BUSINESS TRANSFERS

– SECTION 197 OF THE LRA

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SUMMARY OF THE PRINCIPLES OF SECTION 197

Three elements:

- Transfer
- of a business
- as a going concern

Generally does not apply to sale of share transactions

Business for purposes of section 197 meanspart or whole of a service, undertaking or business

The courts are concerned with substance over form. The application of section 197 of a factual inquiry

Not all assets need to be transferred to attract the application of section 197 of the LRA. It is the essential assests capable that constitute a business must be transferred

The termination of SLA may constitute sale of business where there is a transfer or complete service

A business for purposes of section 197 of the LRA constitutes an discrete economic entity capable of transfer

Transfer section of the employees may trigger s197 if employees for purposes of section 197 constitute a "*business*"

Employees must be transferred on terms and conditions which on the whole are not less favourable

INTRODUCTION

In terms of section 197 of the Labour Relations Act 66 of 1995 (LRA), when a business is transferred as a going concern, the effect is that employees of that business automatically become employed by the new owner of the business, without the need for new contracts of employment between the employees and the new owner.

Under the common law, contracts of employment did not transfer automatically to a new employer when the business in which the employee was employed was transferred as a going concern. This was in accordance with the contractual principle that contracting parties may not assign their contractual rights and obligations to a third party without the other contracting parties' consent. However, this principle had an adverse impact on the continuity of affected employees' employment.

Section 197 of the LRA was enacted to change the common law position, with the effect that an automatic transfer of contracts of employment from the transferring employer (previous employer) to the acquiring employer (new employer) now takes place in the event that the whole or part of any business, trade, undertaking or service is transferred from the previous employer to the new employer, as a going concern.

Section 197 of the LRA therefore makes provision for an exception to the principle that the contract of employment may not be transferred without the consent of the employees, and it has the dual purpose of both facilitating transfers of businesses and protecting employees' interest in job security, as was stated by the Constitutional Court in the matter of *NEHAWU v University of Cape Town & Others [2003] 24 ILJ 95 (CC) (NEHAWU)* and subsequent cases thereafter.

For a transaction to fall within the scope of section 197 of the LRA, the following three elements must simultaneously be present:

Transfer:
A transfer of an entity by one employer to another

Business:
The transferred entity must be the whole or a part of a business, trade, undertaking or service

"Going concern: As in"
The business must be transferred as a going concern

Sale of share transactions do not attract the attention of section 197, as the identity of the employer remains unchanged, and hence contracts of employment remain unaffected. However, to the extent that businesses are restructured pursuant to the sale of shares, section 197 may be triggered. This will be a factual enquiry taking into account the elements of section 197 together with the relevant factors for consideration as outlined by the courts.

In *Road Traffic Management Corporation v Tasima (Pty) Ltd; Tasima (Pty) Ltd v Road Traffic Management Corporation (2020) 41 ILJ 2349 (CC)* (Tasima) the court held as follows: *"A legal causa is a prerequisite for the application of s197. It follows that only once the source of the respective rights and obligations to effect and receive transfer has been identified, can it be determined whether the jurisdictional facts for the application of s197 are present. Once the legal causa is identified, the factual enquiry outlined in NEHAWU can be conducted. Thus, an enquiry as to the causa must be conducted before applying the test in s 197 to the facts. Otherwise one is looking at facts without the legal parameters being in place".*

ELEMENT ONE: TRANSFER FROM ONE ENTITY TO ANOTHER

ELEMENTS OF SECTION 197 OF THE LRA

What constitutes 'a transfer'?

Any commercial transfer mechanism may suffice, irrespective of whether it takes the form of, or is in reality, a sale of business, merger, takeover, outsourcing, exchange, donation or any other mechanism which has the effect of shifting an entity from one employer to another.

The type of transaction involved is not determinative of the question of whether there was a transfer from one employer to another. In each instance, the relevant facts must be evaluated. The enquiry is always one of substance over form.

In a South African context, transfers of services, whether as 'first' or a subsequent generation transfer, are likely to attract the application of section 197.

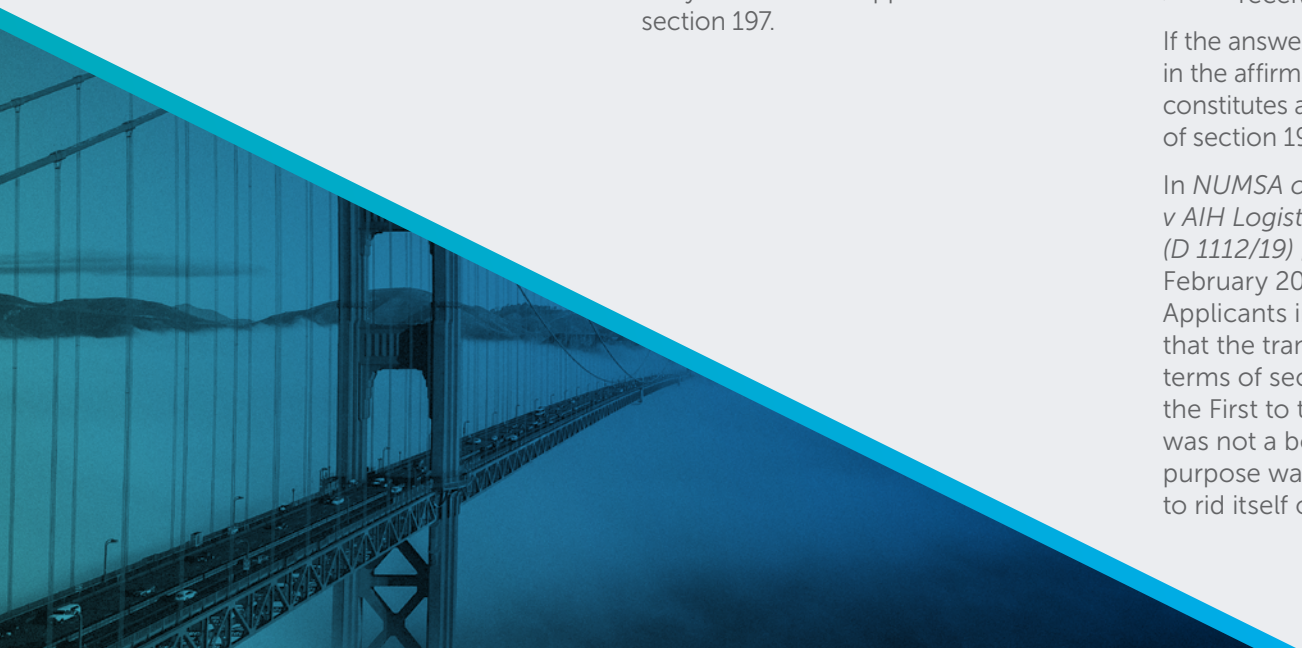
Franchise agreements (termination of one franchise agreement, and subsequent replacement of the franchisee) have been held to fall outside of section 197. It is, however, not the name of the transaction that is determinative, but rather:

1. Does the transaction concerned create rights and obligations that require one entity to transfer something in favour of/or for the benefit of another, or to another?
2. If the answer to (1) is in the affirmative, does the obligation imposed with the transaction contemplate a transferor who has the obligation to effect a transfer or allow a transfer to happen and a transferee who received the transfer?

If the answer to the second question is in the affirmative, then the transaction constitutes a transfer for the purposes of section 197 of the LRA.'

In *NUMSA obo Members and Others v AIH Logistics (Pty) Ltd and Another (D 1112/19) [2023] ZALCD 3 927* February 2023) (AIH Logistics), the Applicants in this matter alleged that the transfer of the business in terms of section 197 of the LRA from the First to the Second Respondent was not a bona fide transfer and its purpose was for the First Respondent to rid itself of a certain portion of its labour force. There was no dispute that the transfer did in fact occur or that the Applicants continued to do the same work for the Second Respondent as they did for the First Respondent. The Applicants argued that the business had not 'changed hands' as was required by section 197; certain employees in the business were not transferred; no price had been paid for the transfer; the Second Respondent was making rent-free use of the First Respondent's premises; the First Respondent retained the primary contractual relationship with the client for which the Second Respondent was doing assembly work; there was no sale or lease of tools or transfer of assets and the First Respondent had retained meaningful control over the Applicants.

The court held that in order for section 197 to apply, it does not mean that all assets and personnel must be transferred from the old employer to the new employer. "*However, in a true arm's length transfer of business, what should be transferred are those assets and personnel that are essential to the business as it was operated by the transferor, as without the transfer of the means to do the work, there could be no transfer of the business as a going concern.*" The court held that what given the facts of the case, there was no transfer in terms of section 197 of the LRA.



ELEMENT TWO: "BUSINESS"

What constitutes 'a business' or 'part thereof' for purposes of section 197 of the LRA?

'Business' is defined very widely in section 197 of the LRA to include the whole or part of any:

- business,
- trade,
- undertaking or
- service.

Normally, one would be able to establish whether what is being transferred is a business by looking at the constituent parts of the business, and by determining which of these parts are to be divested of by the 'seller'. Not all the components of a business need to be transferred, or transferred simultaneously, for section 197 of the LRA to be applicable. For instance, a business may have been transferred whether or not all of the fixed assets of the business were transferred with the workforce, contracts and name.

In the case of *Tasima* the court held that:

> *"A 'business' could have a variety of components: tangible or intangible assets, goodwill, management staff, a workforce, premises, its name, contracts with particular clients, the activities it performs, its operating methods etc. The various components that are transferred must be sufficiently linked so that it can be said that, together, they form an economic entity capable of being transferred."*

The Constitutional Court in *Rural Maintenance (Pty) Limited and Another v Maluti-A-Phofung Local Municipality (2017) 38 ILJ 295 (CC)* (Rural Maintenance) found that any court must make a factual finding on what assets are essential for the operation of the business with reference to the nature of the business. Accordingly, for section 197 to apply, it is the essential assets (of a business) that must be transferred.

ELEMENT THREE: GOING CONCERN

What constitutes a 'going concern'?

Whether the element of 'going concern' has been met, is a factual enquiry, determined objectively in the light of circumstances of each transaction, and is therefore based on the particular set of facts in question. No single factor is determinative, and the factors to be taken into account do not constitute a closed list. Factors to be taken into account include:

The transfer or otherwise of assets, both tangible and intangible,

whether or not workers are taken over by the new employer,

whether customers are transferred, and

whether or not the same business is being carried on by the new employer.'

In *NEHAWU* the constitutional court, when defining the term "*going concern*" held as follows: "*The phrase 'going concern' is not defined in the LRA. It must therefore be given its ordinary meaning unless the context indicates otherwise. What is transferred must be a business in operation 'so that the business remains the same but in different hands'. Whether that has occurred is a matter of fact which must be determined objectively in the light of the circumstances of each transaction. In deciding whether a business has been transferred as a going concern, regard must be had to the substance and not the form of the transaction*"

The test for determining a 'going concern', has been described as a 'snapshot' test, where the business is compared before and after the transfer, and if sufficiently alike, will lead to the conclusion that the transfer was a "*going concern*". In *Chemical Energy Paper Printing Wood and Allied Workers Union on behalf of Members v Hydro Colour (Pty) Ltd and Another (2011) 32 ILJ 1677 (LC),* the court held:

> *"...what should be done in determining whether or not a transfer has taken place is to take a 'snapshot of the entity before the transfer and assessing its components' and comparing the picture with the one of the business after the transfer 'to establish whether it is substantially the same business but in different hands... '*

The intention of the parties (whether a transfer as a going concern is planned) is relevant but not of critical importance, moreover it is the substance, not the form, of the transaction(s) that will be determinative. Deliberate attempts to avoid the effect of section 197 will not survive scrutiny, where the reality contradicts the structure employed by the contracting parties.

DETERMINING THE APPLICATION OF SECTION 197

What factors need to be considered when determining whether the elements of section 197 of the LRA have been met?

The court in NEHAWU held that the assessment of the application of section 197 of the LRA is one of substance over form and must be determined objectively with reference to the particular circumstances of the transaction. The court held further that the following non-exhaustive factors should be considered (each factor is not individually determinative):

Whether there are tangible or intangible assets being transferred;

Whether workers are transferred;

Whether customers are being transferred; and

Whether the same business is being undertaken by the new employer.

Put differently, in the more recent judgement of *Mobile Telephone Networks (Pty) Ltd and Others v CCI SA (Umhlanga) (Pty) Ltd and Others [2023] 10 BLLR 1006 (LAC) (MTN)*, the Labour Appeal Court (LAC) held that the weight given to various factors will differ and must be assessed in the context. The court also provided what they termed the following "*critical attributes*" to determine whether section 197 of the LRA applies to a transaction:

- Business has retained its identity: "*Can the business which is alleged to have been transferred be recognised as such because it has retained its identity post-transfer: ie, is the business in the hands of the alleged 'new' owner the same business that was in the hands of the 'old' owner?*

- *Has the business performing the service been transferred: What 'components' of the 'old' business are visible or discernible which are now in the hands of the alleged 'new' owner? What is required is to locate the business that performs the service, not simply discern the performance of a similar service.*

- *Critical mass of employees: In a labour-intensive business, has a critical mass of the workers moved over to the alleged new owner?*

- *Transfer of assets: What assets – of whatever kind – were possessed by the 'old' owner and are now in the hands of the alleged 'new' owner?*

- *Nature and effect if the agreement: What influence does the agreement between the principal and initial 'outsourcee' have on colouring the circumstances of the alleged transfer?"*

On the basis of the totality of these factors, a court must then determine whether, upon transfer, a distinct economic entity retains its identity notwithstanding that the owner of the entity has changed.

Does the termination of the application of a service level agreement trigger section 197 of the LRA?

The termination of a service agreement may trigger the application of section 197, the answer is fact dependent. Where a service is divested of in a piecemeal fashion for instance, with the cumulative effect being that the previous service provider is replaced by a new service provider, the transaction may be treated as a section 197 transfer, irrespective of the label put on it by the parties provided, it meets the requirements of section 197 of the LRA. However, the mere transfer of a service or the termination of a service level agreement alone is not sufficient to trigger the application of section 197 of the LRA. The court in *Rural Maintenance* held that what must be transferred is a fully functional business.

In the case of *Dimension Data (Pty) Ltd and Others v GWB Technologies cc and others (J478/2022) [2022] (Dimension Data)* the Labour Court considered whether section 197 of the LRA was triggered by a change in service providers rendering outsourced services.

Dimension Data and two other service providers (collectively referred to as "*Didata*") entered into an agreement with the City of Johannesburg (COJ) to provide End-User Computing Services (EUC Services). The contract between Dimension Data was subsequently terminated and after a successful tender process, the tender was awarded to GWB Technologies (GWB) who was then responsible for providing the same EUC Services to the COJ. GWB disputed that the rendering of the EUC Services triggered section 197 of the LRA. The court referred to *Tasima* with regards to the transfer of an economic entity as the basis to determine the application of section 197 of the LRA. The courts therefore had to determine whether the transfer of the provision of the EUC services constituted a transfer of a "*business*" for the purposes of section 197.

The court also held that "*To the extent that GWB contends that the relevant economic entity is Didata, the service provider, this contention confuses the concept of a business with that of a legal entity. For the purpose of section 197, a 'business' does not necessarily refer to a legal entity – a business can comprise of a wide variety of components.*" The court in *Dimension Data* found that the transfer of the right to deliver the EUC services constituted an economic entity capable of being transferred in that the same corporeal and incorporeal assets used for the delivery of the services remained the same, including some of the same employees. In addition, the COJ emphasised the need for the continuity of the services and GWB had no discretion to render the services as "*it sees it*", emphasising the "*as is*" transfer nature of the transfer of the EUC services. The court held that "*The provision of the EUC services comprises a discrete economic entity, and access to the City's IT infrastructure has been handed over to GWB to enable it to carry on the same activity as previously carried out by the employees, on the same premises and for the benefit of the same client.*"

In *Tasima*, the court held: '*Where services are involved, this court has held that what must be transferred is the business that supplies services - not the service itself. That being so, the mere termination of a service contract would not, without more, constitute a transfer within the contemplation of s 197. There must be 'other indicators', such as whether assets and customers were transferred to the new owner and whether employees were taken over by the new owner. In Aviation Union, this court was confronted with the question of whether a clause in an outsourcing contract contemplated the transfer of a business or simply the outsourcing of a service. This court considered the fact that both the premises from which the business was conducted and the assets with which it was conducted were transferred as*

being indicative that there had been a transfer of a business which supplied services as a going concern, rather than a mere outsourcing of a service. On this basis, it concluded that s 197 applied in that matter.'

In *AFMS Group v South African Airways (SOC) Ltd and Others (J 998/2022) [2022] ZALCJHB 256*, the court once again confirmed that the mere cancellation of service agreement is not sufficient to constitute a transfer in terms of section 197 of the LRA. That what must be transferred is a "*business*" and an independent economic entity.

In *SVA Security (Pty) Limited v Makro (Pty) Limited (a division of Massmart) and Others (J720/17) [2017] ZALCJHB 137 (3 May 2017)*. it was held that: *"... [O]nly the service [was] taken over, and not the applicant's business. The applicant [may] continue with its business by providing similar services to other clients. The fact that some of the applicant's employees were [transferred] cannot be indicative of a transfer. To hold otherwise would lead to untenable results in that if every time a contract of service is taken over by a new service provider, and the latter [must] take over all the employees on the basis that a section 197 transfer has taken place, this would imply that the old service provider can simply wash its hands off its employees after losing a contract. Clearly this scenario could not have been anticipated by the drafters of section 197."*

In *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and Others [2015] 8 BLLR 757 (CC) (City Power)*, the court held: *"The transfer of a going concern does not mean that, upon the termination of a service contract by one party and a subsequent appointment of another service provider, a transfer of the contracts sufficient to satisfy the requirements of s 197 has been effected. The question is whether the activities conducted by a party such as [the old service provider], constitute a defined set of activities which represents an identifiable business undertaking so that when a termination of an agreement between [the old service provider] and [the client] takes place, it can be said that this set of activities, which constitutes a discrete business undertaking has now been taken over by another party."*

In *Aviation Union of SA and Another v SA Airways (Pty) Limited and Others 2012 (1) SA 321 (CC) (Aviation Union of SA),* the court held that where there is a transfer of a service, what must be transferred is the business performing the service and not the service. Itself.

Ultimately the courts are concerned with whether a complete economic entity, a "*business*" for purposes of section 197 has been transferred. This can only be determined on a case by case basis.

Was section 197 triggered when the client was compelled through intense political protest to terminate the service agreement and employ a majority of the service providers' staff?

In *Imvula Quality Protection and Others v University of South Africa (J435/17) [2017] ZALCJHB 310 (31 August 2017) (UNISA)* the Labour Court considered this question. The Labour Court held that section 197 was not applicable.

The facts are as follows: UNISA paid a monthly fee to two service providers (two service providers) for them to provide security services which included placing staff at the UNISA campuses, providing uniforms, equipment and managing security services. After it was faced with a demand to insource the outsourced security functions, UNISA terminated the contracts of the two service providers. It then partially insourced the security function and offered employment to the majority the security staff employed by the two service providers. Although the security staff would be employed by UNISA, a new service provider was contracted with to provide its own equipment like torches, guard tracking, uniforms and vehicles to UNISA. The new service provider would also provide managers and supervisors to manage the security service.

The two service providers alleged that section 197 applied to the termination of the contracts and UNISA's offers of employment to their staff. They argued that providing security guards is a service, therefore, a business and the insourcing of the service resulted in the service's continuation. UNISA argued that section 197 did not apply and that there was no transfer of a business as a going concern despite its offers of employment to the staff.

The Labour Court held that "*the termination of a service contract or the appointment of a new service provider does not in itself trigger the application of section 197*".

It referred to two situations "*within the realm of outsourcing and insourcing*" identified by the Constitutional Court. In one situation s197 applies whereas in another it does not. The distinction between the situations arises due to the definition of the term 'business' in s197. The term business includes a service, however, the Labour Court held that although the definition of 'business' does include a service, it is the business supplying the service that is capable of being transferred, not the service itself.

In the first situation identified by the Constitutional Court, the right to provide the services is forfeited by the outgoing service provider but its business is not transferred. The court held that "*in this instance, the right to provide the outsourced service may transfer, but no business is transferred as a going concern.*" In this situation, s197 is not applicable. In the second situation section 197 applies, as in that situation when the service contract is terminated (either because the service is insourced or because there is a change in service providers) the business (and its infrastructure) supplying the service is transferred from the outgoing service provider back to the client or to the new service provider as a going concern.

The Labour Court held that the two service providers failed to show that the termination of the contract fell within the second situation. It importantly held that the two service providers had not established that there was a transfer of a business. It held that "*[a]though it is not impossible for a transfer only of employees to constitute the transfer of a business for the purposes of section 197, the requirement of the existence of a business must be met.*"

In this case, no assets and no infrastructure were transferred from the two service providers to UNISA. Other than the employees working on UNISA contracts, the two service providers retained all remaining components making up their own businesses and could offer security services to other clients.

On Appeal, the LAC held the two service providers businesses did not just comprise of security guards. It held UNISA did not seek to run a security service and the security business at the UNISA campuses constituted more than guards patrolling the campus. The appeal was dismissed.

TRANSFERING EMPLOYEES

Which employees will be transferred?

Where a part of the business is being transferred it becomes difficult to determine whether employees form part of the 'business'.

There is no South African authority on this issue. However, based on international trend, relevant considerations should include:

Which cost centre pays the employee's cost

How much time the employee spends on the business (or part thereof)

Whether the employee(s) allocated to the particular business unit form a coherent grouping

The amount of value given to the business by the employee

The terms of the employee's contract of employment

Can the transfer of employees alone constitute a transfer in terms of section 197 of the LRA?

This is a fact dependent enquiry and will be determine with reference to whether the employees, alone, constitute an independent economic entity capable of transfer.

The court in *UNISA* held that the transfer of employees alone did not trigger the application of section 197 of the LRA. No infrastructure or assets were exchanged between service providers and that the employees alone did not constitute a "*business*" for the purposes of section 197 of the LRA.

The Labour Court, in *Imvula Quality Protection and others (Red Alert Tss (Pty) Ltd and others as Intervening applicants) v University of South Africa [2017] 11 BLLR 1139 (LC)* (upheld on appeal), held, in the context of transferring of employees alone: *"Although it is not impossible for a transfer only of employees to constitute the transfer of a business for the purposes of section 197, the requirement of the existence of a business must be met. It makes no difference that the nature of the business is the provision of a service, the business that supplies the service must be transferred."*

Are restraints of trade agreements capable of transfer in terms of section 197 of the LRA?

Yes. In *Slo Jo Innovation (Pty) Ltd v Beedle and Another (J 737/22) [2022] ZALCJHB 212; [2023] 1 BLLR 68 (LC); (2023) 44 ILJ 839 (LC) (10 August 2022)*, the court held that restraint of trade agreements contained in employee contracts are capable of transfer in terms of section 197 of the LRA.

This principle was also confirmed by the High Court in *Avis Southern Africa (Pty) Limited and Others v Porteous and Another 2023/0817898) [2023] ZAGPJHC 1160*, wherein it was held that *"[w]hen a restraint agreement is entered into for the benefit of the business, the benefit so created is incidental to the business and part of its goodwill with the result that the benefit will ordinarily pass to the purchaser, unless the parties intended the contrary to be true."*

Employee rights

The primary protection afforded to employees in terms of section 197 is the right to continuity of employment. This was given expression in sections 187 and 197 of the LRA. A dismissal for a reason related to a transfer of a business as a going concern will constitute an automatically unfair dismissal in terms of section 187(1)(g) of the LRA, which will result in the more onerous remedies associated with automatically unfair dismissals being available to the successful employee.

In terms of section 197 of the LRA, the new employer is automatically, without the need to consult or obtain consent from any parties, substituted in the place of the previous employer in respect of all contracts of employment. All of the rights and obligations (whether contractual or otherwise) that existed between the previous employer and the employees, will continue in force against the new employer. Actions taken by the previous employer before the transfer (including the unfair dismissal of an employee who would otherwise have been transferred) will be considered to have been done by the new employer.

Employees of the transferred business who were dismissed prior to the transfer, can therefore claim reinstatement to the transferred business (and even compensation from the new employer) insofar as their dismissals were unfair.

Despite the statutory obligation that the new employer be substituted for the previous employer, as a contracting party to the employment contract, the new employer will nonetheless still comply with the requirements of section 197 if it transfers employees on terms and conditions that are on the whole not less favourable to the employees than those on which they were previously employed. In the same vein, the new employer may transfer the employees to a different pension, provident, retirement or similar fund, if the criteria in section 14(1)(c) of the Pension Fund Act 24 of 1956 (Pension Fund Act) are met.

The new employer's ability to unilaterally replace existing contractual terms with 'terms which are on the whole not less favourable' does not, however apply to any terms and conditions of service contained in a collective agreement – such terms and conditions must be applied exactly as contained in the collective agreement.

Unless otherwise agreed, the new employer will be bound by any arbitration awards made in terms of the LRA, the common law or any other law, as well as any binding collective agreements.

It is open to the parties to agree to contract out of the aforestated employee protections, however, any attempt to contract with a transferred employee to the effect that prior service to the previous employer will be disregarded, will be pro non scripto and hence unenforceable. Such agreements must be in writing and must be entered into between at least one of the previous or new employers (or both) and the employees, as well as any person or body (such as a trade union) that the employer must consult with in an operational requirement dismissal context.

Please refer to the CDH Retrenchment guideline for more information

Section 197 of the LRA introduces some formalities for the commercial partners in the transfer of the business, non-compliance with which may result in post-transfer liabilities for previous employers. The previous and new employers must agree on a valuation (as at the date of transfer) of various amounts due to employees, such as accrued leave, severance pay that would have been payable, and any other unpaid amounts that have accrued to employees. The two employers must also agree which employer is liable to pay these amounts, and what provision is being made for such payment. If they agree to apportion the liability, the terms of the apportionment must be agreed. The terms of the agreement must be disclosed to all transferred employees.

If the previous employer fails to meet the obligation to reach this agreement with the new employer, the previous employer will be jointly and severally liable with the new employer, for a period of 12 months after the transfer, should any of the listed accrued dues become payable.

In addition, the previous and new employers are jointly and severally liable for any claim concerning any term or condition of employment that arose prior to the transfer.

Are employers prohibited from initiating retrenchment proceedings following a section 197 transfer?

No. However the reason for the dismissals must be linked to the bona fide operational requirements of the new employer and cannot be casually linked to the employees having been taken over in terms of section 197 of the LRA. The two step factual enquiry set out by the Constitutional Court in *South African Chemical Workers Union and others v Afrox Limited (JA24/98) [1999] ZALAC 8*, finds application.

Information and consultation

The transferred employees need only be consulted on the transfer, and the terms and conditions of employment thereafter, if the previous and/or new employer wants to contract out of the protections afforded employees in terms of s197. Such consultation cannot result in a unilateral implementation of the employers' position – it is only possible to deviate from s197 by agreement. As previously stated, it is not possible to agree that the transfer will interrupt the employee's term of service – the years of service with the previous employer cannot be nullified.

Agreements where employees consent to deviate from section 197 must be in writing and must be entered into between at least one of the previous or new employers (or both) and the employees, as well as any person or body (such as a trade union) that the employer must consult with in an operational requirement dismissal context.

In any negotiations to conclude an agreement to contract out of section 197's protections, the employer or employers concerned must disclose to the person or body concerned all relevant information that will allow it to engage effectively in the negotiations.

The terms of the written agreement between the previous and new employers that regulate which employer is liable for the amounts that had to be valued and agreed (as previously stated), must also be disclosed to any new employees who become employed by the new employer after the transfer.

SECOND GENERATION

OUTSOURCING

Outsourcing transaction (irrespective of the 'generation') is likely to attract section 197 of the LRA.

Some uncertainty existed in our law regarding the applicability of section 197 to second and further generation outsourcing transactions which has been definitively resolved in a series of recent cases, most notably *Aviation Union of SA and Another.*

The same test to be used for general commercial transactions applies (as set out previously) to the so-called second generation outsourcing transactions, and the determinative factor is (again) not the name of the transaction, but its effect. When determining whether a subsequent generation transfer should be considered a section 197 transfer, the initial transfer transaction will (although not determinative in and of itself) be scrutinised. Such an initial transaction may well contain provisions that are indicative of the parties' intention for the business going forward, such as provisions retaining the previous employer's right to replace the service provider in future with a third party. There is no absolute requirement that the initial transaction, which resulted in a service being rendered by an external entity, should have constituted a section 197 transfer for subsequent dealings with such service to restart under section 197.

In addition, the conduct of the parties, as well as the current transaction documents (at the time of a subsequent transfer) will also be analysed to determine whether section 197 is applicable.

INSOLVENCY

Transfers of contracts of employment in circumstances of insolvency

Section 197A of the LRA applies to a transfer of a business if the previous employer is insolvent, or if a scheme of arrangement or compromise is being entered into to avoid winding-up or sequestration for reasons of insolvency.

Despite the Insolvency Act 24 of 1936, if a business is transferred in insolvent circumstances, the employees employed in that business will follow the business, and the new employer is automatically substituted in the place of the previous employer.

Should the transfer take place under these circumstances, employees will retain the contractual terms and conditions they enjoyed prior to the transfer (or at least on the whole not less favourable), but the rights and obligations that existed between them and the previous employer, before the transfer, will remain only between them and the previous employer, and will not transfer to the new employer. Similarly, anything done by the previous employer, prior to the transfer, will be considered to have been done only by the previous employer, and the new employer will bear no responsibility for same.

It remains impossible however to nullify past years of service, and this cannot be changed, even by agreement.

The new employer may transfer the employees to a different pension, provident, retirement or similar fund, if the criteria in section 14(1)(c) of the Pension Fund Act are met.

Unless otherwise agreed, the new employer will be bound by any arbitration awards made in terms of the LRA, the common law or any other law, as well as any binding collective agreements. Accordingly, terms and conditions of service contained in a collective agreement must be applied exactly as contained in the collective agreement, and the new employer will not be able to apply 'on the whole not less favourable terms' unless an agreement to the contrary is reached with the employees. Such agreement must conform to the same requirements of negotiation and information sharing as is the case with normal section 197 transfers.

The section 197 obligations that rest on the two employers, to agree to certain valuations and make provisions for payments, do not apply to transfers that fall under section 197A, and neither will any joint and several liabilities arise.

Disclosure of information concerning insolvency

Section 197B applies to an employer that is facing financial difficulties that may reasonably result in the winding-up or sequestration of the employer, must advise a consulting party (any person or body, such as a trade union, that the employer must consult with in an operational requirement dismissal context) of these financial difficulties.

An employer that applies to be wound up or sequestrated, whether in terms of the Insolvency Act or any other law, must at the time of making such application, provide the aforestated consulting parties with a copy of the application. Similarly, if the employer receives an application for its winding-up or sequestration from a third party, it must supply the relevant consulting party with a copy of such application within two days of receipt thereof, or within 12 hours, if the application is brought on an urgent basis.

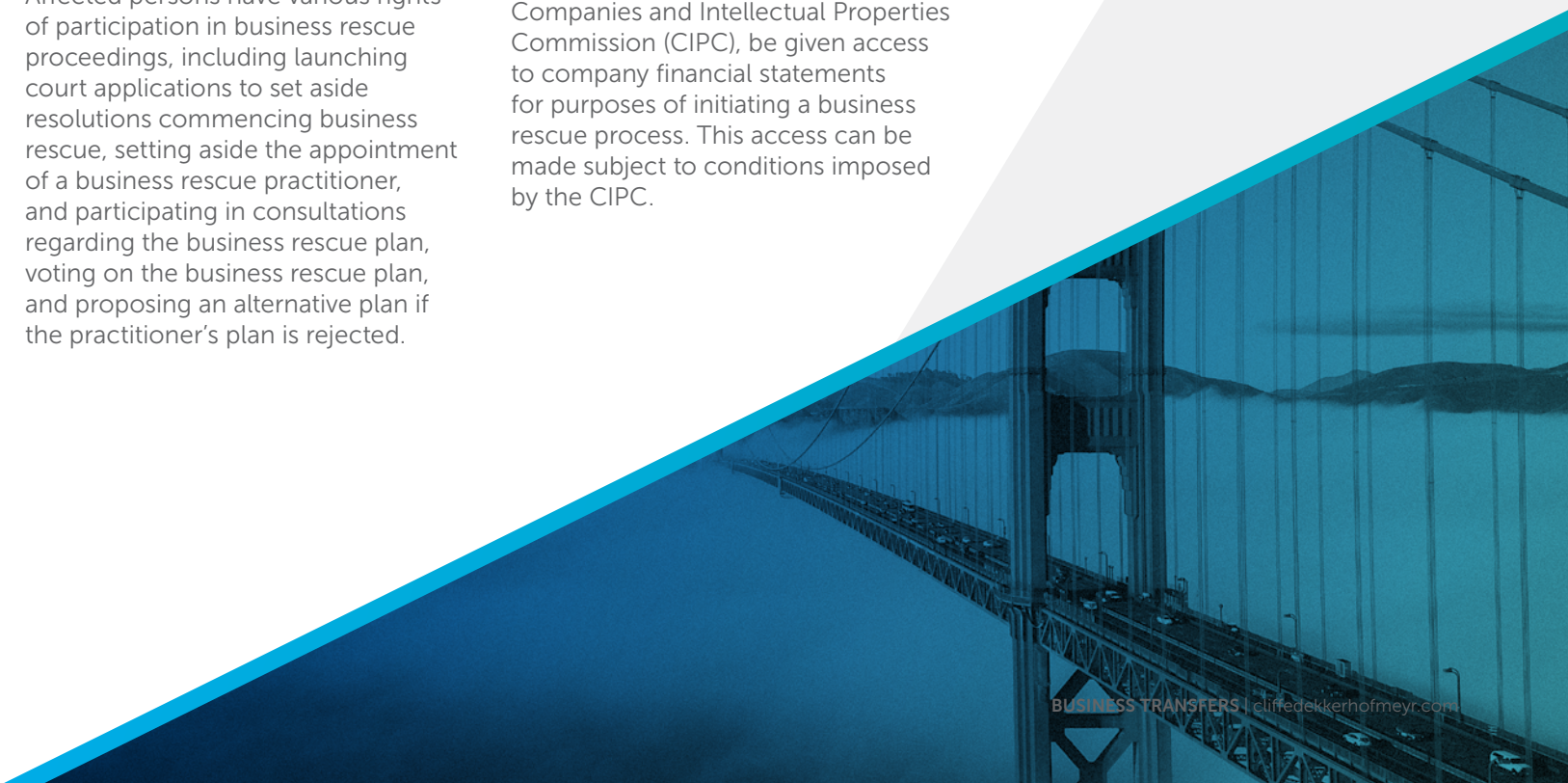
The Companies Act 71 of 2008 (Companies Act) also requires that, in certain circumstances, notice be given to all 'affected persons' of the company's financial distress. The term 'affected person' includes registered trade unions representing employees of the company, and if any of the employees are not represented by a registered trade union, then to each of those employees or their respective representatives. An example of a circumstance in which the board has a statutory duty to disclose information to employees is where the board of a company resolves to begin business rescue proceedings.

If it adopts and files such a resolution, it has to notify all affected persons within five business days that the resolution was adopted. It must also furnish a sworn statement of the relevant facts. Thereafter, the company must periodically provide information relating to the business rescue process to affected persons, including the identity of the business rescue practitioner.

Affected persons have various rights of participation in business rescue proceedings, including launching court applications to set aside resolutions commencing business rescue, setting aside the appointment of a business rescue practitioner, and participating in consultations regarding the business rescue plan, voting on the business rescue plan, and proposing an alternative plan if the practitioner's plan is rejected.

A company that objectively finds itself in financial distress as defined in the Companies Act, but fails to resolve to place the company in business rescue, must also give notice to affected persons (including the employees, their trade unions and other representatives) of such fact, setting out the criteria that indicate that the company is in financial distress, and its reasons for not adopting a business rescue resolution.

The Companies Act further confers another business rescue related right to access to information on trade unions, in section 31. Trade unions must, through the intervention of the Companies and Intellectual Properties Commission (CIPC), be given access to company financial statements for purposes of initiating a business rescue process. This access can be made subject to conditions imposed by the CIPC.



MARKET RECOGNITION

Our Employment Law team is externally praised for its depth of resources, capabilities and experience.

Chambers Global 2014–2024 ranked our Employment Law practice in Band 2 for employment. *The Legal 500 EMEA 2020–2024* recommended the South African practice in Tier 1. *The Legal 500 EMEA 2023–2024* recommended the Kenyan practice in Tier 3 for employment.

The way we support and interact with our clients attracts significant external recognition.

Aadil Patel is the Practice Head of our Employment Law team, and the Head of our Government & State-Owned Entities sector. *Chambers Global 2024* ranked Aadil in Band 1 for employment. *Chambers Global 2015–2023* ranked him in Band 2 for employment. *The Legal 500 EMEA 2021–2024* recommended Aadil as a 'Leading Individual' for employment and recommended him from *2012–2020.*

The Legal 500 EMEA 2021–2024 recommended Anli Bezuidenhout for employment.

Chambers Global 2018–2024 ranked Fiona Leppan in Band 2 for employment. *The Legal 500 EMEA 2022–2024* recommend Fiona for mining. *The Legal 500 EMEA 2019–2024* recommended her as a 'Leading Individual' for employment, and recommended her from *2012–2018.*

Chambers Global 2021–2024 ranked Imraan Mahomed in Band 2 for employment and in Band 3 from *2014–2020. The Legal 500 EMEA 2020–2024* recommended him for employment.

The Legal 500 EMEA 2023–2024 recommended Phetheni Nkuna for employment.

The Legal 500 EMEA 2022–2024 recommended Desmond Odhiambo for dispute resolution.

The Legal 500 EMEA 2023 recommended Thabang Rapuleng for employment.

Chambers Global 2024 ranked Njeri Wagacha in Band 3 for FinTech. *The Legal 500 EMEA 2022–2024* recommended Njeri for employment. *The Legal 500 EMEA 2023–2024* recommends her for corporate, commercial/M&A.

BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE
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