydraulics (Pty) Ltd* [2000] 12 BLLR 1444 (LC); *Fredericks & Others v MEC Responsible for Education & Training in the Eastern Cape Province & Others* [2001] 11 BLLR 1269 (Ck); Du Toit "The difference between 'benefit' and 'remuneration'" *Labour Law News and CCMA Reports* (May 2000).

8 See *Foodgro (A division of Leisurenet Ltd) v Keil* [1999] 9 BLLR 875 (LAC) at 879. The position in English law is similar: "The purchaser was under no obligation to offer re-employment to the employees. The choice of employees not to continue employment with a new employer was said to be "the main difference between a servant and a serf" (per Lord Atkins in *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] 3 All ER 549 (HL)).

9 S 197(2). In the remainder of this article, the term 'protected transfer' is used to described the transfer of a business subject to s 197.

10 See, in particular, *Nehawu v University of Cape Town* [2002] 4 BLLR 311 (LAC); discussed at 102-103 below.

Faced with this hard question, the trade union legal officer might remember section 3 of the LRA, stating that the Act must be interpreted “in compliance with the Constitution”. The Constitution guarantees “everyone” the right not only to fair labour practices, but also the right of access to health care, social security and education. It also places certain obligations on the state to give effect to these rights by means of legislation.¹¹ No less importantly, the Constitution states that the above provisions bind not only the state, but natural and juristic persons as well, “if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right”.¹²

All these rights, however, are subject to limitation by “laws of general application” within the parameters of reasonableness and justifiability permitted by the Constitution’s own “limitation clause”.¹³ The LRA is a law of general application. A number of questions therefore arise:

- Do employment benefits, such as those enjoyed by Mrs X and her colleagues, fall within the ambit of those rights which sections 27 and 29 of the Constitution are seeking to protect? Can the duty to preserve such benefits in principle be enforceable against juristic persons such as the university and the cleaning company?
- If so, how should section 197 of the LRA, as a statutory provision potentially limiting employees’ continued enjoyment of the rights in question, be interpreted?
- And if section 197 does permit the extinction of those rights, is it constitutional?

These questions are examined in the remainder of the article.

3 THE NATURE AND EXTENT OF SOCIO-ECONOMIC RIGHTS

Though the Constitution itself does not use the term, the following basic rights have been described as “socio-economic rights”:¹⁴

- the right to an environment that is not harmful to health or well-being (s 24);
- the right of access to adequate housing (s 26(1));
- the right of access to:
 - (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance (s 27(1));

11 See ss 27 and 29(1) of the Constitution.

12 S 8(2), Constitution

13 S 36, Constitution; see note 15 below.

14 See Olivier Okpaluba Smit & Thompson (eds) *Social Security Law: general principles* Butterworths 1999 517- 520; Liebenberg “South Africa’s evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?” 2002(2) *LDJ* 159 at 162- 164.

- the right to:
 - (a) a basic education, including adult basic education; and
 - (b) further education, which the state, through reasonable measures, must make progressively available and accessible (s 29(1)); and
- children's rights (s 28(1)).

Importantly, the duty placed on the state to give effect to the rights provided for in sections 26 and 27 (above) at any point in time is limited to that which is permitted by its "available resources". Similarly, the duty to provide further education is limited to "reasonable measures". Only the rights of children, set out in section 28, are unqualified. It follows that the corresponding rights of citizens are limited to the same extent.¹⁵

Section 8(2) of the Constitution, as noted already, explicitly provides for the horizontal application of basic rights "if, and to the extent that, [they are] *applicable*, taking into account the nature of the right and the nature of any duty imposed by the right". Section 8(3) states that, when applying a provision of the Bill of Rights to a natural or juristic person, a court "must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right",¹⁶ but "may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)" (emphasis added).¹⁷

Some commentators argue that socio-economic rights are not "applicable" for purposes of section 8(2).¹⁸ On the one hand it is suggested that section 8(2) merely permits the horizontal application of basic rights and,

15 See *Soobramoney v Minister of Health, KwaZulu Natal* [1997] 12 BCLR 1696 (CC); *Government of the Republic of South Africa v Grootboom & others* [2000] 11 BCLR 1169 (CC).

16 For an application of the principle in relation to the LRA's prohibition of unfair labour practices and the law of delict, see *Walters v Transitional Local Council of Port Elizabeth and another* [2001] 1 BILR 98 (LC). For consideration of the effect of the constitutional right to privacy in the context of disciplinary proceedings by a private employer, see *inter alia Protea Technology Ltd v Wainer* 1997 (9) BCLR 1225 (W); *Allied Workers Union of SA obo Ncube v Northern Crime Security CC* (1999) 20 ILJ 1954 (CCMA) and *Sugreen v Standard Bank of SA* [2002] 7 BALR 769 (CCMA). See also *Goosen v Caroline's Frozen Yoghurt Parlour (Pty) Ltd and another* [1995] 2 BLLR 68 (IC) and *George v Liberty Life Association of Africa Ltd* [1996] 8 BLLR 985 (IC) (decided in terms of the interim Constitution).

17 S 36(1) reads as follows:

"The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose."

18 'Private person' or 'private actor' in the discussion that follows includes the state in its capacity as employer and other employers in the public sector; eg, local government. The reason is that the relationship between the state and its employees is a private one; that is, the rights and duties between them are limited to their particular relationship and do not extend to members of the public at large.

accordingly, "leaves entirely to the courts the determination of when, if ever, horizontal application would be appropriate".¹⁹ Cheadle and Davis interpret the term "applicable" as meaning not only whether a right is "capable" of horizontal application but also whether it is "suitable" to be so applied.²⁰ The socio-economic rights provided for in sections 26 and 27 of the Constitution, the authors believe, are not "applicable" in this sense. "Given the potentially onerous nature of such a duty on private persons", they conclude, "the likely outcome of the analysis must be that these rights are not suitable for horizontal application."²¹

But there is also a counter-argument. International law, it is pointed out, "has increasingly emphasised that non-state actors have obligations regarding the realisation of economic, social and cultural rights".²² From this standpoint "the argument that socio-economic rights are generally incapable of horizontal application is wrong in principle. Each right must be assessed on its own in the light of the duties it embodies to determine whether it has horizontal reach".²³ Similarly, De Vos states that it is "impossible to make a blanket statement about the instances in which the social and economic rights will, or will not, apply to juristic persons or private individuals" and that each obligation must be considered on its merits.²⁴

If this is correct, the inquiry becomes two-fold. The first question is whether the right is capable or, as Cheadle and Davis put it, "suitable for application". Socio-economic rights are not uniform in terms of their cost. The fact that certain socio-economic rights may be unsuitable for horizontal application as between particular parties does not mean that all socio-economic rights are unsuitable as between all parties.

This seemingly practical question, however, cannot be separated from the underlying legal question as to the relationship between the parties. A private person, unlike the state, clearly cannot be held liable to give effect to the socio-economic rights of other private persons in general. Some

19 Sprigman & Osborne "Du Plessis is *not* dead: South Africa's 1996 Constitution and the application of the Bill of Rights to private disputes" (1999) 15 *SAJHR* 25 at 31.

20 Cheadle & Davis "The application of the 1996 Constitution in the private sphere" (1997) 13 *SAJHR* 44 at 57-58. See also Sprigman & Osborne *op cit* at 35-36.

21 Cheadle & Davis at 60.

22 Chirwa *Obligations of non-state actors in relation to economic, social and cultural rights under the South African Constitution* Community Law Centre, University of the Western Cape, 2002 21, with reference *inter alia* to the Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights, the International Covenant on Economic, Social and Cultural Rights, the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy of the International Labour Organisation (ILO). To the extent that these instruments are not legally binding, it is suggested, they may nevertheless "constitute evidence of an emerging customary rule that private actors have direct obligations engendered by economic, social and cultural rights": *op cit* 9.

23 *Ibid* 21. See also De Vos "Pious wishes or directly enforceable human rights? Social and economic rights in South Africa's 1996 Constitution" (1997) 13 *SAJHR* 67 at 70; *In re Certification of the Constitution of the RSA 1996* 1996 4 SA 744 (CC); 1996 10 BCLR 1253 (CC) 1286.

24 De Vos "Pious wishes or directly enforceable human rights? Social and economic rights in South Africa's 1996 Constitution" (1997) 13 *SAJHR* 67 at 100.

prior legal nexus, such as that created by a contract of employment, must exist in terms of which one party can be held liable to meet the other's claim.²⁵ And if this is so, it would seem to dispose of the question of "suitability": if one party is (say) contractually bound to provide a particular service or benefit to the other, it can hardly be considered "unsuitable" or "inapplicable".

But does this not, by the same token, render the issue of horizontality irrelevant? If a benefit is due in terms of an existing legal duty, does the question of a constitutional right of access to that benefit not fall away?

The answer, it is submitted, is 'no'. This becomes clear in a situation where – as in the case study above – the existing duty is terminated. The common law presents no obstacle to this. The question is whether the Constitution, and section 197 interpreted in compliance with the Constitution, will permit the corresponding right to be extinguished.²⁶

The starting point is that the Constitution, and laws in general, must be interpreted purposively rather than formally. The preamble to the Constitution describes the purpose of the Constitution as, *inter alia*, "[improving] the quality of life of all citizens and [freeing] the potential of each person". Socio-economic rights should be seen as a means towards this end. It follows that statutory rights relevant to this constitutional objective – such as, in the present context, section 197 – should be interpreted in such a way as to further it, rather than limit it.²⁷ It also follows that any limitations on such rights must be interpreted restrictively. In weighing up the parties' statutory rights in such a context, thus, the court will not be at large to exercise its discretion solely with reference to the *prima facie* meaning of the statute, but is bound to give due weight to any constitutionally-protected right the claimant is found to have.

Applying these principles to the case of Mrs X, it will be seen that the substance of several of the socio-economic rights entrenched in the Constitution are at issue – in particular, her right to social security in the form of pension rights, her daughter's right to further education and her son's right of access to medical care. In terms of the contract between Mrs X and her current employer, she is entitled to employment benefits corresponding to the above-mentioned socio-economic rights. There is also a potential nexus between Mrs X and the cleaning company in the

25 If this is accepted, it would dispose of some of the more extreme interpretations that may be placed on the notion of horizontality: see, eg. Cockrell "Private Law and the Bill of Rights": A Threshold Issue of 'Horizontality'" *Bill of Rights Compendium* Issue 11 Butterworths June 2002 3A-13.

26 Had s 197 not been on the statute book, the question might have been whether the common law should be applied, or developed, in order to give effect to the affected rights: see s 8(3), Constitution.

27 "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights": s 39(2), Constitution. Likewise, common law rules must be interpreted with a view to giving effect to the underlying constitutional right, subject only to the degree of limitation permitted by the limitation clause: s 8(3), Constitution; and see Cockrell *op cit* par 3A10.

form of section 197 of the LRA, which may oblige the latter to assume responsibility for providing those benefits. If the above analysis is correct, these contractual and statutory rights may be seen as a vehicle for giving effect to objectives that sections 27 and 29 of the Constitution are seeking to achieve. This should have an important bearing on the interpretation of section 197 as a means of protecting or permitting the extinction of those rights.

4 SOCIO-ECONOMIC RIGHTS AND EMPLOYMENT

The above instance of the *de facto* provision of socio-economic benefits by an employer to an employee is not an isolated one. In fact, there is a pervasive connection between employment and access to a wide range of benefits corresponding to those envisaged by the Constitution.

In terms of the Unemployment Insurance Act,²⁸ for example, employers and employees contribute jointly to the Unemployment Insurance Fund from which employees or former employees may claim unemployment, illness, maternity and other benefits.²⁹ Similarly, the Compensation for Occupational Injuries and Diseases Act³⁰ requires an employer to pay an assessed amount into a statutory compensation fund in respect of its employees, thereby entitling the latter to claim benefits in respect of injuries or diseases suffered as a result of their employment. The effect is to compel an employer (or employer and employee jointly) to satisfy employees' right of access to social security to a greater or lesser extent.

Claims for socio-economic benefits against private parties are concurrent with, and not additional to, statutory claims. Thus a pension from a private fund, typically included in an employment package, disqualifies an employee from claiming a social pension, or "grant",³¹ or reduces it by the amount of the private pension.³² To this extent, in other words, the right to social security contained in section 27(1) of the Constitution, and implemented by the Social Assistance Act, may equally be satisfied by a private provider, thereby absolving the state from further responsibility to do so.³³

If this approach is correct, the definitive question is not who provides the benefit, but whether its content (whatever the legal basis for its provision) corresponds to that envisaged by the Constitution. If so, it would

28 Act 63 of 2001 (replacing Act 30 of 1966) read with the Unemployment Insurance Contributions Act 4 of 2002 ('UIA').

29 *ie.* adoption benefits and dependants' benefits: see s 12 read with Parts E and F of the Act.

30 Act 130 of 1993 ('COIDA').

31 *Ito* the Social Assistance Act 59 of 1992, as amended by the Welfare Laws Amendment Act 106 of 1997.

32 For discussion of some of the questions this gives rise to, see Olivier *et al op cit* 108-110.

33 Similarly, in terms of s 78 of COIDA, medical aid provided by the employer can take the place of medical aid provided in terms of the Act, to that extent relieving the employer of its statutory obligations.

follow that the value of privately-provided benefits should be no less than that of the corresponding statutory benefits, which may be deemed to give effect to the constitutional mandate. In practice, however, medical aid, pension and other benefits available to an employee are often superior to the equivalent state benefits.³⁴ Can it be argued that the level of statutory benefits defines the extent of the right in question? And if so, are benefits provided to employees over and above this level purely contractual, divorced from the status of socio-economic rights and falling beyond the ambit of the constitutional guarantee? If this is so, Mrs X could not rely in any way on sections 27 and 29 of the Constitution.

On the other hand it may be argued that sections 27 and 29 of the Constitution do not limit the rights in question. The rights themselves are unqualified; all that is limited is the extent to which the state is liable to give effect to them at any point in time. In this regard section 27(2) provides as follows:

The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

On a purposive reading, section 27(2) recognises that steps taken by the state may not necessarily be adequate to “realise” the rights in question when measured, for example, against the vision contained in the preamble to the Constitution. By no stretch of the imagination can the modest levels of social grants, public education, health care and other measures taken by the state “within its available resources” be equated to those of a society based on “social justice”, able to “free the potential of each person”. It is, indeed, debatable whether the levels of private-sector benefits available to the majority of employees approximate this standard.

An appropriate test for establishing the constitutional protection of private socio-economic benefits over and above the statutory levels, it is submitted, can be inferred from the limitation clause.³⁵ The denial of such protection can only be read into the relevant statutes to the extent that such exclusion is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.³⁶ On this basis it would be more accurate to say that the “private” benefits available to many employees may place them (and often their families) in the relatively fortunate position of having achieved the realisation of their socio-economic rights to a greater extent than those who are unemployed. It does not necessarily imply that the benefits they enjoy are protected any less than the statutory benefits.³⁷

34 *Soobramoney* (note 15 above) is a case in point. Had Mr Soobramoney been a member of a medical aid scheme, he may well have been entitled to the treatment which he tried unsuccessfully to claim from the state.

35 See note 17 above.

36 Eg, the perks enjoyed by highly-paid corporate executives may exceed the level of access to socio-economic rights contemplated by the Constitution and to that extent fall beyond the scope of constitutional protection.

37 Socio-economic benefits provided in terms of an employment package need not be limited to the typical employment benefits. Employee assistance programmes (EAPs), eg, have been introduced in many South African workplaces. Vosloo & Barnard

[continued on next page]

Wherever the boundary is drawn, however, it is submitted that a certain core of employment benefits falls squarely within the definition of socio-economic rights. To the extent that these benefits are contingent on employment, protection of employment becomes a necessary aspect of the protection of the right in question. But, if a business or part of it is transferred, all employment rights and benefits are terminated except to the extent that section 197 of the LRA provides for the transfer of those rights and benefits to the transferee of the business.

If this analysis is correct, the construction placed on section 197 will determine whether Mrs X's access to socio-economic rights which are constitutionally entrenched is extinguished or continues. This, in turn, would mean that section 197 should be interpreted in such a way as to restrict any limitation of the rights in question; in other words, to include the proposed transfer of the cleaning service within the ambit of section 197, thereby allowing the rights in question to survive, unless its exclusion can be justified in terms of the criteria of constitutional interpretation.

5 SECTION 197 AND THE CONSTITUTION

The starting point is that all provisions of the LRA must be interpreted in terms of the Constitution. The test is twofold.³⁸ Section 3 of the LRA states:

Any person applying this Act must interpret its provisions –

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

The first leg of the test is to establish whether there is *prima facie* conflict between section 197 and the constitutional rights contained in sections 27–29. This is clearly not the case. To the extent that employees' rights are enforceable against the "old employer", section 197 on the face of it provides for the transfer of those same rights to the "new employer"³⁹ and, as such, serves to protect them. There is therefore no need to "read down" section 197 "in compliance with" sections 27–29 as required by section 3(b) (above).

The task therefore becomes one of interpreting section 197 in such a way as to give effect to the "primary objects" of the Act, included amongst which is "to give effect to and regulate the fundamental rights conferred by section 27 of the [interim] Constitution".⁴⁰ The latter section states *inter*

"A qualitative assessment of the development of employee assistance practice in South Africa" (2002) *SA Journal of Labour Relations* vol 26(4) 33. In principle there seems to be no reason why rights of this nature, to the extent that they fall within the ambit of s 27 of the Constitution, should not enjoy similar protection.

38 For a more detailed discussion, see Woolfrey in Du Toit *et al Labour Relations Law: A Comprehensive Guide* 4 ed (Butterworths 2003) Ch II.

39 The terms "old employer" and "new employer", though used in s 197, are unhelpful in that they beg the question whether the transferee of a business is indeed the "new employer" of the employees. It would be, to say the least, premature to use this term in the context of a dispute whether or not a transaction is subject to s 197.

40 Replaced by s 23 of the final Constitution (the labour clause).

alia that “[e]veryone has the right to fair labour practices”. This may not take the inquiry much further.⁴¹ To this, however, must be added the requirement of section 39(2) of the Constitution that:

[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

Section 197, in other words, must be interpreted in such a way as to promote the objectives reflected in the preamble to the Constitution (above), as well as the specific objectives of sections 27–29. To this extent, it is submitted, it would in principle favour the inclusion of an outsourcing transaction within the ambit of the section if the preservation of employees’ socio-economic benefits is dependent on such inclusion.⁴²

The proviso “in principle”, however, is important. Assuming that section 197 itself is constitutional,⁴³ it means that the facts of the transaction must bring it within the ambit of section 197. For example, section 197 applies only to “employees”. If Mrs X was in fact an independent contractor, section 197 could not affect her. Other elements, however, are matters of judicial interpretation rather than fact. At the heart of the provision are the requirements that the transaction must amount to (a) the “transfer” of (b) a “business or part of a business” or “service” as (c) a “going concern”.⁴⁴ The facts of the transaction, in other words, must be capable of being construed in conformity with these requirements.

It is submitted that a transaction whereby a “service” forming part of the university’s operations will in future be performed by a different person amounts *prima facie* to the transfer of part of a business as a going concern. *Prima facie*, therefore, the benefits enjoyed by Mrs X in terms of her employment contract with the university are subject to the protection of section 197 in the event of outsourcing.

41 When interpreting s 197 the Constitutional Court in *NEHAWU v University of Cape Town and Others* (2003) 24 *Ilj* 95 (CC); 2003 (2) BCLR 154 (CC) did so by placing the LRA within the context of s 23(1); see par 34. However, while Mrs X could rely on this provision to justify the preservation of her rights, the university’s new service provider might argue that the imposition of employee benefits far in excess of those contemplated in the contract with the university would be a violation of its own right to fair labour practices, in addition to other constitutional rights. “Fairness”, it could be said, encompasses the creation of employment rights (in the absence of statutory regulation) through individual agreement or collective bargaining. Rendering an employer subject to unintended liabilities by operation of law may be seen as a *prima facie* infringement of this right. The scope for the permissible limitation of fundamental rights is considered below.

42 It is submitted that the employer’s countervailing claim to an interpretation favouring its right to freedom of economic activity (s 22 of the Constitution) would be more tenuous. It would need to be established to what extent such freedom is dependent on or affected by the specific transaction in question.

43 Ie, in the sense of not unduly restricting any basic right guaranteed by the Constitution. Since the contrary has not been suggested, the question of the constitutionality of s 197 will not be considered further.

44 See s 197(1). Other interpretive questions concern the nature of the rights and duties that are subject to transfer; in particular, the meaning of “all contracts of employment in existence immediately before the date of transfer” (s 197(2)(a)) and “all the rights and obligations between the old employer and an employee at the time of the transfer” (s 197(2)(b)). These questions are considered below.

But that is not yet the end of the matter. The “limitation clause” of the Constitution allows a basic right to be limited or restricted by a “law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors”.⁴⁵ Mrs X’s rights in this context and the *prima facie* protection provided by section 197, in other words, are not absolute. Section 197 may be interpreted as limiting those rights, by excluding the outsourcing transaction, provided this falls within the scope permitted by section 36(1).

Of particular relevance is the primary criterion of reasonableness and justifiability “in an open and democratic society based on human dignity, equality and freedom” (above). The parallel European legislation⁴⁶ and the extensive jurisprudence of the European Court of Justice (ECJ) in interpreting the same fundamental concepts provide a ready framework of reference for the application of this criterion. Grounds for the exclusion of an outsourcing transaction from the ambit of the European Directive, it is submitted, would argue for its exclusion from the ambit of section 197.⁴⁷ Even then, however, the court would still need to weigh up “all relevant factors” in the context of the specific transaction, including those listed in section 36(1). It is not proposed in this article to apply the test with the rigour that a court may be expected to do. A brief overview of the listed factors, however, helps to indicate the nature of the inquiry involved.

5.1 The nature of the right

The rights at issue in the above example are, essentially, Mrs X’s retirement benefits and the rights to good quality health care and tertiary education enjoyed by her children. These are important rights which, if removed, would have a serious impact on the lives, dignity and future prospects of all three persons. The nature of the rights should therefore argue for an extensive interpretation of section 197 and against the limitation of the rights.

5.2 The importance of the purpose of the limitation

The main purpose of a restrictive interpretation of section 197 in this context would be to avoid placing an excessive financial burden on the service provider to which the service is being outsourced or, alternatively, to make it possible for the university to outsource the service at a lower cost. In an economic climate dominated by global competition, this may be significant in enabling the university optimally to provide tertiary education and research. It would, however, require detailed evidence to

45 S 36(1); see note 17 above where the “relevant factors” contained in the section are listed.

46 In particular, Directive 2001/23EC; see 2 above.

47 This is not to say that exclusion follows automatically in such an event; it only means that, on this count, s 197 may be interpreted as not protecting the socio-economic rights in question, provided the other criteria of s 36(1) are also met.

establish to what extent the benefits enjoyed by employees form a barrier to cost-effective outsourcing and/or to what extent any economies that are reasonably necessary could be achieved by other means (discussed below).

5.3 The nature and extent of the limitation

The effect of excluding the transaction from section 197, in the example given, would be absolute in the case of the right to tertiary education enjoyed by Mrs X's daughter, in that she would lose it altogether. Mrs X's pension rights would be limited to those offered by the new employer (the difference between those rights and her existing rights could be clearly quantified), while her son would lose his entitlement to private health care and become dependent on state health care. The difference (if any) between the standards of health care offered by the state and the private sector respectively in relation to his condition could be established on a factual basis.

5.4 The relation between the limitation and its purpose

The relation between the limitation and its purpose is a direct one: by excluding the transaction from the ambit of section 197, the cost saving and flexibility that it seeks to achieve will immediately be achieved.

5.5 Less restrictive means to achieve the purpose

The words "less restrictive" take as their starting point the inroads made on employees' socio-economic rights by interpreting section 197 as excluding outsourcing transactions. The question, in other words, is whether equivalent cost savings and flexibility could be achieved if the transaction were held to fall within the ambit of section 197. What is intended, it is submitted, is not a case-specific answer⁴⁸ but an alternative interpretation of the section or other legal provisions whereby the same purpose could be achieved. A number of such means are conceivable. For example:

- the flexibility built into section 197 itself by permitting the new employer to offer transferred employees terms and conditions that are "on the whole not less favourable" than those on which they were previously employed, but not necessarily identical thereto;⁴⁹
- the possibility of transferring employees to pension, provident or retirement funds other than the funds to which they previously belonged, subject to certain safeguards;⁵⁰

48 Eg. achieving economies in terms of a business plan within a particular business, which may well be dependent on other transactions. S 36 is concerned with the interpretation of laws of general application, which has to be consistent. "Means" must therefore refer to *legal* means (ie general rules or principles) that will be at the disposal of all parties in comparable cases to which the same principles could be applied.

49 See s 197(3) (below).

50 S 197(4).

- the right of the new employer to dismiss employees, including employees transferred in terms of section 197, for a fair reason based on its operational requirements;⁵¹ and
- the requirement that the old employer and the new employer must enter into an agreement regulating various matters, including their respective liability for severance payment due to employees dismissed by the new employer.⁵²

Even if an outsourcing transaction is subject to section 197, in other words, results similar to those achieved by excluding it may arguably be achieved through the application of alternative legal provisions. In the context of our case study, the university would in both cases succeed in divesting itself of the service in question, but the cost of doing so would be affected. The service provider, even if it is compelled to employ Mrs X and her colleagues in terms of section 197, may be able to recoup at least part of the cost by relying on the provisions mentioned above. Any inroads on employees' entitlements that may result from such alternative measures could be considered "less restrictive" than the total exclusion of the protection which they are offered by section 197.

If results comparable to those achieved by excluding section 197 can be achieved in this manner, it will be a factor in favour of applying the section. If such results cannot be achieved, it will be a factor in favour of finding the limitation of the employees' rights in terms of section 27–29 to be permissible and, hence, excluding the transaction from the ambit of section 197.

The above factors, however, must be weighed up cumulatively; no single factor is conclusive.

To sum up: if a transaction is capable of being interpreted as a "transfer" for purposes of section 197, then – all things being equal – this interpretation should be favoured in order to protect any socio-economic rights of employees that may be at issue. This places certain constraints on the discretion of a court in interpreting section 197, but does not predetermine the outcome of the inquiry. The court would be called upon to apply the test laid down in section 36(1) of the Constitution to decide whether section 197 may be interpreted as excluding the transaction, thereby permitting the restriction of the rights in question. The balance that emerges from the application of all relevant factors (outlined above) will determine the decision that the court must arrive at.

Having said this, the starting point must be the provisions of section 197 itself. Only in applying these provisions to the facts of a particular transaction can it be established whether the transaction is capable of falling within the ambit of the section.

51 Ss 189 and 189A, LRA.

52 S 197(7). This does not prevent the employers from reaching agreement on further matters that may facilitate the transfer through an apportionment of the attendant costs.

6 THE APPLICATION OF SECTION 197

6.1 "Transfer of a business as a going concern"

For section 197 to find application, it has been noted, three factors must be present. There must be a "transfer" of a "business or part of a business" (which may include a "service"). Moreover, the business or service must be transferred as a "going concern".⁵³ It is immediately obvious that the three factors are closely interrelated. This is hardly surprising, since all three factors refer to different aspects of one and the same transaction. As a result it is difficult to separate them and, in practice, the courts have tended to look at transactions holistically in order to determine whether all the requirements of section 197 are satisfied.

To the extent that the three factors have been considered separately, it is settled that "transfer" is broader than "sale" or change of ownership. In *Schutte & others v Powerplus Performance (Pty) Ltd & another*⁵⁴ the Labour Court accepted the approach adopted by the ECJ. "The ECJ", it was held,

has consistently adopted an approach that examines the substance, rather than the form, of the transaction. Numerous factors have been regarded as indicative of a transfer of a business, but no single factor has been regarded as conclusive of this determination. For example, a sale of assets may indicate a transfer within the meaning of the Directive, but not necessarily. Conversely, the fact that no assets were sold does not mean that there has been no transfer of a business. Likewise, the transfer of a significant number of employees and the immediate continuation or resumption of a service or function is regarded as indicative, but not conclusive, of a transfer within the meaning of Article 1(1) of the Directive.⁵⁵

Broad though the notion of "transfer" is, however, it does not include all transactions resulting in a *de facto* change of control. One of the most common forms of transferring control of enterprises is through the purchase of a controlling shareholding. In *Ndima & others v Waverley Blankets*

53 S 197(1). For discussion, see Blackie & Horwitz "Transfer of Contracts of Employment as a Result of Mergers and Acquisitions: A Study of Section 197 of the Labour Relations Act 66 of 1995" (1999) 20 *ILJ* 1387; Bosch "Transfers of contracts of employment in the outsourcing context" (2001) 22 *ILJ* 840; Bosch "Operational requirements dismissals and section 197 of the Labour Relations Act: problems and possibilities" (2002) 23 *ILJ* 641; Bosch & Mohamed "Reincarnating the vibrant horse? The 2002 amendments to the LRA and transfers of undertakings" (2002) 1 *LLD* 84; Du Toit "Transfer of a business' and 'outsourcing': Changes to European Legislation" *Labour Law News and CCMA Reports* vol 11 no 6 (December 2002). For a general overview see Van Jaarsveld & Van Eck *Principles of Labour Law* 2 ed Butterworths Durban 2002 pars 533-537; Grogan *Workplace Law* 7 ed Jura Cape Town 2003 Ch 14; Du Toit *et al Labour Relations Law* (note 38 above) 427-438. For a comprehensive analysis of the previous s 197, see Smit *Labour Law Implications of the Transfer of an Undertaking* (unpublished LL.D. thesis, Rand Afrikaans University, October 2001).

54 [1999] 2 *BLR* 169 (LC) at par 35.

55 At par 35. The reference is to Directive 77/187/EEC; see note 5 above. The following ECJ decisions are cited: *Spijkers v Gebroeders Benedik Abbatoir* CV 24/85 [1986] (2) *CMLR* 296; *Dr Sophie Redmond Stichting v Bartol* [1992] *IRLR* 366; *Rusk and Christensen v Iss Kantineservice* [1993] *IRLR* 133; *Schmidt v Star-und Leihkasse der Fruheren Amper Bordsesholm* [1994] *IRLR* 302; *Merckx v Ford Motors Co Belgium* [1996] *IRLR* 467.

*Ltd*⁶⁰ the Labour Court ruled that this does not amount to a “transfer” of the business because it remains in the possession of the same company. The employees, in other words, continue to be employed by the same employer and there is no occasion to invoke the protection of section 197.

But a “transfer” only enters the ambit of section 197 if its subject matter is a “business or part of a business”, as defined, and, moreover, if it is “a going concern”. In itself, the latter term means only that the business is “active and operating” and may continue if the purchaser so desires⁵⁷ or, as *Mlambo J* found in *NEHAWU v University of Cape Town & others (1)*,⁵⁸ “that the shop is being kept open instead of being closed up”.⁵⁹ In *Maloba v Minaco Stone Germiston (Pty) Ltd & another*⁶⁰ the Labour Court accepted that it “convey[s] the fact that the object of the transfer must have been a place where people were working before the transfer and will continue to be a place where people are working after the transfer”.⁶¹

In *Kgethe & others v LMK Manufacturing (Pty) Ltd & others*⁶² it was found that an agreement for the sale of assets does not amount to transfer of a business “as a going concern”.⁶³ Similarly, the Labour Appeal Court in *NEHAWU v University of Cape Town & Others*⁶⁴ cited the following ruling of the House of Lords with approval:

It seems to me that the essential distinction between the transfer of a business, or part of a business, and a transfer of physical assets, is that in the former case the business is transferred as a going concern, ‘so that the business remains the same business but indifferent hands’. (if I may quote from Lord Denning MR in *Lloyd v Brasseley* [1969] 1 All ER 382 at 384, [1969] 2 QB 98 at 103 in a passage quoted by the industrial tribunal), whereas in the latter case the assets are transferred to the new owner to be used in whatever business he chooses.⁶⁵

The Labour Appeal Court in *NEHAWU v University of Cape Town & Others*⁶⁶ considered the meaning of the term more fully. For purposes of income tax, it was noted, a “going concern” includes part of an enterprise “if that part is capable of separate operation”.⁶⁷ According to the Department of Inland Revenue in New Zealand, “a going concern should be:

56 [1999] 6 BLLR 577 (LC) at par 66.

57 *Manning v Metro Nissan* (1998) 19 ILJ 1181 (LC), with reference to *General Motors SA v Besta Auto Component Manufacturing* 1982 (2) SA 653 (SE). See also *Schutte & others v Powerplus Performance (Pty) Ltd & another* [1999] 2 BLLR 169 (LC) at par 34 (above).

58 [2000] 7 BLLR 803 (LC).

59 At par 33.

60 [2000] 10 BLLR 1191 (LC).

61 Thus, *in casu*, the transferred business was not a “going concern” because, “whilst it remained a corporate entity, [its] operating divisions had been closed, its machinery . . . had been commercially disposed of, [part] of its premises had been sub-let and . . . it maintained what in essence was a skeleton staff of some five persons”: *ibid* at par 36.

62 [1997] 10 BLLR 1303 (LC) at 1309.

63 On appeal the Labour Appeal Court overturned the finding as to the nature of the agreement on the grounds that it had not been proven, but appeared to accept that a transfer of assets cannot be equated to transfer of a business as a going concern; *Kgethe & others v LMK Manufacturing (Pty) Ltd & another* [1998] 3 BLLR 248 (LAC) at par 34.

64 [2002] 4 BLLR 311 (LAC).

65 At par 51, with reference to *Melon v Hector Powe Ltd* [1981] 1 All ER 313 (HL).

66 [2002] 4 BLLR 311 (LAC).

67 S 11(1)(c) of the Value-Added Tax Act 89 of 1991.

- able to be carried on by the recipient;
- accompanied with an express supply of goodwill;
- a supply of all assets, both tangible and intangible, that are central to the business.⁶⁸

However, it “does not necessarily mean that every single asset owned by the transferor’s enterprise must change hands as a result of the sale of that enterprise as a going concern”.⁶⁹ The court referred with apparent approval to two New Zealand decisions in which the meaning of the term was considered. In *Variety Leisure Corporation v Commissioner of Inland Revenue*⁷⁰ it was found that the expression “going concern” meant “that the particular activity is not closed down on sale but remains active and operating before, during and after the transfer to new ownership”.⁷¹ In *Kenmir Ltd v Frizzell*⁷² the following explanation was offered:

In the end, the vital consideration is whether the effect of the transaction was to put the transferee in possession of a going concern, the activities of which he could carry on without interruption. Many factors may be relevant to this decision though few will be conclusive in themselves. Thus if the employer carries on business in the same manner as before, this will point to the existence of a transfer, but the converse is not necessarily true, because a transfer may be complete even though the transferee does not choose to avail himself of all the rights which he acquires thereunder. Similarly, an express assignment of goodwill is strong evidence of a transfer of the business but the absence of such an assignment is not conclusive if the transferee has effectively deprived himself of the power to compete. The absence of an assignment of premises, stock-in-trade or outstanding contracts will likewise not be conclusive, if the particular circumstances of the transferee nevertheless enable him to carry on substantially the same business as before.

In determining whether a transfer satisfies all the requirements of section 197, the Labour Court in *Schutte & others v Powerplus Performance (Pty) Ltd & another*⁷³ followed the test adopted by the ECJ in *Spijkers v Gebroeders Benedik Abattoir CV*.⁷⁴

The decisive criterion for establishing whether there is a transfer for the purposes for the directive⁷⁵ is whether the business in question retains its identity. Consequently a transfer of an undertaking, business or part of a business does not occur merely because its assets are disposed of. Instead it is necessary to

68 At par 43. The New Zealand Goods and Services Tax Act of 1985 defines the term as the “supply of a taxable activity between registered persons, where, without further action on the part of the transferee, it is capable of uninterrupted operations by the transferee; and the supply is to form part of the taxable activity of the transferee”: at par 40.

69 At par 44. According to a guideline issued by the South African Revenue Service, “the term “going concern” means that the enterprise is sold ‘lock, stock and barrel’ and the enterprise is capable of being continued without change”: cited *ibid* at par 42.

70 (1988) 10 NZTC 5, 255.

71 Cited at par 45.

72 [1968] 1 All ER 414 (HL); cited at par 46.

73 [1999] 2 B.I.L.R. 169 (I.C.).

74 [1986] 2 C.M.L.R. 296.

75 The reference is to the Acquired Rights Directive of the European Community (77/187/EEC), adopted in 1977, providing *inter alia* for “the protection of employees in the event of a change of employer”.

consider . . . whether the business was disposed of as a going concern, as would be indicated, *inter alia* by the fact that its operation was actually continued or resumed by the new employer, with the same or similar activities. In order to determine whether those conditions are met, it is necessary to consider all the facts characterising the transaction in question, including the type of undertaking or business, whether or not the business's tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred 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 therefore be considered in isolation.⁷⁶

The crucial features of a protected "transfer", the court found, were that "the economic entity remained in existence, its operation has been taken over by the first respondent and the same or similar activity is being continued by it".⁷⁷

Similarly, the Labour Appeal Court in *NEHAWU v University of Cape Town* (above) referred to the ruling by the ECJ in *Spijkers v Gebroeders Benedik Abattoir* (above) as follows:

[T]he expression 'transfer of an undertaking, business or part of a business to another employer' envisages the case in which the business in question retains its identity. In order to establish whether or not such a transfer has taken place in a case such as that before the national court, it is necessary to consider whether, having regard to all the facts characterising the transaction, the business was disposed of as a going concern, as would be indicated *inter alia* by the fact that its operation was actually continued or resumed by the new employer, with the same or similar activities.⁷⁸

Would the above-mentioned outsourcing transaction pass this test? It would seem beyond question that the functions performed by the cleaning service of the university form a "service" or "part of a service" which, at the same time, forms part of the university's overall operations or "business". It also appears that those functions will continue to be performed up to the time of transfer and will thereafter continue to be performed by a new employer. To that extent the cleaning service matches the definition of "a going concern". By virtue of the outsourcing transaction itself it may be regarded as an "economic entity", distinct from other

76 [1986] 2 CMLR 296; cited at par 36.

77 At par 51. See also *Fourie & another v Iscor Ltd* [2000] 11 BLLR 1269 (I.C.).

78 At par 49; from par 15 of the *Spijkers* judgment. S 197 also applies in the event that a partnership is reconstituted. If the employer is a partnership, an employee's contract of employment is entered into with the partners jointly and severally. Since a partnership is dissolved and a new partnership formed whenever a partner resigns or a new partner joins, a new contract of employment is tacitly entered into between the partners and their employees under those circumstances. If so, employees' rights against previous partnerships, including rights to severance pay based on length of service with the previous partnership, become enforceable against the new employer: see *Burman Katz Attorneys v Brand NO & others* [2001] 2 BLLR 125 (LC) at par 13, with reference to *Whitaker v Whitaker* 1931 EDL 122; *Baldinger v Broomberg and Rowe* 1949 (3) SA 258 (C) at 268.

parts of the university's operation, that will "remain in existence", albeit "taken over" by a new party. Its operation will "actually [be] continued or resumed by the new employer, with the same or similar activities".

In all these respects there appears to be no reason why the outsourcing transaction should not be regarded as a protected transfer; although, if the argument above is correct,⁷⁹ it is enough that it *may* be regarded as such. To the extent that entrenched constitutional rights of Mrs X and other employees are contingent on the transfer being defined as a protected transfer, it has been argued, this should tip the scales in favour of such an interpretation.

The courts have not had occasion to consider this question and have in some cases imposed criteria designed to exclude outsourcing transactions from the protection of section 197.⁸⁰ This approach, and its validity, will be considered below.

6.2 The automatic transfer of employment rights

The relevant European Directives⁸¹ have stated *ab initio* that the transfer of employment rights is an automatic result of a protected transfer. Section 197, in its original form, did not. In *Schutte v Powerplus*,⁸² however, the Labour Court interpreted the section to mean that transfer of the applicants' contracts of employment had taken place automatically and in *Foodgro (A division of Leisurenet Ltd) v Keil*⁸³ the Labour Appeal Court described the transfer of contracts of employment in terms of section 197 as "automatic".⁸⁴ In *NEHAWU v University of Cape Town & others (1)*⁸⁵ Mlambo J disagreed with the above approach but acknowledged himself to be bound by the ruling in *Foodgro v Keil* (above). Further support for the approach in *Schutte v Powerplus* (above) was expressed in *Western Province Workers Association v Halgang Properties CC*.⁸⁶

A degree of confusion was introduced by the remarkable decision of the Labour Appeal Court in *NEHAWU v University of Cape Town & Others*,⁸⁷ dismissing the view expressed in *Foodgro v Keil* (above) as an *obiter dictum* and interpreting the former section 197(2)(a) as follows:

The concept of a transfer of a business 'as a going concern' implies agreement between employers in respect of which parts of the business will be transferred. This will obviously also include agreement on the labour force. There is therefore no room for automatic non-consensual transfer of employees who are not intended to be part of the business that is transferred. Employees are as

79 See 10–14 above.

80 In particular, *NEHAWU v University of Cape Town & others (1)* [2000] 7 BLLR 803 (LC); discussed below.

81 See note 3 above.

82 Note 54 above.

83 [1999] 9 BLLR 875 (LAC) at par 13.

84 See also *Fourie & another v Iscor Ltd* [2000] 11 BLLR 1269 (LC) at par 8.4.

85 [2000] 7 BLLR 803 (LC).

86 [2001] 6 BLLR 693 (LC) at pars 14–17.

87 [2002] 4 BLLR 311 (LAC).

much a part of a business as its other assets. Purchasers and sellers are at liberty to define what is included in the concept of a 'going concern', and usually do.⁸⁸

Fortunately, the confusion was shortlived. In December 2002 the Constitutional Court⁸⁹ overturned the above ruling by the Labour Appeal Court, holding that "upon the transfer of a business as a going concern as contemplated in section 197(1)(a), workers are transferred to the new owner".⁹⁰ In addition, the amended section 197(2) now provides explicitly that, in the event of a protected transfer,

- (a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;
- (b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee.

Mrs X would therefore face no obstacle to the transfer of her employment benefits from the university to the new employer on this score.

6.3 The nature of the rights and duties that are transferred as a result of a protected transfer

The rights and duties that form the subject matter of a protected transfer are defined in the most encompassing terms. In addition to contractual rights and duties, section 197 states that:

- "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"; and
- "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".⁹¹

A similar position prevailed in terms of the previous section 197. Thus, in *Foodgro (A division of Leisurenet Ltd) v Keil*⁹² the Labour Appeal Court held that an employee's period of service with the old employer should be taken into account when calculating her claim for severance pay against the new employer.⁹³ The majority of the court found that "[t]he subject

88 From *Editor's Summary* at 312.

89 In *NEHAWU v University of Cape Town* (2003) 24 ILJ 95 (CC); 2003 (2) BCLR 154 (CC).

90 At par 71. The judgment continues: "The fact that there was no agreement to transfer the workforce or part of it between UCT and the contractors did not, as a matter of law, prevent a finding that the outsourcing was a transfer of a business as a going concern. Whether the outsourcing constituted the transfer of one or more businesses as a going concern is a question that has yet to be determined."

91 S 197(2)(b)-(c).

92 [1999] 9 BLLR 875 (LAC).

93 In terms of s 41 of the Basic Conditions of Employment Act of 1997 (replacing s 196 of the LRA) an employee who is dismissed for operational reasons is entitled to severance pay equivalent to one week's remuneration per completed year of service.

matter of section 197(2)(a) is 'all the rights and obligations between the old employer and each employee at the time of the transfer' . . . but not an employee's 'continuity of employment'. The latter is a calculation, a fact – not a right or obligation between old employer and employee".⁹⁴ Not being a "right or obligation", it is not subject to variation by agreement.⁹⁵ Thus, even if the contract of employment is replaced by a new contract, length of service and the amount of severance pay to which it would entitle an employee in the event of retrenchment are unalterable.⁹⁶

Similarly, in *Success Panel Beaters & Service Centre CC v NUMSA & another*⁹⁷ the Labour Appeal Court held that an order for reinstatement and payment of compensation to an employee who had been unfairly dismissed by the old employer was enforceable against the new employer.⁹⁸

There can be no doubt that employment benefits are included within the reach of section 197(2) (see above). Most of the benefits that have been considered will be contractual rights forming part of an employee's "remuneration".⁹⁹ Any socio-economic benefits not incorporated in the contract of employment will be included in the omnibus terms of section 197(2)(b).

Less clear is the extent to which such benefits may be varied. In the first place, the transfer of rights and duties may be changed or waived by agreement between the parties. Such agreement, however, must be explicit. In *Keil v Foodgro (A division of Leisurenet Ltd)*¹⁰⁰ the Labour Court also held that rights accruing from length of service will remain in existence unless expressly waived. The judgment was upheld on appeal.¹⁰¹ The

94 At par 22. The judgment effectively overrides that of Landman J in *SACWU v Engen Petroleum Ltd & another* [1999] 1 BLLR 37 (LC) where it was held that, to succeed in a claim of this nature, the application "must show that a right to a redundancy benefit, in the event of future redundancies, accrued contractually to each affected employee. It is not enough to show that it was available by operation of law or that it was offered to the union and accepted" (at par 13).

95 At par 25. It is submitted that the court erred in *Burman Katz Attorneys v Brand NO & others* [2001] 2 BLLR 125 (LC) by ordering that only the employee's period of service since 11 November 1996 (when s 197 took effect) should be taken into account when calculating severance pay.

96 It is, however, less clear whether organisational rights to which employees were entitled by virtue of their trade union membership are transferred together with the business. In *Kgethe & others v LMK Manufacturing (Pty) Ltd & another* [1998] 3 BLLR 248 (LAC) the Labour Appeal Court declined to order that the trade union's organisational rights be incorporated into the agreement for transfer of the business. "Those rights either exist", Kroon JA held, "or they do not" (at par 53). The implication is that organisational rights are existing rights which do not require contractual regulation unless the parties wish to alter them.

97 [2000] 6 BLLR 635 (LAC).

98 At 637. See also *NUFAWU & Others v Luther NO & Others* [2001] 4 BLLR 443 (LC) at par 14.

99 See 91–93 above for discussion of employment benefits. On the meaning of "benefits", see note 7 above. To the extent that the provision of certain benefits is regulated by statute (in particular, by the Unemployment Insurance Act 63 of 2001 and COIDA 63 of 2001), s 197 will not be applicable in that the new employer will be bound by the statute itself, rather than by s 197, to assume the obligations of the previous employer.

100 [1999] 4 BLLR 345 (LC).

101 In *Foodgro (A division of Leisurenet Ltd) v Keil* [1999] 9 BLLR 875 (LAC).

amended section 197(6) now clearly lays down the requirements for an agreement of this nature. Section 197(7)(a) also requires a valuation of severance pay that would have been due to employees in the event of retrenchment by the old employer as at the date of transfer.

Secondly, it has been noted that the amended section 197 provides for the unilateral variation of existing employment rights and benefits in two further ways:

- the new employer may vary the “terms and conditions” of employment that are offered to transferred employees, provided they are “on the whole not less favourable to the employees than those on which they were employed by the old employer”;¹⁰² and
- the new employer may transfer an employee “to a pension, provident, retirement or similar fund other than the fund to which the employee belonged prior to the transfer”, provided certain criteria are satisfied.¹⁰³

In the case of Mrs X, there can be little doubt that the reductions to her medical aid, pension and study benefits proposed by the new employer go beyond the limits permitted by section 197(3)(a).¹⁰⁴ By no stretch of the imagination can the non-existent or attenuated benefits on offer be regarded as “on the whole not less favourable” than her existing benefits. If the outsourcing transaction is found to be protected, the new service provider would need to improve her benefits (and those of other employees) substantially in order to comply with section 197.

Less clear is the position in respect of her pension rights, which are regulated separately by section 197(4). This provision is considered in more detail below.

6.4 Outsourcing

Reference has been made to the caution on the part of the courts in characterising outsourcing transactions as protected transfers. The reason is not difficult to find. If outsourcing is followed by the automatic transfer of the entire workforce and their existing rights, it would seem on the face of it to defeat the object of the exercise. On closer inspection, however, the issue is more nuanced. The flexibility that is built into section 197, discussed above, makes it possible to modify a transaction to accommodate the concerns of all parties. Even if outsourcing is accompanied by the transfer of the existing workforce, in other words, the new employer may seek agreement or take measures – in the last resort, dismissal for operational reasons – to secure the objectives of the transaction.

It has, however, been suggested that special criteria should apply in determining whether or not an outsourcing transaction is subject to section 197.

¹⁰² S 197(3)(a). If any terms and conditions are regulated by a collective agreement, however, no unilateral variation is permitted: see s 197(3)(b).

¹⁰³ S 197(4). This topic is discussed more fully at 24ff below.

¹⁰⁴ If any of Mrs X’s existing conditions of employment are regulated by collective agreement between her union and the university, of course, the status of her benefits would be unassailable: the flexibility permitted by s 197(3)(a) would then be excluded.

"Services" tend to be labour-intensive. In *Schutte v Powerplus* (above) the court referred with apparent approval to *Süzen v Zehnacker Gebäudereinigung*¹⁰⁵ in which the ECJ held that "for outsourcing of services to be treated as a transfer of business there must be some concomitant transfer of significant assets (tangible or intangible) or the taking over by the new employer of a major part of the workforce".¹⁰⁶ It is submitted that this approach, taken at face value, is problematic.

In the first place it purports to be in accordance with the test in *Spijkers* (above), which calls for all relevant facts to be given due consideration and no single fact to be viewed in isolation. Requiring the transfer of "significant assets" or "a major part of the workforce" as a *sine qua non*, it is submitted, would be in conflict with *Spijkers*.¹⁰⁷ Secondly, it creates scope for deliberate evasion of the legislation by tailoring a transaction to ensure that it falls beyond the definition of "transfer".¹⁰⁸ While a transfer of assets or a significant part of the workforce are undoubtedly highly significant indicators, it is submitted that the test in *Spijkers* should be reasserted in the context of outsourcing. Significantly, the court in *Schutte v Powerplus* (above) interpreted the *Süzen* judgment as requiring "an examination of substance and not form; weighing factors that are indicative of a section 197 transfer against those which are not; treating previous cases as useful indicators, but not precedent, and in this way deciding what is ultimately a question of fact and degree".¹⁰⁹ While it is debatable whether this accurately reflects the reasoning of the ECJ in *Süzen*, it is submitted that it is the preferable approach.

In *NEHAWU v University of Cape Town & others (1)*¹¹⁰ Mlambo J adopted a different approach. Ruling that the "transfer" of a business is "markedly

105 [1997] IRLR 255; in preference to the "broad" approach adopted in *Schmidt v Star-und Leihkasse der Früheren Amper Bordsesholm* [1994] IRLR 302, in which the transfer of a service was treated as the transfer of part of a business. The *Süzen* approach was followed in subsequent cases: see *Hidalgo and others* (ECJ judgment dated 10-12-1998; case no 173/96); *Hernández Vidal* (ECJ judgment dated 10-12-1998; case no 127/96), and is now embodied in Directive 2001/23/EC. See also *Betts v Brintel Helicopters Ltd* [1997] IRLR 361; *Dines v Initial Healthcare Services* [1995] ICR 11.

106 *Schutte v Powerplus* at par 37.

107 It has also been criticised as a "commercial" rather than a "labour law" test: Smit *op cit* 130, with reference to Barnard *EC Employment Law* 3 ed Oxford 2000 467.

108 Eg. by declining to employ employees of the "old employer" who might otherwise have been employed: see *Betts v Brintel Helicopters* 1997 IRLR 361 (CA) and the warning sounded in *ECM v Cox* 1999 IRLR 559 (CA). The Court of Appeal went on to hold that "an employment tribunal was entitled to have regard as a relevant circumstance to the reason why employees of the transferor had not been taken on by the transferee in deciding whether or not a transfer of an undertaking had taken place": *Transfer of Undertakings (Protection Of Employment) Regulations 1981: Government Proposals for Reform: Detailed Background Paper* Employment Relations Directorate, Department of Trade and Industry, September 2001 par 25. See also Smit *op cit* 133.

109 At par 50. See also pars 43-48 for the application of this test. The Labour Court is, of course, not bound by ECJ decisions; any misinterpretation of such a decision does not affect the validity of its judgment.

110 [2000] 7 BLLR 803 (LC). While disagreeing with Seady AJ in *Schutte v Powerplus* as to the automatic nature of the transfer of employment rights following a s 197 transfer, Mlambo J did not take issue with her interpretation of the test in *Süzen*. While referring

[continued on next page]

different [from] outsourcing”,¹¹¹ the court imposed two further criteria for distinguishing a “transfer” for purposes of section 197 from outsourcing. First, the transfer must be permanent in contrast to outsourcing where “what is transferred is nothing more than the opportunity to perform the so-called outsourced services”.¹¹² Second, the outsourcing party must relinquish control as well as the power to dictate standards in respect of the outsourced services.¹¹³ On appeal, the Labour Appeal Court in *NEHAWU v University of Cape Town & Others*¹¹⁴ made no ruling in this regard. The Constitutional Court, as noted above, in effect overruled the hard-and-fast distinction drawn by Mlambo J by its finding that an outsourcing transaction may amount to the transfer of part of a business.¹¹⁵

While Mrs X is thus left in a position of some uncertainty, there are grounds for arguing that the transaction in question meets the requirements of section 197, even without reference to the protection of constitutional rights. Room for uncertainty arises from the manner in which the court may apply the criteria adopted in *Spijkers* and *Schutte* (above). The judgment of the Constitutional Court, while establishing that outsourcing *may* amount to a “transfer”, does not state in so many words that it must be assessed in the same way as any other transaction. Scope therefore remains for following the judgment of the ECJ in *Süzen* (above), or upholding the criteria imposed by Mlambo J, on the basis that these do not absolutely exclude the possibility of defining an outsourcing transaction as a “transfer”.

In this event, it is submitted, the constitutional factor must be brought into the equation. Criteria which unduly restrict the application of section 197, thereby allowing the extinction of socio-economic rights, cannot pass constitutional muster. Purely commercial interests cannot trump rights that are constitutionally entrenched.¹¹⁶ The university and/or the new employer would need to assert a purpose of equal importance – for example, safeguarding the university’s ability to give effect to the right to education of citizens in general – as a reason for excluding the protection of section 197. On the facts outlined above, it is doubtful whether this could be done.

to this test with apparent approval, however, the position arrived at by the court was significantly different: see pars 30–33 of the judgment and text below.

111 At par 30.

112 At par 32.

113 At par 33.

114 [2002] 4 BLLR 311 (LAC).

115 *NEHAWU v University of Cape Town* (2003) 24 ILJ 95 (CC); 2003 (2) BCLR 154 (CC); see 19 above.

116 The finding of Waglay J in a different context (that of protecting the right not to suffer unfair discrimination) is apposite: “If profitability is to dictate whether or not discrimination is unfair, it would negate the very essence for the need of a Bill of Rights.” See *Whitehead v Woolworths (Pty) Ltd* [1999] 8 BLLR 862 (LC) at par 28.

6.5 The dismissal of employees before or after a protected transfer

For the sake of completeness, it should be considered to what extent Mrs X faces the risk of dismissal in the event that the transaction is found to be subject to section 197. In theory, it could happen in one of two ways. The university might dismiss her prior to transfer at the behest of the new service provider because it wants to take on fewer staff; or, if she survives the transfer, she may face dismissal by the new employer.

The LRA seeks to guard against both these possibilities. A dismissal by reason of "a transfer, or a reason related to a transfer, contemplated in section 197 or 197A" is declared to be automatically unfair.¹¹⁷ Although the prohibition is cast in extremely wide terms, it may be assumed that it is intended to apply only where the transfer is the predominant or proximate reason for the dismissal.¹¹⁸ It would not, for example, prevent the new employer from dismissing Mrs X for a reason based on its operational requirements following the transfer. While this may appear to emasculate the protection offered by section 187(1)(g), it is another way of saying that Mrs X will be in no better or worse a position than any of the new employer's other employees. Should the new employer resort to retrenchments, Mrs X would be subject to the same selection criteria as other employees. If seniority is the criterion,¹¹⁹ her years of service with the university will count as years of service with the new employer.¹²⁰ Selecting transferred employees for dismissal, on the other hand, would be a classic illustration of that which is prohibited by section 187(1)(g) and, as such, automatically unfair.

7 PENSION AND OTHER RETIREMENT RIGHTS¹²¹

Assuming the outsourcing transaction discussed in our example is subject to section 197, what happens to the pension rights that Mrs X accumulated during her employment by the university?

Special provision is made, in the LRA as in Europe, in respect of the transfer of pension rights upon the transfer of a business. The need for doing so is obvious. Pension funds are frequently company funds, making it impossible to transfer employees' existing pension rights to a new employer. In addition, pension funds vary considerably in the nature and value of the benefits they confer. Of particular importance is the distinction between "defined contribution"¹²² and "defined benefit" schemes.¹²³ It

117 S 187(1)(g).

118 Cf the reasoning of the court in *SACWU & others v Afrojox Ltd* [1999] 10 BLLR 1005 (LAC).

119 Or 'LIFO' ('last in first out').

120 *Foodgro (A division of Leisurenet Ltd) v Keil* [1999] 9 BLLR 875 (LAC).

121 S 197(4) refers to "pension, provident, retirement or similar fund[s]". For the sake of brevity, the term "pension funds" is used below as referring to all these funds.

122 Which "specify the contribution to be paid by the employer and the employee, but do not specify the amount or guarantee the benefit": Olivier *et al op cit* 113.

123 I.e. "offer[ing] the retiring member a benefit which is defined according to a formula, taking into account the member's final salary, . . . years of membership and a certain factor (known as the 'accrual' or 'pension' factor)": *ibid* 114.

may be neither feasible nor reasonable to expect the new employer to provide transferred employees with rights to retirement benefits equivalent to those which they enjoyed in their previous employment. On the other hand (as the example of Mrs X illustrates), it is vitally important to provide employees with the greatest possible protection against erosion of their pension rights.

Against this background, legislation in South Africa as well as Europe has sought to strike an appropriate balance. Paragraph 4 of European Directive 2001/23 provides as follows:

- (a) Unless Member States provide otherwise, paragraphs 1 and 3¹²⁴ shall not apply in relation to employees' rights to old-age, invalidity or survivors' benefits under supplementary company or intercompany pension schemes outside the statutory social security schemes in Member States.
- (b) Even where they do not provide in accordance with subparagraph (a) that paragraphs 1 and 3 apply in relation to such rights, Member States shall adopt the measures necessary to protect the interests of employees and of persons no longer employed in the transferor's business at the time of the transfer in respect of rights conferring on them immediate or prospective entitlement to old age benefits, including survivors' benefits, under supplementary schemes referred to in subparagraph (a).

Section 197(4) of the LRA provides that an employee may be transferred "to a pension, provident, retirement or similar fund other than the fund to which the employee belonged prior to the transfer, if the criteria in section 14(1)(c) of the Pension Funds Act¹²⁵ . . . are satisfied". To this, the newly-enacted section 15B of the Pension Funds Act has added detailed provisions for the apportionment of any actuarial surplus in a pension fund.¹²⁶ While much of the latter falls beyond the scope of the present discussion, two of its effects may be noted:

- Employers are no longer entitled to appropriate the surplus in a pension or provident fund upon the transfer or amalgamation of the fund. Though this had already been established by case law,¹²⁷ section 15B now places the question beyond doubt by providing *inter alia* for the allocation of a portion of the surplus to increasing the benefits payable to members and former members of the fund.¹²⁸ This means that

124 Providing for the automatic transfer of employment rights and obligations in the event of a protected transfer.

125 Act 24 of 1956. S 14(1)(c) "requires the registrar to be satisfied that any scheme to amalgamate or transfer funds is reasonable and equitable, and accords full recognition to the rights and reasonable benefit expectations of the persons concerned in terms of the fund rules, and to additional benefits which have become established practice" (note 53a to s 197(4), LRA).

126 "Actuarial surplus" means, broadly speaking, the difference between the net value of the assets in a fund and its liabilities in respect of pensionable service accrued by members prior to the valuation date: see s 1, Pension Funds Act as amended by s 1, Act 39 of 2001.

127 *Tek Corporation Provident Fund and Others v Lorentz* 1999 (4) SA 884 (SCA); *Younghusband and others v Decca Contractors (SA) Pension Fund and its Trustees* (1999) 20 ILJ 1640 (PFA), upheld in *Resa Pension Fund v Pension Fund Adjudicator and others* (2000) 21 ILJ 1947 (C).

128 For discussion, see Breitenbach *Contentious and current issues surrounding the surplus legislation* (Address to the 2003 Conference of the Pension Lawyers' Association) esp pars 6-15.

Mrs X will benefit from any surplus that may have accumulated in the university's pension fund during her period of service; and

- Mrs X and other transferred employees would not be entitled to share in any existing surplus in the pension fund to which they have been transferred.¹²⁹

It furthermore appears that Mrs X will be entitled to any specific benefits which, in terms of the rules of the university's pension fund, may fall due upon termination of her employment by the university. In *Telkom and others v Blom and others*¹³⁰ the Supreme Court of Appeal found, in the context of a protected transfer, that the affected employees nevertheless remained entitled to certain benefits that were due to them upon termination of their employment by the old employer.¹³¹ This was, however, a consequence of a particular contractual provision which defined "termination" as including the transfer of employment contracts to a new employer. It therefore does not establish any general principle, except to suggest that the old employer may remain liable towards transferred employees for obligations which, by their nature, are incapable of being transferred to the new employer.¹³²

However, what does happen to Mrs X's existing pension rights upon transfer in terms of section 197 is less clear.¹³³ Section 197(4) does no more than permit her transfer to a different pension fund that meets certain minimum requirements. It does not state that her accumulated rights benefits *vis-à-vis* the existing pension fund¹³⁴ must be transferred to the new employer's pension fund. It does not, indeed, state explicitly that the new employer is obliged to create a pension fund if none exists. While

129 Breitenbach *op cit* pars 30ff.

130 Case no 227/02 (SCA) 30 May 2005 (unreported). See also the judgment of the High Court, reported as *Blom and Others v Telkom SA Ltd and Others* [2002] 5 BPLR 3395 (T).

131 That is, "if the services of [an affected employee] are terminated by the employer as a result of the abolition of his post or a reorganisation of the employer's activities", certain specified pension and gratuity benefits "shall be paid to the member": *Telkom v Blom* (above) at par 12.

132 This proposition is, however, open to question. On the face of it, if the new employer is substituted for the old employer in respect of all rights and obligations, the new employer could be held liable for the value of any "pension and gratuity benefits" that are due by the old employer, except to the extent that s 197(4) allows for variation and/or the matter is regulated by agreement between the parties in terms of s 197(6). The question was not pursued in *Telkom v Blom*.

133 S 197(4) "does not adequately address the transfer of pension rights simultaneously with the transfer of employment contracts where employees are not by agreement party to the transfer": *Telkom v Blom* (above) at par 18. See also Olivier *et al* at 146-147, where some of the variations in the provision of retirement benefits that may occur as a consequence of transfer from one retirement fund to another are considered. A reduction in the value of a promised retirement benefit without the consent of the affected employees, it is argued, "effectively amounts to a unilateral change in terms and conditions of employment" and may also amount to an unfair labour practice in terms of s 186(2)(a) of the LRA (at 147). The latter suggestion is doubtful: rights to retirement benefits have consistently been held to form part of "remuneration" and, as such, excluded from the protection of "benefits" *ito* s 186(2)(a): see note 7 above.

134 Which may be assumed to be a separate legal person from the employer: cf *Telkom v Blom* (above) at par 16.

this may be inferred from the general transfer of rights and obligations, it leaves considerable scope for uncertainty. While failure to provide comparable pension rights may amount to constructive dismissal,¹³⁵ it does not follow that such dismissal will be unfair. If the new employer's offer of "substantially less favourable" conditions was dictated by *bona fide* operational requirements, Mrs X and her colleagues may be left without a remedy.

The same would apply in respect of medical aid benefits and other contractual rights, such as a thirteenth cheque. The implications of these uncertainties are considered in conclusion.¹³⁶

8 CONCLUSION

It will be assumed (even though, as noted above, the law is not clear and the decision of the Labour Court in *Nehawu v University of Cape Town*¹³⁷ does not support the assumption) that the transaction described above must be interpreted as falling within the scope of section 197. What would be the effects?

The first effect is that the new service provider will have to take on Mrs X and her colleagues on terms that are "on the whole not less favourable" than those offered by the university.¹³⁸ This implies that any significant reduction in respect of one component – for example, medical aid benefits – should be compensated for by another component – for example, remuneration. It remains to be seen how the courts interpret the provision.

In the case of pension rights, the position is less clear. While subject to the same general rule (above), it is expressly provided that Mrs X may be transferred to a different pension fund.¹³⁹ Should the benefits provided by the new fund be substantially inferior, the shortfall would presumably have to be compensated, most probably by additional remuneration in an amount sufficient to place Mrs X in the same position upon retirement that she would have been in had her employment at the university run its course.

At this point it should be obvious that the transaction may be making progressively less sense from the service provider's point of view. The latter, presumably, will have entered into negotiations with the university on the basis of its existing wage structure. The outcome, however, may be to impose wage costs significantly in excess of its original estimate. Leaving aside the propriety of business tenders premised on low wages and

135 S 186(f) defines it as "dismissal" if "an employee terminated a contract of employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer".

136 See 86 above.

137 [2000] 7 BLLR 803 (LC); referred back to the Labour Appeal Court by the Constitutional Court.

138 S 197(3); discussed at 196–197 above.

139 *Ibid.*

few benefits, the service provider may be expected to increase its price to compensate for the added cost. This, in turn, may reduce the savings which the university was hoping to effect. Withdrawing from the transaction, assuming that were possible, would not be the answer either. Any other service provider with which the university may seek to do business would be in precisely the same position.

One possible outcome, on these facts, is that the university may find it impossible to outsource its cleaning service. To effect savings, one option would be to take on the employees and their union in an attempt to reduce wages. Even if successful, this may well be at the cost of industrial action with the attendant legacy of disruption and potential for future conflict. Alternatively, dismissals for operational reasons – possibly in other departments, including academic departments – would be a likely response. In either event the core business of the university – teaching and research – will suffer to a greater or lesser extent.

The other possible outcome, on the same facts, is that the transaction may be challenged *ex post facto*, thus confronting the service provider with a wage explosion, with increased remuneration to the former university employees payable retrospectively to the date of transfer and its other employees undoubtedly expecting equal treatment. Assuming it is possible to avoid insolvency and stave off industrial action, retrenchments and possible cancellation of contracts would be distinct possibilities.

All this is a far cry from the conception of section 197 as an instrument for serving the interests of workers as well as employers in a context of economic growth.¹⁴⁰ Undoubtedly, strong arguments could be addressed to a court in support of the contention that section 197 should not be applicable to outsourcing transactions unless in exceptional circumstances. It is submitted, however, that the answer lies not in excluding section 197 but in applying it in accordance with the purposes of the LRA. Of particular importance is the purpose of promoting collective bargaining.¹⁴¹ In the context of section 197 this finds application in the provision for variation of the consequences of the transfer by written agreement between the parties, designed specifically to address problems of the kind outlined above.¹⁴²

On the given facts, such an agreement would need to be reached between one or both employers on the one hand and Mrs X's union on the other.¹⁴³ Achieving it might not be easy. All parties would be faced with the prospect of substantial loss – the workers in terms of remuneration, the university in terms of its strategic plan, the service provider in terms of profit and loss. In the scheme of the LRA, however, collective bargaining is the essential means of seeking a balance between competing interests.

140 See 93-94 above.

141 See s 1(c) and (d).

142 S 197(2) read with s 197(6).

143 S 197(6) read with s 189(1). The union, rather than the employees, must represent the employees irrespective of whether it has a bargaining relationship with the university: see s 189(1)(b)(ii).

In the above situation the aim would be to find an acceptable compromise between the cost of the *status quo* and that of the arrangement which the university and the service provider initially contemplated.

To assist the process, both employers would have to disclose to the union "all relevant information that will allow it to engage effectively in the negotiations".¹⁴⁴ It may be expected that the union, drawing on its experience in other situations, would bring suggestions to the table for averting the harshest consequences for its members. By its presence, it might also induce the university to seek expert advice it might otherwise not have sought. In the process, more creative expedients may be arrived at than either might initially have imagined.

If agreement is reached it would, most probably, involve concessions by all parties. Mrs X might hope to retain certain benefits – for example, the university might concede the continuation of reduced tuition fees for the transferred employees and their children. The service provider might be persuaded to offer improved medical aid facilities to all its employees. In return, the union might agree to a productivity arrangement – for example, making wage increases dependent on increased performance. Though all parties might ritually criticise the outcome, it would be the best that any of them could hope for in the absence of industrial conflict or court action, the result of which would be both costly and uncertain.

It may thus be concluded that section 197 may indeed offer protection to the socio-economic rights enjoyed by employees who are subject to an outsourcing transaction. The nature and extent of the protection, however, need not be left to a court to determine. It is open to the parties to do so themselves.

Time, however, will be of the essence. The scenario sketched above shows how important it is for employers, as well as unions, to be well and timeously advised in the run-up to an outsourcing transaction. In a polarised relationship, if there is one option worse than the avoidance of section 197, it could be its mechanical application unmediated by collective bargaining.

APPENDIX: OTHER SOUTHERN AFRICAN COUNTRIES¹⁴⁵

Botswana

The relevant legislation in Botswana is concerned in the first place with protecting employees' continuity of service in the event of transfer to a new employer, rather than with protecting terms and conditions of employment. Section 29(1) of the Employment Act of 1982 (Chapter 47:01) provides as follows:

144 S 197(6)(b)

145 Research was conducted in respect of Botswana, Lesotho, Namibia, Swaziland, Zambia and Zimbabwe. In respect of Mozambique no materials could be located in any accessible library or electronic database.

If a trade, undertaking, business or enterprise (whether or not it is established by or under any written law) is transferred from one person to another and an employee . . . continues to be employed therein, the period of continuous employment immediately preceding the transfer shall be deemed . . . to be part of the employee's continuous employment with the transferee immediately following the transfer.

Section 29(2) makes a similar provision where one body corporate is substituted for another as employer and section 29(3) where an employer dies and employment is continued under the legal personal representatives or trustees of the deceased. Finally, section 29(4) provides that if there is a change in the partners, legal personal representatives or trustees who employ any person, the employee "shall be deemed to remain in employment with the same employer and such change shall be deemed . . . not to interrupt such employment".

The protection thus provided leaves the common law essentially undisturbed.¹⁴⁶ The contract of employment and other rights and obligations are not transferred automatically. The old employer will terminate all contracts and the new employer is free to re-employ the employees or not employ them. In terms of section 27 an employee may protest against termination to the labour officer within 14 days. In terms of section 28 the employee is entitled to severance pay if the employment is terminated for any reason unless the employee's service with the employer was less than 60 months, or if he/she was dismissed for serious misconduct, or if he/she is entitled to the payment of a gratuity or/and pension.

It furthermore appears that the Act only applies to the transfer of a whole business and not to part of a business. The Act only protects those employees who were employed by the old employer at the time of the transfer and are re-employed immediately by the transferee. In that case the section provides continuous employment (previous employment is reckoned as employment with the transferee which might be relevant in connection with pension, promotion, severance pay (as a five year service award in terms of section 28 of the Act) or period of notice for dismissal).

"transferred"

The section simply uses the term "transferred". It appears to include, therefore, any transfer, including a merger and, provided an entire "trade" or "undertaking" is outsourced, possibly outsourcing as well. It is likely, however, that South African case law will be persuasive.

Lesotho

Relevant legislation in Lesotho is confined to "contracts of foreign service". Section 163 of the Labour Code Order 24 of 1992 provides that a

¹⁴⁶ In Part IV of the Act, dealing with special contracts in relation to recruitment, s 49 provides that the transfer of any contract of employment from one employer to another "shall be subject to the consent of the employee and the endorsement of the transfer upon the contract by a labour officer".

contract of employment may be transferred to a new employer if the (old) employer and the employee “mutually agree” thereto and if a labour representative or attesting officer authorises the transfer.

No provision is made in regard to the transfer of a business as a going concern and it must be assumed that in this event the common law rule will apply. Contracts of employment will be terminated by the old employer and the new employer will be free to re-employ the employees on new terms and conditions of employment. The new employer will not be liable for claims that arise out of the prior employment relationship.

The employee's sole entitlement will be to severance pay in terms of section 79 unless he/she has been dismissed for misconduct. Severance pay is due to employees who have completed more than one year of continuous service “with the same employer” and is equivalent to two weeks' wages for each completed year of service.

Namibia

The Labour Act 6 of 1992 preserves the employer's common law right to dismiss employees upon transfer of a business and explicitly provides that such dismissal shall be treated as retrenchment.

Section 50 of the Act provides for the collective termination of contracts of employment “on account of the re-organization or transfer of the business” on the same basis as for other operational reasons. The old employer may terminate any or all of the contracts but must inform any recognised trade union (or, if such a trade union does not exist, the workplace union representative) as well as the Labour Commissioner of the facts set out in section 50(1). In the case of the union or workplace union representative such information must be provided at least four weeks before termination.

Thereafter the union, workplace union representative or employees must be allowed an opportunity to negotiate about the conditions of termination. In terms of section 52 the employer is further required to pay severance pay to all employees who have completed at least twelve months of employment unless their dismissal took place for reasons of misconduct or “incapability” or if any of the further conditions set out in section 52(2) are present.

It follows that the new employer may re-employ the dismissed employees on new terms and conditions of employment.

Swaziland

Neither the Employment Act 5 of 1980 nor the Industrial Relations Act 1 of 1996 contains provisions relevant to the transfer of an enterprise as a going concern. In terms of section 35 of the Employment Act employees are entitled to severance pay upon termination of their services unless termination is for a fair reason in terms of section 36. One such fair reason is “because the employee is redundant”.¹⁷ It is unclear whether

147 S 36(j).

employees dismissed prior to the transfer of a business can be considered "redundant" under certain circumstances. If so, it would disentitle them from receiving severance pay.

Zambia

The Industrial and Labour Relations Act 27 of 1993 and the Industrial and Labour Relations (Amendment) Act 30 of 1997 contain no provisions relevant to the transfer of a business as a going concern. The Employment (Special Provisions) Act 29 of 1975 is applicable only during a state of emergency.

Zimbabwe

Zimbabwe is the only Southern African country outside South Africa to have enacted legislation providing for the transfer of contracts of employment upon transfer of a business. These provisions precede the South African LRA by a good many years.

A number of regulations relevant to the transfer of a business as a going concern were contained in the Transport Operating Industry Employment Regulations, 1961,¹⁴⁸ applicable to all employers and employees in the transport operating industry in what was then Southern Rhodesia.

Regulation 19(1) states that "[c]ontinuous service shall only be deemed to be broken by the death, resignation, retirement or discharge of the employee concerned". Regulation 19(2) adds that continuous service is deemed not to be broken if an employee is dismissed and re-employed within two months in certain circumstances. Regulation 19(4) specifically provides as follows:

If upon the change of ownership of the establishment an employee enters the service of the new owner or continues his employment in the establishment, his service with the previous owner shall be reckoned as service with the new owner and shall be deemed not to have been broken by such change of employer.

While the purpose of the regulation was to protect employees who were dismissed due to the sale of a business but were re-employed by the new employer by preserving their continuity of service, their contracts of employment were not transferred automatically. In *Attorney General of Southern Rhodesia v Thornton's Transportation Rhodesia (Private) Ltd*¹⁴⁹ it was held that the intention of the regulations "was that continuous service rendered before the regulations came into force must take into account to determine an employee's minimum rate of pay from then on . . . It was never intended that on the coming into force of the regulations each employee would be deemed to have started work on that date and his minimum rate determined on that basis".¹⁵⁰

148 Government Notice No. 408 of 1961.

149 (1964) R.L.R. 150.

150 at 152 G.

The Labour Relations Act 16 of 1984¹⁵¹ now provides for the automatic transfer of the reciprocal rights between employer and employee from the old employer to the new employer in the event of the transfer of a business, including length of service. The relevant part of section 16(1) reads as follows:

[W]henever any undertaking . . . is alienated or transferred in any way whatsoever, the employment of [persons employed there] shall, unless otherwise lawfully terminated, be deemed to be transferred to the transferee of the undertaking on terms and conditions which are not less favourable than those which applied immediately before the transfer, and the continuity of employment of such employees shall be deemed not to have been interrupted.

“undertaking”

Although section 16(1) makes no mention of “going concern”, Gubbay CJ in *Mutare Rural District Council v Chikwena*¹⁵² interpreted the term “undertaking” to mean “a separate and viable business”. Reference was also made to the “somewhat similar provision” contained in section 197 of the South African LRA and rulings of the South African Labour Court¹⁵³ on the meaning of the phrase “as a going concern” were described as “apposite”. The meaning of “undertaking” may thus be taken to be same as “a going concern”.

“the employment”

All rights and obligations between the old employer and the employee are included in the transfer, whether contractual or otherwise. No distinction is drawn between transfers in general and transfers under circumstances of insolvency. The effect is that all rights and obligations will be transferred to the new employer even in the event of the old employer’s winding up or sequestration.¹⁵⁴

Subsection 2(c) provides that the rights that the employees had against the old employer “immediately before the transfer” may be enforced either against the new employer or against both the old and new employers.

In terms of subsection (2)(b) the employees may agree to conditions of employment which are less favourable than those which applied “immediately before the transfer”. Rights to social security, pensions, gratuities or other retirement benefits, however, may only be reduced with prior written authority of the Minister of Labour.

151 Ch 28:01; as amended by the Labour Relations Amendment Act 20 of 1994.

152 2000 (1) ZLR 534 (SC) at 537E, with reference to an Australian case *Top of the Cross (Pty) Ltd v Federal Commissioner of Taxation* (1980) 50 FLR 19.

153 In *Manning v Metro Nissan* (1998) 19 ILJ 1181 (LC) at 1189; *Schutte & Others v Powerplus Performance (Pty) Ltd & Another* (1999) 20 ILJ 655 at 664.

154 Ie, in contrast to the position in terms of s 197A(2)(b) of the South African LRA (as amended). The reason, apparently, is that many employers sold their companies due to the change of government in 1980 and left the country without paying retrenchment benefits to employees: Blackie & Horwitz “Transfer of Contracts of Employment as a result of Mergers and Acquisitions: A Study of Section 197 of the Labour Relations Act 66 of 1995” (1999) 20 ILJ 1387 at 1405.

“unless otherwise lawfully terminated”

Section 16(1) does not prevent the dismissal of employees prior to transfer of the business for any lawful reason other than the transfer itself. In *Mutare Rural District Council v Chikwena*¹⁵⁵ it was furthermore held that “all or some of the employees [may] be excluded by agreement¹⁵⁶ from the alienation or the transfer of the undertaking to the new employer. The phrase ‘deemed to be transferred’ makes this clear”.¹⁵⁷ If this is so, it would greatly reduce the protection of employees, in that employees excluded from the transfer may well face retrenchment by the old employer and would thus be left with no right except to severance pay and other outstanding remuneration and/or benefits.¹⁵⁸

Any violation or evasion of section 16, actual or attempted, is declared an unfair labour practice in terms of section 16(3). It is unclear whether an agreement between the old employer and new employer to exclude employees from the transfer without a reason consistent with the purposes of the section would be seen as an attempt at evading its requirements.

155 2000 (1) ZLR 534 (SC).

156 I.e. between the old employer and the new employer.

157 At 538 D-F.

158 See s 13.