

**THE INTRICACIES OF SECTION 197 OF THE LRA IN PROTECTING THE RIGHTS OF
EMPLOYEES RESULTING FROM BUSINESS TRANSFERS**

by

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Abstract

Section 197 of the Labour Relations Act 66 of 1995 plays a crucial role in safeguarding the rights of employees during business transfers. This provision aims to ensure job security and protect the terms and conditions of employment for employees affected by such transfers. Section 197 imposes an obligation on the new employer to retain the existing employees' contracts of employment, preserving their rights and benefits. It mandates that the new employer step into the shoes of the previous employer concerning all employment-related matters. The intricacies of Section 197 extend to various aspects, including continuity of service, preservation of benefits, and protection against unfair dismissal. Employees are shielded from arbitrary termination or detrimental changes to their working conditions due to a transfer of business ownership. Despite its protective intent, challenges arise in interpreting and applying Section 197. Issues such as defining a 'transfer,' determining who qualifies as an employee covered by the provision, and addressing disputes over compliance can complicate its implementation. Section 197 of the Labour Relations Act serves as a vital mechanism for upholding employee rights in the context of business transfers. Understanding its nuances is essential for both employers and employees to navigate these transitions while ensuring fairness and adherence to legal requirements.

List of abbreviated terms

BCEA.....	Basic Conditions of Employment Act 75 of 1997
CC	Constitutional Court
DSD	Department of Social Development
ILO.....	International Labour Organisation
LAC	Labour Appeal court
LC.....	Labour Court
LRA	Labour Relations Act 66 of 1995
MEC.....	Members of the Executive Council
MSD.....	Ministry of Social Development
NEHAWU.....	National Education, Health, and Allied Workers' Union
PFMA.....	Public Financial Management Act
PSA	Public Service Act
SA.....	South Africa
SASSA.....	South African Social Security Agency
SCA	Supreme Court of Appeal
UIF	Unemployment Insurance Fund

Declaration

I, **LEONARA DAISY HAZEL VAN RENSBURG** declare that this mini-dissertation is my own work. I have acknowledged all the sources I have consulted with or used in this mini dissertation. I also certify that this work has not been submitted for any other degree or examination at any other university, except now at the University of Limpopo.

Ms VAN RENSBURG LDH

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Dedication

God has graciously carried me through this work and countless other blessings. My eternal gratitude to His grace and mercy. My children, Tebogo Sharon and Thato Lauren for keeping up with the 'born before technology' mom in me; the shouting and ranting when things went South in all aspects of my life. My mother, Ruth Ngwale does not necessarily have a full understanding nor comprehension of my academic journey but prays about it materialising. My sister Dinky, (may her beautiful soul rest in perfect peace), for the purest form of love. Joan and Florina for understanding and embracing me even in my countless shortcomings. The partner that I had in Emjay, for holding my hand in warm, encouraging ways, especially when it mattered. My family, Jose, Darren Ru, Mary, Katlego, Bokang and Nathi. Katlego Tseka, for keeping me awake every time I needed to be awake. My study buddies, "The Frogs", Tsamago, Shiringane and Seabela for the long and sometimes cold and dark nights (load shedding was real) spent in my office or home studying. My gratitude to Veli Maphutha for always believing in me when I least did. Invaluable relationships were formed during undergrad: Vho Madzhie, Sesi Linkie and Sesi Shibu remain a blessing. Not acknowledging the entire security personnel at my workplace will be a spit in their faces: they were always at my back and called, no matter what time I needed them to let me in or out of the building. My colleagues Sechephi Charity Sekhukhune (may her soul rest in peace), Given, Debra, Ndivhuwo, Reggy and Refilwe for cheering me on.

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CHAPTER 1: INTRODUCTION AND BACKGROUND OF BUSINESS TRANSFERS

1.1 Introduction

Section 197 of the Labour Relations Act (LRA) plays a pivotal role in the regulation of employment contracts during the transfer of businesses or services.¹ This section, intended to protect employees' rights in such transitions, has become a source of significant legal controversy. It is often debated whether section 197 prioritizes labour protection or provides employers with a mechanism to contract out of existing provisions, leading to conflicting interpretations. Furthermore, the undefined terms within the section complicate its application, making it a challenging area of labour law.

This paper examines the application of section 197 using the South African Social Security Agency (SASSA) as a case study. SASSA, tasked with administering social grants under the Department of Social Development (DSD), operates in a unique context where its employees are subject to both public sector regulations under the Public Service Act (PSA) and the oversight of the DSD. This dual regulatory framework presents complexities when considering section 197, particularly in instances of restructuring or changes in operational control

To perform its function optimally, SASSA centralised the provision of social assistance to reduce corruption and improve service delivery to the indigent, the poor, the vulnerable and the needy through monthly payment of social grants to assist with living expenses for those who are unable to support themselves.² The Agency's goal is to reduce poverty and promote social inclusion by ensuring that those in need receive adequate support and care, as provided for in terms of section 27 of the Constitution of the Republic of South Africa, 1996 (Constitution).³

It was in the case of *Mashavha v President of the Republic of South Africa* matter wherein the ruling that sparked the establishment of the SASSA found its roots.⁴ Section 235(8)⁵ provided that the State President was in a position to make a proclamation in the Government Gazette, subject to the provisions of section 126, thereby allowing the stipulations of section

¹ Paul Benjamin, 'A Matter of Ongoing Concern: Judicial Interpretation and Misinterpretation of Section 197 of the Labour Relations Act' (2005)9 (2) *African Journal Online* 169.

² Trusha R 'Corruption and Social Grands in South Africa' (2008) *Institute for Security Studies* 47.

³ The Constitution of the Republic of South Africa (hereinafter referred to as the Constitution).

⁴ *Mashavha v President of the Republic of South Africa and Others* 2005 (2) SA 476 (CC).

⁵ The Interim Constitution of the Republic of South Africa.

235(6)(b), assigning to a competent authority within the jurisdiction of the government of a province, generally or to a specified extent, the administration of law. In short, assigning national functions to provincial government departments was the essence of the *Mashavha* case wherein the applicant based the inconsistent standard operating procedures on the decentralization of the administration of social grants, to provinces.⁶ *Mashavha* was a resident of the Limpopo province (then named the Northern Province), who had, after suffering an unfortunate accident become disabled and subsequently eligible for a disability grant. His application for a disability grant was, in line with the provisions of the Social Assistance Act, approved in October 2000 and he was advised to collect his grant after (three) 3 months. By November 2001 *Mashavha* had not received his disability grant yet and approached an attorney in that regard. After his attorney wrote a letter of demand to both the Minister of Social Development and the MEC of Health and Social Development, he was paid an amount of R2 280.00 instead of R7 740.00, on 25th January 2002.

The fact was what the applicant had based his action on, citing that if the presidential proclamation had not been assigned to another sector it deprived him of the assistance.⁷ Even though the applicant was paid his disability grant later, the proclamation was an issue at play. The Constitutional Court echoed the finding of the Pretoria High Court that Proclamation R7 of 1996 was unconstitutional and therefore invalid. However, the order of invalidity was suspended for 18 months from the date of order so that the Social Assistance Bill and the South African Social Security Agency Bill could be enacted to pave the way for the establishment of the South African Social Security Agency.⁸ In spite of the judgment herein, the woes in respect hereof were still far from over.

Since the 06th of March 2006 was the date on which the order of invalidity was to take effect, the applicants approached the Court on the day, requesting that the invalidity suspension be extended for a further 25 days so that the Minister would be able to finalize the last step of the SASSA Act. The application was dismissed by van der Westhuizen J, as the court viewed the application as falling outside of the time computing method, according to which the suspension took effect from midnight of the day before and by implication the order

⁶ *Ibid.*

⁷ *Mashavha v President of the Republic of South Africa and Others* 2005 (2) SA 476 (CC).

⁸ Media summary of the Constitutional Court CCT14/06 in the ex parte matter of *The Minister of Social Development and Others*.

suspending the invalidity had lapsed, subsequently meaning the Court no longer had the jurisdiction to extend it.

In the Northern Province, the Department of Health and Social Welfare consisted of a single political head, with two separate votes. The Social Welfare component further consisted of three sub-components: i) Social Welfare Services; ii) Community Development; and iii) Social Security Services. It was the service rendered by the latter component that was affected by the *Mashavha* judgment and subsequently became the main objective of the newly established South African Social Security Agency. The Act further empowered the Agency to employ a Chief Executive Officer and other staff members for both the core business, grants administration and support services for the rendering of corporate and financial support services.⁹

In South Africa, several legislations regulate the operations of the South African Social Security Agency (SASSA). The South African Social Security Agency Act was the basis upon which the Agency was established in line with the Constitutional Court judgment.¹⁰ The Social Assistance Act (SSA),¹¹ which provides for the provision of social assistance for people who are unable to support themselves financially. The SSA¹² aims at providing for the establishment of a comprehensive social security system in South Africa, which includes social assistance and other benefits one of which includes medical benefits and pension funds. The Public Finance Management Act, of 1999, (PFMA) provides for the management of public finances in South Africa, including the management of funds allocated for social assistance. National Payment System Act, 1998 (NPSA) aims to provide for the regulation of payment systems in South Africa, including the payment of social assistance to beneficiaries.

The SASSA is a public entity established in 2006 in terms of Schedule 3A of the PFMA to manage, administer and disburse social grants in South Africa.¹³ As the establishment of the Agency was rushed after the committee working on the establishment thereof was not ready as at the date given by the Constitutional Court, available resources have to be used as there was no extension of the due date of establishment, a ministerial determination was put in place until the Agency was in a position to create its own legislation as a state entity.

⁹ South African Social Security Agency Act 13 of 2004, section 7.

¹⁰ Ibid

¹¹ Social Assistance Act, 13 of 2004.

¹² Social Security Act 116 of 1994.

¹³ Public Finance Management Act 1 of 1999.

The ministerial determination has an open-ended impact on the SASSA employees, in terms of salary structures, non-subscription on motor vehicle subsidiaries, non-subscription to UIF, etcetera. Ministerial determination refers to a decision or ruling made by a government minister or authority that outlines certain conditions of employment that must be followed in a particular industry or sector. Section 7(2) provides for the consultation of the Minister of Social Development with the Ministers of Finance and Public Service and Administration on matters relating to policy, remuneration, conditions of service and where applicable, allowances.¹⁴ It was on the basis of this very provision that the then Minister of Public Service and Administration, Ms Fraser-Moleketi issued the draft Ministerial Determination detailing Agency staff conditions of service, applicable to all Agency staff members, from levels 1 to Senior Management.¹⁵ Such determination may include, exclude or replace any basic condition of employment as contained in the Basic Conditions of Employment Act¹⁶ (BCEA) regarding a category of employees (usually in consultation with employee organizations).¹⁷ Ministerial determinations are related to the basic conditions of employment, which are the minimum entitlements and the rights granted to employees. These basic conditions typically include wages,¹⁸ working hours,¹⁹ deductions²⁰ etcetera.

1.2 Research Problem

The act of continued adherence and implementation of the 2006 draft ministerial determination is a travesty. The problem is that there is no consistency regarding SASSA being an entity as provided for in terms of schedule 3A of the PFMA or a government department, as it cannot be both. The transfer in terms of section 197 of the Labour Relations Act resulted in no salary structure adjustments, or medical scheme changes, as well as the UIA not being implemented when the transfer occurred in 2006. The Constitutional Court ordered that an entity be formed yet the entity is still regulated by the Public Service Act (PSA) by virtue of implementing the ministerial determination.

¹⁴ South African Social Security Agency Act 13 of 2004, section 7(2).

¹⁵ SASSA Remuneration, Grading and Performance Management Framework, 2006.

¹⁶ Basic Conditions of Employment Act 75 of 1997 (hereinafter referred to as BCEA)

¹⁷ National Treasury PFMA Schedules 1,2,3A-D of 30 September 2011.

¹⁸ See section 13 of the BCEA.

¹⁹ See section 6 of the BCEA.

²⁰ See Section 14 of the BCEA.

1.3 Research Methodology

The research methodology will use a qualitative research method. It will include the legislation which is related to labour law and transfers, mergers and acquisitions, books, local and international journal articles and the Constitution. International instruments will also be used in this study as well as found in the library.

1.4 Literature Review

South Africa is governed by the Constitution, in which all individual rights are enshrined in terms of Chapter 2 of the Bill of Rights. Employment rights are contained in section 23²¹ as a fundamental human right worthy of protection, and the state is required to take all reasonable measures to achieve protection of the right. This section states that everyone has the right to fair labour practices. So, if the transfer of a business is affecting certain labour practices or is affecting the employees negatively then the section is also affected. In terms of section 27 of the LRA, employees have the right and their trade unions to collectively bargain to determine wages, terms and conditions of employment and other matter of mutual interest. This research is mainly based on the effects of section 197 of the LRA in relation to the South African Social Security Agency due to the ministerial determination of 2006 as it affects employees negatively.

In the recent, ground-breaking judgment in the matter of *City Power Ltd v Grinpal Energy Management Services*,²² the provisions of section 197 dictate that the employment contracts equally be transferred upon the transfer of a business.²³ Briefly, Grinpal was appointed by City Power as a third-party contractor for the purpose of supplying and installing prepaid electricity meters. The services of Grinpal were later terminated by City Power after they had established that Grinpal had provided them with a fraudulent tax certificate. The entire business database, infrastructure and software were handed over to City Power by Grinpal, but City Power refused to take over Grinpal employees' employment contracts as provided for in terms of section 197(2). Of interest, is the argument by City Power that the provisions of section 197 of the LRA did not apply as it was an organ of state by virtue of it being a municipal entity. The Constitutional Court held that the provisions of the LRA superseded that of the Municipal Act to the extent of every employment matter. The provisions of section 210

²¹ See Section 23 of the Constitution.

²² *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and Others* [2015] ZACC 8.

²³ <https://www.werksmans.com/uploads/2018/10/043037-WERKSMANS-may-legal-organs-of-state-02>.

of the LRA gave special credence to this provision that in any contrasting provision of any laws, apart from those of the Constitution or any other Act specifically amending the LRA, the provisions of the LRA will maintain prevalence.

Against the backdrop of *City Power Ltd v Grinpal Energy Management Services (Pty) Ltd*,²⁴ is the case of *SVA Security (Pty) Ltd v Makro Ltd, a Division of Massmart*²⁵ LC wherein Fidelity had won a tender for the provision of security services at Makro outlets that had previously been awarded to SVA Services.²⁶ Fidelity invited former SVA employees who had previously worked at Makro stores to apply for vacancies within the new contract space. SVA contended that the contract between Makro and Fidelity constituted a transfer in terms of section 197 of the LRA thereby inferring that the transfer ought to have been automatic and no necessity of applying for positions anew. The LC held that the following elements needed to be present for the presence of section 197 transfer:

A transfer.

Of a business, whole or partially; and

As a going concern. (The LRA does not define the concept of a 'going concern' a function that has largely been left to the courts to determine).

While SVA contended that Fidelity would be conducting the very same service to Makro, by providing security services and the management of staff. This line of argument was rejected by the LC stating that SVA had failed to prove that there was an actual transfer of equipment, intellectual property and assets that would enable Fidelity to provide the service to Makro, citing that Fidelity had taken over the service and not the business. This dynamic, therefore, did not necessarily translate into a section 197 transfer.

Section 197 of the LRA²⁷ mandates the protection of employees' rights and job security during business transfers, mergers, acquisitions, or outsourcing. So, section 197²⁸ of the LRA attempts to resolve what should happen to workers when a business, as opposed to a corporate entity owning a business, changes owners.²⁹ The LRA in South Africa serves as a

²⁴ *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and Others* [2015] ZACC 8.

²⁵ *SVA Security (Pty) Ltd v Makro Ltd, a Division of Massmart* (case number J720/17) [2017] ZALCJHB 137; (2017) 38 ILJ 2376 (LC) (3 May 2017).

²⁶ Nagan, D, Momentum Legal Updates No. 20 of 2017 October 2017.

²⁷ Labour Relations Act.

²⁸ See section 197 of LRA.

²⁹ Todd C et al ` *Business Transfer and Employment Rights in South Africa* 1 ed (2004) 16.

fundamental pillar for the protection of employees' rights within the workplace. Section 197 of the LRA specifically addresses the transfer of employment following the sale or transfer of a business. This research aims to scrutinise the effect of Section 197 of the LRA on employees, especially on SASSA employees because of the draft ministerial determination of 2006 as it had a major impact on the employment conditions of such employees. This research further evaluates both the positive and negative implications presented in terms of job security, employment conditions, and the overall welfare of workers. The application of section 197 has three components and one of them includes transfer, so in the case of *NEHAWU v University of Cape Town*,³⁰ a transfer has been defined as “the transfer of business by one employer (old employer) to another (new employer) as a going concern.”³¹

To understand Section 197, it must be noted that it establishes that “when a business, or a part thereof, is sold or transferred to another entity, all employees associated with that specific business or part are transferred to the new owner on the same terms and conditions of employment. This section ensures that employees' rights are maintained during such transactions, preventing unfair terminations, and safeguarding their employment. While the intention behind this provision is positive, its implementation and subsequent impact on employees vary. Such as the following implications:

Positive Implications on Job Security:

Section 197 provides employees with a level of reassurance regarding their job security during business transfers. Employees can continue to work without fear of sudden terminations or drastic changes to their employment conditions. This provision promotes stability and mitigates the negative effects that such transitions may have on workers' economic well-being.

Preservation of Employment Conditions:

Another important aspect of Section 197 is the preservation of employment conditions. This section mandates that the new employer is obliged to honour and maintain employees' existing terms and conditions of employment, including salaries, benefits, leave entitlements, and other workplace entitlements. This guarantees that employees' rights and benefits are

³⁰ *NEHAWU v University of Cape Town & Others* 2003 (24) ILJ 95 (CC).

³¹ See Section 197(1)(b) of the Labour Relations Act.

not compromised due to a change in ownership, ensuring a seamless transition while maintaining employee satisfaction and welfare.

Continuation of Collective Bargaining Rights and Exclusion of bargaining forums

Section 197 also safeguards the collective bargaining rights of employees. It stipulates that any collective agreements and recognized trade unions will continue to be valid and binding even after the transfer of ownership. This provision ensures that employees can still collectively negotiate their working conditions, allowing them to voice their concerns and demands under the new employer, ultimately contributing to greater employee empowerment and participation. In our case, the employees of SASSA do not have bargaining forums this affects section 18 of the Constitution of the Republic of South Africa,³² because it limits the freedom of association upon the SASSA employees. Section 23(2)(a) and (b) of the Constitution are going to be affected as bargaining forums are not included due to ministerial determination on SASSA employees.³³

Impact on Job Satisfaction and Employee Relations

By providing job security and preserving employment conditions, Section 197 contributes to enhanced job satisfaction among employees. Employees who feel secure in their positions are more likely to be more productive and equally committed to their work. Additionally, when employees' rights are protected during ownership transfers, it fosters positive employee relations, leading to a cooperative and harmonious work environment.

Uncertainty during the Transfer Process:

During the transfer process, employees may experience a sense of uncertainty due to the lack of clarity or knowledge regarding their future employment prospects.³⁴ This uncertainty can lead to anxiety, stress, and decreased productivity.³⁵ Employers must ensure effective communication and transparency to minimize these negative effects.

Restriction on Career Advancement:

Employees might face challenges in terms of their career advancement due to the new employer's policies, culture, or different business requirements compared to the previous

³² See Section 18 of the Constitution.

³³ See Section 23(2)(a)(b) of the Constitution.

³⁴ Bordia P et al `Uncertainty During Organizational Change: Types, Consequences, and Management Strategies'(2004) Journal of Business and management 124.

³⁵ Ibid.

employer. These factors can limit personal growth and development opportunities within the new working environment.

Salary structure

The new entity did not have unique salary structures built for it as it remained subjected to being regulated by the PSA and thus incompatible with other entities which subscribed to their own salary structures, policies and provisions. This impacted their quality of life and their ability to provide for their families. Additionally, it also affected the overall morale and motivation of employees as they felt unfairly treated by the government. This caused tension between levels of staff, especially since it was not based on qualification, experience, or output, but rather on a pre-determined job grading system.

Medical aid.

In terms of section 197 of the LRA, provides for the transfer of a business when from one employer to another, all rights and responsibilities of the transferring employer are transferred to a new employer. This includes the rights and obligations related to medical aid and pension funds. The impact of Section 197 on employees on medical aid and pension is as follows-

1. Continuity of medical aid coverage: the new employer is obliged to continue providing medical aid coverage to transferred employees, including any pre-existing medical conditions. This ensures that employees do not experience a break in their medical aid coverage and can continue receiving necessary healthcare services.
2. Continuity of pension funds: The new employer is also responsible for ensuring the continuity of employee funds. This means that transferred employees can continue contributing their pension funds and accrue benefits without interruption. In the matter of *Telkom Ltd & others v Blom*³⁶ & others the SCA was subjected to the daunting question pertaining to the whether pension funds of employment contracts of employees who were transferred in terms of section 197, were equally transferred to a new employer too.³⁷ Section 197 aims to protect employee's rights and benefits during a business transfer, including their access to medical aid and pension funds. It ensures continuity of coverage and benefits as well as the preservation of accrued benefits. The Pension Fund Act's purpose is to ensure that the transfer of pension benefits is

³⁶ *Telkom Ltd & others v Blom & others* [2003] 3 All SA 130 (SCA).

³⁷ Moseki Maleka, 'Does your pension go with you?', *The Quarterly Law Review for People in Business* vol 11 part 4.

reasonable and equitable and that it gives full recognition to the rights and reasonable benefits expectations of members in terms of the fund rules.³⁸

Potential Job Losses:

While one of the main purposes of Section 197 is to protect employee rights, there may be instances where certain positions become redundant after the transfer. Despite best practices to limit job losses outlined in the LRA, some employees may still face the risk of unemployment. In terms of section 197 of the LRA the employee has the right to decline or refuse to be transferred but this could lead to loss of job.³⁹ Employers must adhere to the provisions outlined in the LRA to minimize the negative impacts on employees in such cases. However, SASSA employees have not, until now, experienced any job losses.

Section 197 of the Labour Relations Act plays a vital role in safeguarding the rights and interests of employees during business transfers. The provision helps ensure job security, preserve employment conditions, and uphold collective bargaining rights, ultimately fostering job satisfaction among workers. However, challenges and negative implications such as uncertainty during the transfer process, restrictions on career advancement, and potential job losses still exist. Employers, employees, and relevant stakeholders must collaborate to address these challenges and find ways to provide a seamless transition while prioritizing employees' welfare and rights.

1.5 Research Aim and Objectives

1.5.1 Aim

The research aims to analyse whether SASSA meets its Constitutional obligations in not only creating but also maintaining a protective and conducive environment, particularly regarding the SASSA Act and the SAA. It should also aim at analysing the challenges relating to the transfer of business which is faced by SASSA employees and how it needs to be ended to give effect to the provisions of section 197 to the extent that the provisions of Schedule 3(A) of the PFMA are met.

1.5.2 Objectives

The study will undertake to achieve its aims by investigating standards in the implementation of the applicable legislation such as the Social Assistance Act, SASSA Act and policies

³⁸ Pension Funds Act (hereinafter referred to as PPA).

³⁹ Grogan J` A Twist on Transfer: LAC Reinterpret Section 197' (2002) *June Employment Law* 9.

regulating benefits. It will also provide an analysis of moving from being administered by the provisions of the Public Service Act 103 Of 1994 and the open-ended nature of the 2006 draft ministerial determination ceases and propose changes in respect of existing legislation to ensure that employees will know whether they fall under government department and a public entity.

1.6 Research Questions

The research will investigate whether the government complied with the Public Service Act and SASSA Act when it introduced the implementation of an open-ended draft ministerial determination in 2006. The ministerial determination never provided for an end date and after 17 years, it remains in force.

What was the reason for introducing the draft ministerial determination in 2006 and how it impacts on and affects SASSA employees? It will consider whether the SASSA meets its Constitutional obligations in creating a protective environment for the employees and whether it is not capable of doing better. How has section 197 of the LRA affected the employees of SASSA? What was the reason for implementing the ministerial determination of 2006?

1.7 Significance of the Study

The study analyses the challenges faced by the SASSA employees because of the introduction of the ministerial determination of 2006. It looks at whether SASSA employees are unable to benefit from UIF as well as motor vehicle schemes and medical schemes as well as pension benefits.⁴⁰ This study will benefit SASSA employees as it mentions all the issues they faced because of the ministerial determination of 2006. The study will also benefit the parliament as they create statutes and will address the challenges faced by the employees. Trade unions and bargaining councils will also benefit from this study.

1.8 Chapterization

The study will consist of five chapters which will be outlined as follows:

⁴⁰ KHamunakwadi P, 'Extension of Social Protection to Self-Employed Workers: Re-Considering the Need and the Possibilities considering the Covid 19 pandemic' (2023) University of Western Cape 34.

Chapter one serves as an introduction to the circumstances around the study, setting the background and the objectives thereto.

Chapter two will primarily focus on the legislative framework upon which the subject is based, with special reference to the promotion and protection of the rights of employees.

Chapter three will provide an overview of the transfer of business in South Africa and the accompanying protection of the employees and the contracts of employment during the transfer.

Chapter four will offer an in-depth comparative analysis of processes and procedures as they currently unfold, and how they compare and complement the ideal governance of state-owned enterprises in Namibia, the United Kingdom and South Africa. The reason is to compare the different legal frameworks and regulatory approaches each country adopts. These countries have distinct labour laws and policies regarding employee rights during business transfer, mergers and acquisitions.

Chapter five, as the final chapter, will provide a conclusion entailing recommendations to be taken into consideration.

CHAPTER 2: AN ANALYSIS OF THE LEGISLATIVE FRAME OF SECTION 197 OF THE LABOUR RELATIONS ACT 66 of 1995

2.1 Introduction

The aim of this chapter seeks to provide the historical and legislative background of the concept of transfer of business undertakings resulting from the transfers of employment contracts. Noting that government entities are not immune to the practice of business

transfers, broader focus will be given to SASSA employees resulting from the transfer of business which occurred in 2006, and the employment rights of the employees affected by the said transfer of employment contracts from the Department of Health and Social Welfare, now known as the Department of Social Development.

The phenomenon of business transfers is nothing new to the business world and has been taking place for decades.⁴¹ It was during the 1980's that the number of business transfers that have occurred at European Union (EU) level, had doubled every three years, making up for 40% of the global number of business transfers.⁴² Business transfers have taken place for some time, in the form of mergers, business transfers, acquisitions, outsourcing and transfers of employment contracts.

The real issue behind this concept has been employment contracts, and what happens to such after takeovers.⁴³ It is however, of very little consequence to the legislator and implementers, alike, how the terms and conditions of employment and related experiences could have changed for the workers who have been transferred to new employers in spite of the idealistic nature of the provisions of section 197 of the LRA.⁴⁴ Especially when the change is for the worse. A dimension that forces a microscopic view of the role and responsibilities of labour inspectors, particularly in government departments or entities. Labour law board tribunals have, over a period, had to deal with the issue of transfer of undertakings regarding problems encountered since the times of common law, to the modern-day transition to statutory provisions.

2.2 Common Law Position Relating to Business Transfers

Where judicial decisions and customs, instead of statutory provisions are relied on, such regulation is referred to as common law.⁴⁵ Countries that predominantly relied on common law are the United Kingdom as well as Commonwealth countries such as South Africa. In terms of common law, the new employer is not obliged to employ employees from the entity

⁴¹ Buckley PJ et al `The International Theory of the Multinational Enterprise: A Review of the Progress of a Research Agenda After 30 Years' (2015) *International Business Strategy* 125.

⁴² Cooke, FI, et al 'For Better and for Worse: Transfer of Undertakings and the Reshaping of Employment Relations' (2004) *International Journal of Human Resource Management* 15.

⁴³ Masobe, P (Mini dissertation) `The Effect of Transfer of Undertakings on Employees Rights in Labour Law and Insolvency Law: A Comparative Analysis (2014) *North-West University* 1.

⁴⁴ Cooke, FL, et al 'For Better and for Worse: Transfer of Undertakings and the Reshaping of Employment Relations' (2004) *International Journal of Human Resource Management* 152.

⁴⁵ Clark BR, `Federal Common Law: A structural Reinterpretation' (1995) *Law Reviews* 15.

that he has acquired;⁴⁶ he is also in a position to terminate the services of such employees by merely serving them with notices of termination of employment.⁴⁷ A rather unfair state of affairs as it creates an impression that the risk of failed businesses should be borne by the employee instead of the employer. Taking into consideration that it is often ailing businesses that are put up for sale, it appears as though the common law position directly or indirectly, promoted automatically unfair dismissals as restructuring and subsequent retrenchments will become inevitable.

“The right to choose one’s employer is the main difference between a servant and a serf. The policy related consequences which underline the decision is that employees should be free to choose their own employer.”⁴⁸

2.3 The ILO and International Instruments in Developing Labour Laws

At the dawn of democracy, in 1994, South Africa once again became a member of the International Labour Organisation (ILO) after its absence therefrom, due to practices informed by apartheid policies.⁴⁹ Section 39 states that when interpreting the Bill of Rights, a court, tribunal, or forum must promote the values that underpin an open and democratic society based on human dignity, equality, and freedom must consider international law and may consider foreign law.⁵⁰

International instruments provide a set of global standards and guidelines that all countries may use, but member states must adapt their respective prescripts accordingly, in order to develop their tailor-made labour laws.⁵¹ These standards help in ensuring that a minimum level of protection for workers across the global divide is being adhered to.⁵² Modern day survival is highly dependent on job security and as such, it is a foregone conclusion that the employment relationship be nurtured and harvested into meaningful, sustainable, and manageable legislations.

⁴⁶ Veneziane B, ‘The Employment Relationship’ (2009) *The Transformation of Labour law in Europe* 2245.

⁴⁷ Garbers, C, et al, “The New Essential Labour Law Handbook” 7th Ed 2019, 299.

⁴⁸ Govender, L (master’s Dissertation) ‘A Legal Analysis of Outsourcing Within the Framework of Section 197 of the Labour Relations Act’ (2018) *University of Johannesburg* 112.

⁴⁹ Rubin N et al ‘International Labour Law and the Law of the New South Africa’ (1998) *Labour Journal* 23.

⁵⁰ See Section 39 1(a)(b)(c) of the Constitution.

⁵¹ Cassese S, ‘Global Standards for National Administrative Procedure’ (2005) *Law and Contemporary Problems* 112.

⁵² Dahan D, ‘Shared Responsibility and the International Labour Organisation’ (2012) *Journal of International Law* 50.

With the major objective of the ILO being the harnessing of social justice, it effectively sets out the template that dictates the wider employment sphere.⁵³ The provisions of the ILO instruments seek to promote consistency and uniformity in labour laws across different countries.⁵⁴ This is especially important for businesses operating internationally, as it reduces confusion and compliance challenges.

International instruments often focus on protecting the rights and interests of workers, ensuring fair treatment, safe working conditions, and reasonable compensation.⁵⁵ Countries can use these standards to strengthen their labour laws and provide better protection for their workforce. For regions like the European Union, international instruments can facilitate the synchronisation of labour laws among member states.⁵⁶ This supports the free movement of workers and helps maintain a level playing field for businesses. International instruments provide a legal framework that countries can reference when drafting or amending their labour laws.⁵⁷

This can streamline the legislative process and make it easier to address emerging labour-related issues. International instruments can serve as the basis for bilateral and multilateral agreements between countries.⁵⁸ These agreements can cover issues such as cross-border labour mobility, which is important in today's interconnected world. As migrant workers move from country to country, the uniformity of prevalent labour laws emulates from the provisions of the ILO Conventions.⁵⁹ Protocols and Recommendations ease what would likely have translated into culture shocks stemming from an otherwise, array of labour laws.

⁵³ Cox RW, 'Ideologies and the New International Economic Order: Reflections on Some Recent Literature (1979) *International Organisation* 200.

⁵⁴ Charmovitz S, 'Trade, Employment and Labour Standards: The OECD Study and Recent Developments in the Trade and Labour Economic Standards Debate' (1997) *Hein Online* 21.

⁵⁵ Asante SKB, 'International Law and Foreign Investment: A Reappraisal' (1988) *International & Comparative Law Quarterly* 289.

⁵⁶ Deacon B et al, 'Globalisation and Emerging Regional Governance of Labour Rights' (2011) *International Journal of* *Manpower* <<https://www.emerald.com/insight/content/doi/10.1108/0143772111136796/full/html>> Accessed 24 Amy 2024.

⁵⁷ Macklem P, 'Labour Law Beyond Borders' (2002) *Journal of International E Law* 69.

⁵⁸ Pauwelyn J, 'A Typology of Multilateral Treaty Obligations: are WTO Obligations Bilateral or Collective in Nature' (2003) *European Journal of International Law* 90.

⁵⁹ Szabla C, 'Enfranchising Hierarchies in the Global Periphery: Migration, Development and the 'Native'in ILO Legal Reform Efforts' (2020) *Melbourne Journal of International Law* 77.

Embracing international labour standards demonstrates a country's commitment to social responsibility and human rights.⁶⁰ It enhances a country's reputation on the global stage and can contribute to better working conditions overall.⁶¹ Developing countries often lack the resources and expertise to create comprehensive labour laws. International instruments provide these countries with guidance and best practices for ensuring fair treatment of workers. In summary, international instruments provide a foundation and framework for the development of labour laws that protect workers, ensure fair treatment, and contribute to global labour standards and social responsibility.⁶²

Some of the international instruments which protect employees during business transfers include the International Labour Organization Employment Policy Convention 122 of 1964⁶³ which deals with Employment Policy.⁶⁴ It may not directly address business transfers, but its principles could be relevant in considering the impact of such transfers on employees, ensuring their rights, job security, and fair treatment during the transition. This convention is important in regulating the protection of the employees during business transfers as it affects the employees' rights.

The Transfer of Undertakings Directive 2001/23/23/EC is a European Union law that protects the contracts of employment of people working in businesses that are transferred between owners.⁶⁵ It replaced and updated the law previously known as the Acquired Rights Directive

⁶⁰ Kinley D and Tadaki J, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2003) *Virginia Journal of International Law* 111.

⁶¹ Ibid.

⁶² Rombouts SJ, 'The International Diffusion of Fundamental Labour Standards: Contemporary Content, Scope, Supervision and Proliferation of Core Workers' Rights Under Public, Private, Binding, and Voluntary Regulatory Regimes' (2018) *Columbia Human Rights Law Reviews* 1019.

⁶³ Employment Policy Convention 112 of 1962 <
https://www.google.com/search?q=International+Labour+Organization+Employment+Policy+Convention+122+of+1964+&sca_esv=f7a9fdc91166be13&rlz=1C1ZKTG_enZA925ZA925&sxsrf=ADLYWIIvgV83gvE_iPALNj6RC-bMkGDE5Q%3A1716556347965&ei=O5JQZuTEOqaci-gP5K-2yAI&ved=0ahUKewikzu3argaGAXUmzgIHHeSXDSkQ4dUDCBA&uact=5&oq=International+Labour+Organization+Employment+Policy+Convention+122+of+1964+&gs_lp=Egxnd3Mtd2l6LXNlcniAiS0ludGVybmF0aW9uYWwgTGFi3VvYIE9yZ2FuaXphdGlvb2IuBFbXBSb3ltZW50IFBvbGJjeSBDb252ZW50aW9uIDEyMiBvZiAxOTY0IEjmfPDN_EliaKHADeAGQAOCYAYIEoAGCBKoBAzUtMbgBA8gBAPgBAfgBAPgCA6ACWKgCEcICChAAGLADGNYEGEfCAGcQI_xgnGOoCwgIUEAAYgAQY4wQYtAIY6QQY6gLYAQGYAxyIBgGQBgi6BgYIARABGAGSBwEzoAd_&scient=gws-wiz-serp> Accessed 25 May 2024.

⁶⁴ Haberli C, 'The International regulatory Framework for National Employment Policies: Examples from Bangladesh, Ethiopia, Ghana, Madagascar, South Africa, Switzerland and Viet Nam' (2015) *Swiss Programme for Research on Global Issues for Development* 25.

⁶⁵ Transfer of Undertakings Directive 2001/23/23/EC(20<
https://www.google.com/search?q=transfers+of+undertakings+directive+2001%2F23%2F23&sca_esv=559361602&rlz=1C1ZKTG_enZA925ZA925&sxsrf=AB5stBhsUBc87IXFUKLuAN_itSs25SS-kq%3A1692802212270&ei=pBzmZPOJEPiIxc8PuNiOUA&oq=EU+Acquired+Rights+Directive+%282001%2F23%2F23%29&gs_lp=Egxnd3Mtd2l6LXNlcniAiKUVVIEFjcXVpcmVkiFJpZ2h0cyBEaXJlY3RpdmUgKDlwMDEvMjMvR>

77/187/EC. This directive states that it applies to legal transfers and mergers of an undertaking.⁶⁶ The directive further stipulates that any employee’s contract of employment will be transferred automatically on the same terms as before in the event of a transfer of the undertaking. This means that if an employer changes control of the business, the new employer cannot reduce the employee’s terms and conditions unless the Directive’s exemption criteria are met. Before the transfer takes place, the employees must be consulted in terms of Article 7 of this Directive.⁶⁷ The employer must inform the employees before he transfers the business as the transfer will affect their employment rights.

According to Article 3,⁶⁸ the transferor’s rights and obligations arising from a contract of employment or from an employment relationship existing on the date of transfer within the meaning of Article 1(1) shall, because of such transfer, be transferred to the transferee. Member states may provide that, after the date of transfer within the meaning of Article 1(1) and in addition to the transferee, the transferor shall continue to be liable in respect of obligations that arose from a contract of employment or an employment relationship.

Following the transfer within the meaning of Article 1(10), the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement.⁶⁹ Until the date of termination or expiry of the collective agreement or the entry into the force or application of another collective agreement. Member states may not limit the period for observing such terms and conditions, with that it shall not be less than one year.

The transfer of an undertaking, business, or a part of a business shall not in itself constitute grounds for dismissal by the transferor or the transferee.⁷⁰ This provision shall not stand in the way of dismissals that may take place for economic, technical, or organisational reasons entering changes in the workforce. If the contract of employment or the employment relationship is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee,⁷¹ the employer shall be regarded as having been

[UMpKgIIADIKEAAYRxiWBBiwAzIKEAAYRxiWBBiwAzIKEAAYRxiWBBiwAzIKEAAYRxiWBBiwAzIKEAAYRxiWBBiwAzIKEAAYRxiWBBiwAzIKEAAYRxiWBBiwAzIKEAAYRxiWBBiwAzIKEAAYRxiWBBiwAzIKEAAYRxiWBBiwA0iNNFAAWABwAXgBkAEAmAEAoAEAggEAuAEByAEA4gMEGAAgQYgGAZAGBg&sclicent=gws-wiz-serp_01](https://www.european-council.europa.eu/media/e3989023/1/EN/MAIN/Texts_and_documents/2001_06_12_EU_Directive_2001_77.pdf) >Accessed 23 May 2024.

⁶⁶ Pisarczyk L and Wiczorek K, ‘The Influence of a Transfer of Undertaking on Collective Agreements and Employee Representation’ (2021) *European Union Collective Labour law* 87.

⁶⁷ See Article 7 of Transfer of Undertaking Directive 2001.

⁶⁸ See Article 3 of Transfer of Undertaking Directive 2001.

⁶⁹ See Article 1(10) of Transfer of Undertaking Directive 2001.

⁷⁰ McMullen J, ‘Transfer of Undertakings: The Purposive Approach’ (2019) *Industrial Law Journal* 44.

⁷¹ MacMullen J, ‘The Right to Object to Transfer of Employment Under TUPE’ (2008) *Industrial Law Journal* 12.

responsible for the termination of the contract of employment or of the employment relationship.⁷²

The OECD Guidelines for multinational enterprises emphasise the importance of protecting employees during business transfers as well.⁷³ These guidelines provide recommendations to multinational enterprises for responsible business conduct. When it comes to business transfers, the guidelines suggest that employees' rights, job security, and working conditions should be safeguarded.⁷⁴ This ensures that employees are not adversely affected by the transfer and helps maintain labour standards and social cohesion. Adhering to these guidelines can foster better relationships between companies, their employees, and the communities they operate within.⁷⁵ The OECD guidelines for Multinational enterprises reflect the expectations from governments to businesses on how to act responsibly. They bring together all thematic areas of business responsibilities, including human rights and labour rights as well as information.

2.4 Constitutional Provisions

The Republic of South Africa is a Constitutional democracy. Fundamentally, the South African Constitution (Constitution) in the Bill of Rights, enshrines section 23, to specifically place entitlements of employees on matters relating to sound labour laws and primarily guide the way the provisions of the LRA must be interpreted. While other sections such as section 18,⁷⁶ which gives rise to the right to freedom of association; section 9 which gives rise to the right to equality; section 27, which gives rise to the right to access to security and section 33 which makes provision for fair administrative action, these are equally embedded in South African Labour legislation. It is vital to understand the application of fundamental rights as provided for, by the Constitution, in terms of section 8.⁷⁷

⁷² Davidow G, 'The Three Axes of Employment Relationships: A Characterisation of Workers in Need of Protection' (2002) *The University of Toronto Law Journal* 33.

⁷³ Horn N, 'International Rules for Multinational Enterprises: The ICC, OECD, and ILO Initiatives' (2018) *American University Law Review* 70.

⁷⁴ Masocha VW, 'An Analysis of Employee Protection in Business Transfers: Is the Purpose of Section 197 Subverted by Judicial Interpretation in Outsourcing Contracts?' (2013) *University of Cape Town* 16.

⁷⁵ OECD Guidelines for Multinational Enterprises on Responsible Business Conduct <<https://mneguidelines.oecd.org/mneguidelines/>> Accessed 23 May 2024.

⁷⁶ See Section 18 of LRA.

⁷⁷ (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, considering the nature of the right and the nature of any duty imposed by the right. (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court— (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent

The notion of 'rights' has since grown from being a basic connotation, to an entitlement with merit, in the context that the employer no longer holds the right to have the final say in matters of employment but that employees have as many rights and responsibilities as employers if not more. It is important to note that the rights contained in the Bill of Rights are interrelated. In South Africa, when there's a transfer of a business that affects employees' benefits, it generally falls under the ambit of the Labour Relations Act (LRA), and the Basic Conditions of Employment Act (BCEA).⁷⁸ These laws provide certain protections to employees in cases of business transfers, such as mergers or acquisitions.

The Transfer of Business Provisions in the LRA states that:

1. Employees' contracts are automatically transferred to the new employer.
2. Employee rights and benefits are retained post-transfer.
3. Collective agreements remain in force.
4. Employees can't be retrenched due to the transfer itself.

Regarding the Constitution, these laws help protect employees' rights and benefits, which align with the principles of fair labour practices and social justice outlined in the South African Constitution. If these protections weren't in place, there could be violations of constitutional rights related to labour and equality. However, any direct constitutional implications would likely depend on how the specific business transfer and its effects on employees' benefits were handled. In South Africa, employees' benefits are often intertwined with constitutional principles. The Constitution, adopted in 1996, outlines various rights and principles that impact employees' benefits and their working conditions.

The Constitution guarantees the right to fair labour practices, which includes fair treatment in the workplace, protection against unfair discrimination, and the right to just and favourable conditions of work.⁷⁹ This can encompass aspects of employees' benefits, such as wages, leave, and working hours. The Constitution prohibits unfair discrimination on various grounds, including race, gender, religion, and more.⁸⁰ This principle extends to employees' benefits,

that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1). (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

⁷⁸ Clarke M et al 'Workers' Protection: An Update on the Situation in South Africa' (2002) *Research Gate* 17

⁷⁹ Section 23 of the Constitution.

⁸⁰ See Section 6 of EEA.

ensuring that all employees are entitled to equal treatment and benefits regardless of their background.⁸¹

While business transfers have generally been taking place across the private sector, it has not been a common cause for business transfers to take place within government tiers.⁸² Be that as it may, it is not an unheard-of phenomenon either. One such state institution is the South African Social Security Agency, which was transferred in terms of section 197 of the LRA, from the Department of Social Development. This is a state agency tasked with the huge responsibility of administration and disbursement of social assistance as provided for in terms of section 27 of the Constitution which recognizes the right to access social security, including appropriate social assistance if individuals are unable to support themselves and their dependents. This could have implications for employees' benefits such as retirement funds and medical aid schemes. South African labour laws, such as the LRA and BCEA, are designed to align with constitutional rights and principles. These laws ensure that employees' benefits are protected during various workplace situations, including transfers of businesses.

2.5 Provisions of Section 197 of the LRA

As alluded to above, the provisions of the ILO seek to provide and equally regulate social justice.⁸³ Equally, section 1 of the LRA cites the purpose of the LRA as that of advancing economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objectives of the LRA.⁸⁴ These primary objects of the LRA entail the protection of the rights of employees who are being transferred from one employer to another by not merely having set regulations in place but rather by also ensuring that international standards are adhered to by employers as well as trade unions. This is achieved by ensuring that the applicable legislation is backed up efficient workplace policy, covering all avenues that should advance the transfer of employee contracts of employment in a manner that is mindful of the mental health of the employees being transferred from one employer to another

⁸¹ Freedman S, 'Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm' (2017) *Disability and Equality Law* 45.

⁸² Hargrave M, 'Privatization: What it is, How it Works, and Examples' (2023) <https://www.google.com/search?sca_esv=f7a9fdc91166be13&rlz=1C1ZKTG_enZA925ZA925&sxsrf=ADLYWI I2hAkkBctX-XWuuTSzq7wAS0mgjQ:1716560333689&q=While+business+transfers+have+generally+been+taking+place+across+the+private+sector,+it+has+not+been+common+cause+for+business+transfers+to+take+place+within+government+tiers&spell=1&sa=X&ved=2ahUKEwis97LHvaaGaxWV1QIHHWcbDTwQBSgAeqQIBxAB&biw=609&bih=646&dpr=1#ip=1> Accessed 24 May 2024.

⁸³ Maupain F, 'New Foundation or new Face? The ILO and the 2008 Declaration on Social Justice for a Fair Globalization' (2009) *European Journal of International Law* 240.

⁸⁴ LRA.

as the transition is likely to be stressful because of uncertainties. It continues to lay emphasis on collective bargaining as a cornerstone of the process of transferring employment and in ensuring that the extent of fairness is well cushioned in that regard.

Section 3⁸⁵ stipulates that interpretation of the Act be done “in compliance with the Constitution” as the root of the provisions of the Labour Relations Act.⁸⁶ Wallis continues to lament that the authors of section 197 of the Act, did not realise the upheaval in meaning and effect of the word ‘by’ in the provisions would come to.⁸⁷ Prior to the enactment of Section 197 of the South African Labour Relations Act (LRA),⁸⁸ which specifically addresses the transfer of a business as a going concern and the protection of employees' rights in such situations, there was no comprehensive legal framework in South Africa that directly governed the transfer of businesses and the rights of employees affected by such transfers. However, some legal principles and precedents were established through common law and case law that laid the foundation for the protection of employees during business transfers. Prior to the LRA, the transfer of a business was primarily governed by common law principles.⁸⁹ This meant that employees' rights and employment conditions were not automatically protected during business transfers, and the new employer was not necessarily obliged to maintain the same terms of employment. Employee rights and terms of employment were largely governed by individual employment contracts.⁹⁰ The common law deemed a contract of employment as a personal concept that existed only between an employer and employee. If these contracts were not transferred to the new employer or if the new employer chose not to honour them, employees could potentially face changes to their working conditions, benefits, and terms of employment.⁹¹

Over time, South African courts recognised the need to protect employees during business transfers.⁹² Court decisions started to establish certain precedents that leaned towards

⁸⁵ Section 3 of the Labour Relations Act 66 of 1995.

⁸⁶ Du Toit D, ‘The Transfer of Enterprises and the Protection of Employment Benefits (2004) *International Labour Journal* 85.

⁸⁷ *Ibid.*

⁸⁸ See Section 197 of LRA.

⁸⁹ Cheadle H, ‘Regulated Flexibility and Small Business: Revising the LRA and the BCEA’ (2006) *University of Cape Town* 34

⁹⁰ Du Toit B et al ‘Business Transfer and Employment Rights in South Africa’ (2004) *LexisNexis Butterworths* 5

⁹¹ Barr N et al, ‘Reforming Pensions: Principles, Analytical Errors, and Policy Directions’ (2009) *International Social Security Review* 39.

⁹² Ver Loren Vn Themaat, AAH (Doctoral Thesis) ‘The Protection of Workers in the Case of Business Transfers: A Comparative Study of the Law in the USA, UK and South Africa (1994) *University of London* 243.

protecting employees' continuity of employment and existing terms and conditions in the event of a business transfer. While not codified in law, certain employee protections were implied based on principles of fairness and equity.⁹³ This could involve considerations related to the transfer of pension funds, leave balances, and other benefits.

It is important to note that these protections were not as comprehensive or consistent as those provided by Section 197 of the LRA. The introduction of Section 197 in the LRA in 1995 marked a significant shift by explicitly outlining the rights and obligations of employees and employers during business transfers. This section provides a clear legal framework that ensures the automatic transfer of employees' contracts and protects their rights, benefits, and working conditions when a business is transferred as a going concern.

The enactment of Section 197 aimed to provide more certainty and consistency in dealing with business transfers, promoting the interests of both employers and employees in such situations. Section 197 of the South African Labour Relations Act (LRA) also covers the transfer of a business as a going concern. This section outlines the rights and obligations of employees when a business or part of a business is transferred from one employer to another. In such cases, the employees' employment contracts are automatically transferred to the new employer, along with their rights, benefits, and obligations.

When a transfer of a business takes place, employees' employment contracts are transferred automatically to the new employer, (lock, stock, and barrel). This kind of transfer includes all terms and conditions of employment. The continuity of the employees' service is maintained, meaning their previous service with the old employer counts towards benefits such as leave, pension, and severance pay with the new employer. Employees' rights, benefits, and working conditions must be preserved after the transfer. This includes matters such as remuneration, working hours, and any other terms of employment. Both the old and new employers are required to consult with affected employees and their trade unions or representatives before the transfer takes place.

Employees have the right to object to the transfer, but these objections need to be based on reasonable grounds such as changes to their working conditions or concerns about the new employer's ability to fulfil their obligations. The new employer assumes responsibility for all

⁹³ Cohen, T, 'Implying Fairness into the Employment Contract' (2009) *Industrial Law Journal* 2271.

the liabilities and obligations associated with the transferred employees, including any legal claims that may have arisen from their employment before the transfer took place.

2.6 Analysis of Case Laws Dealing with Business Transfers in South Africa

According to le Roux,⁹⁴ from a commercial perspective, there are two generic ways in which a business may be controlled: through the acquisition of majority shares, subject to the provisions of the Companies Act and upon the instance of the assets of a subsidiary company being sold. Before amendment of Companies Act, there was a broad understanding that the provisions of section 197 merely regulated business transfers as going concerns.⁹⁵ The automatic nature of employee transfers is said to have been the major reasoning behind the 2002 amendment, after much litigation in that regard.⁹⁶ Section 197 is aimed at not only protecting employees but also ensuring that their rights and responsibilities are equally maintained: a responsibility that primarily lies with the transferring employer.⁹⁷

In the case of *Schutte v Power Plus Performance*⁹⁸ it was concluded that ‘transfer’, in this context, goes beyond the act of just a ‘sale’ but instead carries a much broader meaning. The decision amplified the notion that mergers, takeovers, large scale restructuring processes may constitute ‘transfers. The Labour Court herein held that:

“A business or part of a business may be transferred in circumstances other than a sale. These may arise in the case of a merger, takeover or as part of a broader process of restructuring within a company or group of companies. Transfer can take place by virtue of an exchange of assets or a donation, given the range of circumstances under which a transfer can take place, the need for an agreed price or valuation may not arise. Consideration may take some other form. The outsourcing in this matter was part of a broader process of restructuring and must be seen against the backdrop of the [old employer’s] acquisition of 50% stake in the [new employer].”⁹⁹

The court highlighted the various circumstances under which a business or part of a business can be transferred, emphasizing that such transfers can occur not only through sales but also through mergers, takeovers, or as part of broader restructuring processes within a company

⁹⁴ Le Roux P.A.K, ‘Outsourcing and S197 of the LRA, Going Concerns, Employment Contracts and the Transfer of a Business or Service’ (2015)24 *Contemporary Labour Law*, 61.

⁹⁵ Chetna S (master’s Dissertation) ‘A Critical Analysis of Section 197 of the Labour Relations Act 66 of 1995 as Amended Taking into Consideration the Elements of Section 197, the Definition of Case Law’, (2016) *University of Johannesburg* 112.

⁹⁶ *Ibid.*

⁹⁷ Tshoose CI, ‘Appraisal of Selected Themes on the Impact of International Standards on Labour and Social Security Law in South Africa’ (2022) *Potchefstroom Electronic Law Journal* 23.

⁹⁸ *Schutte & Others v Power plus Performance (Pty) Ltd & Another (1999) 20 ILJ 655 (LC).*

⁹⁹ *Ibid.*

or group of companies. It mentions that transfers can happen through an exchange of assets or even as a donation, indicating that the need for an agreed price or valuation may not always be necessary. Consideration for the transfer can also take other forms beyond monetary transactions.

The court further discussed outsourcing as part of a larger restructuring process and links it to the acquisition of a 50% stake in the new employer by the old employer. This connection implies that the outsourcing decision was influenced by the broader corporate strategy and ownership changes within the companies involved.

In practical terms, this statement accentuates the flexibility and complexity of business transfers beyond traditional sales transactions. When businesses engage in mergers, takeovers, or restructurings, they may opt to transfer parts of their operations to align with strategic objectives to elevate efficiencies. The mention of outsourcing within a restructuring context suggests that companies may choose to outsource certain functions or activities to external parties as part of their overall realignment efforts.

The reference to the acquisition of a 50% stake in the new employer by the old employer indicates a significant ownership change that likely influenced decisions related to outsourcing. This scenario highlights how ownership structures can impact strategic choices regarding business transfers and operational changes within organizations.

As put by Bosch¹⁰⁰ the LRA has for the longest time been seen as the foundation of confusion and concern. His subjective view stems from an article presented by Benjamin, at the 19th Annual Labour Law Conference, wherein he lamented that “there is perhaps no other section of the Act that has given rise to such widely divergent interpretations”.¹⁰¹ At this point one wonders if this section is a virtue or a vice.

In the case of *NEHAWU v University of Cape Town and Others*¹⁰² the Constitutional Court held that, when articulating the provisions of section 197 considering the right to fair labour practices, it comprises of dual purposes: these purposes are essentially two-pronged as they seek to effect balance on both sides of the coin – the employer as well as the employee in

¹⁰⁰ Bosch, C, 'Aluta Continua, or Closing the Generation Gap: Section 197 of the LRA and its Application to Outsourcing' (2018) *International Labour Journal* 84.

¹⁰¹ Benjamin, P, 'A Matter of Going Concern: Judicial Interpretation and Misinterpretation of Section 197 of the Labour Relations Act' (2005) *Law, Democracy & Development* 169.

¹⁰² *National Education, Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC).

the sense that the objective on the part of the employer, of realising profit remains and the security of employment in respect of the employee remains important. A tight balance needs to be maintained in both roles, to the best of stakeholders' abilities to put eliminate unfair job losses.

In an article by Greeff attorneys in this regard, 'business is defined as a broad definition wherein a 'service' is necessitated and that such service constitutes the entire operation or any part thereof.¹⁰³

In the matter of *NUMSA obo Members and AIH Logistics and Another*,¹⁰⁴ the Labour Court stated that cognisance be taken of the view that the main objective of section 197 is the protection of employees' rights, particularly their right to seamless continuity of employment. In this case, the applicants had alleged that the first respondent 'transferred' the business to get rid of them and that essentially there was no actual transfer as the previous employer was still predominantly in charge of what seemed to be a brokerage (the second respondent). The applicants based their allegations of a transfer not having had taken place, based on:

The agreement between the first and second respondents did not relate to a transfer. Selected employees were omitted from the transfer process.

There was no exchange of bills of exchange between the respondents.

The second respondent uses the premises of the first, free of rental payments.

There was no sale or lease of resources between the respondents.

The first respondent remained under obligation with the client (Mahindra) who provides the parts which are assembled by the second respondent.

The first respondent continues to conduct skills training to transferred employees and solely retains the certification in respect of such training; and

The control of the operations lies with first respondent.

The outcome was that the activity undertaken by the respondents in this regard, fell short of being construed as a transfer in terms of the provisions of section 197 of the LRA. Effectively, the Labour Court ordered that the applicants be placed in the very same position (at the first respondent) prior to the occurrence of the purported transfer, as a going concern.¹⁰⁵

¹⁰³ <https://greeffattorneys.co.za/2019/03/29/transfer-of-employment--contracts-on-sale-of-a-business>.

¹⁰⁴ *NUMSA obo Members v AIH Logistics and Another* (D 1112/19) [2023] ZALCD 3 (27 February 2023).

¹⁰⁵ *Ibid.*

2.7. Contextualising the Transfer of Sassa Employees from DSD

The SASSA employees from the DSD to SASSA involved not only a shift in functions and responsibilities but also had significant legal implications under section 197 of the LRA.¹⁰⁶ Section 197 governs the transfer of employees when a business or service is transferred as a going concern, ensuring that employees' rights and conditions of employment are preserved.¹⁰⁷ In the case of SASSA, the transfer from DSD raised important questions about the application of section 197, particularly about how employees' contracts, job security, and benefits would be protected during the transition.¹⁰⁸

The SASSA saga highlighted challenges in interpreting and applying section 197 to public sector transfers, as this section is traditionally applied to private sector business transfers.¹⁰⁹ One key issue was whether the establishment of SASSA as a new entity and the transfer of employees from DSD constituted a "going concern" under section 197.¹¹⁰ This case raised concerns about ensuring that employees' terms and conditions were maintained despite the restructuring. The legal complexities surrounding the transfer demonstrated that while section 197 is intended to protect employees in such transitions, its application in the public sector context required careful consideration of the specific operational and administrative dynamics involved.¹¹¹ This case study emphasizes the need for clarity in applying section 197 to similar transfers in the public sector, ensuring that employee protections remain robust and aligned with the law.¹¹²

SASSA is the agency that is tasked with the management of social protection systems which was signed into law in 2004 under the South African Social Security Agency Act, together with the Social Assistance Act. These legislations are the founding prescripts for the establishment of the Social Security Agency. Before the South African Social Security Agency came into existence the employees of SASSA were under the employ of the Department of

¹⁰⁶ Sekikotla M, 'A Legal Analysis of the Social Protection for Workers Engaged in Atypical forms of Employment in South Africa' (2024) *University of Limpopo* 45.

¹⁰⁷ Pillay D, 'Moving Litigation from Dispute Resolution to Solving Problems and Building Organisation' (2020) 1 *Search ProQuest* 13.

¹⁰⁸ Ketji N, 'The Return-to-Work Policy for Injured and Deceased Workers' (2018) *University of Western Cape* 17.

¹⁰⁹ Mpambani L, 'An Evaluation of the Child Support Grant Policy as Administered by the Western Cape Provincial Department of Social Development in its Gugulethu Office' (2014) *Cape Peninsula University of Technology* 43.

¹¹⁰ Ibid.

¹¹¹ Davidow G, 'The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection' (2002) *The University of Toronto Law Journal* 34.

¹¹² Ibid.

Social Development (DSD).¹¹³ SASSA was formed after court cases were initiated by civil society organisations and individuals arising from frustrations with poor grants administration.¹¹⁴ These cases drew on the constitutional mandate in the realisation of people's social protection rights.¹¹⁵

The *Mashava* Judgement by Pretoria High Court, and subsequently affirmed by the Constitutional Court, ruled that Proclamation 7, which assigned administration of the Social Assistance Act to the provinces was invalid, and that grants administration responsibility would revert immediately to the national sphere of government. The Constitutional Court ruling was the deciding factor in the creation of SASSA as a Schedule 3A Public Entity. The other factor that shaped the creation of SASSA is the Social Security Improvement Plan.¹¹⁶ This action plan was launched in 2001 by the cabinet committee for improvement to the social security system. The committee identified three majors' interventions which are the development of comprehensive norms and standards for social assistance administration;¹¹⁷ replacement of the social pension system (SOCPEN) system (which was never done); and lastly the improvement of the physical infrastructure at pension pays points (cash pay points are now extinct)

The Taylor Committee of Inquiry into a Comprehensive System of Social Security for South Africa also contributed to the enhancement of products and operations within SASSA.¹¹⁸ The Taylor Committee's report confirmed the diagnosis made by an earlier commission and recommended the establishment of a Social Security Board reporting to the Minister for Social Development and a Social Security Agency which would report to the board.¹¹⁹

¹¹³ Brockerhoff S, 'Review of the Development of Social Security Policy in South Africa' (2013) *Studies in Poverty and Inequalities Institute* 80.

¹¹⁴ Ngandu S and Motala S, 'Ten Years of the South African Social Security Agency: The Journey 2006 – 2016' (2021) *Social Security Reviews* 24.

¹¹⁵ Black Sash. (2011). Social Assistance A Guide for Paralegals. <<https://doi.org/10.4135/9781483345727.n735>> Accessed 23 August 2023.

¹¹⁶ Mundau M et al, 'Analysing the Community Development Worker (CDW) Program's Impact in Linking Citizens to Social Grants on Poverty Alleviation: Case Study of the Western Cape Province of South Africa' (2017) *Journal of Sociology and Social Anthropology* 47

¹¹⁷ Midgley James, *Social Development: The Developmental Perspective in Social Welfare* (First Published 1995, Sage 1995) 208

¹¹⁸ Brockerhoff S, 'A Review of the Development of Social Security Policy in South Africa' (2013) *Studies in Poverty and Inequality Institute* 29.

¹¹⁹ Ibid.

SASSA operates within the framework of the Public Finance Management Act (PFMA) schedule 3A.¹²⁰ This schedule outlines the specific financial management responsibilities and requirements for public entities like SASSA. It details financial reporting, procurement, budgeting, and other financial management practices that SASSA must adhere to as a government agency.¹²¹ The PFMA schedule 3A helps ensure transparency, accountability, and efficient use of public funds within SASSA's operations.¹²²

There are a lot of services that are rendered by SASSA, and it plays a crucial role in the country by providing social security services to vulnerable and disadvantaged individuals and families.¹²³ SASSA administers social grants, such as Disability Grants, Old Age Grants, Child Support Grants, Foster Child Grants, Care Dependency Grants, Social Relief of Distress and Grant in Aid, to help alleviate poverty and improve the quality of life, not for those only in need but those meeting the set criteria. SASSA ensures that individuals and families who are unable to support themselves due to various circumstances, such as relief to those befallen by disasters; those suffering from physical and or mental disabilities that prevent them from participation in the open labour market; or old age, receive financial assistance and support, once the eligibility criteria is met.

2.8 Conclusion

The framework for the regulation of business transfers in South Africa, particularly under Section 197 of the LRA, plays a pivotal role in solidifying the foundation relating to the rights and job security of employment during the transfer of a business. Section 197 is designed to ensure continuity of employment, the protecting of employees from unfair dismissals, and the preservation of their existing terms and conditions of employment. Legislation establishes a clear and comprehensive set of rules and obligations for both the transferor and transferee parties involved in the business transfer process. This includes the requirement for consultation with affected employees and their representatives, disclosure of relevant information, and adherence to the principle of automatic transfer of employment contracts.

¹²⁰ Sambo VT (Doctoral Thesis) 'The Implementation of the Internal Audit Provisions of the Public Finance Management Act (Act No. 1 1999): A Case of the South African Social Security Agency' (2017) *University of South Africa* 113.

¹²¹ Ibid.

¹²² Gcaza X (master's Dissertation) 'An Assessment of Financial Accountability on Social Grnats at the South African Social Security Agency (SASSA), 2011-2014' (2014) *University of Fort Hare* 89.

¹²³ Makhetha MT, 'A Policy- Making Framework for Social Assistance in South Africa: the Case of the Department of Social Development and the South African Social Security Agency' (2015) *North-West University* 90.

Collective bargaining also takes on a crucial role within the auspices of protection of employment during business transfers.

Furthermore, Section 197 promotes a fair and equitable transition for employees by preventing the arbitrary termination of employment solely due to a change in business ownership. This legal framework contributes to the overall stability of the labour market, fostering a sense of security among workers and promoting industrial peace. While Section 197 is an essential protective mechanism for employees, it also serves the interests of businesses by providing a structured and transparent process for managing workforce transitions. By mitigating uncertainties related to job security and employment conditions, the framework encourages a smoother transfer of businesses, facilitating economic growth and investment.

CHAPTER 3: THE PROTECTION OF WORKERS IN THE CASE OF BUSINESS TRANSFERS: A SOUTH AFRICAN PERSPECTIVE

3.1 Introduction

In the dynamic landscape of business in South Africa, the concept of business transfer plays a pivotal role in shaping economic transactions and nurturing economic growth.¹²⁴ Business transfers, often referred to as the process of transferring ownership or control of a business entity from one party to another, encapsulates a complex journey encompassing legal, financial, and strategic considerations. As businesses navigate through transitions in ownership, they encounter a myriad of challenges and opportunities that define their future trajectory within the South African market.¹²⁵ Understanding the tones of business transfers is essential for local entrepreneurs, state organs and international investors seeking to engage in the vibrant business culture of South Africa.

In terms of the LRA, the business includes the whole or a part of any business, trade, undertaking or service.¹²⁶ Gregon¹²⁷ is of the view that the definition of “business” in Section 197(1)(a) is tautological, and its main purpose seems to be to emphasise that section 197 applies not only to the transfer of entire businesses but also to parts of businesses. In addition to material and immaterial assets, intellectual property assets are also included in the term “business”.¹²⁸

A transfer is defined in section 197(1)(b) to mean the transfer of a business by one employer (“the old employer”) to another employer (“the new employer”).¹²⁹ This term clarifies the types of transactions that might be covered under section 197. Two distinct enquiries should occur. Firstly, was there a transfer within the meaning of section 197? If yes, was an undertaking transferred as a going concern based on the facts? Thus, the process of a business's "transfer" is related to the notion of a "transfer". Business transfers occur because of a sale

¹²⁴ Awonuga KF et al, ‘Business Incubators and their Impact on Startup Success: A Review in the USA’ (2024) 11 (1) *International Journal of Science and Research Achieve* 1419.

¹²⁵ Ansell N et al, ‘Reconceptualising Temporality in Young Lives: Exploring Young Peoples Current and Future Livelihoods in AIDS- Affected Southern Africa’ (2014) *Transactions of the Institute of British Geographers* 19.

¹²⁶ Labour Relations Act.

¹²⁷ Grogan “A Twist on Transfers: LAC Reinterprets Section 197” June 2002 EL 9 12-13

¹²⁸ Koiranean M, ‘Intellectual Capital and Property Rights (IPR) as the Key Asset of a Family Firm: A Case Study with an Evaluation Approach’ (2011) *Electronic Journal of Family Business Studies* 29.

¹²⁹ See Section 197 (1) (b) of LRA.

of the business, but the grasp of section 197 extends beyond the transfer effected under these circumstances.¹³⁰

In South Africa, when a business is transferred, the new employer takes over the employees 'contracts of employment from the old employer.¹³¹ Unless there is an agreement to the contrary between the employers and the employee representatives. The continuity of the employee's employment will not be interrupted by the transfer of the business. The new employer must employ the old employees on the terms and conditions which are overall not less favourable than those which employees enjoyed with the old employer.

Furthermore, when a business is transferred the employment contracts of the employees are assumed by the new employer, from the previous one.¹³² Unless the employer and the employee representatives have an agreement stating otherwise. The business transfer will not result in the termination of the employee's employment. The terms and conditions under which the employees will work for the new company must, for the most part, be comparable to those they received from their previous employer.

3.2 The Significance of Section 197 of the LRA

The examination of section 197 implies a reference to the purpose behind its enactment, especially when viewed in consideration of the preceding discussion regarding common law.¹³³ This section delves into the rationale behind section 197, as clarified by South African courts in more detail. The objective of the LRA is outlined in section 1 of the LRA. The primary goal of the Act is to promote economic development, social justice, labour harmony, and the democratisation of workplaces. To achieve this aim, the Act first aims to uphold and regulate the fundamental rights granted by section 23 of the Constitution. Additionally, it must fulfil its obligations arising from its International Labour Organization (ILO) membership.¹³⁴

¹³⁰ Mohlabi GSM, (master's Dissertation) 'Transfer of Business, Trade or Undertaking and its Effects on Contract of Employment' (2010) *University of Limpopo* 90.

¹³¹ Masoebe P, (master's Dissertation) 'The Effects of Transfer of Undertakings on Employee Rights in Labour Law and Insolvency Law: A Comparative Analysis' (2014) *North-West University* 76.

¹³² Du Toit D, 'The Transfer of Enterprises and the Protection of Employment Benefits in South and Southern Africa' (2004) *Law, Democracy and Development* 65.

¹³³ Masocha V, (master's Dissertation) 'An Analysis of Employee Protection in Business Transfers: Is the Purpose of Section 197 Subverted by Judicial Interpretation in Outsourcing Contracts?' (2012) *University of Cape Town* 15.

¹³⁴ Rombouts SJ, 'The International Diffusion of Fundamental Labour Standards: Contemporary Content, Scope, Supervision and Proliferation of Core Workers' Rights Under Public, Private, Binding, and Voluntary Regulatory Regimes' (2018) *Columbia Human Rights Law Reviews* 162.

The Act must include provisions for collective bargaining to facilitate employee involvement in workplace decision-making and the effective resolution of labour disputes.¹³⁵ The LRA in South Africa plays a crucial role in upholding the constitutional right to fair labour practices as enshrined in section 23(1) of the Constitution.¹³⁶ While the constitution outlines this general right, it is the responsibility of national laws like the LRA to define and implement the specifics of fair labour practices. Therefore, the LRA was established to protect this fundamental right.

Section 23(1) of the Constitution affords 'everyone' the right to fair labour practices, which means that employers and employees alike enjoy the protection of this right under the provisions of section 23 and the LRA.¹³⁷ Consequently, the purpose of the LRA is to maintain a healthy balance between the inherent conflicts of interests that characterise the labour relations sector. The apparent incompatibility of employers' and employees' interests is only exacerbated in the business transfer context. Therefore, the purpose of section 197 needs to be deduced from this angle.

A contradiction regarding the purpose of section 197 arose before the Constitutional Court in the case of *NEHAWU v University of Cape Town*.¹³⁸ One group argued that the main purpose of the section is to facilitate business transfers.¹³⁹ The second group argued that the purpose of the section is to protect employment security in the event of a transfer. Consequently, the CC recognised that the core of business transfer disputes is a conflict between an employer's interest in the profitability, or efficient disposal of the business, and the employee's interest in job security. Therefore, the purpose of section 197 'lies somewhere in-between' the two opposing interests. The Court identified the dual purpose of section 197 as the medium that seeks to both facilitate sales of businesses as going concerns and protect the employment of the workers concerned.

¹³⁵ Khoza FK, 'An Examination of Employee Participation as Provided for in the Labour Relations Act of 1995' (1999) *Rhodes University* 44.

¹³⁶ Condradie M, 'A Critical Analysis of the Right to Fair Labour Practices' (2013) *University of Free State Scholar* 9

¹³⁷ Subramanien DC, 'The Right to Strike Under the Labour Relations Act 66 of 1995 (LRA) and Possible Factors for Consideration that Would Promote the Objectives of the LRA' (2019) *Potchefstroom Electronic Law Journal* 14.

¹³⁸ *Nehawu v University of Cape Town* 2003 (2) BCLR 154 (CC).

¹³⁹ *Ibid.*

3.3 The Effect of Business Transfer on the Contracts of Employment in Terms of Section 197 of the LRA

Section 197 guarantees continuity of employment on the transfer of a business and also provides for the maintenance of the terms and conditions of the contract of employment subject to any changes brought about by the agreement.¹⁴⁰ Compared to the common law position, which demanded a difficult procedure of novation and negotiation to assure any continuity of employment, this is a significant shift.¹⁴¹ It is plausible that such requirements should exist, but Section 197 itself does not specifically provide for such agreements or even disclosure of the transfer. The fact that section 197 gives employees more job security in a changing corporate environment may be its most significant outcome.¹⁴² The relationship between dismissals and section 197 will also be covered in this context.

Unfair dismissal during a business transfer can occur if an employee is dismissed without a fair reason or if the dismissal is procedurally unfair.¹⁴³ Fair reasons for dismissal include misconduct, incapacity, operational requirements, and redundancy. Procedural unfairness can occur if proper notice is not given, if there is no opportunity to respond to allegations, or if there is bias in the decision-making process.¹⁴⁴ Section 197 also provides for protection against retrenchment due to operational requirements during a business transfer.¹⁴⁵ If an employee's position becomes redundant as a result of the transfer, they must be offered alternative employment within reasonable commuting distance and on substantially similar terms and conditions.¹⁴⁶ If alternative employment is not available or if it is unreasonably refused by the employee, then severance pay may be payable.¹⁴⁷

The most revolutionary and most controversial effect of section 197 is that it provides for the continuity of the contract of employment by providing for its automatic transfer on the transfer

¹⁴⁰ Jones J, (master's Dissertation) 'The Interpretation and Effect of Section 197 of the Labour Relations Act 66 of 1995' (2001) *University of Stellenbosch* 100.

¹⁴¹ Ibid.

¹⁴² Limema NC, 'Prospects of Employment Security for Employees on Fixed-term Contracts in Terms of South African Labour Legislation' (2016) *North-West University* 30.

¹⁴³ Van Zyl L, 'An Evaluation of the Fairness Criteria for Dismissals Due to Absenteeism and Desertion from the Workplace' (2011) *North-West University* 90.

¹⁴⁴ Narcisse S et al, 'Employee Fairness Perceptions of Performance Appraisal: A Saint Lucian Case Study' (2008) *International Journal of Human Rights* 77.

¹⁴⁵ Masobe P, (master's Dissertation) 'The Effects of Transfer of Undertakings on Employee Rights in Labour Law and Insolvency Law: A Comparative Analysis' (2014) *North-West University* 30

¹⁴⁶ Benson E *Offers of Alternative Employment: A Guide to Redundancy Law* 1st ed Springer.

¹⁴⁷ Ibid.

of a business.¹⁴⁸ Section 197 accomplishes this by effecting a change in the parties to the contract, without their consent. This concept varies greatly from the common law position, and it will be some time before its full effects are clarified in our law. Determining what exactly this continuity of employment entails, as well as deciding which employees are affected by the section and whether they have a right to object to the transfer or not are also very important questions relating to this issue.

In *aviation Union of SA v SAA (Pty) Ltd and Others*¹⁴⁹ the question arose as to whether the employer and employee could by agreement cause the transfer of the business to interrupt the continuity of the employment of the employee who would be transferred along with the business. On the facts, the employee had signed a letter of appointment with the new employer after being transferred. The LC found that this agreement could not interrupt her continuity of employment as it was expressly forbidden by section 197(4). The court found that while "all the rights and obligations between the old employer and each employee at the time of the transfer could be varied by agreement, the employee's continuity of employment could not. With reference to *Macer v Abafast*,¹⁵⁰ it was held that the continuity of employment is neither a right nor an obligation between the old employer and employee, but merely a calculation and a fact.¹⁵¹ Section 197 therefore effectively ensures the continuity of employment on the transfer of the business, even when the terms of the contracts of employment are varied by agreement.

In terms of contracts of employment, Section 197 protects employees by ensuring that their terms and conditions of employment remain intact after the business transfer.¹⁵² The new employer is required to honour all existing contracts, including benefits, seniority, and any other entitlements that were enjoyed by the employees under the previous employer.¹⁵³ This provision aims to safeguard employees from unfair treatment or dismissal due to a change in ownership. Section 197 also safeguards employees' rights by prohibiting dismissals solely based on the transfer of a business. The new employer cannot terminate an employee's contract because of the transfer unless there are valid operational reasons for doing so.

¹⁴⁸ Jones J, 'The Interpretation and Effects of Section 197 of the Labour Relations Act 66 of 1995' (2001) *Stellenbosch University* 66.

¹⁴⁹ *Aviation Union of SA & Another v SAA (Pty) Ltd & Others* CCT 08/11[2011] ZACC 31.

¹⁵⁰ *Macer v Abafast* 1990 IRLR 137 (EAT)

¹⁵¹ *Ibid.*

¹⁵² Biggs L, 'The Application of Section 197 of the Labour Relations Act in an Outsourcing Context' (2008) *Nelson Mandela Metropolitan University* 23.

¹⁵³ *Ibid.*

Employees are entitled to continue their employment under similar conditions as before the transfer, ensuring continuity and stability in their working environment.

3.4 Transfer of Employees on an Outsourcing in South Africa

Outsourcing typically involves contracting out specific services to a third-party provider for a fee.¹⁵⁴ The service provider assumes responsibility for delivering the outsourced services, and in return, the customer pays for these services. When a function is outsourced, the service provider takes over the entire function and is accountable for delivering the final product.¹⁵⁵ The customer does not have control over how the work is carried out. The service provider hires employees to perform the outsourced function, retaining control over them, handling their compensation, and having the authority to manage them.¹⁵⁶ By outsourcing a function, the customer transfers the employment-related risks associated with that function to the service provider as they no longer directly employ those individuals performing the task.¹⁵⁷

The transfer of a business as a going concern is governed by LRA Section 197. All employment contracts that were in effect at the time of the business transfer are transferred to the new employer along with the business if section 197 applies to the particular transaction.¹⁵⁸ It has been determined that section 197 applies to transfers that take place when an employer chooses to outsource a portion of its operations to a service provider, provided that the principles about the definition of a transfer as a continuing concern and a business are duly considered.

Not every outsourcing transaction will automatically fall within section 197.¹⁵⁹ However, very little is required for its application. For example, if the service performed by the old and new service providers is the same, and some employees are taken over by the new service

¹⁵⁴ Clemons EK et al, 'Making the Decision to Contract for Cloud Services: Managing the Risk of an Extreme form of IT Outsourcing' (2011) *National University of Singapore* 8.

¹⁵⁵ Kumar S et al, 'Outsourcing: When and How Should it be Done' (2006) *Information Knowledge Systems* 65.

¹⁵⁶ Greer CR et al, 'Human Resource Management Outsourcing: The Make or Buy Decision' (1999) *Academy of Management Executive* 40.

¹⁵⁷ Ibid.

¹⁵⁸ Smit N, 'South African Regulation (or Non-Regulation) of a Transfer of a Business, Trade or Undertaking' (2000) *International Journal of Comparative Labour Law* 400.

¹⁵⁹ Khumalo B, 'The Application of Section 197 of the Labour Relations Act to Second-generation Outsourcing' (2019) *Southern African Public Law* 70.

provider and the business can seamlessly continue to be conducted by the new employer as a distinct economic entity that would be sufficient to trigger the application of section 197.¹⁶⁰

3.4.1 Dismissals

Under section 197 of the LRA, dismissals for operational reasons (such as redundancies or retrenchments) may be carried out if they are unrelated to the business transfer;¹⁶¹ in other words, for the proposed dismissal to be justified and not be deemed null and void, it must be based on an operational requirement distinct from the transfer itself. However, dismissals for misconduct and incapacity (such as below standard performance) may be carried out normally before or after the transfer, given that this is the real cause of the dismissal.¹⁶²

3.4.2 What liability could arise for the transferor or the transferee for any dismissals before the transfer?

If section 197 of the LRA applies, the liability for the dismissal will transfer to the employees, unless the parties have agreed otherwise in their agreement.¹⁶³ In most cases, the parties will agree for the transferor to retain responsibility for any dismissals implemented before the transfer date (and consequently the transferee for dismissals following the transfer date

3.4.3 What liability could arise for the transferor or the transferee for any dismissals after the transfer?

Regarding transfers under section 197 of the LRA, the previous employer (transferor) will share liability with the new employer (transferee) for any employee-related payments or terminations due to operational requirements for 12 months after the transfer, unless the previous employer can demonstrate full compliance with section 197.¹⁶⁴ Mere compliance with section 197 also falls short in this context and for it fully meet the criteria of what would be construed as a justifiable dismissal is that it be read combining both sections 186(1)(f) and 187(1)(g) of the LRA. Whereas section 186(1)(f) outlines that the conditions that the employ is transferred under, when substantially less favourable to the employee are unfair, section 187(1)(g) renders a dismissal in relation to a business transfer an automatically unfair. Consequently, dismissals that are aligned to the transfer of a business are prohibited. The

¹⁶⁰ Ibid.

¹⁶¹ Dube N, 'Dismissal for Operational Requirements: a critical Examination of the Role of the Courts in Mitigating Dismissals with Specific Reference to the Banking Industry' (2022) University of Cape Town 98.

¹⁶² Ibid.

¹⁶³ Bosch C, 'Operational Requirements Dismissals and Section 197 of the Labour Relations Act: Problems and Possibilities' (2002) *Industrial Law Journal* 40.

¹⁶⁴ Germishuys W et al, 'The legal Obligation to Provide for Employee-related Contingent Liabilities when an Enterprise is Sold as a Going Concern' (2014) *South African Mercantile Law Journal* 201.

extent of the parties' liability for such matters is usually negotiated between the parties and provided for in the terms of their agreement.

3.5 Information, Consultation and the Right to Object to Business Transfer

Under Section 197, an employee's position in a company transfer is inextricably linked to their right to knowledge.¹⁶⁵ Employees are entitled to get complete information about the transfer, including the reasons for it, how it will affect their job security, and any potential changes to their terms and conditions of employment.¹⁶⁶ Employees are better equipped to comprehend the circumstances and make wise decisions about their futures, thanks to this information.¹⁶⁷

Moreover, one of the most important parts of the transfer procedure is the right to consultation.¹⁶⁸ Before completing the transfer, employers must hold meaningful dialogues with workers or their representatives. The impact of the transfer on employees, prospective modifications to employment terms, and other steps that can lessen unfavourable effects on employees should all be covered in these negotiations.¹⁶⁹ Employee concerns and opinions about the move can be voiced during this conversation, which promotes transparency.

Employees also have the option to protest the business transfer if they are of the view that it will negatively affect their job or working circumstances.¹⁷⁰ The LRA stipulates that if employees choose to object, they must do so in writing and within a certain amount of time.¹⁷¹ Employers must take these arguments into honest consideration and investigate reasonable concessions or alternatives to allay employees' worries.

If employees express objections to the business transfer, employers are expected to engage in further consultations to address the issues raised.¹⁷² This process may involve negotiating with employees or their representatives to find mutually acceptable solutions that safeguard

¹⁶⁵ Smit N, 'Labour law Implications of the Transfer of an Undertaking (2001) *University of Johannesburg* 9.

¹⁶⁶ Workman-Davies B, 'The Right of Employers to Dismiss Employees in the Context of Business Transfers-An Analysis of the Automatically Unfair Dismissal Provision of the Labour Relations Act 65 of 1995' (2007) 28 *Industrial Law Journal* 2139.

¹⁶⁷ Ibid.

¹⁶⁸ Lober P, 'Information and Consultation' (2018) *The Transfer of Undertaking in the Public Sector* 24.

¹⁶⁹ Mililiken FJ et al, 'An Exploratory Study of Employee Silence: Issues that Employees Don't Communicate Upward and Why' (2003) 40 (6) *Journal of Management Studies* < <https://doi.org/10.1111/1467-6486.00387> > Accessed 19 April 2024.

¹⁷⁰ Sparkes JR et al, 'Knowledge Transfer and Human Resource Development Practices: Japanese Firms in Brazil and Mexico' (2000) *International Business reviews* 30.

¹⁷¹ Weiler P, 'Promises to Keep: Securing Workers Right to Self- Organisation Under the NLRA' (1982) *Havard Law Reviews* 44.

¹⁷² Forman J et al, 'How Corporate Communication Influences Strategy Implementation, Reputation and the Corporate Brand: An Exploratory Qualitative Study' (2005) *Corporate Reputation Review* 257.

employees' rights and interests. Employers must demonstrate a willingness to listen to employees' perspectives and engage in constructive dialogue to resolve any conflicts or challenges related to the transfer.¹⁷³

Communication plays a vital role in ensuring a smooth and fair business transfer process. Employers should provide regular updates to employees throughout the transfer process, keeping them informed of any developments, decisions, or changes that may affect their employment. Open and transparent communication builds trust and minimises uncertainties among employees, fostering a more positive transition experience.

Employees have the right to seek clarification or additional information from their employers regarding the business transfer.¹⁷⁴ Employers are obligated to respond promptly to employees' inquiries and address any uncertainties or ambiguities regarding the transfer. This transparency promotes a more transparent and equitable transfer process, instilling confidence in employees about the company's commitment to their employment well-being.¹⁷⁵

The right to information and consultation before a business transfer is essential for protecting employees' rights and ensuring fair treatment during times of organisational change.¹⁷⁶ These rights provide employees with the opportunity to voice their concerns, raise objections, and actively participate in the decision-making process. By upholding these rights, employers can demonstrate their commitment to respecting and valuing their employees' contributions and well-being.

The rights to information, consultation, and objection in the context of business transfers under Section 197 of the LRA are critical components of ensuring a just and transparent transfer process. By upholding these rights, employers can harness trust, promote open communication, and address employees' concerns effectively, ultimately contributing to a smoother transition for all parties involved.

¹⁷³ Martin G et al, 'Is There a Bigger and Better Future for Employer Branding? Facing up to Innovation, Corporate Reputations and Wicked Problems in SHRM' (2011) *The International Journal of Human Rights* 300.

¹⁷⁴ McMullen J, 'An Analysis of the Transfer of Undertakings (Protection of Employment) Regulations 2006' (2006) *Industrial Law Journal* 1298.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

3.6 The Transfer of Business from the Public to the Private Entity

When a business is transferred from a state-owned entity to a private entity in South Africa, Section 197 applies to safeguard the rights of employees during this transition.¹⁷⁷ The new employer, in this case, the private entity, is obligated to take over all employment contracts and obligations that existed between the previous employer (state-owned entity) and its employees. Under Section 197, the transfer does not affect the continuity of employment for employees.¹⁷⁸ Their years of service with the state-owned entity are recognised by the new private employer, ensuring job security and preventing unfair dismissal due to the transfer.¹⁷⁹

Before the transfer takes place, both the previous and new employers are required to consult with any recognised trade unions or employee representatives regarding the implications of the transfer on employees.¹⁸⁰ This ensures transparency and allows for negotiations to protect employee rights during and after the transfer process.¹⁸¹ One key aspect regulated by Section 197 is that all terms and conditions of employment must be preserved post-transfer. This includes salary levels, benefits, leave entitlements, and any other contractual agreements that were in place before the transfer occurred.¹⁸²

Another important point is that liabilities related to employees also transfer from the state-owned entity to the private entity. This means that any outstanding payments, such as wages, bonuses, or benefits owed to employees by the previous employer become the responsibility of the new employer.¹⁸³ Employees do not need to provide explicit consent for their employment contracts to be transferred under Section 197. The protection afforded by this section is automatic and ensures that employees are not disadvantaged by changes in ownership or management.

¹⁷⁷ Stevens AG, 'Enforceable Accountability: A Corporate Governance Mirage for South African State-owned Companies' (2021) *University of Cape Town* 70.

¹⁷⁸ Blackie W Et Al, 'Transfer of Contracts of Employment as a Result of Mergers and Acquisition: A Study of Section 197 of the Labour Relations Act 66 of 1995' (1999) *Industrial Law Journal* 209.

¹⁷⁹ Zhao M et al, 'Managing Control of Labour in State-Owned Enterprises: Cases from the Textile Industry' (2019) *Chinese Workers and their State* 55.

¹⁸⁰ Cooke FL, 'Ownership Change and Reshaping of Employment Relations in China: A Study of Two Manufacturing Companies' (2002) *Journal of Industrial Relations* 310.

¹⁸¹ Ibid.

¹⁸² Rousseau DM, 'New Hire Perceptions of their Own and their Employer's Obligations: A Study of Psychological Contracts' (1990) *Journal of Organisational Behaviour* 30.

¹⁸³ Baker GP et al, 'Compensation and Incentives: Practice vs Theory' (1988) *The Journal of Finance* 12.

If disputes arise during or after the transfer process, Section 197 provides mechanisms for resolving conflicts between employers and employees.¹⁸⁴ This can include mediation, arbitration, or legal action if necessary to ensure fair treatment for all parties involved.¹⁸⁵ Both state-owned entities and private entities must comply with all legal requirements stipulated in Section 197 when undergoing a business transfer.¹⁸⁶ Failure to adhere to these regulations can result in legal consequences and penalties for non-compliance.

Effectively, when a business in South Africa transitions from being state-owned to privately owned, Section 197 of the Labour Relations Act plays a vital role in protecting employee rights, ensuring job security, preserving terms and conditions of employment, transferring liabilities, facilitating consultation with employee representatives, and providing mechanisms for dispute resolution.

3.7 Conclusion

In conclusion, the business transfer process in South Africa, governed by Section 197 of the Labour Relations Act, plays a crucial role in protecting employees' rights during a change in ownership. This section ensures that employees are not unfairly affected by the transfer of a business from one employer to another. The legislation provides continuity of employment for workers, safeguarding their existing terms and conditions of employment. Employers involved in a business transfer must adhere to the provisions outlined in Section 197 to ensure a smooth transition that respects the rights of employees.

Moreover, the effect of business transfers on contracts of employment is significant. When a business is transferred under Section 197, all employment contracts are automatically transferred to the new employer. This means that employees retain their existing terms and conditions of employment, including benefits, seniority, and other entitlements. The new employer steps into the shoes of the previous employer regarding these contractual obligations, ensuring that employees are not disadvantaged due to the change in ownership.

Furthermore, Section 197 also imposes obligations on both the old and new employers to inform and consult with employee representatives regarding the transfer. This consultation process aims to ensure transparency and fairness throughout the transfer process. By

¹⁸⁴ Spree W, (master's Dissertation) 'The Transfer of Undertakings with Specific Reference to the Transfer of Insolvent Undertakings-an Evolution of the South African Law' (2007) *University of Stellenbosch* 66.

¹⁸⁵ Ibid.

¹⁸⁶ Appiah-Kubi K, 'State -Owned Enterprises and Privatisation in Ghana' (2001) *The Journal of Modern African Studies* 45.

involving employee representatives, both employers can address any concerns or issues that may arise because of the business transfer, fostering better communication and cooperation between all parties involved.

Additionally, employers need to understand their responsibilities under Section 197 when engaging in a business transfer. Failure to comply with the requirements set out in this legislation can lead to legal consequences and potential disputes with employees. Therefore, employers must seek legal advice and guidance to navigate the complexities of business transfers effectively while upholding the rights of their employees.

In essence, Section 197 of the Labour Relations Act serves as a vital mechanism for protecting employees' rights during business transfers in South Africa. By ensuring continuity of employment and preserving existing contractual terms and conditions, this legislation promotes fairness and stability for workers impacted by changes in ownership. Employers must proactively engage with the provisions outlined in Section 197 to facilitate a seamless transition that upholds the interests of both employees and businesses involved.

CHAPTER 4 - PROTECTION OF EMPLOYEES DURING BUSINESS TRANSFERS: A COMPARATIVE STUDY

4.1 Introduction

The focus of this chapter is on the protection of employees during business transfers, examining the legal frameworks and challenges that arise in various countries such as the United Kingdom and Namibia as they will be compared with South Africa. This chapter explores how business mergers, sales, plant closures, and other corporate restructuring processes impact job security and worker rights, often leaving employees vulnerable. A comparative study is undertaken, analysing the legal approaches of the United Kingdom, South Africa, and Namibia. Each country has its own unique regulatory landscape, shaped by its socio-economic context and labour relations history. By exploring these jurisdictions, this chapter aims to highlight the different ways employee protections are structured during business transfers, the challenges these systems face, and potential strategies for improving worker safeguards. The comparative analysis will provide valuable insights into the balance between economic objectives and the protection of workers' rights in different legal frameworks.

The impact of business mergers, sales, workplace shutdowns, plant moves, subcontracting, or other corporate restructuring can be severe for employees.¹⁸⁷ The loss of job security and the elimination of collectively negotiated safeguards can create a void for displaced workers, a void that conventional labour law, which heavily relies on voluntarism, is increasingly incapable of addressing. Traditional labour law has struggled to reconcile the fundamental conflict between the economic imperatives of restructuring and rationalization and the societal need for safeguarding workers' interests.¹⁸⁸

When the UK Government was confronted with the European Community's Directive on the Safeguarding of Employees' Rights in the Event of Transfers of Undertakings, the question regarding the need for legislation to protect workers in the case of business transfers was seriously debated.¹⁸⁹ Previously, similar questions had emerged regarding the enactment of

¹⁸⁷ Jork F et al, 'Restructuring Across Value Chains and Changes in Work and Employment: Case Study Evidence from the Clothing, Food, It and Public Sector' (2007) *Works Changes in Work* 120.

¹⁸⁸ Katsaroumpas I, (Doctorate thesis) 'Collective Labour Law in Times of Economic Crisis: Theoretical and Comparative Perspectives' (2016) University of Oxford 300.

¹⁸⁹ European Community's Directive on the Safeguarding of Employees' Rights in the Event of Transfers of Undertakings <[https://www.irishstatutebook.ie/eli/1980/si/306/made/en/print#:~:text=\(1\)%20The%20transfer%20of%20an,a%20transferee%20is%20hereby%20prohibited](https://www.irishstatutebook.ie/eli/1980/si/306/made/en/print#:~:text=(1)%20The%20transfer%20of%20an,a%20transferee%20is%20hereby%20prohibited)> Accessed 10 January 2024.

the law on unfair dismissal, the Redundancy Payments Act,¹⁹⁰ and some provisions of the European Community's Directive on Collective Redundancies.¹⁹¹ In the United States, the minimal protection provided by the law and its shrinking ability to lessen the impact of business reorganisations has compelled unions to develop strategies to deal with the trend of corporate mergers, takeovers, reorganisations, and closures.¹⁹²

Considering the widely reported decrease in union participation, it is essential to broaden the conversation to encompass non-unionized workers and entire communities. In South Africa, a comparable dialogue has emerged, particularly regarding the interactions between workers and employers in a non-racial South Africa, as well as the prospective role of collective bargaining in economic reconstruction.¹⁹³ A comparative analysis of the legal frameworks in Namibia, South Africa, and the United Kingdom can highlight the contrasting interests that become prominent during corporate reorganizations and propose potential approaches to reconcile these divergent interests.

The similarities in the industrial relations systems in the three countries are striking: the major premise in all of them is that employees sell their labour power in a free exchange, that employers exercise ultimate control over the productive processes, and that employees are expected to accept the employers' management and decision-making powers. As a result, that will disadvantage the employees because of change in the management. Business transfers and accompanying business changes are a focal point for the tension between the protection of rights of employees, including their "property rights" in the job and their "right to meaningful participation, and the interests of management in achieving its economic objectives effectively."¹⁹⁴

The acquired rights laws in the UK fell short of the expectations of people who desired more work security.¹⁹⁵ These laws were developed from the EC's 1974 social action agenda and

¹⁹⁰ Redundancy Payments Act 21 of 1967.

¹⁹¹ Collective Redundancies Directive 98/59/EN <<https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vj3ecgdh6fqq> > Accessed 10 January 2024.

¹⁹² Domhoff W, 'The Rise and Fall of Labour Unions in the U.S From the 1830s until 2012 (but mostly the 1930s- 1980s)' (2013) < http://whorulesamerica.net/power/history_of_labour_unions.html > Accessed 13 January 2024.

¹⁹³ Naidoo R, 'Poverty Alleviation Through Social Dialogue: The Role of Trade Union in South Africa' (2013) *Trade Unions and Poverty Alleviations in Africa, Harare* 75.

¹⁹⁴ Marleen O, 'Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers' (1991) 69(4) *North Carolina Law Review* 1213.

¹⁹⁵ Morck R et al, 'The Global History of Corporate Governance: An Introduction' (2005) < <http://www.nber.org/chapters/c10267> > Accessed 12 January 2024.

were viewed with great skepticism by companies and certain governments.¹⁹⁶ Though legislative amendments were introduced in the UK after the European Commission started infringement proceedings due to the UK's failure to fulfill its obligations, they also promise to expand the scope of application of UK legislation. Since 1989, however, judicial activism in the European Court of Justice has seemed to expand the scope of the EC Directive.¹⁹⁷ While there are still significant shortcomings, in part due to the absence of UK legislation supporting workers' representatives' appointments, the gained rights legislation has resulted in employee job security and has introduced some curb on the way in which management approaches business reorganizations.

Business transfer laws in Namibia have undergone scrutiny, with a focus on enhancing regulatory frameworks to facilitate smoother transitions.¹⁹⁸ Recognizing the importance of nurturing a conducive environment for business transfers, efforts have been made to refine legal provisions and mechanisms governing these processes. The objective is to balance the interests of employers and employees while promoting economic stability. Developments in Namibia include a closer examination of laws pertaining to worker rights, job security, and the role of collective bargaining during business transfers.¹⁹⁹ These improvements aim to create a more transparent and equitable landscape for businesses undergoing transfers, fostering a business environment that encourages growth and protects the rights of all stakeholders involved in the transition.

International comparative labour law plays a crucial role in comprehending and tackling the intricacies associated with the transfer of businesses across international borders.²⁰⁰ With businesses increasingly expanding their operations globally, the consequences of relocating operations, assets, or entire entities transcend national confines.²⁰¹ Comparative labour law enables policymakers, legal professionals, and businesses to scrutinize and draw lessons

¹⁹⁶ European Foundation for the Improvements of Living and Working Conditions <<https://archives.eui.eu/en/isaar/645#:~:text=The%20Council%20Resolution%20of%2021,labour%20in%20the%20economic%20and>> Accessed 10 January 2024.

¹⁹⁷ Sweet A, 'The European Court of Justice and the Judicialization of EU Governance' (2010) *Living Reviews in EU Governance* 132.

¹⁹⁸ Conroy L, 'Millennial Development: A Case Study of Namibia's Vision 2030' (2011) *Electronic Theses and Dissertation University of Windsor* 236.

¹⁹⁹ Benjamin P, 'The Persistence of Unfree Labour: The Rise of Temporary Employment Agencies in South Africa and Namibia' (2013) *Routledge Studies in Employment and Work Relations in Context* 500.

²⁰⁰ Hajro A et al, 'Addressing the Elephant in the Room: Global Migration and its Implications for Business School Teaching' (2022) 21 (1) *Academy of Management Learning* 201.

²⁰¹ Robert T, 'The Social Entities Revolution on Corporate Law: A Primer on Emerging Corporate Entities in Europe and the United States and the Case for the Benefit Corporation' (2013) *William & Mary Business Law Review / Law School Journals* 640.

from diverse legal frameworks implemented in various countries.²⁰² This comparative examination aids in identifying optimal practices, potential pitfalls, and innovative approaches that can guide the formulation or enhancement of regulations governing cross-border business transfers. It serves as a valuable instrument for cultivating a nuanced understanding of the complex relationships among employers, employees, and pertinent stakeholders, providing insights into how legal systems can effectively balance the interests of the different parties involved in such cross-border business transfers.

Furthermore, the importance of international comparative labour law lies in its capacity to promote harmonization and convergence of legal standards.²⁰³ By examining how various jurisdictions address issues such as employee protections, collective bargaining, and job security during business transfers, policymakers can work towards creating a more cohesive and globally applicable framework. This not only facilitates smoother cross-border business operations but also contributes to the establishment of fair and consistent practices that uphold workers' rights and promote ethical business conduct on an international scale.²⁰⁴ Comparative law offers us avenues by which to access other, foreign patterns of thought and organization different from those familiar to us. We learn a different language, and a different legal culture altogether, something we might call different “patterns of order that shape people, institutions, and the society in a jurisdiction.

4.2. Purpose and Challenges of Comparative Law

The international comparative labour law presents several challenges, particularly in relation to business transfers.²⁰⁵ One of the main difficulties is harmonizing labour laws across different countries with different economies. Each country has its own set of labour regulations and standards, which can vary significantly. When a business is transferred internationally, it becomes crucial to ensure that the rights and protections of workers are maintained, regardless of the country they are in. Finding common ground and establishing a framework that respects the principles of labour law can be a complex task.

²⁰² Roberts A, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International: Law' (2011) *International & Comparative law Quarterly* 48.

²⁰³ International Labour Organisation (ILO) < <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/the-benefits-of-international-labour-standards/lang--en/index.htm> > Accessed 10 January 2024.

²⁰⁴ Stiglitz JE, 'Regulating Multinational Corporations: Towards {Principles of Cross-Boader Legal Framework in a Globalized World Balancing Rights with Responsibilities}' (2007) *American University International Law Review* 474.

²⁰⁵ Michaels R, 'Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law' (2009) *The American Journal of Comparative Law* 400.

Another challenge of international comparative labour law in the context of business transfer is addressing the issue of jurisdiction.²⁰⁶ Determining which country's laws should apply in cases of a business transfer can be complicated. It requires a thorough understanding of the legal systems involved and careful consideration of factors such as the location of the business, the nationality of the workers, and the terms of any existing labour agreements. Failure to properly determine jurisdiction can lead to confusion, disputes, and potential violations of workers' rights.

Furthermore, ensuring the effective enforcement of labour laws across borders is a significant challenge.²⁰⁷ Even when labour laws are harmonized and jurisdiction is determined, enforcing these laws can be difficult. Different countries may have varying levels of commitment to labour rights and may lack the resources or infrastructure to effectively enforce them. This can result in exploitation of workers and unfair labour practices. It is essential to establish mechanisms for cooperation and collaboration between countries to ensure that labour laws are enforced, and workers' rights are protected.

In this chapter the countries which were selected for comparative studies are United Kingdom and Namibia because they have strong regulations of the business transfer as well as advanced protection for the employees during business transfer.

4.3 Business Transfers in the United Kingdom

In the United Kingdom, business transfers are commonly facilitated through mechanisms such as mergers and acquisitions (M&A), where one company acquires another. The UK has a well-established legal framework governing such transactions, with detailed regulations and contractual practices that provide clarity and structure to the process.²⁰⁸ Additionally, the UK benefits from a mature financial market, facilitating funding for business transfers.²⁰⁹ The transparency and stability of the UK business environment contribute to a relatively smooth transfer process.

²⁰⁶ Stone KVV, 'Labour and Global Economy: Four Approaches to Transitional Labour Regulation' (1994) *Michigan Journal of International Law* 302.

²⁰⁷ Macklem P, 'Labour Law Beyond Borders' (2002) *Journal of International Economic Law* 34.

²⁰⁸ Black B, 'A Self-Enforcing Model of Corporate Law' (1996) *Harvard Law Review* 13.

²⁰⁹ Wronka C, 'Anti-Money Laundering Regimes: A Comparison Between Germany, Switzerland, and the UK with a Focus on the Crypto Business' (2022) *Journal of Money Laundering Control* 76.

On the other hand, South Africa approaches business transfers with its own set of dynamics.²¹⁰ The country has a growing economy and a diverse business landscape. Business transfers in South Africa may involve navigating through complex regulatory frameworks, including compliance with the Broad-Based Black Economic Empowerment (B-BBEE) section 2 as well as Code 100 policies aimed at promoting economic transformation. This section states the objectives of the B-BBEE including the promotion and economic transformation and empowerment of previously disadvantaged groups. Understanding and adhering to these policies is crucial for a seamless business transfer in the South African context. Cultural and regional differences also play a significant role in business transfers in both countries.²¹¹ The UK, being part of the European business landscape historically, has integrated into global business practices with a focus on efficiency and competitiveness. In contrast, South Africa's business environment is influenced by its unique socio-economic history, with considerations for inclusivity and diversity shaping business transfer strategies.

Furthermore, tax implications differ between the UK and South Africa. While the UK has a sophisticated and well-established tax system, South Africa's tax landscape may require careful consideration and planning to navigate successfully.²¹² The tax implications of a business transfer can significantly impact the overall success and profitability of the transaction in both jurisdictions. In the United Kingdom, laws regulating business transfers are primarily governed by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).²¹³ TUPE is designed to protect employees' rights when a business or part of a business is transferred to a new owner. It ensures that employees maintain their existing terms and conditions of employment, fostering job security during the transfer process. The UK legal system provides a clear and structured framework for businesses to navigate, offering predictability in dealing with employee-related aspects of transfers.

²¹⁰ Esser I et al, 'Dynamics of Corporate Governance in South Africa: Broad Based Black Economic Empowerment and the Enhancement of Good corporate Governance Principles' (2008) *International Journal of Law and Information Technology* 43.

²¹¹ Lucas LM, 'The Role of Culture on Knowledge Transfer: The Case of the Multinational Corporation' (2006) *The Learning Organization* 20.

²¹² Bernstein A, 'South Africa's Key Challenges: Tough Choices and New Directions' (2014) *The Annals of the American Academy of Political and Social Science* 98.

²¹³ Transfer of Undertakings (Protection of Employment) Regulations 2006 < <https://www.legislation.gov.uk/uksi/2006/246/contents/made> > Accessed 08 February 2024.

In South Africa, the legal framework governing business transfers is influenced by the LRA and BCEA.²¹⁴ Similar to the TUPE in the UK, these South African laws are designed to safeguard the rights of employees during business transfers. However, South Africa's emphasis on B-BBEE introduces an additional layer to the regulatory landscape such as the Code 100 of the B-BBEE.²¹⁵ This provision promotes economic empowerment and transfer of ownership to black people. Compliance with B-BBEE policies is a crucial consideration, ensuring that the transfer contributes to economic transformation and empowerment within the country. Both the UK and South Africa recognize the significance of informing and consulting with employees during a business transfer. In the UK, TUPE mandates that employee representatives be consulted, while in South Africa, the LRA requires consultation with employee representatives or trade unions. Effective communication and consultation are fundamental elements in ensuring a seamless transition for employees in both jurisdictions.

In terms of contractual and commercial aspects, the UK operates under a common law system, which allows parties a great deal of flexibility in negotiating and structuring business transfers.²¹⁶ On the other hand, South Africa's legal system is based on a combination of common law and civil law, creating a regulatory environment that may necessitate more explicit and detailed contractual arrangements to ensure legal compliance and protect the involved parties. While both the UK and South Africa are committed to safeguarding employees during business transfers, the specific legal frameworks and considerations differ. The UK's TUPE offers a comprehensive structure for employment-related aspects, whereas South Africa's legal landscape introduces complexities related to empowerment policies. It is essential for businesses looking to transfer operations in either jurisdiction to understand and navigate these regulatory environments.

4.4 Business Transfers in Namibia

Comparative analysis of laws regulating business transfers in Namibia and South Africa involves examining the legal frameworks that govern the process of transferring businesses in these two countries. Both Namibia and South Africa have specific laws and regulations in place to ensure smooth and transparent business transfers.

²¹⁴ Spree W (master's Dissertation) 'The Transfer of Undertakings with Specific Reference to the Transfer of Insolvent Undertakings: An Evolution of the South African Law' *University of Stellenbosch* 87.

²¹⁵ See Code 100 of the B-BBEE Codes.

²¹⁶ Hansmann H et al, 'The Functions of Trust Law: A Comparative Legal and Economic Analysis' (1998) *Nyul Reviews* 76.

In Namibia, business transfers are primarily governed by the Business Transfer Act.²¹⁷ This Act provides guidelines and procedures for the transfer of businesses, including the transfer of assets, liabilities, and contracts. The Act also outlines the obligations of both parties which are protected during the transfer process. Additionally, the act requires that the transferor informs all employees and creditors about the intended transfer.

In contrast, South Africa does not have specific legislation dedicated to business transfers. However, the Companies Act such as section 51 provides provisions for the transfer of shares in a company.²¹⁸ This section deals with the registration and transfer of the company and the rights of the shareholders in relation to the transfer of shares. This act ensures that the transfer of shares is done in a fair and transparent manner, protecting the rights of both the transferor and the transferee. Additionally, the act requires that any agreements related to the transfer of shares are filed with the Companies and Intellectual Property Commission.

It is worth noting that in Namibia, certain businesses, such as banks and insurance companies, have additional regulations and requirements for their transfer such as provided for in section 21 of the Business and Intellectual Property Authority Act 2 of 2016.²¹⁹ In South Africa, the transfer of businesses is also subject to competition law regulations such as section 12 of the Competition Act 89 of 1998.²²⁰ The section 12 of the Competition Act prohibits anti-competitive business transfers,²²¹ such as mergers and acquisitions that may result in a substantial lessening of competition.²²² These regulations aim to maintain a fair and competitive market environment for businesses and consumers.

Both Namibia and South Africa have systems in place to ensure that business transfer are conducted transparently and fairly. However, there are differences in the specific laws and regulations governing these transfers. While Namibia has a dedicated act for business transfers, South Africa relies on section 197 of the LRA.

Overall, the comparative analysis of laws regulating business transfers in Namibia and South Africa highlights the significance of having a clear legal framework to govern the process. This ensures that both parties are protected, and transfer is conducted fairly and

²¹⁷ Business Transfer Act of 1997

²¹⁸ See Section 51 of the Companies Act 71 of 2008.

²¹⁹ Adamas DW et al, 'African Financial Systems: A Review' (2011) *Review of Development of Finance* 22.

²²⁰ Roberts S, 'Competition and Regulation Interface in Energy, Telecommunications and Transport in South Africa' (2017) *Competition Law and Economics Reviews* 67.

²²¹ Competition Act of 1998

²²² See Section 12 of the Competition Act 89 of 1998.

transparently. It is essential for businesses considering a transfer in either country to familiarize themselves with the specific laws and regulations that apply to their industry.

4.5 How will the reforms in the United Kingdom and Namibia Influence the Law on Business Transfer in South Africa

The UK has historically served as a benchmark for legal frameworks in various countries, including South Africa. Reforms in the UK related to business transfer laws, especially those concerning company acquisitions, employee rights, and contractual obligations, often set a precedent for similar adjustments elsewhere.²²³ South Africa, keen on international business standards, could likely align some of its transfer laws with UK reforms to foster a more investor-friendly environment and ensure clearer, standardized procedures for business acquisitions.

Changes in the UK's corporate governance practices often ripple through global markets.²²⁴ South Africa seeks to incorporate aspects of the UK's evolving governance norms. This could influence how South African businesses handle ownership transfers, mergers, and acquisitions, potentially emphasizing transparency, accountability, and shareholder rights, mirroring shifts in the UK. On the other hand, Namibia's business transfer laws may not directly impact South Africa due to geographical distance and differing economic landscapes. However, if Namibia undertakes reforms that align with international best practices, especially those like UK standards, South Africa might indirectly consider adopting some of these principles. This could be particularly pertinent if Namibia's reforms involved modernizing contract law, employment regulations, or intellectual property rights, elements crucial to business transfer laws.

Given South Africa's active role in regional economic bodies such as the Southern African Development Community, in the form of the SADC Treaty in Article 5 (2) (d),²²⁵ it might draw inspiration from regional harmonization efforts influenced by the UK and Namibia's reforms. This Article requires SADC to develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the people

²²³ Coates IV JC, 'Reforming the Taxation and Regulations of Mutual Funds: A Comparative Legal and Economic Analysis' (2009) *Journal of Legal Analysis* 30.

²²⁴ Branson DM, 'The Very Uncertain Prospects of Global Convergence in Corporate Governance' (2001) *Cornell International Law Journal* 340.

²²⁵ Rogerson CM, 'Reframing Place-Based Economic Development in South Africa: The Example of Local Economic Development' (2014) *Bulletin of Geography Socio-economic Series* 420.

of the region generally, among member states.²²⁶ Any convergence of business transfer laws within the SADC region, influenced by the UK and indirectly shaped by Namibia, could prompt South Africa to consider aligning its laws for smoother cross-border transactions.

However, direct implementation of UK or Namibia reforms into South African law might encounter challenges due to differing legal systems, socio-economic conditions, and cultural context. Adjustments would need careful consideration to ensure compatibility and effectiveness within South Africa's legal framework while addressing the country's unique business landscape and societal needs.

Harmonizing business transfer laws with UK and regional reforms might offer South African businesses enhanced predictability, reduced legal complexity, and increased investor confidence. Aligning with global best practices could potentially attract foreign direct investment and stimulate economic growth by streamlining transfer processes and providing a more conducive business environment.

While each country's reform might influence South Africa differently, these changes present an opportunity for collaborative learning and the exchange of best practices. South Africa could actively engage in comparative legal studies with the UK and Namibia, assessing the efficacy of their reforms and strategically adopting elements that suit its unique business landscape while fostering mutual learning and growth amongst nations.

4.6 Comparative Analysis of Employee Protection Laws

In the United Kingdom, employee protection laws during business transfers are primarily governed by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). These regulations aim to safeguard employees' rights when a business or part of a business is transferred to a new employer. The TUPE regulations ensure that employees' terms and conditions of employment are preserved, and they cannot be dismissed because of the transfer. Additionally, the regulations require the outgoing employer to inform and consult with employee representatives about the transfer. In Namibia, employee protection laws also address business transfers through the Labour Act of 2007. This legislation provides for the protection of employees' rights in cases of business transfers, ensuring that their employment contracts are not terminated solely due to the transfer. Furthermore, the

²²⁶ See Article 5(2)(d) of the SADC Treaty.

Labour Act mandates that both the previous and new employers inform and consult with employee representatives regarding the transfer, like the provisions under TUPE in the UK.

4.6.1 Similarities and Differences in Jurisdictions

Both the United Kingdom and Namibia have established legal frameworks to protect employees during business transfers, emphasizing the preservation of their rights and ensuring consultation with employee representatives. However, there are notable differences between these jurisdictions. For instance, while TUPE in the UK applies to all businesses regardless of size, Namibia's Labour Act exempts small businesses with fewer than 20 employees from certain provisions related to consultation processes during transfers. Moreover, there may be differences in specific protections provided to employees, such as redundancy entitlements and obligations related to pension schemes. Despite these variances, both jurisdictions share the common goal of safeguarding employees' rights during business transfers.

4.6.2 Potential Areas for Harmonisation or Improvement

The comparative analysis reveals potential areas for harmonization or improvement in employee protection laws during business transfers. One area for consideration is aligning thresholds for exemption from certain provisions across jurisdictions to ensure consistent protection for all employees regardless of the size of the transferring business. Additionally, harmonizing specific protections such as redundancy entitlements and pension obligations could contribute to greater clarity and consistency for employers operating across different jurisdictions. Furthermore, enhancing provisions related to informing and consulting with employee representatives during business transfers could promote a more standardized approach to employee involvement in such processes. By identifying these potential areas for harmonization or improvement, policymakers can work towards enhancing employee protection laws across different jurisdictions.

4.8 Lessons learned

The comparative analysis between the UK and Namibia's business transfer laws highlights important lessons on the significance of a clear and structured legal framework in facilitating business transitions while safeguarding employee rights. The UK's Transfer of Undertakings (Protection of Employment) Regulations (TUPE) serve as a robust model, providing comprehensive protections for employees and fostering a predictable business environment. Namibia, while sharing similar employee protections under its Labour Act, demonstrates the

need for tailored legislation that considers the size and nature of businesses, especially in a developing economy. The analysis emphasizes the importance of consultation and communication with employees in both jurisdictions but also reveals the potential for Namibia to enhance protections for smaller businesses and harmonize with global standards. This comparison offers valuable insights into how both developed and developing nations can balance the interests of business owners and employees while ensuring transparency, fairness, and economic empowerment in business transfers.

4.9 Conclusion

The comparative analysis of business transfers in Namibia, South Africa, and the United Kingdom has revealed several key insights. Firstly, it is evident that each country has its own unique legal framework governing business transfers, with variations in the scope of regulations, employee protections, and procedural requirements. Namibia's Labour Act provides comprehensive provisions for protecting employees' rights during business transfers, while South Africa's Labour Relations Act offers similar protections but with some differences in application. In contrast, the United Kingdom's Transfer of Undertakings (Protection of Employment) Regulations (TUPE) sets out specific rules for employee transfers in the context of business acquisitions or outsourcing.

Furthermore, the comparative analysis highlighted the importance of considering the impact of business transfers on employees' rights and job security. While all three jurisdictions aim to safeguard employees' interests during business transfers, there are nuances in the legal mechanisms and approaches employed. For instance, the UK's TUPE regulations focus on preserving employees' terms and conditions post-transfer, whereas Namibia's Labour Act emphasizes consultation and notification requirements to ensure fair treatment of employees.

In addition, the comparative study shed light on potential areas for harmonization or alignment of labour laws across jurisdictions to facilitate international business transactions and promote consistency in employee protection. By identifying common principles and best practices from Namibia, South Africa, and the United Kingdom, policymakers and legal practitioners can explore opportunities for collaboration and knowledge sharing to enhance the effectiveness of labour law related to business transfers.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The provisions of Section 197 of the LRA in protecting the rights of employees resulting from business transfers are crucial in safeguarding the interests of workers during such transitions. This research delved into the multifaceted aspects surrounding business transfers and the legal framework provided by Section 197 of the LRA in South Africa, as well as compared it with similar legislation in Namibia and the United Kingdom.

Throughout this study, it became evident that Section 197 of the LRA plays a pivotal role in ensuring that employees are not unfairly disadvantaged when a business undergoes a transfer. The legislative framework outlined in Chapter 2 highlights the specific provisions and requirements that must be adhered to by employers to protect the rights of employees during such transitions. Moreover, the comparative analysis conducted in Chapter 4 shed light on how different jurisdictions approach employee protection during business transfers, showcasing both similarities and differences among South Africa, Namibia, and the United Kingdom.

From a practical standpoint, it is imperative for businesses engaging in transfers to fully comprehend their obligations under Section 197 of the LRA to avoid potential legal repercussions and ensure a smooth transition for all parties involved. Employers must prioritize transparency, communication, and consultation with employees throughout the transfer process to mitigate uncertainties and uphold employee rights effectively.

5.2 Recommendations

5.2.1 Strengthening Awareness and Education Programs

One of the key recommendations arising from this research is the need for enhanced awareness and education programs aimed at both employers and employees regarding their rights and obligations under Section 197 of the LRA. This can help in ensuring that all parties involved in a business transfer are well informed about the legal framework governing such transfers, thereby reducing misunderstandings and potential disputes. The role of labour inspectors is relegated to obscurity when it comes to government departments and other state entities. They should be more visible and enforce the observation of labour laws, across the board.

5.2.2 Regular Review and Updating of Legislation

Another important recommendation is the regular review and updating of legislation related to business transfers, particularly Section 197 of the LRA. Given the dynamic nature of business environments and employment practices, legislative frameworks must evolve in line with changing circumstances to provide adequate protection to employees during business transfers. Regular reviews can help identify gaps or areas for improvement in existing laws, ensuring that they remain effective in safeguarding the rights of employees.

These recommendations aim to enhance the protection of employees during business transfers by promoting awareness, education, and legislative updates that align with best practices in South Africa, Namibia, and the United Kingdom.

BIBLIOGRAPHY

Books

Benson E Offers of Alternative Employment: A Guide to Redundancy Law 1st ed Springer.

Garbers, C, et al, "The New Essential Labour Law Handbook" 7th Ed 2019, 299.

Midgley James, Social Development: The Developmental Perspective in Social Welfare (First Published 1995, Sage 1995) 208

Todd C et al `Business Transfer and Employment Rights in South Africa 1 ed (2004) 16.

Case law

Mashavha v President of the Republic of South Africa and Others 2005 (2) SA 476 (CC).

City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and Others [2015] ZACC 8.

City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and Others [2015] ZACC 8.

SVA Security (Pty) Ltd v Makro Ltd, a Division of Massmart (case number J720/17) [2017] ZALCJHB 137; (2017) 38 ILJ 2376 (LC) (3 May 2017).

NEHAWU v University of Cape Town & Others 2003 (24) ILJ 95 (CC).

Telkom Ltd & others v Blom1 & others [2003] 3 All SA 130 (SCA).

Nokes v Doncaster Amalgamated Colliers Ltd [1940] AC 1014 (HL).

Schutte & Others v Power plus Performance (Pty) Ltd & Another (1999) 20 ILJ 655 (LC).

National Education, Health and Allied Workers Union v University of Cape Town and Others 2003 (3) SA 1 (CC).

NUMSA obo Members v AIH Logistics and Another (D 1112/19) [2023] ZALCD 3 (27 February 2023).

Nehawu v University of Cape Town 2003 (2) BCLR 154 (CC).

Carol Keil v Foodgro 1999 (10) ZALAC 98 (LAC).

Macer v Abafast 1990 IRLR 137 (EAT)

Media summary of the Constitutional Court CCT14/06 in the ex parte matter of *The Minister of Social Development and Others*.

Dissertations and thesis

Chetna S (master's Dissertation) 'A Critical Analysis of Section 197 of the Labour Relations Act 66 of 1995 as Amended Taking into Consideration the Elements of Section 197, the Definition of Case Law', (2016) *University of Johannesburg* 112.

Gcaza X (master's Dissertation) 'An Assessment of Financial Accountability on Social Grants at the South African Social Security Agency (SASSA), 2011-2014' (2014) *University of Fort Hare* 89.

Govender, L (master's Dissertation) 'A Legal Analysis of Outsourcing Within the Framework of Section 197 of the Labour Relations Act' *University of Johannesburg* 112.

Gyesi S, (master's Dissertation) 'Comparative Analysis of the Laws on Termination of Employment in the Republic of South Africa and the Republic of Ghana' (2022) *University of Cape Town* 58.

Jones J, (master's Dissertation) 'The Interpretation and Effect of Section 197 of the Labour Relations Act 66 of 1995' (2001) *University of Stellenbosch* 100.

Katsaroumpas I, (Doctorate thesis) 'Collective Labour Law in Times of Economic Crisis: Theoretical and Comparative Perspectives' (2016) *University of Oxford* 300.

Masobe P, (master's Dissertation) 'The Effects of Transfer of Undertakings on Employee Rights in Labour Law and Insolvency Law: A Comparative Analysis' (2014) *North-West University* 30

Masobe, P (Mini dissertation) 'The Effect of Transfer of Undertakings on Employees Rights in Labour Law and Insolvency Law: A Comparative Analysis' (2014) *North-West University* 1.

Masocha V, (master's Dissertation) 'An Analysis of Employee Protection in Business Transfers: Is the Purpose of Section 197 Subverted by Judicial Interpretation in Outsourcing Contracts?' (2012) *University of Cape Town* 15.

Masoebe P, (master's Dissertation) 'The Effects of Transfer of Undertakings on Employee Rights in Labour Law and Insolvency Law: A Comparative Analysis' (2014) *North-West University* 76.

Mohlabi GSM, (master's Dissertation) 'Transfer of Business, Trade or Undertaking and its Effects on Contract of Employment' (2010) *University of Limpopo* 90.

Sambo VT (Doctoral Thesis) 'The Implementation of the Internal Audit Provisions of the Public Finance Management Act (Act No. 1 1999): A Case of the South African Social Security Agency' (2017) *University of South Africa* 113

Spree W (master's Dissertation) 'The Transfer of Undertakings with Specific Reference to the Transfer of Insolvent Undertakings: An Evolution of the South African Law' *University of Stellenbosch* 87.

Spree W, (master's Dissertation) 'The Transfer of Undertakings with Specific Reference to the Transfer of Insolvent Undertakings Evolution of the South African Law' (2007) *University of Stellenbosch* 66.

International Instruments

Transfer of Undertakings (Protection of Employment) Regulations 2006<
<https://www.legislation.gov.uk/ukxi/2006/246/contents/made> > Accessed 08 February 2024.

International Labour Organisation (ILO)< <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/the-benefits-of-international-labour-standards/lang--en/index.htm> >Accessed 10 January 2024.

European Foundation for the Improvements of Living and Working Conditions<
<https://archives.eui.eu/en/isaar/645#:~:text=The%20Council%20Resolution%20of%2021,labour%20in%20the%20economic%20and>> Accessed 10 January 2024.

European Community's Directive on the Safeguarding of Employees' Rights in the Event of Transfers of Undertakings<[https://www.irishstatutebook.ie/eli/1980/si/306/made/en/print#:~:text=\(1\)%20The%20transfer%20of%20an,a%20transferee%20is%20hereby%20prohibited](https://www.irishstatutebook.ie/eli/1980/si/306/made/en/print#:~:text=(1)%20The%20transfer%20of%20an,a%20transferee%20is%20hereby%20prohibited) > Accessed 10 January 2024.

Collective Redundancies Directive 98/59/EN
<<https://www.eumonitor.eu/9353000/1/j9vvik7m1c3qyxp/vj3ecgdh6fqq> > Accessed 10 January 2024.

OECD Guidelines for Multinational Enterprises on Responsible Business Conduct
<<https://mneguidelines.oecd.org/mneguidelines/> > Accessed 23 May 2024.

Journal Articles

Adamas DW et al, 'African Financial Systems: A Review' (2011) *Review of Development of Finance* 22.

Ansell N et al, 'Reconceptualising Temporality in Young Lives: Exploring Young Peoples Current and Future Livelihoods in AIDS- Affected Southern Africa' (2014) *Transactions of the Institute of British Geographers* 19.

Appiah-Kubi K, 'State-Owned Enterprises and Privatisation in Ghana' (2001) *The Journal of Modern African Studies* 45.

Asante SKB, 'International Law and Foreign Investment: A Reappraisal' (1988) *International & Comparative Law Quarterly* 289.

Awonuga KF et al, 'Business Incubators and their Impact on Startup Success: A Review in the USA' (2024) 11 (1) *International Journal of Science and Research Achieve* 1419.

Baker GP et al, 'Compensation and Incentives: Practice vs, Theory (1988) *The Journal of Finance* 12.

Barr N et al, 'Reforming Pensions: Principles, Analytical Errors, and Policy Directions' (2009) *International Social Security Review* 39.

Benjamin P, 'The Persistence of Unfree Labour: The Rise of Temporary Employment Agencies in South Africa and Namibia' (2013) *Routledge Studies in Employment and Work Relations in Context* 500.

Benjamin, P, 'A Matter of Going Concern: Judicial Interpretation and Misinterpretation of Section 197 of the Labour Relations Act' (2005) *Law, Democracy & Development* 169.

Bernstein A, 'South Africa's Key Challenges: Tough Choices and New Directions' (2014) *The Annals of the American Academy of Political and Social Science* 98.

Biggs L, 'The Application of Section 197 of the Labour Relations Act in an Outsourcing Context' (2008) *Nelson Mandela Metropolitan University* 23.

Black B, 'A Self-enforcing Model of Corporate Law' (1996) *Harvard Law Review* 13.

Blackie W Et Al, 'Transfer of Contracts of Employment as a Result of Mergers and Acquisition: A Study of Section 197 of the Labour Relations Act 66 of 1995' (1999) *Industrial Law Journal* 209.

Bosch C, 'Operational Requirements Dismissals and Section 197 of the Labour Relations Act: Problems and Possibilities (2002) *Industrial Law Journal* 40.

Bosch, C, 'Aluta Continua, or Closing the Generation Gap: Section 197 of the LRA and its Application to Outsourcing' (2018) *International Labour Journal* 84.

Branson DM, 'The Very Uncertain Prospects of Global Convergence in Corporate Governance' (2001) *Cornell International Law Journal* 340.

Brockerhoff S, 'A Review of the Development of Social Security Policy in South Africa' (2013) *Studies in Poverty and Inequality Institute* 29.

Brockerhoff S, 'Review of the Development of Social Security Policy in South Africa' (2013) *Studies in Poverty and Inequalities Institute* 80.

Buckley PJ et al 'The International Theory of the Multinational Enterprise: A Review of the Progress of a Research Agenda After 30 Years' (2015) *International Business Strategy* 125.

Cassese S, 'Global Standards for National Administrative Procedure' (2005) *Law and Contemporary Problems* 112.

Charmovitz S, 'Trade, Employment and Labour Standards: The OEDC Study and Recent Developments in the Trade and Labour Economic Standards Debate' (1997) *Hein Online* 21.

Cheadle H, 'Regulated Flexibility and Small Business: Revising the LRA and the BCEA' (2006) *University of Cape Town* 34

Clark BR, 'Federal Common Law: A structural Reinterpretation' (1995) *Law Reviews* 15.

Clarke M et al 'Workers' Protection: An Update on the Situation in South Africa' (2002) *Research Gate* 17

Clemons EK et at, 'Making the Decision to Contract for Cloud Services: Managing the Risk of an Extreme form of IT Outsourcing' (2011) *National University of Singapore* 8.

Coates IV JC, 'Reforming the Taxation and Regulations of Mutual Funds: A Comparative Legal and Economic Analysis' (2009) *Journal of Legal Analysis* 30.

Cohen, T, 'Implying Fairness into the Employment Contract' (2009) *Industrial Law Journal* 2271.

Condradie M, 'A Critical Analysis of the Right to Fair Labour Practices' (2013) *University of Free State Scholar* 9

Connoy L, 'Millennial Development: A Case Study of Namibia's Vision 2030' (2011) *Electronic Theses and Dissertation University of Windsor* 236.

Cooke FL, 'Ownership Change and Reshaping of Employment Relations in China: A Study of Two Manufacturing Companies' (2002) *Journal of Industrial Relations* 310.

Cooke, FI, et al 'For Better and for Worse: Transfer of Undertakings and the Reshaping of Employment Relations' (2004) *International Journal of Human Resource Management* 15.

Cooke, FL, et al 'For Better and for Worse: Transfer of Undertakings and the Reshaping of Employment Relations' (2004) *International Journal of Human Resource Management* 152.

Cox RW, 'Ideologies and the New International Economic Order: Reflections on Some Recent Literature' (1979) *International Organisation* 200.

Dahan D, 'Shared Responsibility and the International Labour Organisation' (2012) *Journal of International Law* 50.

Davidow G, 'The Three Axes of Employment Relationships: A Characterisation of Workers in Need of Protection' (2002) *The University of Toronto Law Journal* 33.

Du Toit B et al 'Business Transfer and Employment Rights in South Africa' (2004) *LexisNexis Butterworths* 5

Du Toit D, 'The Transfer of Enterprises and the Protection of Employment Benefits in South and Southern Africa' (2004) *Law, Democracy and Development* 65.

Du Toit D, 'The Transfer of Enterprises and the Protection of Employment Benefits' (2004) *International Labour Journal* 85.

Dube N, 'Dismissal for Operational Requirements: a critical Examination of the Role of the Courts in Mitigating Dismissals with Specific Reference to the Banking Industry' (2022) *University of Cape Town* 98.

Esser I et al, 'Dynamics of Corporate Governance in South Africa: Broad Based Black Economic Empowerment and the Enhancement of Good corporate Governance Principles' (2008) *International Journal of Law and Information Technology* 43.

Forman J et al, 'How Corporate Communication Influences Strategy Implementation, Reputation, and the Corporate Brand: An Exploratory Qualitative Study' (2005) *Corporate Reputation Review* 257.

Frankenberg G, 'Critical Comparisons: Re-Thinking Comparative Law' (1985)26 (2) *Legal theory and the Legal Academy* 411

Freedman S, 'Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm' (2017) *Disability and Equality Law* 45.

Germishuys W et al, 'The legal Obligation to Provide for Employee-related Contingent Liabilities when an Enterprise is Sold as a Going Concern' (2014) *South African Mercantile Law Journal* 201.

Greer CR et al, 'Human Resource Management Outsourcing: The Make or Buy Decision' (1999) *Academy of Management Executive* 40.

Grogan "A Twist on Transfers: LAC Reinterprets Section 197" June 2002 *EL* 9 12-13

Grogan J 'A Twist on Transfer: LAC Reinterpret Section 197' (2002) *June Employment Law* 9.

Haberli C, 'The International regulatory Framework for National Employment Policies: Examples from Bangladesh, Ethiopia, Ghana, Madagascar, South Africa, Switzerland, and Viet Nam' (2015) *Swiss Programme for Research on Global Issues for Development* 25.

Hajro A et al, 'Addressing the Elephant in the Room: Global Migration and its Implications for Business School Teaching' (2022) *21 (1) Academy of Management learning* 201.

Hansmann H et al, 'The Functions of Trust Law: A Comparative Legal and Economic Analysis' (1998) *Nyul Reviews* 76.

Horn N, 'International Rules for Multinational Enterprises: The ICC, OECD, and ILO Initiatives' (2018) *American University Law Review* 70.

Jones J, 'The Interpretation and Effects of Section 197 of the Labour Relations Act 66 of 1995' (2001) *Stellenbosch University* 66.

Jork F et al, 'Restructuring Across Value Chains and Changes in Work and Employment: Case Study Evidence from the Clothing, Food, It and Public Sector' (2007) *Works Changes in Work* 120.

Kampa WJ, 'Comparative Law: A Theoretical Framework. (1974) *International & Comparative Law Quarterly* 36.

Kennedy D, 'New Approaches to Comparative Law: Comparativism and International Governance' (1997) *Utah Law Review* 24.

Khoza FK, 'An Examination of Employee Participation as provided for in the Labour Relations Act of 1995' (1999) *Rhodes University* 44.

Khumalo B, 'The Application of Section 197 of the Labour Relations Act to Second-generation Outsourcing' (2019) *Southern African Public Law* 70.

Kinley D and Tadaki J, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2003) *Virginia Journal of International Law* 111.

Koiranean M, 'Intellectual Capital and Property Rights (IPR) as the Key Asset of a Family Firm: A Case Study with an Evaluation Approach' (2011) *Electronic Journal of Family Business Studies* 29.

Kubyana KL et al, 'To Order or not to Order Reinstatement as a Remedy for Constructive Dismissal' (2019) *Obiter Journals* 53.

Kumar S et al, 'Outsourcing: When and How Should it be Done' (2006) *Information Knowledge Systems* 65.

Le Roux P.A.K, 'Outsourcing and S197 of the LRA, Going Concerns, Employment Contracts and the Transfer of a Business or Service' (2015) *Contemporary Labour Law*, 61.

Limema NC, 'Prospects of Employment Security for Employees on Fixed-term Contracts in Terms of South African Labour Legislation' (2016) *North-West University* 30.

Lober P, 'Information and Consultation' (2018) *The Transfer of Undertaking in the Public Sector* 24.

Lucas LM, 'The Role of Culture on Knowledge Transfer: The Case of the Multinational Corporation' (2006) *The Learning Organization* 20.

Macklem P, 'Labour Law Beyond Borders' (2002) *Journal of International Economic Law* 34.

Macklem P, 'Labour Law Beyond Borders' (2002) *Journal of International E Law* 69.

MacMullen J, 'The Right to Object to Transfer of Employment Under TUPE' (2008) *Industrial Law Journal* 12.

Makhetha MT, 'A Policy-Making Framework for Social Assistance in South Africa: The Case of the Department of Social Development and the South African Social Security Agency' (2015) *North-West University* 90.

Maregele, B 'SASSA Shows Concept for Poor Social Development (2016) *Ground Up* 12.

Marleen O, 'Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers' (1991) 69(4) *North Carolina Law Review* 1213.

Martin G et al, 'Is There a Bigger and Better Future for Employer Branding? Facing up to Innovation, Corporate Reputations and Wicked Problems in SHRM' (2011) *The International Journal of Human Rights* 300.

Masocha VW, 'An Analysis of Employee Protection in Business Transfers: Is the Purpose of Section 197 Subverted by Judicial Interpretation in Outsourcing Contracts?' (2013) *University of Cape Town* 16.

Maupain F, 'New Foundation or New Facade? The ILO and the 2008 Declaration on Social Justice for a Fair Globalization (2009) *European Journal of International Law* 240.

McMullen J, 'An Analysis of the Transfer of Undertakings (Protection of Employment) Regulations 2006' (2006) *Industrial Law Journal* 1298.

McMullen J, 'Transfer of Undertakings: The Purposive Approach' (2019) *Industrial Law Journal* 44.

Mundau M et al, 'Analysing the Community Development Worker (CDW) Program's Impact in Linking Citizens to Social Grants on Poverty Alleviation: Case Study of the Western Cape Province of South Africa' (2017) *Journal of Sociology and Social Anthropology* 47

Naidoo R, 'Poverty Alleviation Through Social Dialogue: The Role of Trade Union in South Africa' (2013) *Trade Unions and Poverty Alleviations in Africa, Harare* 75.

Narcisse S et al, 'Employee Fairness Perceptions of Performance Appraisal: A Saint Lucian Case Study' (2008) *International Journal of Human Rights* 77.

- Ngandu S and Motala S, 'Ten Years of the South African Social Security Agency: The Journey 2006 – 2016' (2021) *Social Security Reviews* 24.
- Paul Benjamin, 'A Matter of Ongoing Concern: Judicial Interpretation and Misinterpretation of Section 197 of the Labour Relations Act' (2005) *African Journal Online* vol.9 No.2 169.
- Pauwelyn J, 'A Typology of Multilateral Treaty Obligations: are WTO Obligations Bilateral or Collective in Nature' (2003) *European Journal of International Law* 90.
- Pisarczyk L and Wieczorek K, 'The Influence of a Transfer of Undertaking on Collective Agreements and Employee Representation' (2021) *European Union Collective Labour Law* 87.
- Robert T, 'The Social Entities Revolution on Corporate Law: A Primer on Emerging Corporate Entities in Europe and the United States and the Case for the Benefit Corporation' (2013) *William & Mary Business Law Review | Law School Journals* 640.
- Roberts A, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International: Law' (2011) *International & Comparative Law Quarterly* 48.
- Roberts S, 'Competition and Regulation Interface in Energy, Telecommunications and Transport in South Africa' (2017) *Competition Law and Economics Reviews* 67.
- Rogerson CM, 'Reframing Place-Based Economic Development in South Africa: The Example of Local Economic Development' (2014) *Bulletin of Geography Socio-economic Series* 420.
- Rombouts SJ, 'The International Diffusion of Fundamental Labour Standards: Contemporary Content, Scope, Supervision and Proliferation of Core Workers 'Rights Under Public, Private, Binding, and Voluntary Regulatory Regimes' (2018) *Columbia Human Rights Law Reviews* 1019.
- Rombouts SJ, 'The International Diffusion of Fundamental Labour Standards: Contemporary Content, Scope, Supervision and Proliferation of Core Workers 'Rights Under Public, Private, Binding, and Voluntary Regulatory Regimes' (2018) *Columbia Human Rights Law Reviews* 162.
- Rousseau DM, 'New Hire Perceptions of their own and their Employer's Obligations: A study of Psychological Contracts' (1990) *Journal of Organisational Behaviour* 30.
- Rubin N et al 'International Labour Law and the Law of the New South Africa' (1998) *Labour Journal* 23.
- Salacuse JW et al, 'Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' (2005) *International Law Journal* 17.
- Smit N, 'Labour law Implications of the Transfer of an Undertaking' (2001) *University of Johannesburg* 9.
- Smit N, 'South African Regulation (or Non-Regulation) of a Transfer of a Business, Trade or Undertaking' (2000) *International Journal of Comparative Labour Law* 400.

Sparkes JR et al, 'Knowledge Transfer and Human Resource Development Practices: Japanese Firms in Brazil and Mexico' (2000) *International Business Reviews* 30.

Stevens AG, 'Enforceable Accountability: A Corporate Governance Mirage for South African State-owned Companies' (2021) *University of Cape Town* 70.

Stiglitz JE, 'Regulating Multinational Corporations: Towards {Principles of Cross-Border Legal Framework in a Globalized World Balancing Rights with Responsibilities' (2007) *American University International Law Review* 474. Michaels R, 'Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law' (2009) *The American Journal of Comparative Law* 400.

Stone KVV, 'Labour and Global Economy: Four Approaches to Transitional Labour Regulation' (1The Significance of International Comparative Labour law994) *Michigan Journal of International Law* 302.

Subramanian DC, 'The Right to Strike Under the Labour Relations Act 66 of 1995 (LRA) and Possible Factors for Consideration that Would Promote the Objectives of the LRA' (2019) *Potchefstroom Electronic Law Journal* 14.

Sweet A, 'The European Court of Justice and the Judicialisation of EU Governance' (2010) *Living Reviews in EU Governance* 132.

Szabla C, 'Entrenching Hierarchies in the Global Periphery: Migration, Development and the 'Native' in ILO Legal Reform Efforts' (2020) *Melbourne Journal of International Law* 77.

Trusha R 'Corruption and Social Grands in South Africa'92008) *Institute for Security Studies*. 47.

Van Zyl L, 'An Evaluation of the Fairness Criteria for Dismissals Due to Absenteeism and Desertion from the Workplace' (2011) *North-West University* 90.

Ver Loren Vn Themaat, AAH (Doctoral Thesis) 'The Protection of Workers in the Case of Business Transfers: A Comparative Study of the Law in the USA, UK, and South Africa (1994) *University of London* 243.

Wallis, M, 'It's Not Bye-Bye to 'By': Some Reflections on Section 197 of the LRA' (2013) *Industrial Law Journal* 24.

Weiler P, 'Promises to Keep: Securing Workers Right to Self- Self-Organisation Under the NLRA' (1982) *Havard Law Reviews* 44.

Workman-Davies B, 'The Right of Employers to Dismiss Employees in the Context of Business Transfers-An Analysis of the Automatically Unfair Dismissal Provision of the Labour Relations Act 65 of 1995' (2007) 28 *Industrial Law Journal* 2139.

Wronka C, 'Anti-Money Laundering Regimes: A Comparison Between Germany, Switzerland, and the UK with a Focus on the Crypto Business' (2022) *Journal of Money Laundering Control* 76.

Zhao M et al, 'Managing Control of Labour in State-Owned Enterprises: Cases from the Textile Industry' (2019) *Chinese Workers and their State* 55.

Legislation

The Constitution of the Republic of South Africa, 1996.

Basic Conditions of Employment Act 75 of 1997

Business Transfer Act of 1997

Companies Act 71 of 2008.

Competition Act of 1998

Labour Relations Act 66 of 1995.

Pension Funds Act.

Public Finance Management Act 1 of 1999.

Redundancy Payments Act 21 of 1967.

Social Assistance Act, 13 of 2004.

Social Security Act 116 of 1994.

South African Social Security Agency Act 13 of 2004.

Online Articles

Black Sash. (2011). Social Assistance A Guide for Paralegals. <
<https://doi.org/10.4135/9781483345727.n735>.

Deacon B et al, 'Globalisation and Emerging Regional Governance of Labour Rights' (2011)
International Journal of Manpower<
<https://www.emerald.com/insight/content/doi/10.1108/01437721111136796/full/html>.

Domhoff W, 'The Rise and Fall of Labour Unions in the U.S From the 1830s until 2012 (but
mostly the 1930s- 1980s)' (2013) <
http://whorulesamerica.net/power/history_of_labour_unions.html>.

Hargrave M, 'Privatization: What it is, How it Works, and Examples' (2023)
<https://www.google.com/search?sca_esv=f7a9fdc91166be13&rlz=1C1ZKTG_enZA925ZA925&sxsrf=ADLYWII2hAkKBctX-XWuuTSzq7wAS0mgjQ:1716560333689&q=While+business+transfers+have+generally+been+taking+place+across+the+private+sector,+it+has+not+been+common+cause+for+business+transfers+to+take+place+within+government+tiers&spell=1&sa=X&ved=2ahUKEwis97LHvaaGaxWV1QIHwcbDTwQBSqAegQIBxAB&biw=609&bih=646&dpr=1#ip=1>.

Mililiken FJ et al, 'An Exploratory Study of Employee Silence: Issues that Employees Don't Communicate Upward and Why' (2003) 40 (6) Journal of Management Studies < <https://doi.org/10.1111/1467-6486.00387>.

Morck R et al, 'The Global History of Corporate Governance: An Introduction' (2005) < <http://www.nber.org/chapters/c10267>.

Reports

Draft Ministerial Determination of 2006.

Moseki Maleka, 'Does your pension go with you?' *The Quarterly Law Review for People in Business* vol 11 part 4.

Nagan, D, Momentum Legal Updates No. 20 of 2017 October 2017.

National Treasury PFMA Schedules 1,2,3 A-D of 30 September 2011.

SASSA Remuneration, Grading and Performance Management Framework, 2006.