# The effects of transfer of undertakings on employee rights in labour law and insolvency law: A comparative analysis

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**Abstract**

Common law, basically afforded employees the right to choose their employers. This freedom to contract was normally visible in instances of transfers of undertakings and it, therefore, meant that an employer could not transfer an employee's employment contract without the latter's consent. When an undertaking went insolvent on the other hand, employment contracts also terminated and the notion of "advantage to creditors" meant that employees were left with little to nothing to show for their years of employment. Consequently, employees found themselves out of jobs and struggling to make ends meet. However, the legislator implemented section 197 of the *Labour Relations Act* 66 of 1995which was ultimately amended in 2002 to regulate the transfer of a business, trade or undertaking, where such are transferred as a going concern. This therefore meant that employment contracts are transferred automatically upon such transfers. The enactment of section 197A together with the amendment of section 38 of the Insolvency Act meant that the notion of advantage to creditors was dealt away with; hence protection was afforded to employees.

The aim of this piece is to examine the effects of transfer of undertakings on employee rights in both labour law and insolvency law. In this field of transfers, South Africa has followed England for some time. This has been evident before the enactment of section 197 of the *Labour Relations Act* 66 of 1995. In *Roshall v Design Three*1989 10 ILJ 1127 the court acknowledged the common law position stated in *Nokes v Doncaster Amalgamated Collieries Ltd*1940 AC 1014 (HL).The court in this case stated that one's right to choose an employer is "the main difference between a servant and a serf". This piece will, therefore, compare the position in South Africa with one of England.

A further comparison will be made with the European Union law, because problems experienced in South Africa and England were encountered by the European Union (hereafter-EU) as well. The aim of this piece is to draw similarities and differences between South Africa, England and European Union as a whole and establish whether employees do get protection from Labour and Insolvency legislation upon transfer of undertakings that are both insolvent and solvent.

**Key words:** labour, insolvency, transfers, undertakings, contracts

**Opsomming**

Gemene reg het aan werknemers die reg gegee om hulle werkgewers te kies. Hierdie vryheid om ‘n kontrak aan te gaan het gewoonlik voorgekom in gevalle van oordrag van ondernemings en  dit het daarom beteken dat ‘n werkgewer nie ‘n werknemer se werkskontrak sonder die werknemer se toestemming kon oordra nie.

Wanneer ‘n onderneming egter bankrot gespeel het, is die werknemer se kontrak ook beëindig en, vanweë die gedagte van “voordeel aan krediteure”, het werknemers na jare van werk weggegaan met min tot niks. As gevolg hiervan het hierdie werknemers hulself in ’n posisie van werkloosheid en ekonomiese druk bevind.

Die wetgewer het sedertdien egter artikel 197 van die *Wetgewing of Arbeidsverhoudinge* 66 van 1995 geïmplementeer. Dit is uiteindelik in 2002 verander om die oordrag te reguleer van ’n besigheid, handelsaak of onderneming waar sulke oorplasings gesien was as ‘n lopende saak. Dit het ingehou dat werkskontrakte outomaties na so ’n oordrag ook oorgedra sou word.

Die implementering van artikel 197A saam met die verandering van artikel 38 van die Insolvensie Wet het weggedoen met die gedagte van voordeel aan krediteure. Sodoende is beskerming aan werknemers gegee.

Die doel van hierdie skryfstuk is om die uitwerkings van die oordrag van ondernemings op werknemersregte, in sowel arbeids- as insolvensiewetgewing, te ondersoek. In die afdeling van oordragte het Suid-Afrika vir ’n geruime tyd Engeland nagevolg. Dit is veral gesien in die tydperk voor die implementeering van afdeling 197 van die *Wetgewing of Arbeidsverhoudinge* 66 van 1995.

Met *Roshall v Design Three 1989 10 ILD 1127* het die regtershof die gemene reg se standpunt van *Nokes v Doncaster Amalgamated Collieries Ltd 1940 AC 1014 (HL)* erken. In hierdie geval het die regtershof gestel dat ‘n persoon se reg om ‘n werkgewer te kies “die hoofverskil is tussen ‘n dienaar en ‘n slaaf”.

Hierdie skryfstuk gaan daarom die stand van sake in Suid-Afrika met dié in Engeland vergelyk. ‘n Verdere vergelyking gaan gemaak word teenoor die wetgewing van die Europese Unie, aangesien probleme wat in Suid-Afrika en Engeland voorgekom het, ook in die Europese Unie (hierna EU) teëgekom is.

Die doel van hierdie skryfstuk is om die ooreenkomste en verskille tussen Suid-Afrika, Engeland en die Europese Unie as ‘n geheel te vergelyk en vas te stel of werknemers beskerming ontvang van Arbeids- en Insolvensiewetgewing wanneer insolvente of solvent ondernemings oorgedra word.

**Sleutelwoorde:** arbeid, bankrotskap / insolvensie, oorplasings, ondernemings, kontrakte

**List of Abbreviations**

| | |
|---|---|
| ARD | Acquired Rights Directive |
| CEPPWAWU | Chemical Energy Paper Printing Wood and Allied Workers Union |
| EAT | Employment Appellate Tribunal |
| EPCA | Employment Protection Consolidation Act of the United Kingdom |
| EC | European Commission |
| ECJ | European Court of Justice |
| EU | European Union |
| ILJ | Industrial Law Journal |
| LRA | Labour Relations Act |
| TUPE | Transfer of Undertakings (Protection of Employment) Regulations |
| NUMSA | National Union of Metalworkers of South Africa |
| UK | United Kingdom |

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## CHAPTER 1

## Introduction and background

### 1.1 INTRODUCTION

Transfers of undertakings are notions that have taken place for some time, however, the real issue behind this concept has been employment contracts and what happens to such upon takeovers. Labour law panels and tribunals have for some time had to deal with this issue of transfer of undertakings and have encountered problems from common law to the current times.

The aim of this chapter, therefore, is to discuss the historical background of the notion of transfer of business undertakings as a going concern. From the common law position to the Industrial court's position and judgements passed thereof.

### *1.2 Common Law Position*

Common law generally afforded a creditor the freedom to transfer any rights he had against a debtor by cession without such a debtor's consent.[1] However, there were certain limitations attached to such freedom. Jordaan states that these limitations were either statutory, by common law or by agreement.[2] At common law a contract of employment was seen as a personal concept that existed only between an employer and an employee.[3] It, therefore, as Jordaan states, "renders rights which arise from contracts 'so personal in their character that it can make any reasonable

1 Jordaan 1991 *Industrial Law Journal* 936.
2 Jordaan 1991 *Industrial Law Journal* 936.
3 Bosch, du Toit and Todd *Business Transfers and Employment Rights* 5. They state that South Africa and other European countries, have relied on the notion of freedom to contract and state that this notion has largely influenced labour laws of such jurisdictions. They then refer to the case of *Nokes v Doncaster Amalgamated Collieries Ltd* 1940 AC 1014 (HL) Where Lord Atkin stated that one's right to choose an employer is "the main difference between a servant and a serf".

or substantial difference to the other party whether the cedent or cessionary is entitled to enforce it".[4]

The above sentiments clarify the common law position and show without a shadow of doubt that the employment contract could not be transferred without the employee's consent. It was, therefore, necessary for an employer to obtain consent from the employee before procuring any sort of transfer.[5] This notion was grounded on the employee's freedom to choose whom he or she wished to provide his or her services to as settled in the case of *Nokes v Doncaster Amalgamated Collieries Ltd* (hereafter *Nokes*-case).[6] Smit further indicates that this freedom was in accordance with the law of cession.[7]

Jordaan[8] in this issue indicates that while the creditor is by and large liberated to transfer rights he or she holds against a debtor by way of a cession without the latter giving a nod or consenting to such, he states clearly that where contracts of employment take centre stage, such cannot happen. He contends that whereas the employee abandons his freedom to a certain degree by placing himself under the supervision and control of his employer, what is important is the notion that he/she has the freedom to choose whom he/she wishes to be employed by.[9] Lord Atkin in the *Nokes*-case pronounced two reasons behind the freedom of choice of an employee as thus:

> It is said that one company does not differ from one another: and why should not a benevolent of the chancery division transfer the services of a workman to another

4 Jordaan 1991 *Industrial Law Journal* 936. Smit also reiterates the very same principles when he contends that "the 'reason for this was that any right that arises from contracts so personal in their character that it can make any reasonable or substantial difference to the other party whether the cedent or cessionary is entitled to enforce it' was rendered non-transferable, unless the debtor consented to the transfer. An employer's right to demand service from an employee falls under a contract of such a personal nature." This further shows that the law did not allow employees to be transferred without them giving a nod to such a transfer. To advance this point further, Smit indicates that a mere cession of an employment contract was also very inadequate and therefore not allowed. See, Smit 2003 *Stellenbosch Law Review* 207. This principle was further expressed in *East Rand Exploration Co v Nel* 1903 TS 42 where the court stated that: "Now speaking generally, the question of whether one of two contracting parties can by cession of his interest, establish a cessionary in his place without the consent of the other contracting party depends on whether or not the contract is so personal in its character that it can make any reasonable or substantial difference to the other party whether the cedent or the cessionary is entitled to enforce it."

5 Jordaan 1991 *Industrial Law Journal* 936.

6 1940 AC 1014 (HL).

7 Smit *Implications of transfer of undertakings* 86.

8 Jordaan 1991 *Industrial Law Journal* 936.

9 Jordaan 1991 *Industrial Law Journal* 937. See also Smit at 86.

> admirable employer as good and perhaps better. The answer is twofold. The first is, however, the new master may be it is hitherto the servant who has the choosing of him, and not the judge. The second is that it is a complete mistake in my experience to suppose that people, whether they are servants or landlords or authors do not attach importance to the identity of the company with which they deal. It would possibly hurt the feelings of financial gentlemen with large organising powers to know how strongly some people feel about big combinations, and especially amalgamations of small trading concerns. But it is said how unreasonable this is for a big company can buy the majority of shares in the old company: replace its managers: change its policy and produce the same results. Be it so: but the result is not the same: the identity of the company is preserved: and in any case the individual concerned, while he must be prepared to run the one risk, is prepared to say that he is not entitled to run the other.

This dictum in the *Nokes*-case was cited with approval in a number of cases, a typical example is a more recent case of *Roshall v Design Three*[10] where the honourable court said "I had fancied that ingrained in the personal status of a citizen under our laws was the right to choose for himself whom he would serve, and that this right of choice constituted the main difference between a servant and a serf." In these words, Lord Atkin was giving "poignant expression" to the legal maxim of the freedom of the contract of employment which has been cited by many as the basis of all modern social legislation, a typical example being the *Labour Relations Amendment Act* of 2002.[11] This goes to show just how important the courts considered freedom to contract to be.

Basically, in Common law, if an employer wished to transfer the entire business or undertaking together with his employees' rights and duties, a simple surrender or relinquishment of the employer's rights would not be enough.[12] Smit in this instance suggests that what would be needed would be delegation combined with a cession.[13]With this, the intention was to show that the employer could not simply transfer his/her rights and obligations that ensued from the employment contract. She points out that this comprised of a form of novation which usually required an agreement between all the parties involved.[14] According to her, the outcome or consequence of this novation was that the old employment contract is terminated and the new contract takes its place. This, however, did not mean that the old terms

10 1989 10 ILJ 1127 (IC).
11 Anon 2011 Http:// www.justcite.com/Document/.../nokes-v-doncaster-amalgamated-collierie.com.
12 Smit *Implications of transfer of undertakings* 86.
13 Smit *Implications of transfer of undertakings* 86.
14 Smit *Implications of transfer of undertakings* 86. According to Smit, the parties involved include the new employer, the old employer and the employees.

and conditions continued to be in place in the new contract, the converse may happen in that the parties may agree on new terms and conditions.[15] In common law, what is clear is the fact that automatic continuity of employment contracts was a concept non-existent.

### *1.2.1 The shortcomings of common law*

Common law had many implications which were detrimental to employees. According Basson[16]*et al*:

> When a business is sold, the position of employees in terms of common law is deceptively simple: No employee may be forced to continue his or her contract of employment with the new employer. This, of course, is cold comfort to most of employees who would like to stay on (especially in a country with high unemployment) because the common law also provides that the new employer is not obliged to employ them. A transfer of a business could well mean the termination of existing employment contracts. As far as insolvency is concerned the rule is that insolvency of the employer terminates existing contracts of employment. Despite this, it is a fact of economic life that an insolvent business does not necessarily cease to operate as it may still be bought by another concern and given a life-line, or some arrangement with creditors may ensure its survival.

The common law principle of freedom to contract afforded to employees as articulated in the *Nokes*-case could be disadvantageous to employees in many aspects. This is so because the new employer was under no mandate to hire employees of the undertaking being transferred.[17] Conversely, the new employer could offer employment to such employees if he so wished, however, if no offer was made to such employees the only remedy they had was against the old employer. Smit suggests that though employees could resort to such an alternative this still resulted in an even more detrimental position to such employees because of the inadequate protection offered in insolvency cases by common law.[18] Smit points out that some of the first laws enacted to regulate transfer of undertakings were promulgated for the benefit of employers.[19]In terms of the *Employment Protection*

15 Smit *Implications of transfer of undertakings* 86. See Jordaan at 937, "This constitutes a form of renewal or novation, and is usually requires the consent of all the parties involved, that is, the old employment contract is brought to an end and a fresh one is substituted for it. The new contract may incorporate all the terms of the old one, or the parties may agree on fresh terms."

16 Basson 2005 *Essential Labour Law* 171.

17 Smit 2003 *Stellenbosch Law Review* 208.

18 Smit *2003 Stellenbosch Law Review* 208. This is so because businesses were normally transferred they were insolvent.

19 Smit 2003 *Stellenbosch Law Review* 208-209.

*Consolidation Act* of the United Kingdom (hereafter-*EPCA*),[20] if an employee's contract of employment is renewed by the new employer upon transfer, in terms that differ wholly or in part from terms of the previous contract yet the conditions of employment are suitable to the employee, such an employee would not be allowed to claim redundancy payment by reason of dismissal from the old employment contract.[21] In this era of labour regulations, it is very clear that employees had little to no recourse at all against employers who wished to transfer their undertakings. Basically, an employer was not obliged to take on employees of the old employer hence protection was afforded to employees through section 197 of the *Labour Relations Act* (hereafter-*LRA*)[22].

### *1.3 The Industrial Court Position*

When the Industrial Relations Act was enacted in 1956, there were still no provisions regulating transfer of undertaking and continuity of employment contracts thereof.[23] Regulation of such situations would still fall under common law until the Wiehahn

20 Act of 1978.

21 Section 84 and 94 of the EPCA. Smit states that at "a later stage, the employees were also afforded some additional rights by laws stating that where the employees accepted the offer of re-engagement by the transferee, statutory continuity of services was preserved. ERA 1996, s 218(2) in the United Kingdom. However Smit indicates that cases decided recently show that such protection afforded to employees could also be to the benefit of employers." The case of *Nehawu v University of Cape Town* held as thus: "Section 197 strikes at the heart of this tension and relieves the employers and the 2003 3 SA 1 (CC) workers of some of the consequences that the common law visited on them. Its purpose is to protect the employment of the workers and to facilitate the sale of businesses as going concerns by enabling the new employer to take over the workers as well as other assets in certain circumstances. The section aims at minimising the tension and the resultant labour disputes that often arise from the sales of businesses and impact negatively on economic development and labour peace. In this sense, section 197 has a dual purpose; it facilitates the commercial transactions while at the same time protecting the workers against unfair job losses." The quotation shows the twofold importance of section 197 of the LRA, in that it affords employees continuity of their employment contracts while at the same time limiting all the procedures those employers would have had to follow while undertaking the transfer. The court further held as thus: "The majority of the LAC took the view that the purpose of the section is to facilitate the sale of businesses as a going concern by enabling the parties to the transaction to take over employees as well as other assets. Based on this finding, the judgment concluded that there cannot be a transfer within the meaning of section 197 unless the two employers agree that the workers will be transferred as part of the transaction. In doing so it looks only at that aspect of the legislative purpose which concerns the interests of employers. But the purpose of the legislature involves protecting the interests of both the employers and workers. Employers are at risk as far as severance pay is concerned. Workers are at risk in relation to their jobs. Properly construed section 197 is for the benefit of both employers and workers. It facilitates the transfer of businesses while at the same time protecting the workers against unfair job losses. That is a balance consistent with fair labour practices." This shows just how important section 197 is to both sets of parties.

22 Act 66 of 1995

23 Weber *Transfer of undertakings- The protection of Employment in South Africa* 12.

Commission[24] issued its report in 1979 and the Industrial Relations Act was amended.[25] Weber states that the commission was established because of the economic *status quo* of South Africa. He further states that this was due to the pressing need for foreign investment that seemed to escalate due to the political unrest and labour disputes that had taken centre stage during that era.[26]He insists that the major part of the commission's research was based on labour law's assessment, however, the issue of transfer of undertakings was not included in the commission's agenda and research as a whole.[27] It is imperative to note that it was because of the commission's recommendations that the Industrial Court was introduced. This ultimately led to the introduction of the doctrine of unfair labour practice.[28] Bosch[29] on this aspect termed unfair labour practice and the establishment of the Industrial Court indicates that protection was finally afforded to employees to some extent. He states his point as follows:

> Although the main part of their research and evaluation was labour law in South Africa, their results did not include any regulations regarding the transfer of undertakings. Nonetheless, a minimum of labour protection was achieved with the introduction of unfair labour doctrine. Combined with the establishment of the industrial court, which identified unfair dismissals as unfair labour practice, a first step towards employee protection during the transfer was achieved.[30]

24 Wiehahn Commission of 1977. The Wiehahn Commission recommended that black workers be allowed to establish and join registered trade unions. They insisted that union membership should be extended to cover workers of all races. Furthermore, the Commission recommended that the legal reservation of specific occupations for Whites be abolished and advocated for the establishment of an industrial court which would "interpret labour laws and adjudicate on issues such as unfair labour practices". The Wiehahn Commission's argument was that the registration of black trade unions would incorporate them into the same government control and regulation exercised over registered unions which would ultimately lead to better governance by the government of the time. These controls obliged unions to have their accounts audited regularly, to provide the industrial registrar with standard information regarding the union and to draft its constitution in compliance with the specification stipulated by the Industrial Conciliation Act. The Wiehahn Commission further recommended that black workers be allowed into apprenticeship positions, which would ultimately allow these workers to be employed as skilled employees, therefore, leading to an enhanced economy for the country. The commission further advocated for and recommended that segregation of workplace facilities on the ground of race be abolished in order to regulate the labour market in a more coherent manner. See Anon 1979 http://www.sahistory.org.za

25 Weber *Transfer of undertakings- The protection of Employment in South Africa* 12. See also Bosch 2004 *Industrial Law Journal* 923.

26 Weber Transfer of undertakings- The protection of Employment in South Africa 12.

27 Weber *Transfer of undertakings- The protection of Employment in South Africa* 12.

28 Weber *Transfer of undertakings- The protection of Employment in South Africa* 12.

29 Bosch 2004 *Industrial Law Journal* 923.

30 Bosch 2004 *Industrial Law Journal* 923.

Bosch continues with his argument by stating that the commission saw this notion of unfairness as something that could be allied with the right to work, to associate, to bargain collectively, and to withhold labour, for protection and for training or development.[31] The Industrial Court basically associated dismissals that usually occurred during transfers as unfair and, therefore, applied the doctrine of unfair labour practices to such scenarios.[32]

In cases that ensued, employers were obliged to afford employees or recognised representative trade unions or in the absence of such a trade union, a recognised employee representation, adequate information and consultation well in advance of the intended day of the transfer.[33] This latter led to the enactment of section 197 which added value to the importance of job security due to the changing economy.[34] Although freedom to choose one's employer was crucial, employees would rather have their rights safeguarded upon transfer, than their employment contracts terminated.

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31 Bosch 2004 *Industrial Law Journal* 923. He states that the notion suggested that in developing fair labour standards the state, employers and employees should be committed to neither practising nor allowing discrimination nor inequality in the field of labour based on the "grounds of colour, race, sex, religious beliefs, national extraction, social standing or origin. The intention of the notion was basically to eliminate all forms of discrimination." All decisions and other forms of conduct of the parties *vis-à-vis* one another should be fair, equitable and reasonable. Protection of employees in the workplace had taken centre stage.

32 Weber *Transfer of undertakings- The protection of Employment in South Africa* 12. See Smit 2003 *Stellenbosch Law Review* 211. Smit on this issue quotes a number of authors-notably the two Le Roux and Van Niekerk who had the following to say: "terms of ordinary contractual principles, where a contract has become permanently and objectively impossible to perform, and this is not due to the fault of a party, the contract comes to an end automatically. In the context of employment contracts, a different approach was, however, followed. On the question of whether there is a dismissal or whether one could say that the contracts were terminated by operation of law (impossibility of performance), it is generally accepted that there is a dismissal, since the employer can give notice and since the employer initiates the sale or closure of the undertaking." Le Roux & Van Niekerk *The Law of Unfair Dismissal* 91.

33 See *Kebeni v Cementile Products Pty Ltd* (hereafter *Kebeni*-case) 1987 8 ILJ 442 (ILJ). In this matter, although automatic transfer of employment contract had not been established as yet, the court did see it as something that could afford adequate protection to employees if it were to become part of the law. It held as thus: "If it is intended to transfer the undertaking and/or its major assets such as plant and machinery of the employer (transferor) to another party (transferee), safeguards should be incorporated into the agreement between the parties to ensure that the interests of the work-force are adequately protected. One of the safeguard clauses could for example be that all existing contracts of employment would be deemed to have been transferred to the new employer who would be obliged to retain all existing employees without discrimination, save that an individual employee may have the option not to continue his employment relationship with the transferee." 450B. From the above quotation it is easy to presume that the Industrial Court led to the current status quo of automatic transfers of employment contracts. See also *Roshall v Design Three* 1989 10 ILJ 1127 (IC), *NUMSA v Metkor Industries (Pty) Ltd* 1990 11 ILJ 1116.

34 Smit *Implications of transfer of undertakings* 5.

### *1.4 Problem statements*

In South Africa, transfer of business, trade or undertaking is regulated by section 197 of the *Labour Relations Act* (hereafter LRA) [35]which was consequently amended in 2002. Before the amendment, section 197 started by prohibiting the transfer of a contract of employment from the previous employer to the new employer without an employee's consent. Exceptions to this rule included situations where the whole or any part of a business was transferred as a going concern. Another example involved an insolvency transfer where the whole or part of a business was transferred as a going concern if the old employer was insolvent and being wound up or was being sequestrated or some scheme of arrangement was being entered into to avoid being wound up or sequestrated. Consequently, other than in insolvency situations, all rights and obligations between the previous employer and each employee transfer to the new employer unless otherwise agreed. Section 197, therefore, provided for automatic transfer of employment contracts upon a transfer of an undertaking.

In the case of an insolvency transfer, the consequences were that unless there is an agreement to the contrary, the contracts of employment that existed immediately before the winding up or sequestration of the previous employer transferred automatically to the new employer. In this instance, however, only employees were transferred while rights and obligations were not. This section was criticised for containing words or phrases that were not defined and, therefore, capable of different interpretations. In *Schutte v Powerplus Performance (Pty) Ltd* [36]the court was critical of the draftsmanship of section 197 and stated that "given the fundamental conflict of interest addressed in section 197 it is regrettable that its provisions are so terse." The other criticism was that the section did not address the conflict between itself and section 38 of the *Insolvency Act*[37] (hereafter *Insolvency Act*).

35 66 of 1995.
36 1999 2 BLLR 169 (LC).
37 24 of 1936.

The amended of section 197 on the other hand attempted to close the loopholes observed in the old section and tried to define words such as “business” and “transfer” in an attempt to be more precise. It also enacted section 197A which deals with transfers of business in cases of insolvency of the old employer; or if a scheme of arrangement or compromise is being entered into to avoid winding up or sequestration for reasons of insolvency. The section commences by pronouncing its independence from the Insolvency Act and provides for automatic transfer of contracts of employment in such instances. In the case of *Hydro Colour Inks (Pty) Ltd v CEPPWAWU*[38]it was held that the same principles in section 197 apply to section 197Ain determining whether a business has been transferred as a going concern.

In labour law, South Africa has followed England for some time. This has been evident before the enactment of section 197 of the Labour Relations Act 66 of 1995. In *Roshall v Design Three*[39] *the* court acknowledged the common law position stated in *Nokes v Doncaster Amalgamated Collieries Ltd*[40]*.* The court in this case stated that one’s right to choose an employer is “the main difference between a servant and a serf”. This piece will, therefore, compare the position in South Africa with one of England.

A further comparison will be made with the European Union law, because problems experienced in South Africa and England were encountered by the European Union (hereafter-EU) as well. The appropriate legislation in the EU is the *Transfers of Undertakings Directive*[41]. This Directive 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 employees' terms and conditions, unless the Directive's exception criteria are met. That is there must be a good economic, technical or organisational reason for the change.

38 2011 7 BLLR 637 (LAC).
39 1989 10 ILJ 1127 (IC).
40 1940 AC 1014 (HL).
41 2001/23/EC.

The aim of this piece is to draw similarities and differences between South Africa, England and European Union as a whole and establish whether employees do get protection from Labour and Insolvency legislation upon transfer of undertakings that are both insolvent and solvent.

## CHAPTER 2

## Transfer of Undertakings under section 197 of the Labour Relations Act 66 of 1995

### 2.1 Introduction

The world of employment has changed drastically from what it used to be under common law. The principle laid down in *Nokes*-case[42] where Lord Atkin stated that one's right to choose an employer is "the main difference between a servant and a serf" is no longer applicable. Nowadays job security is very essential and employees would rather prefer to preserve their jobs than to choose whom to work for. In the case of *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau & others*[43]Landman J reasoned as follows:

> Section 23(1) of the constitution provides that everyone has a right to fair labour practice. This concept is not defined in the constitution but embraces the right to job security. This right should not be terminated except if it is lawful and fair to do so.

It is, therefore, essential to point out that common law could lead to both exploitation and job insecurity for employees.[44]The contention is that when a business is being transferred, bought or goes in to liquidation; employees are normally last in the pecking-order of people to receive such information.[45]The legislator, therefore, tried to find curative measures and enacted the original section 197 of the Labour Relations Act (hereafter *LRA*) to redress such scenarios.[46]

### *2. The effect of the constitution on section 197*

42 1940 AC 1014 (HL).
43 2003 24 ILJ (LC) at 1726D
44 Biggs *The application of section 197* 11.
45 Abader *The labour law consequences of a transfer of business* 5.
46 Biggs *The application of section 197* 11.

According to the interim constitution of the Republic of South Africa (hereafter the *interim constitution*), every person shall have the right to fair labour practices.[47] This principle was further included under section 23 when the final constitution of the Republic (hereafter constitution) was finally passed.[48] According to Biggs, the "provisions in a statute are not to be interpreted narrowly within the confines of a particular section."[49] He further argues as follows:

> The provisions should be interpreted in the context of the LRA to advance economic development, social justice, labour peace and democratisation of the workplace by fulfilling the primary objects of the LRA which include to give effect to and regulate the fundamental rights under section 27 of the Interim Constitution and now section 23 of the Constitution.

Section 197 must, therefore, be interpreted with the intention of giving effect to the purpose of the LRA.[50] In the case of *Schutte & others v Powerplus Performance (Pty) Ltd &another (*hereafter *Schutte*-case)[51]the importance of the constitution when interpreting the provisions of the LRA was reiterated by Seady AJ as thus:

> Every person has a fundamental right to fair labour practices (s 23(1)(a) of the Constitution). The Act gives expression to this right in a number of provisions. Of relevance to the present matter is s 197. It regulates the transfer of contracts of employment and provides for the rights of employees in situations where there is a transfer of a business or part of a business as a going concern. Section 197 must be interpreted in a way that complies with the Constitution and gives effect to the primary objects of the Act.[52]

The importance of the constitution when interpreting legislation is construed in section 39(2) of the constitution which requires courts to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation. These very same sentiments were shared in the case of *Fedlife Assurance Ltd v Wolfaardt*,[53] however, Froneman J went even further to state that if the LRA had not been enacted with the express object of giving effect to the constitutional right to fair labour practices, the court would have been obliged to develop the common law to give expression to the said constitutional right in terms of s 39(2) of the constitution.[54]

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47 Section 27 of the Constitution of the Republic of South Africa Act 200 of 1993.
48 The Constitution of the Republic of South Africa Act 108 of 1996.
49 Biggs *The application of section* 197 11.
50 Bosch 2004 *Industrial Law Journal* 926.
51 1999 20 ILJ 655 (LC).
52 662 D.
53 2001 21 ILJ 2407 (SCA).
54 2419 I- 2411 A.

### *2.2 Purpose*

One of the inventive elements of the LRA was the provision that contracts of employment will transfer to the new employer if there has been a transfer of a business as a going concern.[55] What in essence the act had done was to provide for automatic transfer of employment contracts.

Section 197 is the first section enacted for the purpose of regulating the transfer of undertakings.[56] The section commences by giving a nod to the notion of freedom to choose one's employer which prohibited employers from transferring employment contracts without employees consent as per the *Nokes*-case.[57]The Purpose of the provisions was indicated in the Explanatory Memorandum that accompanied the draft Labour Relations Bill as thus:

> The Draft Bill explicitly deals with the employer's rights and obligations in the event of a transfer of an undertaking. This resolves the common-law requirement that existing contracts must be terminated and new ones entered into, which leads to the retrenching of employees, the paying of severance benefits etc. and escalates costs in a way that inhibits these commercial transactions.[58]

It is, therefore, pivotal to note that section 197 has a dual purpose. The first being, the protection of workers and their employment contracts while the second is the facilitation of the sale of an undertaking as a going concern.[59]Bosch states that section 197 carries out these purposes by assisting and enabling the new employer to take over employees as well as other assets in certain circumstances.[60]The section, therefore, intents to reduce the strains and rows that result from transfers of undertakings.[61]

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55 Abader *The labour law consequences of a transfer of business* 5.
56 *Schutte*-case 663B-F.
57 An employee's right to choose her employer constitutes "the main difference between a servant and a serf" *Schutte*-case 663B-C.
58 *Schutte*-case 663E-F. See also Abader *The labour law consequences of a transfer of business* 5.
59 Bosch 2004 *Industrial Law Journal* 927.
60 Bosch 2004 *Industrial Law Journal* 927.
61 Bosch 2004 *Industrial Law Journal* 927. See also Jordaan 1991 *Industrial Law Journal* 936. Jordaan summarises this twofold purpose of the section as thus: "At the heart of disputes over transfers and closures lies a clash between the employer's interest in the economic efficiency or survival of the undertaking and the employee's interest in job security; between the employer's right to safeguard sensitive information and the employee's right to be informed at the earliest possible opportunity of changes in the structure and organization of the enterprise; or between the employer's right to transfer the undertaking and the employee's right freely to choose his or her employer." Seady AJ in the *Schutte*-case also used this quote from Jordaan and proceeded

Section 197 commences by prohibiting the transfer of an employment contract from the old employer to the new employer without the employees consenting to such a transfer. However, it laid down exceptions, and indicated that a contract of employment could be transferred without an employee's consent where the whole or any part of a business is transferred as a going concern. In the case of *Manning v Metro Nissan a division of Venture Motor Holdings*[62] Waglay AJ stated as follows:

> I believe it may be appropriate to make some comments about s 197(1) (a) and (2)(a). What these subsections provide for is that whenever a business, trade or undertaking is sold as a going concern the purchaser for all intents and purposes, *vis-à-vis* the employees of the business, trade or undertaking purchased, puts himself in the place of the seller. Consequently all the rights and obligations that existed between the seller and its employees are transferred by operation of this section to the purchaser.[63]

The above dictum simply shows that an automatic transfer of the contract of employment is effected once there's compliance with the requirements set out in section 197.[64] Section 197 provides for continuity of employment.

### *2.3 Insolvency under the original 197*

Another exception to the employees' need to consent to their transfer as per the original section 197 of the LRA is in an insolvency transfer where the whole or part of a business is transferred as a going concern if the old employer was insolvent and being wound up or was being sequestrated or some scheme of arrangement was being entered into to avoid being wound up or sequestrated.[65]

Transfer of an undertaking in situations other than insolvency means that all rights and obligations between the employee and the old employer will transfer to the new employer unless there is an agreement to the contrary.[66]All the rights and obligations

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as thus: "The primary purpose of s 197 is to protect the rights of employees during certain processes of business restructuring. Their continuity of employment is ensured if there is a change of employer. This is an area of legal regulation where the tension between commercial interests and social policy for employees is at its highest." 664 A

62 1998 19 ILJ 1181 (LC).

63 1189 B-C.

64 Abader *The labour law consequences of a transfer of business* 7.

65 Mohlabi *Transfer of a business, trade or undertaking* 10.

66 The said agreement is envisaged in section 197(2) could be concluded with an appropriate person or body referred to in section 189(1) of the LRA to avoid the consequences of subsection 2.

between the old employer and each employee, and anything done before the transfer by the old employer in respect of each employee would be considered to have been done by the old employer. In this instance, only employees were transferred while rights and obligations were not.[67]

### *2.4 The difficulties with section 197 of the LRA 66 OF 1995*

However, the original section 197 was criticised by many for comprising undefined words and, therefore, capable of different interpretations and analyses. According to Abader,[68]the section has been described as a "legal monstrosity". He shows how the section was criticised by stating as thus:

> The drafters seem uncertain of the extent to which the transfer of the contract should be non-consensual and know too little about contract and insolvency law to be completely sure of the implications of their handiwork. The result is a section that yields no completely coherent meaning when construed by the conventional canons of statutory interpretation. Each construction, tentatively adopted, meets an insuperable obstacle in the language and must be jettisoned until ultimately there is nothing left but frustration and failure.[69]Words such as "business" and "going concern" were not defined.[70] The section was further criticised for not addressing the conflict with section 38 of the Insolvency Act[71] as in terms of the latter contracts of employment terminated on insolvency.[72] The issue arose from the fact that the main aim of South African insolvency law was to protect the creditors of the debtor and not the debtor himself.[73]

The phrase "being wound-up" or "sequestrated" used in section 197 (b) (i) and (ii) points out clearly that the section applies to both corporate and individual employers.[74]According to section 38 of the Insolvency Act, (hereafter *Insolvency Act*) upon sequestration of the employer, contracts of employment immediately terminate and the employee is left only with a claim from the insolvent estate for the loss

67 Mohlabi *Transfer of a business, trade or undertaking* 10.
68 Abader *The labour law consequences of a transfer of business* 17.
69 Abader *The labour law consequences of a transfer of business* 17.
70 In the *Schutte*-case, the court had this to say about section 197: ""Given the fundamental conflict of interest addressed in section 197 it is regrettable that its provisions are so terse. Perhaps it is inevitable since the section strikes at the very heart of that conflict and the Act, in its final form, is a product of a negotiated agreement between organised labour and capital, the representatives of conflicting interests."
71 Act 24 of 1936
72 Mohlabi *Transfer of a business, trade or undertaking* 10. See *Venter v Volkskas* Ltd SA 3 1973 175 where it was held that a debtor is insolvent if his liabilities exceed his assets.
73 Spree *Transfer of undertakings* 19.
74 Abader *The labour law consequences of a transfer of business* 23.

suffered.[75]However, because of lack of provisions regulating situations relating to legal persons when such are being wound up in the Insolvency Act, Spree[76] suggests that other acts had to be sort for assistance. Despite the fact that the Companies Act[77]and Close Corporations Act[78] were both enacted for the purpose of regulating such legal persons, they did not offer any provisions regulating consequences of insolvency for employment contracts.[79] This silence, therefore, prompted the question whether the contracts of employment terminate upon the insolvency of such legal persons.[80] Recourse was, therefore, found in the proper application of section 38 of the Insolvency act.[81] Section 339[82] of the Companies Act meant that companies had to adhere to the Insolvency Act.

The ultimate intention of sequestration under the Insolvency Act was to provide for liquidation of the insolvent estate and secure dissemination amongst the creditors if such was possible.[83]The control over the debtor's estate vested in the office of the Master of the High Court until a trustee is appointed. The trustee would, therefore, be entrusted with selling and circulating the proceeds of the sale to the creditors. These very same sentiments were shared in the case of *Mears v Rissik, Mackenzie & Mears' Trustee.*[84]A trustee may also continue with the running of the business upon authorisation by the Master of the High Court.[85] The purpose of sequestration was to pay all concurrent creditors at least a dividend instead of satisfying only a few creditors.[86] Spree indicates that advantage to creditors has to be proved whether there is voluntary surrender or compulsory sequestration. He, however, states that

75 Abader *The labour law consequences of a transfer of business* 23.
76 Spree *Transfer of undertakings* 20.
77 Act 61 of 1973.
78 Act 69 of 1984.
79 Spree *Transfer of undertakings* 20.
80 Spree *Transfer of undertakings* 20.
81 Spree *Transfer of undertakings* 20.
82 According to section 339 of the Companies Act, in the winding up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable be applied mutatis mutandis in respect of any matter not specially provided for in the Act.
83 Spree *Transfer of undertakings* 22.
84 1905 TS 303 at 305.
85 Spree *Transfer of undertakings* 22.
86 Buys v Arbitrator T.R. Kao & Others LAC/REV/ 43/ 02, The Labour Court of Lesotho had the following to say: "At common law, the employer's insolvency constitutes a breach of contract. The trustee or liquidator, as the case may be, may elect not to retain the services of the employee in which event the employee has a concurrent claim for damages against the insolvent estate."

an employee was not given a say in any of this scenarios. Olivier and Potgieter[87] in this regard had this to say:

> Employees as such do not have any say in the sequestration of the estate or the liquidation of the company or the corporation. As creditors, however, they may be in a position to seek the compulsory winding-up of, for example, a company. This presupposes that the employee has some knowledge of the company's financial affairs, which is unlikely, in the light of the fact that the employee need not be informed or consulted.[88]

In some scenarios an undertaking may owe an employee wages. In such instances then, an employee is in a position of a creditor and may be afforded information about the company's finances and could seek compulsory winding up.[89]The employee was surprisingly not afforded the right to be informed or consulted regarding his status as an employee.[90]

During this era, both company law and insolvency law did not deem it necessary for employees to have *locus standi* and be informed and consulted prior to and in the course of insolvency and rescue proceedings.[91]They both basically hindered the rights of employees to be present during these procedures.[92]Olivier and Potgieter contend that requirements set out in labour concerning consultation over closure or transfer of a business and the consequences of that decision have only limited application in these proceedings.[93]The law of insolvency and the Insolvency Act gave preference to creditors and did not have any intention of securing employment for employees.

### *2.5 Transfer of undertakings after the 2002 amendment*

87 Olivier and Potgieter 1995 *Industrial Law Journal* 1319.
88 Par 159.
89 Spree *Transfer of undertakings* 22.
90 Spree *Transfer of undertakings* 22.
91 Olivier and Potgieter 1995 *Industrial Law Journal* 1319.
92 Spree Transfer of undertakings 23.
93 Olivier and Potgieter 1995 *Industrial Law Journal* 1319. Olivier and Potgieter state that a threefold limitation could be discerned. Firstly, the consultation requirements could not extend further than the employer's role in and influence on the proceedings. Secondly, peculiar procedures were often prescribed in order to arrive at certain decisions or agreements such as an agreement on a scheme of arrangement. They further state that procedures emanate from company law or insolvency law and did not take into account labour law.

Section 197 of the LRA was eventually amended in August 2002 mainly because of many criticisms that were directed towards it. The amendments to section 197 were aimed at dealing with the loopholes and ambiguities observed in the old section. The section defines words such as “business” and “transfer” in an attempt to be more specific.[94]When it comes to the term “going concern”, it has been left to the courts to decide situations in which it can be said that an undertaking or business has been transferred as a going concern for purposes of section 197.[95] However, the initial step towards understanding this era of change is, as Weber[96] puts it, “paying regard to the statute.”

### *2.5.1 Analysis of the new section 197*

#### 2.5.1.1 Transfer of contracts of employment.

> (1) In this section and in section 197A
>
> (a) "Business" includes the whole or a part of any business, trade, undertaking or service; and
>
> (b) "Transfer" means the transfer of a business by one employer ("the old employer") to another employer ("the new employer") as a going concern.
>
> (2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6)
>
> (a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;
>
> (b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if there had been rights and obligations between the new employer and the employee;
>
> (c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and
>
> (d) the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer.

94 Mohlabi *Transfer of a business, trade or undertaking* 10. See also Van Niekerk et al *Law@work* 329.
95 Van Niekierk et al *Law@work*329.
96 Weber *Transfer of undertakings- The protection of Employment in South Africa* 18.

From the above provisions, it is safe to construe that the word “business” is not defined. The legislature only mentioned what the word includes. The definition of “transfer” on the other hand is also not clear and is rather confusing as it repeats the word transfer in an attempt to define “transfer” it states that “transfer means a transfer of a business.” Webber views this as tautological and states that both definitions of “transfer” and “business” appear to use more words than needed.[97] However, Weber does pay homage to the inclusion of the word trade in the definition of the word business and insists that it may be viewed differently because it generally involves the purpose of profit meaning that the scope of cover is widened.[98] Weber further states that section 197also applies to both non-profitable organisations and businesses.[99]The definition of the word business was, therefore, meant to cover sorts of structured organisations.[100]The twofold purpose of facilitation of transfers and protection of employees of the LRA has to be born in mind whenever the section is under scrutiny.[101]The protection of employees should not be to the detriment of the business. Weber deals with this issue as thus:

> The wide scope of business and transfer represent an access to the provision that pays respect to the intentions of employee protection and transfer facilitation. On the other hand, the legal consequences are only reasonable and intentional if the protection of the employees to keep their jobs is in any way supportive of the business. Although the main legislative goal is to preserve a profitable business in operation, which is running with its already trained workers, the entrepreneurial decisions cannot be disregarded...If the situation does not fulfil these requirements the overprotection of employees is economically disadvantageous.[102]

The conclusion of these new provisions is that the old employer or transferor is not obligated to seek out consent from the employees before their contracts are transferred.[103] The transferee or new employer is also not supposed to retrench employees.[104]Basically, employment contracts are transferred automatically and no dismissals are considered to have taken place. However, for this automatic transfer to take course, such a transfer of a business must meet the exact wording of section

97 Weber *Transfer of undertakings- The protection of Employment in South Africa* 18.
98 Weber *Transfer of undertakings- The protection of Employment in South Africa* 18.
99 Weber *Transfer of undertakings- The protection of Employment in South Africa* 18.
100 Weber *Transfer of undertakings- The protection of Employment in South Africa* 18.
101 Bosch 2004 *Industrial Law Journal* 927. See also Jordaan 1991 *Industrial Law Journal 936* and Weber *Transfer of undertakings- The protection of Employment in South Africa* 16.
102 Weber *Transfer of undertakings- The protection of Employment in South Africa* 18.
103 Biggs *The application of section* 197 36.
104 According to section 187(1) (g) dismissal is automatically unfair if the reason for the dismissal is a transfer, or a reason related to a transfer, contemplated in section 197 or 197A.

197. Biggs states the exact wording as "the whole or part of a business, trade, undertaking or service" is transferred by the old employer "as a going concern".[105]

Contrasting its forerunner, the amended section 197 states that the new employer complies with it if he transfers employees on terms and conditions that are on the whole not less favourable to the employees than those on which they were employed by the old employer.[106]Mohlabi, however, opines that this provision led to difficulties for employees who wanted to be put in the exact same terms and conditions as with the old employer.[107]If there is a collective agreement regulating conditions of employment for instance, then this provision will not find application.[108]

The amended section 197 makes separate provision for transfers in the normal course and transfer in case of insolvency. It further offers job security far more efficiently than its forerunner in situations that would have otherwise warranted retrenchments.[109]In the case of *NEHAWU v University of Cape Town*[110]it was held that there cannot be a transfer within the meaning of section 197 unless the two employers agree that the workers will be transferred as part of the transaction.[111] The constitutional court in National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others[112]put the matter to rest when Ngcobo J:

> If there is any doubt on this score, the recent amendment to section 197 puts matters beyond doubt by providing that "the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment". Indeed it's declared purpose is ". . . the clarification of the transfer of contracts of employment in the case of transfers of a business, trade or undertaking as a going concern.

Biggs states as thus: "the new section 197 and 197A leaves no doubt that employers who are party to transfers of businesses are deprived of that choice."[113] The amended section 197 clarifies the fact the legislature had a strong desire to ensure that employees retain their jobs when businesses are being transferred as going

105 Biggs *The application of section 197* 36.
106 Section 197(3)(a).
107 Mohlabi *Transfer of a business, trade or undertaking* 13.
108 Section 197(3)(b).
109 Biggs *The application of section 197* 36.
110 2002 4 BLLR 311 (LAC).
111 See also National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others 2003 2 BCLR 154; 2003 3 SA 1 (CC).
112 2003 2 BCLR 154; 2003 3 SA 1 (CC).
113 Biggs *The application of section 197* 36.

concerns.[114]Among other things that are transferred to the new employer are collective agreements and arbitration awards concluded in terms of the LRA. Biggs[115] describes these as thus:

> In a departure from the original section 197, the new employer in the transfer of a going concern inherits the collective dynamics of the old employer including recognition agreements, arbitration awards and extension of bargaining council agreements.

The amended section 197 makes separate provisions for transfers of both solvent and insolvent undertakings. However, transfers of insolvent undertakings will be dealt with later in this chapter. The word "service" was also introduced in 2002 amendments. With this inclusion further ambiguity was removed.[116] The new section 197 can be summarised as requiring these three elements:[117]

1. A business,
2. a transfer as a change of hands (or ownership) and
3. the transfer happening as a going concern

#### 2.5.1.2 Business

In terms of section 197(1)(a) a "business" includes the "whole or a part of any business, trade, undertaking or service". Weber, however, opines that it is largely acknowledged that business, trade and undertaking all represent the same word.[118]He, however, denotes that the tautological repetition in the definition of business required or not, at least shows the legislature has an intention to include all sorts of business structures in the provision.[119]According to Biggs, the provisions of section 197 will only apply when what is being transferred is a "business".[120] In terms of section 197(1)(a) a "business" includes the "whole or a part of any business, trade, undertaking or service".

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114 Biggs *The application of section 197* 36. Section 197(5).
115 Biggs *The application of section 197* 33.
116 Biggs *The application of section 197* 37.
117 Weber *Transfer of undertakings- The protection of Employment in South Africa* 18.
118 Weber *Transfer of undertakings- The protection of Employment in South Africa* 18.
119 Weber *Transfer of undertakings- The protection of Employment in South Africa* 18.
120 Biggs *The application of section* 197 40.

Bosch on the definition of business explains as thus:"Business" is a rather chameleon-like word, "notorious for taking its colour and its content from its surroundings". What will constitute a business for the purposes of the application of section 197 necessarily relate to the particular facts of each case." Given that the important purpose of section 197 is to protect employees, the courts should be cautious of not sticking to the conventional or traditional notion of "business". Such an approach will limit the ambit of section 197 and we would suggest, prevent it from to protect those employees it is intended to reach. Bosch also suggests that particular vigilance is required when determining whether a particular entity is a "service" or "part of a business" for purposes of section 197.

The contention is that it is unlikely that there will be much difficulty in identifying the transfer of a business when the whole of a business is being transferred other than when what is being transferred is part thereof.[121]In order to solve this dilemma that might arise, Bosch suggests that regard must be paid to what constitutes might the term "business".[122]When it comes to elements that compose a business, Bosch[123] explains as thus:

> A business, therefore, can have a variety of components being: tangible or intangible, goodwill, management staff, a workforce, premises, its name, contracts with particular clients, the activity it performs, its operating system etc.

The business being transferred does not necessarily have to contain all these components, even some of these components will be enough.[124]Weber further adds on to this and states that in recent business spheres, assets can also include intellectual property assets.[125] This shows just how broad the components of the term business are.

Bosch,[126] therefore, suggests even further that "the various components of a business must be sufficiently linked structured so as to be identifiable as an entity." He argues that the above statement does not mean that the said entity must be in

121 Bosch, du Toit and Todd *Business Transfers and Employment Rights* 33.
122 Bosch, du Toit and Todd *Business Transfers and Employment Rights* 33.
123 Bosch, du Toit and Todd *Business Transfers and Employment Rights* 33.
124 Bosch, du Toit and Todd *Business Transfers and Employment Rights* 33.
125 Weber *Transfer of undertakings- The protection of Employment in South Africa* 20.
126 Bosch, du Toit and Todd *Business Transfers and Employment Rights* 33.

business but rather that the said components must somehow add up or as he puts it, “hang together”.

The South African Courts have sort assistance from the European Court of Justice when trying to find a clear definition of the term business. In the case of *Suzen v Zehnacker Gebaudereinigung GmgH Krankenhausservice (*hereafter *Suzan*-case)[127]the court developed the concept of “economic entity” defined as “an organised grouping of persons facilitating the exercise of an economic activity which pursues a specific objective”. It has been suggested that the *Suzan*-case placed much emphasis on the organisational components of the entity being transferred and overlooked the nature of such an entity or the activities it conducts.[128]Van Niekerk argues that the concept established by the *Suzan*-case is easy to apply when the whole business entity is being transferred together with its assets but may have problems in instances of transfer of businesses that provide services when such businesses have only a few or no assets at all other than employees with certain expertise.[129]

In the case of *SA Municipal Workers Union & Others v Rand Airport Management Co (Pty) Ltd*[130] the difficulties of interpreting and applying the test was seen. The case was about Rand Airport Management Company which had an intention of outsourcing its non-core functions being the security and gardening services. It accordingly gave notice to employees and their trade unions of the intention to retrench them. The trade union SAMWU brought an urgent matter to court seeking a declaratory order to the effect that the transaction fell under section 197.The Labour Court dismissed the application and stated that section 197 did not apply where nothing more than an activity was outsourced. The court further held that those services were not an entity stating that they had no management structure, assets, goodwill, goals or customers to speak of and were ‘merely an activity’. Weber[131] suggests that the court “had a narrow view due to a too conventional and traditional sense of a business.” Van Niekerk on the other hand criticises the court for confusing

127 1997 IRLR 255 (ECJ)
128 Van Niekerk et al *Law@work*330.
129 Van Niekerk et al *Law@work* 330.
130 2002 12 BLLR 1220 (LC)
131 Weber *Transfer of undertakings- The protection of Employment in South Africa* 20.

form with substance.[132] He argues that the relevant approach that the court should have taken is "enquire into the existence or otherwise of the components that makeup a business".[133] He concludes by stating that to neglect the importance of this enquiry is to "elevate the single component of business (a service) from an illustrative to a determinative level and effectively enable form to dictate substance."[134] The inclusion of the word service in definition of business illustrates that the court intended to include service providers in section 197.

2.5.1.3 Transfer

The word "transfer" is not defined in both the old and amended section 197. Biggs states that the definition of transfer is wider that perceived by the naked eye. He insists that "what falls within the context of a transfer is broader than a purchase and sale, but not always easy to identify." This is also visible in the *Schutte*-case Ltd where the Court stated as thus:

> ...transfer" of a business refers only to sale but may include "merger, take-over or … 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.[135]

The above quote shows clearly that business transfers cover many situations. This was also made even clearer by Mohlabi who stated the following:

> The concept of "transfer" thus relates to the method of transfer of a business. Business transfers occur most often consequent to a sale, but the reach of section 197 clearly extends beyond transfers effected in these circumstances. Any corporate event such as a merger, take over, or other restructuring potentially falls within the ambit of section 197, as does an exchange of assets, a donation and outsourcing of non-core functions or business activities. For there to be a transfer, there must be a shifting of a business entity by one employer to another. This assumes that there must be at least two distinct employers involved in the transaction.[136]

132 In the *Schutte*-case, the court paid homage to the fact that "In determining whether a transfer has taken place within the meaning of article 1(1) of the directive, the ECJ has consistently adopted an approach that examines the substance, rather than the form, of the transaction."

133 These components include: "tangible or intangible, goodwill, management staff, a workforce, premises, its name, contracts with particular clients, the activity it performs, its operating system etc." as stated earlier.

134 Biggs *The application of section 197* 41.

135 Biggs *The application of section 197* 42.

136 Mohlabi *Transfer of a business, trade or undertaking*15. As quoted from Van Niekerk A, Christianson MA, MacGregor M, Smit N and Van Eck BPS Law@work 1st ed (2008).

Transfer of an undertaking can, therefore, take place through the actual sale, some other means of disposition or even *ex lege*.[137]As pointed out by Van Niekerk[138] Gush J in the case of *Jenkin v Khumbula Media Connexion* (Pty) Ltd[139]held that" the issue as to whether or not there has been a transfer should not only depend on the existence of an agreement but on the facts."[140]

The *Schutte*-case also made an interesting point when it held that the issue to be decided was whether the second respondent transferred any part of its business, trade or undertaking to the first respondent as a going concern, as contemplated in the old section 197(1) (a) of the Act. Then concluded by stating that the LRA must be read from a constitutional perspective and that sections 1(a) and 3(b) of the Act required the Labour Appeal Court to follow such approach.[141]

2.5.1.4 Going Concern

In determining whether section 197 is applicable in certain business transactions the central issue to be determined is usually whether there has been a transfer of a business as a going concern.[142] According to a number of judgements, the phrase became part of South African law through judgements in the European Court of Justice (hereafter ECJ).[143] A typical example being the case of *Food& Allied Workers Union v Cold Chain (Pty) Ltd & Another*[144] where Francis J held:

> The next question that is to be decided is whether there will be a transfer as a going concern. In NEHAWU, the Constitutional Court, referring to the jurisprudence of the European Court of Justice, said that this leg of the test is best summarized by asking whether there has been a transfer of an economic entity that retains its identity after the transfer has taken place. This would be indicated *inter alia* by the fact that the operation was actually continued or resumed by the new employer, with the same or similar activity… whether or not the majority of its employees are taken over by the new employer; whether or not its customers are transferred; the degree of similarity between the activities carried on before and after the transfer;…

137 Van Niekerk et al*Law@work*329.
138 Van Niekerk et al *Law@work*329.
139 2010 12 BLLR 1295 (LC).
140 Par 28.
141 Mohlabi *Transfer of a business, trade or undertaking* 15.
142 Weber *Transfer of undertakings- The protection of Employment in South Africa* 31.
143 According to Weber, "the phrase found its way into the South African statute possibly through a statement in an ECJ judgment. In 1986 the European Court made its decision in *Jozef Maria Antonius Spijkers C.V v Gebroeders Benedik Abattoir C. V. & Alfred Benedik en Zonen B. V* Case 24/85 European Court reports 1986 Page 01119 (hereafter Spijkers case); and ascertained that a transfer took place if the business was 'disposed as a going concern'.".
144 2009 30 ILJ 2919 (LC).

Transfer of a business as a going concern for purposes of section 197 is, therefore, effected when an economic entity that retains its identity is transferred.[145] This concept of going concern was further elaborated in the *Schutte*-case it was held that the test as articulated in Spijkers and repeatedly endorsed is that:

> The decisive criterion for establishing whether there is a transfer for the purposes for the directive is whether the business in question retains its identity. Consequently a transfer of an undertaking, business or part of a business does not occur merely because its assets are disposed of. Instead it is necessary to consider, in a case as the present, whether the business was disposed of as a going concern, as would be indicated, inter alia by the fact that its operation was actually continued or resumed by the new employer, with the same or similar activities. In order to determine whether those conditions are met, it is necessary to consider all the facts characterising the transaction in question, including the type of undertaking or business, whether or not the business's tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred and the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended. It should be noted, however, that all those circumstances are merely single factors in the overall assessment which must be made and cannot, therefore, be considered in isolation.[146]

What is important is whether it transferred to the new employer who continues with similar activities. The constitutional in the case of *NEHAWU v University of Cape Town & Others*[147] stated that all these factors must be evaluated together not in isolation from one another. According to this judgement, what is important is whether what is transferred is a business in operation 'so that the business remains the same but in different hands.'[148] Basically the approach that has been followed in a number of judgements is based on the fact that regard must be had to the substance and not the form of the transaction. Seady J in the *Schutte*-case went further and stressed that substance over form "weighs the factors that are indicative of a transfer of a

145 Van Niekerk*Law@work*332. However acquiring a company through a sale of shares has been ruled out of s 197.In*Ndima and Others v Waverley Blankets Ltd* 1999 6 BLLR 577 (LC) (hereafter *Ndima*-case), in which it was held that 'the transfer of possession and control of a business' are two separate concepts. The court also stated that the old and the new employers must be two separate entities. It is for this reason that the section will not apply where control of the business is transferred by way of a share transfer. In such cases control is shifted, but the legal entity of the employer remains the same. The second scenario which will not find application under section 197 is where only assets are disposed of. The same sentiments were shared in the case of *Kgethe and others v LMK manufacturing* 1997 10 1303 (LC).

146 Par 36.

147 2003 24 ILJ 95 (CC).

148 Par 56.

business from those that are not; that makes the overall assessment of the facts, not treating any one as conclusive in itself."[149]

2.5.1.5 Outsourcing

The inclusion of service in the definition of business played a very important role in transfers of employees in scenarios involving outsourcing. Weber[150] defines outsourcing as thus:

> Outsourcing has been defined as 'obtaining (goods or a service) from an outside or foreign supplier, especially in place of an internal source'. In the terms of Section 197 LRA it is any service provision that formerly has been rendered in-house, contracted out to a service provider.

The first issue that caused much controversy was whether a service that is being contracted out would by itself dependent from the main undertaking be called a business.[151] However, this was addressed in the case of *South African Municipal Workers Union and Others v Rand Airport Management Company (Pty) Ltd and Others*[152]"...the word service was construed as including support services into the definition" of business.[153] After this, though it happened after a while, outsourcing was interpreted as a transfer of a business falling within the ambit of section 197. The case of *Aviation Union of SA & Others v SA Airways (Pty) Ltd. &Others*[154]was considered as a major catalyst in this process. Weber in support of this had the following to say:

> All further generation outsourcing, or better to say any change of contractor, has been answered in the affirmative in the Constitutional Court decision of SA Airways at the end of 2011. Outsourcing falls within the ambit of Section 197 LRA if the requirements of business, transfer and a going concern suffice.[155]

From the above phrase by it is visible that employees of an outsourced entity will be protected by section 197.

149 Abader *The labour law consequences of a transfer of business* 15.
150 Weber *Transfer of undertakings- The protection of Employment in South Africa* 46.
151 Weber *Transfer of undertakings- The protection of Employment in South Africa* 46.
152 2004 ZALAC 17.
153 Weber *Transfer of undertakings- The protection of Employment in South Africa* 46.
154 (2008) ILJ 331 (LC), (2009) ILJ 2849 (LAC), (2011) ILJ87 (SCA), (2011) ILJ32 (CC) 2861.
155 Weber *Transfer of undertakings- The protection of Employment in South Africa* 46.

## 2.6 Insolvency After 2002

As stated earlier, before the recent amendment to section 38 of the Insolvency Act, the position of employees in insolvency cases was not a desirable one.[156]The law basically did not offer employees several rights upon insolvency of an undertaking. The employer undergoing insolvency did not have any actual obligations towards the employees' and their "existing contracts" hence these were merely terminated.[157]Nonetheless, employees were often left with fruitless claims with less to no consideration to their troubles whatsoever.[158] It has often been argued that the main objective behind the labour law is to "to strike a balance in order to reach equilibrium between labour and management in the employment relationship."[159] There was, therefore, a need to afford employees more rights and place more duties upon employers upon insolvency. It was even more important to amend section 38 for the advancement of employees' position in such scenarios.

### *2.6.1 Insolvency and the law:*

The Insolvency Act has been amended several times since it was first passed in 1936. When dealing with this field of the law, consideration has to be placed upon several statutes namely the Companies Act[160], Close Corporations Act[161] and for purposes of this piece and other particular incidents the Labour Relations Act and the Basic Conditions of Employment Act[162].

Insolvency as defined

In the case of *Venter v Volkskas Ltd*[163]it was held that in order to determine if an undertaking is insolvent, the legal test applicable for sequestration proceedings is

156 Carolus 2007 Http://www. saflii.org/za.
157 Carolus 2007 Http://www. saflii.org/za.
158 Carolus 2007 Http://www. saflii.org/za.
159 Carolus 2007 Http://www. saflii.org/za.
160 71 of 2008.
161 Act 69 of 1984.
162 75 of 1997.
163 1973 3 SA 175 at 179.

usually the balance sheet test, namely, whether or not the debtor's liabilities, fairly estimated, exceed his assets, fairly valued.[164]

### *2.6.2 The notion of Fair Labour Practice*

According to section 23 of the Constitution, everyone has a right to fair labour practices. Adherence to this notion in insolvency situations came under scrutiny because insolvency led to automatic termination of employment contracts.[165]Two major contentions were advanced against this scenario. The first one was based on the fact that employees who are already vulnerable were prejudiced through job losses. While the second was based on the consideration given to creditors.[166] The fact that when liquidated assets had to be distributed preference was given to secured creditors was even more disadvantageous to employees.[167] Carolus[168] explains as thus:

> Before 1 January 2003, the effect of section 38 of the [Insolvency Act] was that all contracts of employment between an insolvent employer and its employees automatically terminated on the date of sequestration or liquidation, subject to the right of the employees to claim damages available at common law, for losses sustained as a result of such termination. Section 38 was never challenged on the grounds of common law principles, that is on the grounds that the insolvency of the employer (and the subsequent sequestration or liquidation) did not necessarily constitute the supervening impossibility of performance (in that insolvency might have been attributable to fault on the part of the employer or that there existed merely relative or subjective inability on the part of the employer to fulfil its

164 Van Heerden and Boraine 2009 *Potchefstroom Electronic Law Journal* 22. See also Carolus 2007 Http://www. Saflii.org/za at 111 where the following was said: “In common parlance, a person may be said to be insolvent when he is unable to pay his debts. The legal test of insolvency is whether the debtor's liabilities, fairly estimated, exceed his assets, fairly valued (*Venter v Volkskas* Ltd 1973 (3) SA 175 (T) 179). Inability to pay debts is, at most, merely evidence of insolvency. A person who has insufficient assets to discharge his liabilities, although satisfying the test of insolvency, is not treated as insolvent for legal purposes, and does not suffer the legal consequences of insolvency until his estate has been sequestrated by an order of the court'.” Carolus also points out the importance of differentiating between a person and his estate and appropriate terms to use thereto as thus: “The terms ‘sequestration’ and ‘sequestration order’ should strictly be used only with reference to a person's estate. A debtor's estate is sequestrated, not the debtor himself. However, both a debtor's estate and the debtor himself may appropriately be described as ‘insolvent’. When the word 'insolvent' is used to describe a debtor, it carries two possible meanings: either that the debtor's estate has been sequestrated, or that his liabilities exceed his assets. The notion of ‘becoming insolvent’, thus, has a wider meaning than that of ‘being sequestrated’.”

165 Carolus 2007 Http://www. saflii.org/za.

166 Carolus 2007 Http://www. saflii.org/za.

167 Carolus 2007 Http://www. saflii.org/za.

168 Carolus 2007 Http://www. saflii.org/za. As quoted from Van Eck & Steyn 2009 *South African Law Journal* 12.

obligations). However, section 38 was challenged against the background of the right to fair labour practice.

### *2.6.3 The new amendments*

Trade Unions played a very important role leading to the amendment of section 38 of the Insolvency Act. Their arguments were merely based on promoting the constitutionally entrenched right to fair labour practice.[169] According to Carolus, the rationale behind the 2002 amendments was as follows:

1. Trade Unions raised concerns about workers not being alerted and given information about the insolvency that is likely to ensue. COSATU wanted employers to have an obligation towards employees of accordingly serving the latter with notices upon realisation of potential insolvency.

2. The other major distress was based on the issue of employment contracts that terminated automatically as provided for by the Insolvency Act prior to the amendment.[170]

Regarding how these issues were addressed, the following was stated:

> The proposed amendment will address this problem by making it compulsory for a notice to be served on workers in the event of liquidation. Upon sequestration, workers' contracts will be suspended rather than terminated. Workers will then negotiate with the trustees on the appropriate way forward. During suspension workers can claim their UIF unemployment benefits.[171]

Although many regarded this as minimal gains Carolus[172] summarised the advantages of the amendments as thus:

> Trade unions and workers are now required to be notified of BOTH the application for, as well as the granting of a liquidation order. This provision, if effectively enforced, will allow quicker engagement by unions with members affected by the liquidation in appointing their own liquidators or in opposing liquidation. It should be pointed out that, although this amendment took effect in 2003, courts are still granting liquidation orders even if notification requirements have not been complied with. Another innovation is the fact that not only claims for salary/wage or leave pay but also for severance pay due as a result of the employer's insolvency are now classified as preferent claims. One of the most favourable impacts of the new section 38 is the fact that it now provides for the suspension of all employment contracts upon insolvency until the end of a 45-day period after a provisional liquidator has been appointed, whereafter employment contracts terminate by law.

169 Carolus 2007 Http://www. saflii.org/za.
170 Carolus 2007 Http://www. saflii.org/za.
171 Carolus 2007 Http://www. saflii.org/za.
172 Carolus 2007 Http://www. saflii.org/za.

Previously the Act had provided only for the immediate termination of all contracts of employment upon granting a liquidation order.

### 2.6.3.1 Section 197A

This section was enacted along with the 2002 amendment to section 197 of the LRA. What was most notable about it was its subsection 2 thereof commences by resolving and addressing one of the controversies of the old section, that is, its relationship with the Insolvency Act.[173]The section kick offs by an affirmation of its independence from the Insolvency Act where there is a transfer of a business in cases of insolvency of the old employer or if a scheme of arrangement or compromise is being entered into to avoid winding up or sequestration for reasons of insolvency.[174] The section states that despite the Insolvency Act, if a transfer of a business takes place in the circumstances contemplated in subsection (1), unless otherwise agreed in terms of section 197(6) the new employer automatically steps in to the shoes of the old employer in respect of all contracts of employment in existence immediately before the old employer's provisional winding up or sequestration.[175]All the rights and obligations between the old employer and each employee at the time of the transfer remain rights and obligations between the old employer and each employee. Anything done by the old employer in respect of each employee is considered to have been done by the old employer. However, what is most important is the fact that the transfer does not interrupt continuity of employment. Moreover, section 197(3), (4), (5) and (10) applies to a transfer in terms of this section.[176]

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173 In the case of *Ndima*-case, the Court held that the contracts of employment were terminated as result of section 38 of the Insolvency Act and further made a suggestion to the effect that section 197 of the Labour Relations Act (prior to the amendment) and section 38 of the Insolvency Act needed to be amended. The suggested that section 38 of the Insolvency Act could be amended to provide for suspension instead of termination of employment contracts upon the granting of a provisional liquidation order. That is, existing contracts of employment could be suspended pending the discharge of the rule or the granting of the final liquidation order. This was a decision prior the amendment. See also Mohlabi *Transfer of a business, trade or undertaking* 14.

174 Section 197A (1) and (2). See also Mohlabi *Transfer of a business, trade or undertaking* 14.

175 197A (2) (a).

176 Sections 197(3), (4), (5) and (10) are provisions relating to transfers in the normal course and these are advantageous employees of an insolvent undertaking because they retain some of the benefits like transfer to the pension, provident, retirement or similar fund other than the fund to which the employee belonged prior to the transfer.

2.6.3.2 Section 197B

This section on the other hand makes it obligatory to the employer facing financial difficulties that might reasonably result in winding up or sequestration to advise the consulting party in terms of section 189(1) and an employer that applies to be sequestrated, whether in terms of the Insolvency Act, 1936 or any other law to provide the consulting party in section 189(1) with a copy of the application at the time of making the application. An employer who on the other hand receives an application for its winding up or sequestration must also supply a copy of the application to the consulting party within two days of receipt. This section makes time for employees to regroup and look for options which they might have in order to take care of themselves.

**Conclusion**

The issue of transfer of undertakings has undergone an admirable transition from the common law position where employees were generally afforded the freedom to choose whom they want to work for[177] to the Industrial court era which was established as a result of the Wiehahn Commission which saw the concept of fair labour practice find prominence, for the first time in history employees were getting consideration upon business transfers.[178]It was clear to the legislature that there was

177 In the *Nokes*-case, Lord Atkin in the Nokes-case pronounced two reasons behind the freedom of choice of an employee as thus: "It is said that one company does not differ from one another: and why should not a benevolent of the chancery division transfer the services of a workman to another admirable employer as good and perhaps better. The answer is twofold. The first is, however, the new master may be it is hitherto the servant who has the choosing of him, and not the judge. The second is that it is a complete mistake in my experience to suppose that people, whether they are servants or landlords or authors do not attach importance to the identity of the company with which they deal. It would possibly hurt the feelings of financial gentlemen with large organising powers to know how strongly some people feel about big combinations, and especially amalgamations of small trading concerns. It is said how unreasonable this is for a big company can buy the majority of shares in the old company: replace its managers: change its policy and produce the same results. Be it so: but the result is not the same: the identity of the company is preserved: and in any case the individual concerned, while he must be prepared to run the one risk, is prepared to say that he is not entitled to run the other."

178 Bosch 2004 *Industrial Law Journal* 923. Bosch on the establishment of the Industrial Court by the Wiehahn Commission states as thus: "Although the main part of their research and evaluation (Wiehahn Commission) was labour law in South Africa, their results did not include any regulations regarding the transfer of undertakings. Nonetheless, a minimum of labour protection was achieved with the introduction of unfair labour doctrine. Combined with the establishment of

still room for improvement in labour laws governing this country. The enactment of the LRA in 1995 was a step in the right direction. The automatic transfer of employment contracts meant that the legislature was now enacting laws which were consistent with the constitution which states that everyone has a right to fair labour practice. However, South Africa draws from other jurisdictions more especially the European Union and England. It is, therefore, important to discuss this jurisdiction and their developments. The next chapter will focus strictly on England and the developments thereto.

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the industrial court, which identified unfair dismissals as unfair labour practice, a first step towards employee protection during the transfer was achieved."

## CHAPTER 3

## The position in the United Kingdom and the EU

### 3 Introduction

The common law of England was the source of South Africa's jurisprudence for a long time.[179] For a number of years the courts in South Africa followed the principle laid in the *Nokes*-case[180] which afforded employees the freedom to choose whom they wanted to work for. This principle further provided that the employment contract is so personal in nature that an employee may not be transferred without his/her consent. The consequence of this freedom meant that employment contracts terminated in the midst of the transfer.[181]

In England this meant that when a new employer took over the reins, he had the digression to dismiss if he so wished or in the alternative take over those employees on any terms and conditions he wanted.[182] For employees who are taken over the consequence was that they would lose the seniority they had acquired over the years of employment with the old employer. The dismissed employees on the other hand would most certainly have no recourse against the new employer alternatively; they could lodge their claims against the old employer who would be under an obligation to compensate them.[183] With the aim of redressing these issues, the European Economic Community passed Acquired Rights Directive (hereafter ARD) in 1977.[184] The purpose of this directive was largely believed to be twofold.[185] Firstly

179 Weber *Transfer of undertakings- The protection of Employment in South Africa* 71.
180 Ltd 1940 AC 1014 (HL).
181 Basson *Essential Labour Law* 171. According to Basson: "When a business is sold, the position of employees in terms of common law is deceptively simple: No employee may be forced to continue his or her contract of employment with the new employer. This, of course, is cold comfort to most of employees who would like to stay on (especially in a country with high unemployment) because the common law also provides that the new employer is not obliged to employ them. A transfer of a business could well mean the termination of existing employment contracts. As far as insolvency is concerned the rule is that insolvency of the employer terminates existing contracts of employment. Despite this, it is a fact of economic life that an insolvent business does not necessarily cease to operate as it may still be bought by another concern and given a life-line, or some arrangement with creditors may ensure its survival."
182 Johnson and Williams 2007 http://shura.shu.ac.uk/707/.
183 Johnson and Williams 2007 http://shura.shu.ac.uk/707/.
184 Directive 77/187/EC 1977 O.J. L61/ 27.
185 Johnson and Williams 2007 http://shura.shu.ac.uk/707/.

it was adopted to facilitate the transfer of undertakings and employment contracts thereof.[186] Secondly for facilitation of competition between members to the European Union (hereafter EU) by making sure that such is not unduly biased because of contrasting domestic laws.[187] Johnson and Williams state that the Directive tried amongst other things "to reconcile the protection of social (employment) rights with economic (competition) rights at a time when some European governments have sought to promote greater labour market flexibility."[188]

The English government felt that the ARD clarified just how the EU social policies "distorted competitive forces."[189] They argued that such led to restriction in market flexibility or "entrepreneurial freedom which consequently leads to inefficiency". Hardy and Adnett[190] argue as follows:

> From this viewpoint, the Directive, by championing employee rights and restricting entrepreneurial freedom, helped to preserve pockets of inefficiency, especially in the public sector, whilst inducing distortionary creative compliance behaviour elsewhere in the economy.

The English government in a nut shell advocated for freedom to contract as advocated for in the *Nokes*-case.[191] Hardy and Adnett state that this point of view by the British government emanated from a closer look at what is termed "economic liberalism" or economic freedom.[192] They argue that labour markets combined with an economical and competitive product together with freedom of employees to contract which ensures that employment contracts are freely entered into without any coercion whatsoever would be beneficial to both the employer and employee hence production will be increased as a result of satisfaction by the two parties involved.[193]

The English government finally implemented 1977 EC Acquired Rights Directive through the Transfer of Undertakings (Protection of Employment) Regulations of 1981(hereafter TUPE).[194] It suggested that the British government in simple terms

186 Johnson and Williams 2007 http://shura.shu.ac.uk/707/.
187 Johnson and Williams 2007 http://shura.shu.ac.uk/707/.
188 Johnson and Williams 2007 http://shura.shu.ac.uk/707/.
189 Hardy and Adnett 1999 *Journal of European Social Policy* 128.
190 Hardy and Adnett 1999 *Journal of European Social Policy* 129.
191 Hardy and Adnett 1999 *Journal of European Social Policy* 129.
192 Hardy and Adnett 1999 *Journal of European Social Policy* 129.
193 Hardy and Adnett 1999 *Journal of European Social Policy* 129.
194 SI 1981 No.1794. While passing these regulations for the first time, Minister, David Waddington had the following to say: "That the draft Transfer of Undertakings (Protection of Employment)

did not want adopt the ARD simply because it was against its social policy.[195] Edward and James explain as thus:

> The government's attitude towards those Regulations was one of barely disguised hostility. The Minister responsible for their passage through the House of Commons, David Waddington, said: "I am recommending them with a remarkable lack of enthusiasm." When pressed on detail, he observed "We are merely incorporating in the regulations the precise obligation placed on us by the Directive and which by law we are bound now to put into effect through regulations.[196]

Less than two decades later the ARD of 1977 was amended in 1998. This Directive was supposed to have been implemented within three years but once again the British government stalled when it was supposed to implement it.[197] Even though member states were supposed to have begun with the implementation of the Directive by July 2001, the British government through its Trade and Industry Departments submitted proposals as late as September 2001.[198] However, surprisingly enough, the final regulations that were drafted came to force on the 6th April 2006.[199]

### *3.1 Public to Private Sector Transfers*

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Regulations 1981, which were laid before this House on 26th November, be approved. The regulations implement the European Community directive on the approximation of the laws of member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses. They are made under the enabling power in the European Communities Act 1972. They have been a long time in the making, and implementation of the directive is now overdue. The first draft of the regulations was published under the previous Administration in June 1978…I do not believe that we could have delayed much longer in carrying out our Community obligations. The regulations have two main provisions. First, when there is a change of employer they provide for an automatic transfer of the employees along with the business. I emphasise the words "a change of employer", which means where the identity of the employing company changes. The regulations do not apply to a change of ownership where only the controlling shares in the company change hands. Hon. Members will appreciate that at present, if a business is sold as a going concern, the contracts of employment are normally brought to an end. That will no longer be...." Anon 1981 http://hansard.millbanksystems.com.

195 Edward and Segan 2006 http://www.blackstonechambers,com.

196 Edward and Segan 2006 http://www.blackstonechambers,com.

197 Davis 1998 *Industrial Law Journal* 365.

198 Davis 1998 *Industrial Law Journal* 365. This was very surprising since according to Davis the UK government, had made the Amending Directive one of its social affairs priorities, and had amazingly intended to move the legislation much sooner. It had even proposed new Regulations for the first half of 1999. Johnson and Williams on the other hand describe the delay by the UK government as follows: "Despite the amending Directive being a policy initiative of the first Blair administration, its adoption turned out to be surprisingly tortuous." Johnson and Williams 2007 http://shura.shu.ac.uk/707/.

199 Johnson and Williams 2007 http://shura.shu.ac.uk/707/. They state that the necessary amendments were, however, delayed because political reasons other than complications in enacting new laws or amendments thereof.

The British government at the time was run by one Margaret Thatcher. She and her government had not made a secret of their intentions to privatise some of the services that had been provided by the government.[200] It was, therefore, contended that TUPE Regulations of 1981 were, therefore, restricted "to transfers of undertakings that were 'not in the nature of a commercial venture'."[201] The government was, however, accused of supporting "private bidders" who hesitated to tender because of the fear of hiring or taking on original public sector employees on existing terms and conditions.[202] Johnson and Williams do, however, state that, trade unions played a major part in disenabling this conservative government's way of doing things.[203] They state as follows:

> This strategy was to be trenchantly caricatured later by a trade union leader as the deliberate promotion of a 'Dutch auction' designed to see 'who could pay the least to the fewest in the privatisation of public services'.[204]

In the case of *Commission v UK*[205] it was held that confining TUPE to profit making undertakings was a contradiction of the ARD, article 1 thereof which had been interpreted in the case of *Dr Sophie Redmond Stichting v Bartol*[206]as thus:

> Article 1(1) determines the scope of the directive in very general terms: This directive shall apply to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger. The actual text of the directive makes no distinction depending on whether an undertaking is commercial or non-commercial. There is one exception only to its scope *ratione materiae*, that for sea-going vessels (Article 1(3)). The directive, it appears from the preamble thereto, was prompted by changes in the structure of commercial undertakings, caused by economic trends at both national and Community level. This is in fact the situation which arises most frequently: it is precisely those restructuring operations, takeovers and mergers of undertakings which often have substantial repercussions as far as employees are concerned. The fact that the prime objective of the directive is to prevent this restructuring process within the Common Market from taking place to the detriment of employees of the undertakings concerned was confirmed by the Court...[207]

200 Johnson and Williams 2007 http://shura.shu.ac.uk/707/.
201 Johnson and Williams 2007 http://shura.shu.ac.uk/707/.
202 Johnson and Williams 2007 http://shura.shu.ac.uk/707/.
203 Johnson and Williams 2007 http://shura.shu.ac.uk/707/.
204 Johnson and Williams 2007 http://shura.shu.ac.uk/707/.
205 C-383/92 1994 ECR I-2479.
206 C-29/91 1992 ECR I-3189.
207 Par 7. The facts of the case were as follows: The plaintiff in this matter was Dr Sophie Redmond Foundation (hereinafter-the Redmond Foundation), provided assistance to drug addicts to some minority group in the Dutch society. Redmond Foundation resources consisted solely of subsidies from the Municipality of Groningen. The defendants on the other hand were employees of the Redmond Foundation. The Municipality of Groningen ceased to grant the plaintiff subsidies and transferred them to another foundation engaged in assisting drug addicts, the Sigma

When placing importance in the entity retaining its identity the court emphasised the significance of continuation and held as thus:

> According to Article 1(1), the directive is also applicable where, not all the undertaking, but only one or more of its businesses or parts of its businesses are transferred to another employer. Where such a partial transfer takes place, it is self-evident that those factors, establishing that the undertaking has retained its identity, should be applied only in respect of the business of the undertaking or, as the case may be, the part of such business which has been transferred...Continuity has also been established with regard to the clients: both the Redmond Foundation and Sigma declared that they were willing to transfer the former's clients/patients to the latter.[208]

TUPE was eventually amended in 1993 and the result was that its scope was widened making "operating with a view of making profit" inapplicable.[209] This was, however, not the end of the problems caused by the then conservative government of the UK. The case of *Francovich v Italy*[210] laid down a principle of state responsibility for submission to EC law in a case in the field of employment right.[211] This principle would then find application through a number of former employees who lost their jobs due to transfers that were effected prior to the 1993 amendment.[212] The said employees had been transferred to the private sector as a result of the privatisation that took place during Margaret Thatcher's then conservative government rein.[213] These employees contended that it was unlawful to exclude them from application of TUPE.[214]

### *3.1.1 Shortcomings of TUPE 1981*

The biggest problem with TUPE of 1981 was the fact that many saw it as ambiguous hence they could not tell when a relevant transfer within the regulations and the ARD

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Foundation. The Redmond Foundation, therefore, applied to the Kantongerecht to set aside its contracts of employment of its employees who were not taken over by Sigma Foundation. The Kantongerecht thought it was wise to consider the interpretation of Directive 77/187. Accordingly the matter was taken to court.

208 Par 13.

209 Johnson and Williams 2007 http://shura.shu.ac.uk/707/.

210 C-9/90 1991 ECR I-5357.

211 Anon 2007 http://www.eurofound.europa.eu. The principle espoused in that case would later be known as the *Francovich* principle.

212 Johnson and Williams 2007 http://shura.shu.ac.uk/707/.

213 Johnson and Williams 2007 http://shura.shu.ac.uk/707/.

214 Johnson and Williams 2007 http://shura.shu.ac.uk/707/.

actually took place.[215] Ambiguity in a piece of legislation leads to different interpretations and, therefore, leads to even further problems. Johnson and Williams[216] had the following to say regarding this:

> The problem of opaque legislative drafting has been compounded by 'a marked difference of approach not only between the English judiciary and their European counterparts but also as between different (British) judges'. As we shall see, one of the aims of TUPE 2006 is to reduce, if not eliminate, these difficulties.

The problem with this ambiguous legislative drafting is in essence based on its eventual application to scenarios that were not within its scope. When the EC first enacted both the regulations and the ARD, hardly anyone could anticipate the eventual impact that these two would have on the business and labour market.[217] The two areas of major concern were found to be contracting services and retention of identity.[218]

*Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice (*hereafter *Suzen*-case)[219] is a perfect example of shortcomings of the regulations. The *Suzen*-case is pivotal in explaining how the TUPE (1981) regulations were interpreted to incorporate the contracting of services.

Suzen was an employee of a cleaning contractor, one Zehnacker, who had assigned her to clean a school. The contract was taken away from Suzen's employer and awarded to another contractor. Consequently Zehnacker terminated Suzen's services as a result. Suzen together with other fellow colleagues opened proceedings and claimed that reallocation of the contract amounted to a relevant transfer and, consequently, that they were entitled to continue working at the school, albeit for the incoming contractor.

The case was passed on the European Court of Justice (ECJ) for clarification. The ECJ rejected this submission by Suzen, and made a distinction between an 'economic activity' from an 'entity' and held as thus:

> As observed by most of the parties who commented on this point, the mere fact that the service provided by the old and the new awardees of a contract is similar does

215 Johnson and Williams 2007 http://shura.shu.ac.uk/707/.
216 Johnson and Williams 2007 http://shura.shu.ac.uk/707/.
217 Wickes 2011 Http://www.yasni.co.uk.
218 Wickes 2011 Http://www.yasni.co.uk.
219 C-13/95 1997 ECR I -1259.

> not, therefore support, the conclusion that an economic entity has been transferred. An entity cannot be reduced to the activity entrusted to it. Its identity also emerges from other factors, such as its workforce, its management staff, the way in which its work is organized, its operating methods or indeed, where appropriate, the operational resources available to it.[220]

The argument by the court was that loss of a customer by a service providing undertaking does not result in the closure of the undertaking. In fact, what can be inferred from the above *dicta* is that the old employer had the responsibility to maintain his employees and not the new employee.[221] In stating as thus:

> The mere loss of a service contract to a competitor cannot, therefore, by itself indicate the existence of a transfer within the meaning of the directive. In those circumstances, the service undertaking previously entrusted with the contract does not, on losing a customer, thereby cease to exist fully, and a business or part of a business belonging to it cannot be considered to have been transferred to the new awardee of the contract.[222]

However in interpreting whether there had been a transfer in terms of ARD in this particular case, the court held as thus:

> Article 1(1) of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses is to be interpreted as meaning that the directive does not apply to a situation in which a person who had entrusted the cleaning of his premises to a first undertaking terminates his contract with the latter and, for the performance of similar work, enters into a new contract with a second undertaking, if there is no concomitant transfer from one undertaking to the other of significant tangible or intangible assets or taking over by the new employer of a major part of the workforce, in terms of their numbers and skills, assigned by his predecessor to the performance of the contract.[223]

The court here suggested that because “no tangible or intangible assets” had transferred, and nor had a major part of the workforce, there was no transfer whatsoever.[224]

Ironically this *dictum* in the *Suzen*-case caused even further confusion since the court in its earlier decision of *Christel Schmidt v Spar-und Leihkasse (*hereafter

220 Par 15. See also Johnson and Williams 2007 http://shura.shu.ac.uk/707/.
221 Johnson and Williams 2007 http://shura.shu.ac.uk/707/.
222 Par 16.
223 Par 24.
224 Johnson and Williams 2007 http://shura.shu.ac.uk/707/.

*Schmidt*-case)[225] had made a judgement contradictory to it. The decision in the *Suzen*-case in essence revised the approach in the *Schmidt*-case and opted for an "'organisational or commercial law' approach to the question of identity."[226] In this "new narrower approach" to the definition of transfer, even if the new employer carried on a similar activity and work requirements are similar to those of the old employer, the business or undertaking cannot be said to retain its identity if there is no associated transfer of significant tangible of intangible assets from on undertaking to another or "taking over by the new employer of the major part of the work force."[227]

In the *Schmidt*-case a bank outsourced its cleaning services to an outside contractor for one of its branches. However, this job had formerly been done by a single employee who had been directly employed as a part-time cleaner. The ECJ in this matter had decided that there was a transfer.[228]

This in the *Schmidt*-case resulted in requests from Department of Trade and Industry in the UK to explain what the judgement meant under the TUPE regulations.[229] The answer would soon be found in the case *Betts and others v Brintel Helicopters Ltd (*hereafter *Betts*-case)*[230]*, which followed the decision in the *Schmidt*-case. In the *Betts*-case the court allowed an appeal and stated that whilst there was retention of identity no assets were transferred, only staff, and hence there was no transfer of undertakings.[231] The approach in the *Suzen*-case was further followed in *Cannon v Noonan Cleaning Ltd and CPS Cleaning Services Limited (*hereafter *Cannon*-case)[232] which was a case concerning a contract for the cleaning of Balbriggan Garda Station. The contract had eventually been lost to CPS Cleaning Services Limited. Upon this occurrence, no tangible assets were transferred between Noonan Cleaning and CPS Cleaning. Cannon, a former employee of Noonan Cleaning Ltd

225 C-392/92. 1994 ECR I-1311.
226 Davis 2001 *Industrial Law Journal* 232.
227 Davis 2001 Industrial Law Journal 232.
228 Johnson and Williams 2007 http://shura.shu.ac.uk/707/. Johnson and William on the other hand state that the *Schmidt*-case's judgement did not get a welcoming reception "by member states notably Germany and France, nor by the UK government." They do, however, indicate that the judgement "…fared better in the UK courts, despite the absence (prior to the ARD) of any legal tradition recognising the compulsory transfer of workers' employment contracts."
229 Anon 1997 http://www.eurofound.europa.eu.
230 1997 2 All E.R 840.
231 Anon 1997 http://www.eurofound.europa.eu.
232 1998 ELR 153.

turned up for work with CPS cleaning who sent her away and did not employ her. The EAT applied the principle laid down in the *Suzen*-case and held that there was no transfer of undertaking.

Johnson and Williams refer to the case of *ADI (UK) v Firm Security Group Ltd*[233]as a good judgment for testing the strength of TUPE. In this case, ADI a contractor providing security services gave notice of termination of its contract to its client, one Hillier. This was a contract to guard Darwin Shopping Mall Centre in Shrewsbury. The contract was eventually taken over by Firm Security Group Ltd. The Firm Security Group Ltd took over a contract supplied by ADI and carried out the work from the same premises using the same equipment but even though none of staff members were transferred. The EAT refused to interfere and held that:

> ...was open for any tribunal in the absence of the taking over of the major part of the work force, or a transfer of significant tangible or intangible assets to form a view that there was no TUPE transfer.[234]

The court did, however state that if there were a finding that the employees were not taken over to avoid the application of TUPE, then the regulations would be applied.[235]

The problem with this approach is that when a new employer simply refuses to take over employees of the old employer, he can escape liability under the regulations, the ARD included, while a contractor who takes on a major part of the workforce, out of the goodness of his heart will be found liable.[236] It is for this reason that the regulations were criticised especially in the *Cannon*-case where it was held that the regulations had not addressed the initial problem that it had been intended to address. It is for this reasons that TUPE regulations of 2006 were enacted. The vagueness in the drafting of TUPE has been a course for major concern, especially for employees and their trade unions who sometimes find it hard to distinguish between when the regulations apply and when they do not apply.[237] Another

233 2001 3 C.M.L.R. 8.
234 McMullen 2001 *Industrial Law Journal* 398-399.
235 McMullen 2001 *Industrial Law Journal* 398.
236 McMullen 2001 *Industrial Law Journal* 398.
237 Johnson and Williams 2007 http://shura.shu.ac.uk/707/.

problem was that employers had little to no understanding regarding when TUPE applied.[238] Johnson and Williams[239] explain this as thus:

> It is unlikely that workers, their trade unions, client-users, or contractors have taken any comfort from the awkward and expensive reality that doubts are ultimately only resolvable long after the event in the courts. Research in 1997 claimed that more than two thirds of employers surveyed had been involved in litigation and had typically spent some £30,000 on legal advice about tendering for contracts...more than three-quarters of employers had difficulty in deciding when TUPE 1981 applied. When it did apply, 77 per cent of employers highlighted differences with matching terms and conditions of employment and 81 per cent complained of difficulty in changing them. Unsurprisingly, the research concluded that this uncertainty was costly. 'It seemed almost impossible to apply TUPE without legal advice...Some 85 per cent of employers 'always took advice on when TUPE applied', while '21 per cent of respondents were the subject of employment tribunal litigation.

## *3.2 TUPE 2006 - The present position*

The application of TUPE has been described as twofold. Weber talks about the transfer of undertakings as mandated in the ARD and the expressly included service provision changes subsection as additionally drafted in 2006.[240] However, it is important to note that the TUPE regulations of 2006 were enacted as means of devising the recommendations that ensued after the consultation exercise of 2001.[241]

### *3.2.1 Relevant transfer under the 2006 position*

The TUPE 2006,[242] therefore, added a new definition of what a relevant transfer entails. This definition encompassed service provision changes was aimed at involving all outsourcing or retendering scenarios.[243]

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238 Johnson and Williams 2007 http://shura.shu.ac.uk/707/.
239 Johnson and Williams 2007 http://shura.shu.ac.uk/707/.
240 Weber *Transfer of undertakings- The protection of Employment in South Africa* 72.
241 Johnson and Williams 2007 http://shura.shu.ac.uk/707/.
242 3. (1) These Regulations apply to—
(a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;
(b) a service provision change, that is a situation in which—
(i) activities cease to be carried out by a person ("a client") on his own behalf and are

The term 'relevant transfer' has been defined in two ways in these regulations.[244] It starts of by using the very same definition that has been used since 1981.[245] Johnson and Williams refer to this "the transfer of a business or undertaking or part of one as a going concern." They state that the phraseology of the ARD and was enacted for purposes of transfers of economic entities that retain their identities when they finally get to the new employer.[246]

Change of ownership has been heralded as a very important requirement in these regulations. In the case *of Brookes v Borough Care Services*[247] it was held that when company shares are sold and acquired, therefore, by the new owner there is no transfer of the business because the very same company as a legal person distinct from its shareholders and, therefore, will still be referred to as the owner. Takeovers such as share sales fall outside the scope of TUPE because of no ownership changes.

The second part of the definition of relevant transfer is found in Regulation 3 (1) (b) which includes any 'service provision change'. This have been said to include "first and second generation contracting out and taking services back in-house."[248] The aim was basically to ensure that the regulations apply broadly outsourcing scenarios encompassing labour intensive activities "such as cleaning, workplace catering,

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carried out instead by another person on the client's behalf ("a contractor");
(ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf; or
(iii) activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf, and in which the conditions set out in paragraph (3) are satisfied.
(2) In this regulation "economic entity" means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.
(3) The conditions referred to in paragraph (1)(b) are that—
(a) immediately before the service provision change—
(i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;
(ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration.

243 Weber Transfer of undertakings- The protection of Employment in South Africa 75.
244 Johnson and Williams 2007 http://shura.shu.ac.uk/707/.
245 Johnson and Williams 2007 http://shura.shu.ac.uk/707/.
246 Johnson and Williams 2007 http://shura.shu.ac.uk/707/.
247 1998 IRLR 636. See also Salamon v. Salamon Company Ltd 1897 AC 22.
248 Johnson and Williams 2007 http://shura.shu.ac.uk/707/.

security guarding, and maintenance."[249] Weber indicates that the addition of 'service provision change' goes beyond just a mere transfer of an undertaking.[250] He explains this wide definition as thus:

> This can hardly still be labelled as a transfer of undertakings protection law. The extension of the regulation's scope may best be described by a legal fiction, feigning that a service itself (a plain activity) be regarded as an undertaking and, therefore, cause the consequences of automatic transfer of contracts, rights and duties.[251]

The 'service provision changes' were included in the TUPE regulations for purposes of dealing with the loopholes that were seen in the earlier regulations. Weber states that the rational for this enactment "were legal certainty through clarification and decreasing litigation."[252] He states that the jurisprudence in the ECJ did not advance a foregone conclusion that could be depended upon when consultation was eminent for lawyers.[253] The regulations apply to a 'service provision change', that is, where an activity ceases and is carried on by another person. However, what is important is that there must be an organised grouping of employees which has "as its principal purpose the carrying out of the activities concerned on behalf of the client".[254] Moreover, the service as supplied to the client does not only involve a single task or the mere supplying of goods. In fact, this service "excludes 'one-off' transactions, such as organising a conference, where no ongoing arrangement such as preferred supplier status to provide services is intended."[255]

Although the regulations have attempted to address some of the shortcomings experienced in the past, there were some challenges experienced before they were actually put in to practice. There were some suggestions that other types of service provisions had to be excluded from the scope of the regulations. Johnson and Williams indicate that there were suggestions that "'professional business services' such as those undertaken by management consultants and lawyers was intensely

249 Johnson and Williams 2007 http://shura.shu.ac.uk/707/. Johnson and Williams do however indicate that this will not be confined to these activities only.
250 Weber *Transfer of undertakings- The protection of Employment in South Africa* 75.
251 Weber *Transfer of undertakings- The protection of Employment in South Africa* 75.
252 Weber *Transfer of undertakings- The protection of Employment in South Africa* 75.
253 Weber *Transfer of undertakings- The protection of Employment in South Africa* 75.
254 Weber *Transfer of undertakings- The protection of Employment in South Africa* 75. See also Johnson and Williams 2007 http://shura.shu.ac.uk/707 together with regulation 1 (b) TUPE 2006.
255 Johnson and Williams 2007 http://shura.shu.ac.uk/707/.

discussed."[256] Johnson and Williams state the difficulties of excluding these types of services as thus:

> Not only would it have been difficult to identify clearly which professional services should be excluded (whether by listing or generic definition) but there seems no principled reason to discriminate between those who are employed by 'white' or 'blue collar' service providers.[257]

The fact that TUPE treated most service provision changes as relevant transfers "goes beyond what the 2001 Directive".[258] Important is the fact that TUPE regulations of 2006 still makes reference to an 'organised grouping', Johnson and Williams insist that it shows that problems laid down by the ECJ are no longer influential as before.[259] A typical example is the *Suzan*-case made it an obligation for English courts to distinguish between labour intensive and asset-reliant undertaking.

### *3.2.2 Case law relating to TUPE*

This notion of an 'organised grouping' plays a very pivotal role in determining whether the regulations apply in service provision changes. However, Weber states that this 'organised grouping' cannot be determined when there is a service provision with a changing group of employees.[260] A perfect illustration is found in the case of *Eddie Stobart Ltd v Moreman and others.*[261] The issue behind this case started at

256 Johnson and Williams 2007 http://shura.shu.ac.uk/707/. According to the TUPE Draft Revised Regulations public Consultation Document at par 30 it was stated as thus:"In the previous consultation exercise, and in subsequent informal discussions with stakeholders, it emerged that some (though not all) employers' organisations felt that the extension of scope ought not to encompass service provision changes involving "white collar" professional business services – in other words, they felt that an exception ought to be made for such services. In the absence of such an exception, a relevant transfer would occur under draft Regulation 3(1)(b) in a case where, for instance, a client had engaged a firm of consultants to provide it with business advice on an ongoing basis, and subsequently decided to reassign that contract to a different firm of consultants assuming that, prior to the reassignment, the first firm had set up an organised grouping of employees with the principal purpose of meeting that particular client's needs, without which the condition at draft Regulation 3(3)(a)(i) would not be met. The Secretary of State for Trade and Industry, in her announcement in February 2003 of the Government's intentions, indicated that consideration would be given to excepting professional business services from the extension of the Regulations scope. This is the one policy question on which the Government has yet to take a firm decision, and on which views are invited."

257 Johnson and Williams 2007 http://shura.shu.ac.uk/707/.

258 Johnson and Williams 2007 http://shura.shu.ac.uk/707/.

259 Johnson and Williams 2007 http://shura.shu.ac.uk/707/.

260 Weber *Transfer of undertakings- The protection of Employment in South Africa* 76-77.

261 UKEAT /0223/ll/ZT.

the time when its Nottinghamshire depot closed, Eddie Stobart Ltd was providing logistics services to two clients. Eddie Stobart's employees at the depot worked under a shift pattern arrangement whereby the day-shift employees worked mainly on the contract for one client, Vion, and the night-shift employees worked mainly for the other client. The Vion contract was awarded to a third party when the depot closed. Eddie Stobart informed its day-shift employees, and other employees who spent 50% or more of their time on the Vion contract, that TUPE applied and their employment had transferred to the new service provider. The new service provider did not accept that TUPE applied and so Eddie Stobart dismissed the affected employees. The employees brought Tribunal claims against Eddie Stobart and the new service provider. A Tribunal found that TUPE did not apply in the above scenario, as the employees were not in an organised grouping within the meaning of TUPE immediately prior to the alleged transfer. Eddie Stobart appealed against the finding. In holding that employees who spent the majority of their time working for a particular client were not an organised grouping for the purposes of the TUPE Regulations. The EAT held as thus:

> in order for them to be an organised grouping under TUPE, the Regulations require the carrying out of activities for a particular client to be the principal purpose of a grouping of employees...this means that the employees must be organised to some extent by reference to the requirements of the client for whom they perform services, not simply providing services to that client for reasons that are unrelated to it (such as shift patterns which are not client specific but which happen to result in certain employees working predominantly for a particular client due to the client's business hours)...the employees in this case were ultimately organised by shift pattern; the day-shift employees did mainly Vion work, but that was not enough to make them an organised grouping for the purposes of TUPE.[262]

The provisions of regulations were also tested in the case *Kimberley Group Housing Limited v Hambley; Angel Services (UK) Ltd v Hambley* (hereafter *Hambley*-case) [263]

The applicants had been had been employed by an organisation, Leena, which provided accommodation for asylum seekers pursuant to a Home Office contract. Leena provided some 140 properties in Middlesbrough and 50 in Stockton. Leena eventually lost the contract to two different organisations, Kimberley Group Housing and Angel Services. As between the two new providers, 97% of the operations in

262 Anon 2012 httm://www.dmhstallard.com.
263 2008 ICR 1030; 2008 IRLR 682 (EAT).

Stockton and 71% of the Middlesbrough function transferred to Kimberley and the balance to Angel Services. However, neither potential transferee organisation accepted that TUPE 2006 applied to their assumption of the relevant part of the functions previously conducted by Leena. The issue before the tribunals was whether there was a service provision change in situations where the relevant functions are divided between new contractors. If the answer was to the affirmative the next question was to which of the transferees the employees or liabilities associated with their dismissals would be transferred.[264] The employment tribunal, however, held that there was no transfer of undertaking for the purposes of Regulation 3(1)(a) of TUPE 2006 by virtue of the lack of asset transfer as between the outgoing and incoming service providers. On appeal, the EAT, rejected the argument that Regulation 3(1) (b) can only apply where there is one transferee.

The EAT held that it should be unquestionable that when outsourcing contracts of service or rather when there is a service provision change there could still be multiple transferees or a service contract division. Basically the court was of the opinion and held that "that there could be a service provision change where functions are divided to more than one transferee."[265]

In coming to its decision, the EAT actually took a look at a number of approaches that the employment tribunal looked at while coming to its decision. Wynn-Evans states that one approach acknowledged by the employment tribunal was to arbitrarily assign the affected employees between such transferees.[266] The EAT, however, considered this approach to be irrational and agreed with the employment tribunal for not taking such to consideration. The second approach was that the transferee who took over greater part of the transferor or the old employer's activities could be considered responsible for all the employees.[267] The employment tribunal also considered this approach as absurd and eventually settled the issue by indicating that employment contracts could not be 'split', liability related to dismissals as a result of the transfer could be divided on a "percentage basis" by referring to the

264 Wynn-Evans 2008 *Industrial Law Journal* 372.
265 Wynn-Evans 2008 *Industrial Law Journal* 372.
266 Wynn-Evans 2008 *Industrial Law Journal* 372-373.
267 Wynn-Evans 2008 *Industrial Law Journal* 373.

proportion of activities each transferee took over.[268] In allowing the appeal, Wynn-Evans states that the EAT held as thus:

> In allowing an appeal against this finding, the EAT noted uncontroversial that, in determining the application of Regulation 3(1) (b), the relevant activity or activities must first be identified and then it must be considered whether the activities in question ceased to be conducted by a contractor on a client's behalf and were carried out instead by another person on the client's behalf.[269]

True is the fact that the EAT did not agree with the employment tribunal; and disapproved the notion of 'equitable distribution of liabilities' of apportioning "dismissal-related liabilities on a percentage basis as between the new operators of the relevant functions."[270] Wynn-Evans[271] states as thus:

> The EAT viewed this 'proportionate' approach as 'truly novel', unwarranted in statute and common law terms and without precedent. In its view there could be no justification for treating the application of Regulation 3(1) (b) to liabilities for transfer-related dismissals differently from its application to employees who were retained by the transferee or transferees. The employment tribunal's analysis was viewed as entirely inconsistent with the established principle that an employee cannot be the servant of two masters at the same time, especially where those employers are in competition. Just as employees cannot be split between transferee employers, dismissal-related liabilities cannot be so divided.

The EAT, therefore, held that the employment tribunal should have adopted the well-established principle of assignment in order to find the link between the employee and the work or activities which are to be performed.[272] However, this test has been criticised by a number of people who think that the *Hambley*-case's focal point is the notion of assignment as a basis for which employees will be encompassed by TUPE. They state that this principle or the approach in the *Hambley*-case points out the limits of the protection which TUPE 2006 can provide where service functions are divided on contract awards.[273] Wynn-Evans states that in the *Hambley*-case majority of the activities were transferred to one transferee, making it easier for the assignment test to be applied, there is still uncertainty regarding the approaches that

268 Wynn-Evans 2008 *Industrial Law Journal* 373.
269 Wynn-Evans 2008 *Industrial Law Journal* 373.
270 Wynn-Evans 2008 *Industrial Law Journal* 373.
271 Wynn-Evans 2008 *Industrial Law Journal* 373.
272 Wynn-Evans 2008 *Industrial Law Journal* 374.
273 Wynn-Evans 2008 *Industrial Law Journal* 374.

will be taken by tribunals when fragmented division of services become issues to be adjudicated.[274]

### *3.3 Insolvency under the UK and EU Jurisprudence*

Evidence has shown that the positions between the UK and EU are considerably different.[275] However, it is important to note that the insolvency law of the UK has had a great number of influences, especially in South Africa where it helped model the insolvency law.[276] The United Kingdom became subject to the European law when it joined the European Common Market in 1973.[277] This, therefore, meant that the UK would further subject itself to the ARD of 1977 when business transfers took place. Under the 1977 directive, there was no specific mention of what will happen in insolvency scenarios, however, in 1998 the 1977 ARD was amended and such amendments were fused in the 2001 ARD which expressly excluded insolvency scenarios from its scope of regulations.[278] The ARD specifically states that members to the Union are given an option to enact outside the coverage of the directive. Lamponen states as thus:[279]

> The Member States are granted an option to legislate outside the directive´s scope transfer of rights and obligations and dismissals if the transferor is in a bankruptcy or under an analogous insolvency proceeding, these proceedings having begun

274 Wynn-Evans 2008 *Industrial Law Journal* 374. To show that there even be more problems relating to service provision changes, Wynn-Evans refers to the case of *Thomas-James v Cornwall County Council* ET1701021-22, 1701230-31, 1701051 and 1701059/07. "In this case, 17 contractors provided free legal advice to telephone callers under contracts awarded by the Legal Services Commission. On a retendering exercise, the number of contractors was reduced to nine. The issue before the employment tribunal was whether any of the employees who were engaged by a contractor whose services were dispensed with transferred to one of the remaining contractors pursuant to Regulation 3(1) (b). Although an organised grouping of employees was held to have existed for the purposes of Regulation 3(1) (b) pre-transfer, the employment tribunal considered that there was no service provision changes because it was not possible to identify to which service providers specific functions conducted by predecessor contractors had transferred."

275 Todd, du Toit and Bosch *Business Transfers and Employment Rights in South Africa* 126.

276 Todd, du Toit and Bosch *Business Transfers and Employment Rights in South Africa* 126.

277 Todd, du Toit and Bosch *Business Transfers and Employment Rights in South Africa* 126.

278 According to Article 5 (1). Lamponen on the other hand states that "if member states do not state otherwise", the directive will not be applied when the transferor or old employer has been proclaimed insolvent and the business or undertaking being transferred is part of his assets. See also Todd, du Toit and Bosch *Business Transfers and Employment Rights in South Africa* 126.

279 Lamponen *The principle of Employee Protection* 164.

with a goal to liquidate the transferor´s assets under a supervision of a public authority.[280]

This just goes to show the liberty that member states are afforded under ARD. Another important factor of the ARD is the fact that it does not inflict an obligation on member states to extend provisions of the directive "to transfers taking place in an insolvency proceeding, instituted with a view to liquidate the transferor´s assets under the competent judicial authority´s supervision."[281]The long and short of what is being expressed here is that the ARD 2001/23/EC is not to be applied to transfer of undertakings under voluntary liquidation and/or pre liquidation proceedings.[282] On the contrary, member states may provide that the transferor´s debts arising from employment contracts or relationships and payable before the transfer or before the opening of the insolvency proceedings are not to be transferred to the transferee, "provided that such proceedings give rise to protection at least equivalent to that provided for …by Council Directive 80/987/EEC."[283] According to Council Directive 80/987/EEC, "employees are entitled to payments from government financed guarantee fund in respect of claims arising from their contracts of employment."[284] A further important provision is found in article 5(4) which states that member states shall take appropriate measures with a view of preventing misuse of insolvency proceedings in such a way as to deprive employees of the rights provided for in the Directive.[285] It is also imperative to note that the Directive adds weight to the fact that continuity of the business should be considered. Although it is not the intention of the piece to talk about rescue proceedings, it is important to note that the ARD has been

280 Article 5(1). See also Lamponen *The principle of Employee Protection* 164. Lamponen further states that because of the nature and special procedures associated with the insolvency proceedings, member states have special rules "which may at least partially derogate from other provisions of general nature, including provisions of social law."

281 Lamponen *The principle of Employee Protection* 164. Lamponen explains the position in Sweden as thus: "As a general rule in Sweden the former employer, the transferor, is responsible for economic obligations having arisen before the transfer, this rule, however, not being applicable in liquidation." A further comparison is made with Finland and the explanation as follows: "the transferee, or – using the Finnish terminology – the assignee is not liable for the employee´s pay or other claims deriving from an employment relationship having fallen due before the assignment, except if controlling power in the bankrupt enterprise and in the assignee enterprise is or has been exercised by the same persons on the basis of ownership, agreement or other arrangement."

282 Lamponen *The principle of Employee Protection* 165.

283 Article 5(2)(a). See Todd, du Toit and Bosch *Business Transfers and Employment Rights in South Africa* 126.

284 Todd, Du Toit and Bosch *Business Transfers and Employment Rights in South Africa* 126. According to the said Directive, non-payment of compulsory employer contributions to national and social security schemes will not affect the employee. These sentiments were also shared by Du Toit. See also later directive 2002/74/EC.

285 Todd, Du Toit and Bosch *Business Transfers and Employment Rights in South Africa* 126.

held to be applicable in rescue proceedings.[286]According to the case of *D'Urso v Ercole Marelli Elettromeccanica Spa*[287] which held as thus:

> The Directive does not apply to transfers effected in the context of insolvency proceedings which were intended to achieve liquidation of the assets of the transferor but the Directive does apply to a judicially controlled procedure where the primary aim is to protect the assets of the undertaking and to ensure that it continues to trade by means of an agreement to suspend payments of debts.

In the UK when a solvent undertaking is being transferred, the position is not complicated because as per TUPE, employment rights of employees are protected. In this instance, the new employer or transferee steps in to the shoes of the old employer or transferor and inherits all rights and obligations towards the employees.[288] Dismissal of an employee as a result of a transfer results in an unfair dismissal.[289] However, the situation is not as easy when it comes to transfer of insolvent undertakings this is so because TUPE seems to ease some of the provisions when an undertaking being transferred is undergoing insolvency proceedings.[290] The new employer inheriting an undertaking undergoing such proceedings gets provisions which are rather lenient towards him.[291]

There are different scenarios surrounding issues pertaining to insolvent businesses. However in scenarios where the intention is to save any such undertakings the "insolvency practitioner or the transferee may agree to certain changes to an employee's terms of employment" especially when such is done with the aim of safeguarding employment.[292]

In Bankruptcy situations, regulation 8(7) finds application and states that Regulations 4 which permits automatic transfer of employment contracts and 7 which provides for automatic unfair dismissals "do not apply to any relevant transfer where the transferor is the subject of bankruptcy proceedings or any analogous insolvency

286 Todd, du Toit and Bosch Business Transfers and Employment Rights in South Africa 126.-
287 1991 ECR 1-4105, 1993 3 CMLR 513 (ECJ).
288 Herrington and Carmichael 2007 http://www.herrington-carmichael.com.
289 Herrington and Carmichael 2007 http://www.herrington-carmichael.com.
290 Herrington and Carmichael 2007 http://www.herrington-carmichael.com. However it has been contended that the relaxation takes place only when insolvency proceedings are opened with a view of liquidating assets of the transferor.
291 Herrington and Carmichael 2007 http://www.herrington-carmichael.com.
292 Herrington and Carmichael 2007 http://www.herrington-carmichael.com.

proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner."[293]

TUPE sets out what should happen for each type of scenario of business sale or insolvency proceeding and by so doing has tried to make life easier for those who are faced with such situations on a daily basis.

Instances whereby members are voluntarily liquidating the undertaking, regulation 8 will not be applied and the normal rules of transfer of solvent undertakings and automatic dismissals will be applied for the sole protection of employees.[294]

### *3.3.1 Creditors Voluntary Liquidation and Bankruptcy*

When this process takes course, a transfer of a business by a liquidator in a Creditors Voluntary Liquidation proceeding may end in the termination of employees' employment contracts especially when there is no agreement substituting the transferee or new employer as their employer.[295] When a liquidator undertakes the sale of an undertaking, 4 and 7 will not take place "pursuant to Regulation 8(7), as these are liquidation proceedings under the supervision of an insolvency practitioner."[296] This is also the case with Bankruptcy the only difference being that employees will be paid any money owing by the Secretary of State.[297]

### *3.3.2 Administration and Compulsory Liquidation*

When a business is undergoing administration proceedings it will be subject to Regulations 4 and 7 and thus employees will be protected through automatic transfer of their contracts or unfair dismissal proceedings.[298] The rationale behind this is that

293 The Transfer of Undertakings (Protection of Employment) Regulations 246 of 2006.
294 Herrington and Carmichael 2007 http://www.herrington-carmichael.com.
295 Herrington and Carmichael 2007 http://www.herrington-carmichael.com.
296 Herrington and Carmichael 2007 http://www.herrington-carmichael.com. Regulation 8(7) states as follows: "Regulations 4 and 7 do not apply to any relevant transfer where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner."
297 Herrington and Carmichael 2007 http://www.herrington-carmichael.com. "However such payments will be subject to maximum limits paid out of the National Insurance Fund (NIF) by the Redundancy Payments Office (RPO). Sums in excess of such limits become the liability of the transferee."
298 Herrington and Carmichael 2007 http://www.herrington-carmichael.com.

administration proceedings are for the purpose of recuing undertakings and retain such businesses' identities instead of placing such under liquidation.[299] According to Herrington and Carmichael Solicitors, in the event of administration proceedings transferring employees will be provided for by regulations 8(2) and 6 for Administration scenarios. However, as in bankruptcy situations, "liabilities owed to employees will be paid out by the NIF".[300]

In Compulsory Liquidation scenarios, however, when a company is being wound up because it cannot settle its debts employees cannot claim automatic unfair dismissal or alternatively expect that their employment contracts be transferred automatically. The employment contract will be considered to have been terminated. However, "NIF insolvency and redundancy payments shall be due to such employees."[301]

**Conclusion**

According to Weber, the English position has answered the most crucial issues addressed to transfers of undertaking.[302] He points out that this was done by implementation of regulations which encompassed service provision changes.[303] The implementation of these regulations means that every matter in dispute relating to transfers will have to be looked at from an automatic transfer as going concern angle or from a service provision change point of view.[304]

299 Herrington and Carmichael 2007 http://www.herrington-carmichael.com.
300 Herrington and Carmichael 2007 http://www.herrington-carmichael.com.
301 Herrington and Carmichael 2007 http://www.herrington-carmichael.com.
302 Weber *Transfer of undertakings- The protection of Employment in South Africa* 77.
303 Weber *Transfer of undertakings- The protection of Employment in South Africa* 77. Service provision change is not specifically provided for in the German Civil Code, section 613a thereof, however, states that whether such can be considered as a transfer that can be protected statutorily will depend particularly on whether such falls scope of section 613a and the requirements thereof are fulfilled. See Mason 2014 http:// www.pinsetmasons.com.
304 Weber *Transfer of undertakings- The protection of Employment in South Africa* 77.

## Chapter 4

### *4.1 Conclusion and Recommendations*

South Africa has certainly come a long way in this field of transfers of undertakings and employment contracts. However, some scholars insist that the new section 197 remains as complex as the old one. They contend that the brief attempts made to try and elaborate on what kind of transfers fall within the scope of the section do not bring clarity to the critics of the old section.[305] At the start of this dissertation, the impression was that employees were not given adequate protection under section 197 when transfers of undertakings transactions are being effected. However, after thorough research light has been shed. As a matter of fact, the new section 197 has attempted and removed some of the grey areas found in the old section 197.

The notion "transfer as a going concern" is without a shadow of doubt an area that warrants employees' rights to be protected. This means that employees cannot be dismissed solely on the reason of a transfer. It is further important to note that under the EU, dismissals for the sole reason of a transfer are not allowed. However, dismissals for operational requirements, in the tapered sense, are still possible. Moreover, according to section 186 of the LRA, dismissal takes place if:

> An employer terminated a contract of employment with or without notice because the new employer, after a transfer in terms of section 197 or 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided for by the old employer.[306]

This section adds on to the protection that was already afforded to employees by giving such an opportunity to claim constructive dismissal if the new employer provides to employees conditions and circumstances at work which are less favourable than those provided by the old employer.

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305 Abader *The labour law consequences of a transfer of business* 51. As he concludes hid dissertation, Abader commences as thus: "The new section 197 remains as complex as the old. It is doubtful whether the brief attempt to describe the transfers that are covered by the section will resolve the difficult issues raised by the question of when a transfer amounts to a "transfer of a business as a going concern".

306 186(f).

However, when it comes to consultation and information, section 197 still leaves much to be desired with some scholars labelling this as a deficiency of the ever controversial section.[307] A closer look at subsections 6 will assist in establishing whether adequate protection is afforded to employees when transfers are being effected.[308] According to section 197(2), an exception of automatic transfer of employment contracts and the rules surrounding such scenarios have been clearly stipulated.[309] If parties wish to escape the imperative that all contracts of employment transfer automatically to the new employer together with all rights and obligations by concluding an agreement to this effect, they have to follow the basic rules set out in section 197(6). The bases of the matter is that if parties involved in the transfer do not wish to escape from the consequences of section 197, then they do not have to undergo the process of consultation as stipulated in subsection 6. This was stipulated in the case of *S.A. Commercial Catering and Allied Workers Union and Others v Western Province Sports Club t/a Kelvin Grove Club and Another*[310] where the court proclaimed the above notion by holding that employees do not have to be consulted whenever there is a transfer of a business as a going concern as stipulated in section 197 because the old employer is automatically substituted by the new employer and the employees' employment contracts are protected.[311]

In the European Union on the other hand, ARD 2001/23/EC stipulates as thus:

Article 7(1)

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307 Weber *Transfer of undertakings- The protection of Employment in South Africa* 89-90. Weber even states that when closely analysing the South African jurisprudence especially from its inception shows "deficiency of any obligations on the employer to consult or even inform his employees prior to the transfer".

308 (6)(a) An agreement contemplated in subsection (2) must be in writing and concluded between -
(i) either the old employer, the new employer, or the old and new employers acting jointly, on the one hand; and
(ii) the appropriate person or body referred to in section 189(1), on the other.
(b) In any negotiations to conclude an agreement contemplated by paragraph (a), the employer or employers contemplated in subparagraph (i), all relevant information that will allow it to engage effectively in the negotiations.
(c) Section 16(4) to (14) applies, read with the changes required by the context, to the disclosure of information in terms of paragraph (b).

309 Section 197(2) states that "If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6)." This provision stands out and shows that any agreement set out in 197(6) maybe used to escape obligations set out in 197(2).

3102008 29 ILJ 3038 (LC).

311 See Weber *Transfer of undertakings- The protection of Employment in South Africa* 90, Mohlabi *Transfer of a business, trade or undertaking* 90.

> 6. Member States shall provide that, where there are no representatives of the employees in an undertaking or business through no fault of their own, the employees concerned must be informed in advance of:
> - the date or proposed date of the transfer,
> - the reason for the transfer,
> - the legal, economic and social implications of the transfer for the employees,
> - any measures envisaged in relation to the employees.

In England, the TUPE Regulations of 2006 provide for the issue of information and consultation in Sections 13 - 15. Specific attention will, however, be placed in section 13 Subsection (2) which reads as thus:

> (2) Long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives of-
> (a) the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;
> (b) the legal, economic and social implications of the transfer for any affected employees;
> (c) the measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and
> (d) if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact.

When comparing TUPE and the ARD, it is very clear that the TUPE regulations have put to place the requirements set out in the ARD. The TUPE regulations even go further and stipulate the manner in which information has to be disseminated and state that it has to take place in due course before the transfer.[312]The English position seems to be very straight forward. Basically the employer is obliged to furnish any affected employees' representatives with appropriate information.[313] When it comes to employees who want to object to the transfer, in both England and South Africa an employee who objects to the transfer because he does not agree with his new employer and does not want to resign from his old employer, can only approach the courts for an interdict, stating that the transfer did not fall within the

312 Weber *Transfer of undertakings- The protection of Employment in South Africa* 100.

313 Unlike in South Africa and the UK, the requirements in Germany are very different. According to the German Civil Code, section 613a thereof, an employer is obliged to inform every employer even where there is a representative body. Spree sees this as very disadvantageous to the employer. Spree *Transfer of Undertakings* 140. See also Rechtsanwalte "The European Rules on Transfer of Undertakings in Germany" 1-10.

realm of TUPE or Section 197 LRA.[314]Weber states that the employees will have to "prove that the transfer did not involve a coherent grouping, which would be operated similarly to the previous employer, and circumvent his automatic transfer."[315]

In insolvency scenarios on the other hand, article 7 of the ARD is still applicable, meaning that individual employees can only be consulted in the absence of the employee representative.[316] In South Africa as well, employees are protected through disclosure of information to employee representatives. For insolvent undertakings, the amendment of section 38 of the Insolvency Act coupled with the rescue procedure found in the new Companies Act of 2008[317] means that South

314 Weber *Transfer of undertakings- The protection of Employment in South Africa* 114-115.

315 Weber *Transfer of undertakings- The protection of Employment in South Africa* 114-115. It is important to note that in South Africa, employees have a right to object but not to remain under the employment of the old employer.

316 In Germany the requirement is that every single employee be consulted individually even if the undertaking has a representative body. See Spree *Transfer of undertakings* 140.

317 Act 71 of 2008. Chapter 6 thereof. The Preamble of the Act reads as thus: "To provide for the incorporation, registration, organisation and management of companies, the capitalisation of profit companies, and the registration of offices of foreign companies carrying on business within the Republic; to define the relationships between companies and their respective shareholders or members and directors; to provide for equitable and efficient amalgamations, mergers and takeovers of companies; to provide for efficient rescue of financially distressed companies; to provide appropriate legal redress for investors and third parties with respect to companies...;"
Under the old Companies Act 61 of 1973, the process that was more inclined to saving businesses in financial difficulties was termed judicial management which was provided for under section 427 which stated as thus: " Where there is a reasonable probability that, if it is placed under judicial management, it will be to pay its debts or meet its or to meet its obligations and become a successful concern, the court may if it appears just and equitable, grant a judicial management order in respect of that company." Judicial management entailed an application to the High Court, which would lead to a court order that was not easily attainable. See the case of *Merchant West Working Capital Solutions (PTY) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd* 13/12406 at page 5. However this process was criticised amongst others for not being a primary option debt relief since creditors were not able to receive payment for their outstanding debts instead had a right to what is termed *ex debito justitiae* to liquidate the company and therefore skip judicial management all together. See Museta *The Development of Business Rescue in South African Law* 16. It was further criticised for its lack of success resulting from is requirements. Those who were seeking this had to prove that there was a reasonable probability that the company would be successful. Museta therefore criticised the requirement as being too onerous since the courts themselves found it hard to determine the success or failure of a company. The fact that the company had to demonstrate that it had adequate financial resources to assist it in its revival called for even further criticism because during the time of application, such a company would have been in an insolvent state. A company in an insolvent state cannot easily provide if it will be successful in the future or not. Museta *The Development of Business Rescue in South African Law* 16. Further criticism by Museta was drawn from the Van de Vries Commission which stated that after a through look in to the process, they concluded that the major problem with the management was that at the time the orders were granted there were less prospects of survival for the company undergoing revival. This process was therefore not beneficial at all to employees as it has been shown to undermine "the creditworthiness and confidence of the company." Museta *The Development of Business Rescue in South African Law* 16.

Africa is slowly filling the pot holes that were initially found in its jurisprudence.[318] From the common law position where employees lost their jobs upon transfers of businesses as going concerns and in cases of insolvency where employment contracts terminated, it is submitted that South Africa has tried to offer protection, to employees, which is not going to hinder its economic growth and the ability to attract foreign investors. However, when it comes to outsourcing of services, it is further submitted that the legislature should consider the route taken by England and provide for service provisions in the LRA for potential scenarios that might occur in the future, thus making the court's work easier.[319] Perhaps other developing countries like Lesotho[320] could learn from these three jurisdictions and slowly offer protection to their employees taking to consideration their slow economies, the ability to attract investors and their political situations.

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318 South African insolvency law was initially criticised for being behind international standards of the "rescue culture." See Spree *Transfer of undertakings* 140. The corporate rescue procedure provided for under the new Companies Act is defined in the very same Act as follows "Business rescue means proceedings to facilitate the rehabilitation of a company that is financially distressed…" This coupled with the fact that employment contracts are automatically transferred is very advantageous to employees as they do not lose their jobs because the company continues to operate. Section 135 (1) states as thus: (a) s.135(1) "(amounts due and payable to employees during the business rescue proceedings) will be treated equally but will have preference over all unsecured claims against the company and all claims contemplated in s. 135(2), irrespective whether or not they are secured. An employee is also a preferred unsecured creditor for any remuneration, reimbursement of expenses or other employment – related amount which became due and payable by the company at any time before business rescue proceedings began, and had not been paid to the employee immediately before those business rescue proceedings began…"

319 The labour court might be aided slightly because it seems to have adopted the purposive approach but the question remains whether every decision arrived at is really what the legislature intended.

320 As stated earlier, Lesotho still uses the common law position where employment contracts terminate upon transfers of undertakings and businesses' insolvency.

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