IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Held in Cape Town

CASE NO: CA12/00

In the appeal between

National Education, Health and Allied Workers Union **Appellant**

And

University of Cape Town **First Respondent**

Supercare Cleaning (Pty)Ltd **Second Respondent**

Metro Cleaning Services cc **Third Respondent**

Turfmeck cc **Fourth Respondent**

Eco Environment (Pty)Ltd **Fifth Respondent**

JUDGEMENT

ZONDO JP

Introduction

[1] This is an appeal against a judgement that was handed down by Mlambo J sitting in the Labour Court in a dispute between the appellant and the respondents concerning the interpretation and application of the provisions of sec 197 of the Labour Relations Act, 1995 (Act NO 66 of 1995) (**"The Act"**).

Factual background

[2] The first respondent is the University of Cape Town. The appellant is a registered trade union that, prior to the dismissal referred to later in this judgement, had as its members many employees that are employed by the first respondent. The second, third, fourth and fifth respondents are contractors to whom the first respondent out sourced certain of its non-core services in or about September 1999. Such outsourcing occurred pursuant to a decision of the council of the first respondent that certain non-core services be out-sourced so that the first respondent could focus on its core services. As a result of the decision to outsource such services, the first respondent dismissed over 200 of its employees who were involved in the non-core services. The dismissal was for operational requirements. The overwhelming number of the employees who were dismissed were members of the appellant.

[3] Prior to the dismissal of the employees the first respondent had held consultations with the appellant and other stakeholders about the reasons for seeking to outsource some of its non-core services and about the possible dismissal of employees involved in the activities that would be affected by the decision to outsource. No agreement had been reached between the parties. After a tender process the first respondent awarded each one of the second upto the fifth respondents certain services. The outsourcing contracts were to endure for three years. The first respondent sought and obtained a commitment from the second upto the fifth respondents that, if they were awarded the outsourcing contracts, they would give the employees of the first respondent that would be dismissed for operational requirements as a result of the decision to

outsource, an opportunity to apply for employment with them and that they would consider their applications in good faith. After consultations with the appellant on the dismissal of the employees had reached deadlock, the first respondent proceeded to dismiss the employees. Some of the employees applied to one or other of the second to the fifth respondents for such employment but others did not. Of those who applied, about all were appointed. However, some of those who were appointed failed to report for duty on the days they were required to.

Proceedings in the Labour Court

[4] The appellant then brought an application in the Labour Court for an order declaring that the outsourcing of the relevant services by the first respondent to each one of the second upto the fifth respondents constituted a transfer of a part of the first respondent's business as a going concern as contemplated in sec 197 of the Act, and that the employees' contracts of employment had automatically transferred from the first respondent to the second respondent upto the fifth respondents and for other relief which is no longer of any relevance in this matter. The Court a quo dismissed the application with no order as to costs. The appellant then sought and obtained leave from the Court a quo to appeal to this Court.

The appeal

[5] Before us Mr Wallis, who appeared for the appellant, submitted that the first question for this Court to decide is whether, when a business or a part of a business is transferred as a going concern in terms of sec 197(2)(a) of the Act, an agreement between the business transferor and the business transferee to transfer the contracts of employment of the

employees of the business transferor to the business transferee is required before such contracts can transfer or whether they simply transfer automatically by operation of law. In this regard he argued that no agreement involving the transferor and the transferee to transfer such contracts of employment is required. He argued that the transfer of the employees' contracts of employment transfer automatically by operation of law. Mr Wallis submitted that, if this Court decided that the agreement of the business transferor and the business transferee was required, the appeal must fail because it was common cause that no such agreement existed in this matter.

[6] Mr Duminy who, together with Mr Stelzner, appeared for the first respondent, and Mr Pretorius who, together with Mr Breitenbach, appeared for the second respondent, disputed the correctness of Mr Wallis' contention. They argued that, before the contracts of employment could transfer, the agreement of the business transferor and the business transferee was required. Mr Duminy further submitted that in fact this case had nothing to do with the transfer of contracts of employment but was about whether the first respondent had a right to dismiss its employees for operational requirements as it did. If it had, so Mr Duminy's argument proceeded, the question was whether, in that regard, the first respondent had acted fairly. If it had not, that would be the end of the matter. He submitted that there was nothing in the Act that precluded the first respondent from dismissing its employees for operational requirements provided that it did so fairly - even if this was before a transfer of the business as a going concern.

Can there be a transfer of contracts of employment under s197(2)(a) read with ss(1)(a) of the Act without an agreement between business transferor and the business transferee that contracts of employment will transfer to the business transferee?

[7] Before one can attempt to establish the correct interpretation of ss(2)(a) of s 197, it is important to bear in mind the constitutional and statutory context in which s 197(2)(a),, like any other provisions of the Act, must be interpreted. In this regard certain provisions of both the Constitution and the Act are relevant.

[8] Sec 23(1) of the Constitution - which is part of the Bill of Rights in the Constitution- provides that **"(e)veryone has the right to fair labour practices".** Sec 39(2) of the Constitution provides that **"(w)hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.**

[9] Sec 232 of the Constitution provides that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. Sec 233 deals with the application of international law. It reads:

> "When interpreting any legislation, every court must prefer any reasonable interpretation **of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."**

[10] In my view the provisions of s233 of our Constitution are critical in the interpretation of any legislation in our country where there are two possible interpretations to provisions of an Act one of which is reasonable and consistent with international law. The importance of s233 lies in the fact that it enjoins

courts to prefer such an interpretation over any other interpretation that is inconsistent with international law. It seems to me that through s 233 our Constitution seeks to ensure that our behaviour and practices are aimed at meeting international standards.

[11] The provisions of s1 and s3 of the Act must also be taken into account in interpreting s 197. Section 1 of the Act states the purpose of the Act. It provides that the purpose of the Act is **"to advance economic development, social justice, labour peace and the democratisation of the workplace".** It seeks to achieve this purpose by fulfilling the primary objects of the Act. Those include giving effect to and regulating the fundamental rights conferred by s 23 of the Constitution- which includes the right to fair labour practices. Those objects also include giving effect to obligations incurred by the Republic as a member state of the International Labour Organisation. Another primary object of the Act is the promotion of employee participation in decision making in the workplace.

[12] Section 3 of the Act provides as follows: **"Any person applying this Act must interpret its provisions**:

(a) to give effect to its primary objects;

(b) in compliance with the Constitution;

(c) in compliance with the public international law obligations of the Republic". It is within the above constitutional and statutory context that the Act must be interpreted. It is accepted by now that the Act must be interpreted purposively. Against this background I proceed to attempt to interpret s

197(2)(a) which, of course, must be read within the context of the whole section and the Act as a whole.

[13] Sec 197 reads thus:-

"197 Transfer of contract of employment:-(1) A contract of employment may not be transferred from one employer (referred to as "the old employer") to another employer (referred to as "the new employer") without the employee's consent, unless-

(a) the whole or a part of a business, trade or undertaking is transferred by the old employer as a going concern; or

(b) the whole or a part of a business, trade or undertaking is transferred as a going concern-

(i) if the old employer is insolvent and being wound up or is being sequestrated; or

(ii) because a scheme of arrangement or compromise is being entered into to avoid winding up or sequestration for reasons of insolvency.

2 (a) If a business, trade or undertaking is transferred in the circumstances referred to in subsection (1)(a), unless otherwise agreed, all the rights and obligations between the old employer and each employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and each employee and, anything done before the transfer by or in relation to the old employer will be considered to have been done by or in

relation to the new employer.

(b) If a business is transferred in the circumstances envisaged by subsection (1)(b), unless otherwise agreed, the contracts of all employees that were in existence immediately before the old employer's winding-up or sequestration transfer automatically to the new employer, but 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, and anything done before the transfer by the old employer in respect of each employee will be considered to have been done by the old employer.

(3) An agreement contemplated in subsection (2) must be concluded with the appropriate person or body referred to in section 189(1).

(4) A transfer referred to in subsection (1) does not interrupt the employee's continuity of employment. That employment continues with the new employer as if with the old employer.

(5) The provisions of this section do not transfer or otherwise affect the liability of any person to be prosecuted for, convicted of, and sentenced for, any offence."

[14] There is no doubt that in enacting the provisions of s197, the drafters of the Act were prompted by Council Directive NO 77/187/EEC that was issued by the Council of the European Communities on the 14th February 1977 and, may be, the

Transfer of Undertaking (Protection of Employment) Regulations, 1981 of the United Kingdom. For that reason it is appropriate before attempting an interpretation of s 197 to refer to them and see what differences and similarities they have with our s197.

Council Directive NO 77/187/EEC

[15] The preamble to the Directive includes the following:.

> **"Whereas economic trends are bringing in their wake, at both national and Community level, changes in the structure of undertakings, through transfers of undertakings, businesses or parts of businesses to other employers as a result of legal transfers or mergers;**
>
> **Whereas it is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded;"**

[16] Section I of the Directive consists of articles 1 and 2. It deals with the scope of the Directive and the definitions. Article 1(1) reads thus:

> **"1. This Directive shall apply to transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger".**

The provisions of article 1(2) and (3) deal with the territorial scope of the Directive and the non-application of the Directive to sea-going vessels respectively. Article 2 provides definitions of certain terms. For purposes of the

Directive a **"transferor"** is defined as any **"natural or legal person who, by reason of a transfer within the meaning of article 1 (1), becomes the employer in respect of the undertaking, business or part of the business."**

[17] Section II of the Directive deals with the **"safeguarding of employees' rights".** The provisions relating to this subject are contained in articles 3, 4 and 5. Articles 3, 4 and 5 of the Directive read thus:

"SECTION II

SAFEGUARDING OF EMPLOYEES' RIGHTS

Article 3

The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article1(1) shall, by reason of such transfer, be transferred to the transferee.

Member States may provide that, after the date of transfer within the meaning of Article1(1) and, in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from contract of employment or an employment relationship.

1. Following the transfer within the meaning of

Article 1(1), the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.

Member States may limit the period for observing such terms and conditions, with the proviso that it shall not be less than one year.

2. Paragraphs 1 and 2 shall not cover employees rights to old - age, invalidity or survivors' benefits under supplementary company or inter - company pension schemes outside the statutory social security schemes in Member States.

Member States shall adopt the measure necessary to protect the interests of employees and of persons no longer employed in the transferor's business at the time of the transfer within the meaning of Article 1 (1) in respect of rights conferring on them immediate or prospective entitlement to old age benefits, including survivors' benefits, under

supplementary - schemes referred to in the first subparagraphs.

Article 4

1. The transfer of an undertaking, business or part of a business shall not in itself constitute grounds for dismissal by the transferor or the transferee. The provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce.

   Member States may provide that the first subparagraph shall not apply to certain specific categories of employees who are not covered by the laws or practice of the Member States in respect of protection against dismissal.

2. If the contract of employment or the employment relationship is terminated because the transfer within the meaning of Article 1(1) involves a substantial change in working conditions to the detriment of the employees, the employer shall be regarded as having been responsible for termination of contract of employment or of the employment relationship.

Article 5

1. **If the business preserves its autonomy, the status and function, as laid down by the laws, regulations or administrative provisions of the Member States, of the representatives or of the representation of the employees affected by the transfer within the meaning of Article 1(1) shall be preserved.**

   The first subparagraph shall not apply if, under the laws, regulations, administrative provisions or practice of Member States, the conditions necessary for the re - appointment of the representatives of the employees or for the reconstitution of the representation of the employees are fulfilled.

2. **If the term of office of the representatives of the employees affected by a transfer within the meaning of Article 1(1) expires as a result of the transfer, the representatives shall continue to enjoy the protection provided by the laws, regulations, administrative provisions or practice of Member States."**

[18] **A comparison of s 197 with Council Directive NO 77/187/EEC**

As will already have been seen above, subsection (2)(a) of s197 provides that, **“(I)f a business is transferred in the circumstances referred to in ss(1)(a), unless otherwise agreed, all the rights and obligations between the old employer and each employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and each employee and, anything done before the transfer by or in relation to the old employer will be considered to have been done by or in relation to the new employer.”** Article 3(1) of the Directive provides that: **“(t)he transferor’s rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee.”**

[19] What are the differences between our ss(2)(a) of s 197 and article 3(1) of the Council Directive? Both govern a transfer of a business or trade or undertaking. In this regard it may be said that article 3(1) is wider than ss(2)(a) in that the transfer of a business or undertaking that ss(2)(a) refers to is limited to one that occurs **“in the circumstances referred to in subsection (1)(a).”** In my view that means nothing more and nothing less than simply that the transfer of the business is one **“as a going concern”**. Article 3(1) does not have that kind of limitation and applies to every **“transfer of an undertaking,**

business or part of a business to another employer as a result of a legal transfer or merger." A common feature in the two provisions is that they both have the phrase **"rights and obligations".**

[20] Another difference is that ss(2)(a) governs **"all the rights and obligations between the old employer and each employee at the time of the transfer"** whereas article 3(1) limits the rights and obligations that it seeks to govern to **"rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer"**. Another difference is that article 3(1) provides that such rights and obligations **"shall, by reason of such transfer, be transferred to the transferee"** whereas ss(2)(a) provides that **"all rights and obligations ... . continue in force as if they had been rights and obligations between the new employer and each employee ...".** It seems that in terms of article 3(1) it is the occurrence of the transfer that operates to transfer the rights and obligations. In terms of ss(2)(a) it is the transfer of a business as a going concern that operates so as to ensure that **"all rights and obligations ... continue in force as if they were rights and obligations between the new employer and each employee."** Another difference between our ss(2)(a) and article 3(1) is that the transfer of a business referred to in ss(2)(a) is one **"as a going concern"** whereas the transfer of an undertaking or business referred to in article(3)(1) is a transfer within the meaning of article 1(1) which is a **"transfer**

of an undertaking, business or part of a business to another employer as a result of a legal transfer”. Based on the discussion that appears later in this judgement about what it means to transfer a business as a going concern, I am of the opinion that that difference does not make a material difference in a case such as this one.

[21] The second part of article 3(1) permits member states to provide (in national legislation) **“that, after the date of transfer within the meaning of article 1(1) and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship”**. What this means is that, after the transfer, the transferee becomes liable but a joint liability may be provided for in respect of the transferor and the transferee. Under the provisions of ss (2)(a) a joint liability in respect of the old employer and the new employer may also occur in respect of obligations which arose from the contracts of employment or the employment relationship before the transfer but only by agreement. I say only by agreement because of the **“unless otherwise agreed”** provision in ss(2)(a).

[22] Article 3(2) compels the transferee, after the transfer, to observe **“the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement until the date of termination or expiry of the collective agreement or the**

entry into force or application of another collective agreement”. Subsection (2)(a) does not have a provision that specifically refers to the observance of a collective agreement that was in existence at the time of the transfer. Article 3(3) provides that paras (1) and (2) of article 3 **“shall not cover employees’ rights to old age, invalidity or survivors’ benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in member states.”** Subsection (2)(a) has no such exclusion.

[23] Article 4(1) provides that: **“the transfer of an undertaking, business or part of a business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce”.** S 197 does not have a provision that corresponds with that of article 4(1). However, it seems to me to be obvious that, if there is a statutory provision that provides for the transfer of rights and obligations from the old employer to the new employer if there is a transfer of a business as a going concern, an employer cannot be allowed to evade such a provision by the simple device of dismissing the employees prior to the transfer simply because there is to be a transfer. If that were allowed, such a statutory provision would not be worth anything.

[24] In the light of the above comparative analysis of the provisions of both article 3 of the Directive and ss(2)(a) of s 197 the question that arises is whether or not, the differences that exist between these provisions are material for purposes of the case before us. In my view, although ss(2)(a) of s197 might not contain in form the same provisions as those of article 3 and article 4 of the Directive, in substance it contains provisions that seek to achieve the same objective. In my view, therefore, s 197 cannot be interpreted in vaccum. It must be interpreted against the background of the Directive that obviously prompted its enactment. Although such differences as there are in the language of the two provisions must not be ignored, they must also not be exaggerated. I think such differences as there are must be taken into account and their materiality weighed in a particular matter. If, in a particular matter, the differences are not material, the provisions of the Council Directive must be taken into account in construing s 197. If they are material, appropriate caution must be exercised to ensure that s 197 is not ultimately given a meaning that was clearly not intended simply because such a meaning applies to the Directive.

The UK's Transfer of Undertakings (Protection of Employment) Regulations 1981

[25] Pursuant to the Council Directive the United Kingdom promulgated the Transfer of Undertakings (Protection of Employment) Regulations 1981 (**"the Regulations"**). Regulation 3 deals with a **"relevant transfer**". In so far as the provisions of Regulation 3 are relevant to the case before us, they read thus:

"3 A relevant transfer

(1) Subject to the provisions of these Regulations, these Regulations apply to a transfer from one person to another of an undertaking situated

immediately before the transfer in the United Kingdom or part of one which is so situated.

[2] Subject as aforesaid, these Regulations so apply whether the transfer is effected by sale or by some other disposition or by operation of law.

[3] ...

[4] It is hereby declared that a transfer of an undertaking or part of [one

(a) may be effected by a series of two or more transactions; and

(b) may take place whether or not any property is transferred to the transferee by the transferor.]

[5] ....”

[26] Regulation 5 is headed: **“Effect of relevant transfer on contracts of employment, etc.”** Regulation 5 is very important for purposes of comparing the relevant provisions in the UK with our s197 - especially ss(2)(a). It reads thus:-

“Effect of relevant transfer on contracts of employment, etc.

(1) [Except where objection is made under paragraph (4A), a relevant transfer shall not operate so as to terminate the contract of employment of any person by the transferor in the undertaking or part transferred but any such contract which would otherwise have been terminated by the transfer shall have effect after the transfer as if originally made between the person so employed and the transferee.

[2] Without prejudice to paragraph (1) above [but subject to paragraph (4A) below,], on the completion of a relevant transfer-

(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract, shall be transferred by virtue of this Regulation to the transferee; and

(b) anything done before the transfer is completed by or in relation to the transferor in respect of that contract or a person employed in that undertaking or part shall be deemed to have been done by or in relation to the transferee.

[3] Any reference in paragraph (1) or (2) above to a person employed in an undertaking or part of one transferred by a relevant transfer is a reference to a person so employed immediately before the transfer, including, where the transfer is effected by a series of two or more transactions, a person so employed immediately before any of those transactions.

[4] Paragraph (2) above shall not transfer or otherwise affect the liability of any person to be prosecuted for, convicted of and sentenced for any offence.

[4a] [Paragraphs (1) and (2) above shall not operate to transfer his contract of employment and the rights, powers, duties and liabilities under or in connection with it if the employee informs the transferor or the transferee that he objects to becoming employed by the transferee.

[4b] Where an employee so objects the transfer of the undertaking or part in which he is employed shall operate so as to terminate his contract of employment with the transferor but he shall not be treated, for any purpose, as having been dismissed by the transferor.]

[5] [Paragraphs (1) and (4a) above are] without prejudice to any right of an employee arising apart from these Regulations to terminate his contract of employment without notice if a substantial change is made in his working conditions to his detriment; but no such right shall arise by reason only that, under that paragraph, the identity of his employer changes unless the employee shows that, in all the circumstances, the change is a significant change and is to his detriment."

[27] Regulation 6 deals with the effect of a relevant transfer on collective agreements. It reads thus:

"6 Effect of relevant transfer on collective agreements

Where at the time of a relevant transfer there exists a collective agreement made by or on behalf of the transferor with a trade union recognised by the transferor in respect of any employee whose contract of employment is preserved by Regulation 5(1) above, then-

(a) without prejudice (collective agreements presumed to be unenforceable in specified circumstances) that agreement, in its application in relation to the employee, shall, after the transfer, have effect as if made by or on behalf of the transferee with that trade union, and accordingly anything done under or in connection with it, in its application as aforesaid,

by or in relation to the transferor before the transfer, shall, after the transfer, be deemed to have been done by or in relation to the transferee; and

(b) any order made in respect of that agreement, in its application in relation to the employee, shall, after the transfer, have effect as if the transferee were a party to the agreement."

[28] **A comparison of s 197(2)(a) with Reg 5**

Regulation 5 must be read with Regulation 3 because Regulation 3 sets out the scope of application of the Regulations. Reg 5(1) provides that the regulations apply **"to a transfer from one person to another of an undertaking situated immediately before the transfer in the United Kingdom or part of one which is so situated."** An undertaking is defined in Regulation 2 as including **"any trade or business."** The second part of ss(2)(a) of s 197 applies **"(I)f a business, trade or undertaking is transferred in the circumstances referred to in subsection (1)(a)..."** In my view the only difference between the transfers to which the Regulations apply in the United Kingdom, leaving out the provisions of Reg 3(2)-(5) and the transfers to which the second part of ss(2)(a) applies in South Africa, is that, as in the case of the Directive and our ss(2)(a), the transfer to which the second part of ss(2)(a) applies must be one done **"in the circumstances referred to in subsection (1)(a),"** which as I have already said, simply means**" as a going concern**".

[29] Regulation 5(1) begins by stating that a relevant transfer shall not operate so as to terminate the contract of employment by the transferor in the undertaking or part transferred. It then provides that **“any such contract which would otherwise have been terminated by the transfer shall have effect after the transfer as if originally made between the person so employed and the transferee.”** In this regard it must be noted that, although ss(2)(a) does not in terms refer to a contract of employment having **“effect after the transfer as if originally made between the person so employed and the transferee”,** it nevertheless uses terminology that resembles in some way the terminology used in Reg 5(1). The terminology used by ss(2)(a) is that **“all the rights and obligations between the old employer and each employee at the time of the transfer <u>continue in force as if they had been rights and obligations between the new employer and each employee...”</u>**

[30] Regulation 5(2)(a) refers to the transfer of **“all the transferor’s rights, powers, duties and liabilities under or in connection with any such contract”** by virtue of the Regulations **“to the transferee.”**The contract referred to is the contract of employment. Subsection (2)(a)seeks to express the same idea in these terms: **“all rights and obligations between the old employer and each employee at the time of the transfer continue in force as if they were rights and obligations between the new employer and**

each employee". Furthermore, ss(2)(a) has a part that is expressed as follows**: " ... and, anything done before the transfer by or in relation to the old employer will be considered to have been done by or in relation to the new employer."** The terminology in Reg 2(b) is the following: **"anything done before the transfer is completed by or in relation to the transferor in respect of that contract or a person employed in that undertaking or part shall be deemed to have been done by or in relation to the transferee."**

[31] Then there is also the provision of ss(5) of s 197. Subsection (5) reads thus: **"The provisions of this section do not transfer or otherwise affect the liability of any person to be prosecuted for, convicted of, and sentenced for, any offence".** Reg 5(4) reads: **"Paragraph (2) above otherwise affect the shall not transfer or liability of any person to be prosecuted for, convicted of and sentenced for any offence".** Save for the words **"(t)he provisions of this section do not..."** and one punctuation mark, the wording of subsection (5) of s 197 seems to have been taken over from Reg 5(4) of the Regulations. The effect of a relevant transfer on collective agreements is governed by the provisions of Reg 6. There is no express corresponding provision in s 197 in relation to collective agreements.

[32] Reg 8 provides that where, before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee must be treated as unfairly dismissed

if the transfer or a reason connected with it is the reason or principal reason for his dismissal. As I have already said above, although there is no express corresponding provision in s 197, it seems to me that, that notwithstanding, the transfer of a business cannot per se be accepted as a fair reason to dismiss an employee where ss(2)(a) applies. Regulation 9 governs the effect of a relevant transfer on trade union recognition. There is no express corresponding provision in s 197.

[33] In the light of the above comparative analysis of the provisions of ss(2)(a) and ss(5) of s 197 and those of Reg 3 and Reg 5, the inference seems inescapable that the drafters of s 197 were aware of the Regulations and sought to borrow from them in drafting of s197. Indeed, it appears that the provisions of the Regulations can, with appropriate caution, be borne in mind in construing the provisions of s 197 in general and ss(2)(a) in particular. In my view court decisions that have interpreted these regulations may be taken into account in interpreting on s 197 provided certain differences in language that may be material are borne in mind.

Statutory provisions in some countries on the transfer of contracts of employment upon the change of employer aimed to give effect to the Directive

[34] It appears from the International Labour Law Reports that various countries have laws that seek to achieve the same objective that the Council Directive seeks to achieve. In Finland the position seems to be governed by an Act called the Employment Contract Act. Section 7 of that Act is titled: **"Transfer of Rights. Change in ownership**". Subsections 1 and 2 of that Act read thus:

> **"(1) Except for claims that have matured for payment, no rights derived under a contract of employment shall be transferred to a third party by either the employee or the employer without the consent of the other party.**

(2) In the case of a change in ownership of an undertaking, the rights and duties of the former employer shall devolve directly on the new employer…".

[35] In The Netherlands the position appears to be governed by article 1639bb of the Civil Code which is part of the rules that are intended to adapt Dutch legislation to the Council Directive. Article 1639bb of the Civil Code reads thus:

> "On transfer of an enterprise, the rights and obligations arising at that moment for an employer from the contract of employment between him and a worker in that **enterprise are transferred automatically to the transferee. The employer- transferor however remains liable for one year, besides the transferee, for the obligations resulting from the said contract which date from the period before the transfer".** (see International Labour Law Reports vol 9 at 247).

[36] In seeking to give effect to the Council Directive, France has enacted section L.122.12 of their Labour Code. In 2 that section reads thus:.

> "Where there is a change in the employer's legal status because of, inter alia, inheritance, sale, merger, change in the type of business or the establishment of a partnership, all contracts of employment in force at the time of such change shall continue to apply between the new employer and the staff of the undertaking". (International Labour Law Reports vol 10 213).

[37] It will have been gathered from the above comparison of the provisions of the Directive with those of ss(2)(a) and the

comparison of the provision of ss(2)(a) and ss(5) with the provisions of the Regulations of the UK that one of the prominent differences between the provisions of, on the one hand, the Directive and the Regulations and, on the other, the provisions of our s197(2)(a) is that in terms of our s 197 the transfer of a business must be one as a going concern whereas neither the Directive nor the Regulations contain that phrase to describe the transfer of a business or undertaking that they apply to. For that reason it is fundamental to understand when a transfer of a business can be said to be one **"as a going concern"** so as to properly establish the scope of application of ss(2)(a).

<u>What does it mean to say that a business is being transferred "as a going concern"?</u>

[38] The Act does not define the phrase **"going concern".** That being the case resort can be had to English dictionaries. The New Shorter Oxford English Dictionary defines the phrase **"going concern"** as **"a business in operation and thriving".** The New Oxford Illustrated Dictionary (vol1) edited by J. Coulson et al defines **"going concern"** as **'business in operation"**. In **"The New International Webster's Dictionary of the English Language",** Deluxe Encyclopaedic edition, the phrase **"going concern"** is defined as a **"business or organisation that is active and has gotten beyond the planning stage"**. In **"The Shorter Oxford English Dictionary on historical principles"** by William

Little & others vol 1 the phrase **"going concern"** is defined as **"one in actual operation".** The new edition of the **"Longman's Dictionary of Contemporary English,"** 3rd edition**,** defines **"going concern"** as **"a business that is financially successful".** The millennium edition of Collins English Dictionary says when **"going"** is used in the phrase **"a going concern",** it means **"thriving".** If one has regard to the fact that the phrase **"as a going concern"** is used in both ss(1)(a) as well as in ss(1)(b) of s 197 despite the fact that the two paragraphs deal with a transfer in solvent circumstances and in insolvent circumstances respectively, it appears to me that the meaning of the term intended in s 197 cannot be one that suggests a business that is financially successful or thriving.

[39] The term **"going concern"** has been the subject of divergent interpretations in respect of Value Added Tax legislation matters in different countries. In "**Juta's VAT-Value Added Tax Manual"** edited by Kruger and others, Juta, 1994 par 526 there is an interesting discussion on this phrase within the context of VAT legislation. That discussion is in the context of statutory provisions in Value Added Tax legislation to the effect that the supplies of goods that are not exports nor export- related but are nevertheless zero-rated include the supply of an enterprise **"as a going concern in whole or in part, if that part is capable of separate operation, to a registered vendor".** (sec 11(l)(e) of the Value Added Tax Act.)

[40] Kruger et al point out that the concept of a disposal of a business or part of a business as a **"going concern"** could be found under the Sales Tax Act 103 of 1978 as well because that Act also provided that a disposal of a business or part of a business as a going concern was exempt from General Sales Tax. Kruger et al also state under par 5.2.6., at 1-5-17 "**Vatcom expressed the opinion that to give a statutory definition of the transfer of a going concern could lead to inflexibility and in many instances create potential for avoidance".** In Footnote 5 at 1-5-17 in their book they also state that in 1990 the New Zealand Minister of Finance agreed with a recommendation to include a definition of the term **"going concern"** in the Goods and Services Tax Act of 1985. The suggested definition was the **"supply of a taxable activity between registered persons, where, without further action on the part of the transferee, it is capable of uninterrupted operations by the transferee; and the supply is to form part of the taxable activity of the transferee".**

[41] Vatcom, a committee that was appointed by the Minister of Finance on the Value-Added Tax Bill, recommended the publication of the following guidelines in the form of a general ruling by Inland Revenue (now SARS) as to what is a **"going concern",** namely,:-

– the enterprise or a part of it that is capable of separate operation should without any further action on the part of the recipient be capable of uninterrupted operation by the recipient

– the enterprise, or, a part, should be a going concern at the time of the transfer;

– the transfer of the enterprise, or part, should include the transfer of assets that are central to the enterprise;

– the express sale of goods will often, but not necessarily, indicate the transfer of a going concern.

[42] Kruger et al refer to the fact that the Inland Revenue did not issue a comprehensive ruling on what is a **"going concern".** However, it noted in 5.4.1.5 of its Guide for Vendors that "**the term 'going concern'** means that the enterprise is sold **'lock, stock and barrel" and the enterprise is capable of being continued without change**". In this regard it is appropriate to note that the New Oxford English Dictionary defines the term **"lock, stock and barrel"** as meaning **"absolutely everything"** or **'in its entirety".**

[43] Kruger et al discuss at 1-5-18-1-5-22 the position in New Zealand where, according to them, a provision identical to sec 11(I)(e) of our Value Added Tax Act applies. In that discussion they point out that the Department of Inland Revenue in New Zealand had stated that a taxable activity supplied as a going concern should be:

– able to be carried on by the recipient;

– accompanied with an express supply of goodwill;

– a supply of all assets, both tangible and intangible, that are central to the business.

[44] Kruger et al point out that the requirement that there

should be a supply of all assets - both tangible and intangible - **"does not necessarily mean that every single asset owned by the transferor's enterprise must change hands as a result of the sale of that enterprise as a going concern".**

[45] At 1-5-18 Kruger et al refer to two New Zealand cases that deal with the issue of **"going concern".** The one case is given as Case P 32(1992) 14

NZTC 4,231 and the other as Variety Leisure Corporation v Commissioner of Inland Revenue (1988) 10 NZTC 5,255. Case P32 is said to have dealt with the sale of a run-down boarding house which was intended to be used as tourist accommodation after the necessary alterations and repairs had been made. The sale agreement specifically provided for vacant possession. There Willey J referred with approval to the view adopted by the court in the Variety Leisure Corporation case. That view was that the expression **"going concern"** meant **"that the particular activity is not closed down on sale but remains active and operating before, during and after the transfer to new ownership".**

[46] In Kenmir Ltd v Frizzel and others [1968] 1 All ER 414, which is also a case which dealt with the sale of a business, Widgery J said the following at 418E-G:-

> **"In deciding whether a transaction amounted to a transfer of a business, regard must be had**

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

before."

[47] In the case of Landsorganisation I Danmark Tjenerforbundei I Danmark v Ny Molle Kro [1987] ECR 5465 the question that was put to the European Court of Justice by the Danish Court was whether the words **"transfer... to another employer as a result of a legal transfer or merger' in article 1(1) of Council Directive 77/187 of EEC of 14 February 1977 ... cover the situation in which, following the lessee's breach of a lease agreement, the owner of a leased undertaking rescinds that agreement and subsequently himself takes over the running of the undertaking".** The answer that was given by the European Court of Justice was that the Directive did apply even to such a case. In par 13 of its judgement the Court said in part: **" It follows from the preamble and from those provisions that the purpose of the Directive is to ensure, as far as possible, that the rights of employees are safeguarded in the event of a change of employer by enabling them to remain in employment with the new employer on the terms and conditions agreed with the transferor".**

[48] In Spijkers v Gebroeders Benedik Abattoir and Alfred Benedik En Zonen 1986 ECR 119 the European Court of Justice was called upon to answer certain questions relating to the application of the Directive. The one question was whether it could be said that there was a transfer within the meaning of article 1(1) of the Council Directive where the building and stock were taken over and the transferee was thereby enabled to continue the business activities of the transferor and did in fact subsequently carry on the business activities of the same

kind in the buildings. The second question was whether the fact that, at the time when the buildings and stock were sold, the business activities of the transferor had entirely ceased and that in particular there was no longer any goodwill in the business prevented there being a ‘transfer’ as defined. The third question was whether the fact that the circle of customers was not taken over prevented there being such a transfer.

[49] In dealing with the question whether there had been a transfer within the meaning of article 1(1) of the Directive in Spijker’s case, the European Court of Justice equated the transfer of an undertaking within the meaning of article 1(1) of the Directive to a transfer of a business **“as a going concern”**. In par 15 of its judgement it said: **“For these reasons the answers to the questions referred to the Court should be that article 1(1) of Directive 77/187 of 14 February 1977 must be interpreted to the effect that the expression ‘transfer of an undertaking, business or part of a business to another employer’ envisages the case in which the business in question retains its identity. In order to establish whether or not such a transfer has taken place in a case such as that before the national court, it is necessary to consider whether, having regard to all the facts characterising the transaction, the business was disposed of <u>as a going concern,</u> 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”.** (my underlining).

[50] What was said by the European Court of Justice in the

Spijkers case as quoted in the previous paragraph is very similar to what was said by Widgery J in Kenmir's case as quoted above when he said that the vital consideration in determining whether there had been a transfer of a business within the meaning of par 10.2 of Schedule 1 to the Contracts of Employment Act, 1963 was "**whether the effect of the transaction was to put the transferee in possession of a going concern, the activities of which he could carry on without interruption."** Par 10.2 of Schedule 1 of that Act read thus:-

> **"If a trade or business or an undertaking ... is transferred from one person to another, the period of employment of an employee in the trade or business or undertaking at the time of the transfer shall count as a period of employment with the transferee and the transfer shall not break the continuity of the period of employment."**

[51] Dealing with the distinction between the transfer of a business or undertaking and the transfer of assets, the House of Lords had the following to say, per Lord Fraser, in Melon v Hector Powe Ltd [1981]1 All ER 313 H-J :

> "It seems to me that the essential distinction between the transfer of a business, or part of a business, and a transfer of physical assets, is that in the former **case the business is transferred as a going concern, 'so that the business remains the same business but indifferent hands', (if I may quote from Lord Denning MR in Lloyd v Brassey [1969]1 All ER 382 at 384, [1969]2 QB 98 at**

> **103 in a passage quoted by the industrial tribunal), whereas in the latter case the assets are transferred to the new owner to be used in whatever business he chooses."**

[52] There is a proposition that, if the business transferor and the business transferee have agreed that the workforce will not be taken over by the business transferee, such transfer of the business as can take place in those circumstances cannot be said to be one **"as a going concern"**. This is said on the basis that for a business to transfer as a going concern it must be in operation and it cannot be in operation if the workforce is not taken over. I do not agree with this proposition. I elaborate below.

[53] Although, generally speaking, I share the view that workers are very important in any business, I do not agree that, if you do not take over the workforce, you cannot be said to be taking over the business at all or you cannot be said to be taking over the business without the kind of interruption that renders the transfer of the business not to be one as a going concern. An example may be appropriate at this stage. Mr A owns the business of a petrol filling station. He sells me the premises from which it is operated, the stock-in-trade and takes the necessary steps, whatever they may be, to ensure that I carry on where he leaves off in respect of his contractual obligations to his customers and suppliers. He sells me the goodwill but we agree that I will not take over his three petrol attendants and they will stop working on the evening preceding the morning on which I will start running the station on which day I will bring three employees of my own to work as petrol attendants. In such a case it cannot, in my view, be said that there was any interruption to the business at all and yet one workforce will have gone and a new workforce will have come in. I can see no reason why in those circumstances it cannot be

said that the business was transferred to me as a going concern.

[54] Another example entailing a longer period between the last working day of the one workforce and the first working day of the new workforce may also be given. Mr A owns a factory. He sells the factory to Mr B. The two agree that Mr A will dismiss his workforce with effect from the 15th December when the factory shuts down for the Christmas break and that Mr B will take over a s from the 7th January after the end of the annual shut down when his own workforce will commence work. Despite the fact that for over three weeks there was no activity in the factory and that Mr A's workforce is not taken over, I do not think that it can be said that the period of inactivity of the factory from the 15th December to the 7th January constituted an interruption of the operation of the factory or constituted such an interruption of the operation of the factory as would on its own preclude the transfer from being one as a going concern even if all the other factors are present.

[55] In Secretary of State for Employment V Spence and others [1986]3 All ER 616 (CA) Spencer and Sons (Market Harborough) Ltd, was put into receivership under the provisions of a debenture in favour of the Commercial Bank of Wales. The receivers were appointed with effect from the 16th November following which a number of employees were made redundant. The receivers thought that there might be enough work to keep the employees working until early on Friday 25 November. The

business was advertised for sale.

[56] British Telecom, whose work constituted abut 80% of Spencers Ltd’s work, threatened to withdraw its work and send it elsewhere if the receivers had not been able to sell the business by Thursday 24 November. The deadline came and went. Although there was still hope of concluding an agreement to sell the business, the receivers decided to dismiss the workers with immediate effect on the 28th November as there was no guarantee of successful negotiations. The dismissal was at about 11h00. The workers were told to assemble again at 2:00pm to collect certain papers. At precisely 2:00pm an agreement of sale of the business was concluded between the receivers and Econ Atkinson. Of course, when the sale agreement was concluded, Spencer Ltd had no workforce anymore because it had already been dismissed.

[57] The agreement of sale was silent on the workforce. Clause 2 of the sale agreement read as follows:

> **“The vendor shall sell and the purchaser shall purchase title with effect from 2:pm on the contract date.**
>
> 1. **The plant, the stock, the work in progress and the intangible assets.**
> 2. **Subject as is hereafter provided all the vendor’s rights against third parties (including without limitation all rights in connection with such third parties’ warranties and**

representation but excluding the benefit of claims made or notified to third parties before the contract date with respect to the assets.

3. **The goodwill of the business together with the exclusive right of the purchaser and its assignees to represent itself as carrying on the said business in succession to the vendor".**

[58] It appears that the time 2:00pm was chosen because it was a condition precedent of the sale agreement that a fresh contract be concluded with British Telecom to continue with giving the business its work and such fresh contract was concluded at 2:00pm. Mr Taylor, the managing director of Econ Atkinson, learn't of the dismissal of the workforce of Spencers' business after the conclusion of a fresh contract with British Telecom. This suited him as he wanted to start on a clean slate. That afternoon Mr Taylor considered various options of what he should do with Spencers' business. He thought of disposing of the assets, of moving the operation to one of their Yorkshire factories or to maintain the business as a going concern in Market Harborough. He decided on the last mentioned option and re-employed the workforce the following morning. The workforce were given fresh contracts of employment.

[59] Subsequently a dispute arose between some of the workers and the Secretary of State for Employment on whether

or not such employees were entitled to redundancy payments on the basis of their earlier dismissal by Spencers before being employed afresh by Econ Atkinson. The Secretary of State took the point that what had occurred was a transfer of Spencers undertaking to Econ Atkinson and that the employees had been employed by Spencers immediately before that transfer. If he was right on both points, the Secretary 's argument meant that the effect of Reg 5 of the Transfer of Undertakings (Protection of Employment) Regulations, 1981 was to continue the employees' contracts of employment with Econ Atkinson which would have disentitled them to redundancy payments.

[60] The industrial tribunal said the following about the absence of the workforce and the transaction being a transfer of a business or undertaking:

> "Applying the above facts to the law we have first had to decide whether there was a relevant transfer ... Until the contract with British Telecom was negotiated, there was no prospect of work for the business. That was why the receivers made their decision to dismiss the workforce on the Monday morning. Secondly, at the moment that the agreement came into effect, there was no workforce of Spencers. We cannot see how **an undertaking can exist as such without a workforce and, accordingly, we find that what was transferred was not a business or undertaking but the assets thereof".**

[61] There was an appeal to the Court of Appeal. Although the Court of Appeal disposed of the appeal on the point that the employees were not employed immediately before the transfer, it considered it appropriate to reject the proposition that, without the transfer of the workforce, there can be no transfer of an undertaking or business within the ambit of reg 5. Through Balcombe LJ, the Court of Appeal had this to say at 629:

“In the circumstances it is unnecessary to deal with the question whether the industrial tribunal was right on the first issue, namely whether there was a transfer of the undertaking, but in case silence on this point should be taken as agreement with their decision, I must say that in my judgement they were clearly wrong. The leading case on the question of transfer of undertaking is the House of Lords case of Melon v Hector Powe Ltd [1981] 1 All ER 313 and from the headnote I need only refer to the finding (at 313-314):

> **‘The essential distinction between the transfer of a business, or part of a business, and a transfer of physical assets, was that in the former case the business was transferred as a going concern, so that the business remained the same business but in different hands, whereas in the latter case the assets were transferred to the new owner to be used in whatever business he chose”.**

Thereafter at 629 H-J Belcome LJ said:”**It seems to me**

that it cannot be said that the existence of a workforce is vital to the existence of an undertaking, and so in this case the industrial tribunal reached a decision on this issue which no reasonable tribunal, directing itself properly on the law, could have reached. If it had been material, I would on this issue have allowed the appeal. Since it is not material, in my judgement this appeal should be dismissed.” Belcombe LJ also referred to the fact that the European Court of Justice had adopted a similar test in Spijkers’ case which is referred to in this judgement.

[62] In Merckx and Neuhuys v Ford Motors co Belgium SA [1996] IRLR 467 the European Court of Justice also held, in relation to the Directive that, for it to apply, it is not necessary for there to be a direct contractual relationship between the transferor and the transferee .Furthermore I think that this proposition is inconsistent with the judgement of the European Court of Justice in Spijkers’ case, the judgement of the Queens Bench Division in Kinmir Ltd V Frizzell, both of which have already been discussed above. I think it is also contrary to Rostsart de Hertaing v J Benoidt SA (in liquidation) and IGC Housing Service SA [1997] IRLR 127 at 132 par 21 where the European Court of Justice held that article 3(1) of the Directive (which was discussed above and was compared with our ss(2)(a) of s 197) must be interpreted to mean that, in the event of a transfer of undertakings, businesses or parts of businesses,

"the contracts of employment and employment relationship existing on the date of the transfer of an undertaking between the transferor and the workers employed in the undertaking transfer by the mere fact of the transfer of the undertaking, despite the contrary intention of the transferor or transferee and despite the latter's refusal to fulfill its obligations".

[63] In the light of all the above I am satisfied that the fact that in s197 the transfer of a business referred to is one **"as a going concern"** when there is no such express requirement in the Directive nor in the Regulations in respect of the transfer referred to therein does not make any material difference either at all or at least in the instant case. In those circumstances I think that the judgements of the European Court of Justice interpreting the Directive and the judgements of the English courts interpreting the Regulations can provide a useful guide in interpreting our s 197.

[64] Furthermore I am of the view that the question of whether in a particular case a business has been transferred as a going concern is a matter for objective determination. This does not mean that the intentions of the parties are irrelevant but it does mean that the say-so of the parties cannot be conclusive. In my view there are a number of factors that are relevant in determining whether or not a business has been transferred as a going concern. These may include what will happen to the good-will of the business, the stock-in-trade, the premises of the business, contracts with clients or customers, the workforce, the assets of the business, the debts of the business, whether there has been interruption of the operation of the business and, if so, the duration thereof , whether same or similar activities are continued after the transfer or not and

others. I do not think that the absence of anyone of these will on its own mean that the transfer of the business has not been one as a going concern. I would align myself with the approach adopted by the European Court of Justice when, in par 11,12 and13 of its judgement in the Spijkers case, it said:.

> **"[11] ... It appears from the general structure of directive 77/ 187 and the wording of Article 1(1) that the directive aims to ensure the continuity of existing employment relationships in the framework of an economic entity, irrespective of a change of owner. It follows that the decisive criterion for establishing the existence of a transfer within the meaning of the directive is whether the entity in question retains its identity.**
>
> **[12] Consiquently it cannot be said that there is a transfer of an enterprise, business or part of business on the soul ground that its assets have been sold. On the contrary, in a case like the present, it is necessary to determine whether what has been sold is an economic entity which is still in existence, and this will be apparent from the fact that its operation is actually being continued or has been taken over by the new employer, with the same**

economic or similar activities.

[13] To decide whether these conditions are fulfilled it is necessary to take account of all the factual circumstances of the transaction in question, including the type of undertaking or business in question, the transfer or otherwise of tangible assets such as buildings and stocks, the value of intangible assets at the date of transfer, whether the majority of the staff are taken over by the new employer, the transfer or otherwise of the circle of customers and the degree of similarity between activities before and after the transfer and the duration of any interruption in those activities. It should be made clear, however, that each of these factors is only a part of the overall assessment which is required and therefore they cannot be examined independently of each other".

[65] In my view the position is that there will be cases where the transferor and the transferee agree that the workforce will be taken over by the transferee but the transaction cannot be described as a transfer of the business as a going concern if many of the other factors that are relevant to a transfer being one as a going concern are absent and there will be transactions where the transferor and the transferee will agree that the workforce will not be taken over but the transaction will still amount to a transfer of a business as a going concern because of the presence of many or all of the other factors that go to making a transfer of a business to be one as a going concern. Accordingly each transaction must, in my view, be considered on its own merits in the light of all the surrounding circumstances of the transaction before a determination can be made whether it constitutes a transfer of a business as a going concern.

[66] Against the above background, it is now necessary to consider the provisions of s 197 in order to determine the question that must be determined at this stage of this matter, namely, whether the agreement of the business transferor and the business transferee that the former's workforce is to be taken over by the latter is required before the contracts of employment can tranfer. In this regard it is necessary to

determine the purpose of the provisions of s 197. Mr Wallis submitted that the purpose of s 197 is to protect employees against the loss of their jobs when their employer transfers his business or part thereof to another person or entity as a going concern. Mr Pretorius contended that that was not the purpose of s 197. He submitted that the purpose of s 197 was to protect employees --- not against the loss of their jobs ----- but against the transfer of their contracts of employment by their employer to another person or entity without their consent. There is also a suggestion that the purpose of s 197 is to facilitate the transfer of businesses that may be necessary in situations of restructuring by providing for the transfer of the employees' contracts of employment from the old employer to the new employer without their consent so as to avoid the need for the business transferee to negotiate new contracts of employment with the employees if he wishes to take them over on terms and conditions no less favourable to them than their present terms and conditions.

[67] The question of what the purpose of s197 is was considered by this Court in **Foodgro, a Division Leisurenet Ltd v Keil (1999) 20 ILJ 2521(LAC)**.There both in the majority judgement of Froneman DJP in which Nicholson JA concurred as well as in the separate concurring judgement of Conradie JA, it was held that the purpose of s197 was the protection of employees against loss of employment when their employer transferred his business as a going concern. The argument that the purpose of s197 is to facilitate transfers of businesses was rejected, and, in my view, correctly so.The position which obtained before the enactment of s 197 with regard to employees rights and obligations when there was a transfer of a business as a going concern was more favourable to employers than is the positon after the enactment of s 197. The business transferee could only take over the workforce if he wanted to. If he did not want to take over the workforce, he

had no obligation to take it over. Now s197 visits the business transferee with liability for all kinds of actions done by the previous employer prior to the transfer of the business.

[68] In Foodgro this Court dealt with the question of what the effect is of a transfer of his business or undertaking by an employer to someone else on the contract of employment of an employee. Both the majority judgement and the separate concurring judgement concluded, after a proper consideration of the issues relevant to this question, that in such a case the contract of employment of the employee is transferred automatically to the business transferee. Although I agree that that decision on this point was obiter because it was not necessary for the determination of the real issue that was before the Court, I am of the view that the decision was correct. In my view there can be no doubt, having regard to the comparative analysis made earlier in this judgement of s197 and the Directive, on the one hand, and, s 197 and the Regulations, on the other, that the purpose of s197 is the same as the purpose of the Directive as well as the Regulations, namely, to protect employees' employment and other rights whenever there is a change of the identity of the employer in a business or undertaking.

[69] I do not agree that the fact that at common law a business transferee would have had to negotiate new contracts with the employees of the business transferor would have been a sufficient reason to prompt the enactment of s197. Under the common law the workforce of the old employer would be in a very weak position to make any demands to the new employer for different terms and conditions of employment upon the transfer of the business. The overwhelming majority of workers in South Africa are unskilled or semi-skilled. The new employer would not in practice have to negotiate new contracts if he was prepared to take the workers on the same terms and conditions of employment. The old employer would terminate the contracts of employment of his workforce and the new employer would simply take the same contracts, delete the name of the old employer and replace it with his name and call upon those employees who wish to take up employment with

him on the same terms and conditions as those that governed their employment under the old employer to sign the contracts. Probably most, if not all, of unskilled and semi-skilled employees would sign the contracts if the new employer offered them new contracts of employment. In the unlikely event that most did not sign the contracts, the new employer would find it very easy to get replacements of unskilled workers in the job market. In the light of the fact that it would be very easy for a new employer to secure the old employer’s workforce if he wanted them, I do not think that there could have been a need for the enactment of s 197 for the purpose of assisting new employers in situations of transfers of businesses or undertakings.

[70] There are, in my view, two important features of ss(1) which must be borne in mind when reading the subsection. The one is the use of the words **“may not”** and the use of the word **“unless”**. The subsection has two parts. The first part precedes the word **“unless”** and the second part appears after that word. The first part reads:**”A contract of employment may not be transferred from one employer (referred to as the “old employer”) to another (referred to as “the new employer”) without the employee’s consent ...”** This part does not preclude the transfer of a contract of employment in general. It only precludes the transfer of a contract of employment without the consent of the employee concerned. The words: **“may not”** denote a prohibition.

[71] The second part begins with the word:**”unless”** and then follows up with paragraphs (a) and (b) of the subsection. The significance of the word: **“unless”** is that it introduces exceptions to the prohibition contained in the first part of the subsection. The first part of the subsection in effect precludes

the transfer of an employee's contract of employment from one employer to another without the employee's consent. That general rule accords with the position at common law. It is also necessary to point out that at common law the consent of the old employer as well as that of the new employer would be required. If it is accepted, as I think it must be, that the second part of the subsection creates exceptions to the prohibition contained in the first part, the second part can only mean that in cases that fall under par (a) or (b) the opposite of what is said in the first part of the subsection obtains. The opposite of the first part is: a contract of employment may be transferred from one employer (referred to as **"the old employer"**) to another employer (referred to as **"the new employer"**) without the employee's consent.

[72] This means that, while the provisions of ss(1)(a) and(b) dispense with the requirement of an employee's consent to the transfer of his contract of employment from one employer to another in the circumstances falling under paragraph (a) and paragraph (b) of ss1, there is nothing therein that can be said to be to the effect that a transfer of a contract of employment may occur without the employer's consent and without the agreement of the new employer. The subsection states the law in regard to when an employee's consent is required for the transfer of his contract of employment and when it is not. It does not say that the consent of the employer is not required nor does it say that the consent of the new employer is not required. The effect of this therefore is that, as one proceeds to consider the rest of the subsections of s197, one must do so on the basis that as at the end of ss (1) there is nothing to the effect that the employer's consent to a transfer of a contract of employment between himself and his employee to another employer is not required. In order for one to conclude that the consent of the old employer (and that of the new employer for that matter) is not required for the transfer of an employee's

contract of employment in a case falling under par (a) or (b) of ss(1), it will be necessary to find provisions in ss(2) - (5) that change the position that appears to obtain as at the end of ss(1).

[73] Subsection (2)(a) reads:-

> "(2) If a business, trade or undertaking is transferred in the circumstances referred to in subsection (1)(a), unless otherwise agreed, all the rights and obligations between the old employer and each employee at the time of the transfer **continue in force as if they had been rights and obligations between the new employer and each employee and, anything done before the transfer by or in relation to the old employer will be considered to have been done by or in relation to the new employer".**

Subsection (2)(a) only applies to a case where a business, trade or undertaking is being transferred in the circumstances referred to in ss(1)(a). As already stated above those circumstances are where the whole or any part of a business, trade or undertaking is transferred **"by the old employer as a going concern".** If a business, trade or undertaking is being transferred by the old employer but not as a going concern, obviously ss(2)(a) would not apply.

[74] Subsection (2)(a) simply spells out the consequences on the rights and obligations of employment between the old employer and each employee and the new employer and each employee if a business, trade or undertaking is transferred by the old employer as a going concern. The consequences it sets out are subject to being **"otherwise agreed".** What is

glaringly striking about par (a) of ss(2) is that there is no express reference therein to a transfer of a contract of employment. This is remarkable when one has regard to two facts. One is that the subsection immediately before ss(2)(a) , namely ss(1), expressly refers to and deals with the transfer of a contract of employment. The other is that the paragraph that immediately follows par (a) of ss (2), namely, ss(2)(b), also makes an express reference to the transfer of contracts of employment.

[75] The fact that in par (b) of ss (2) there is an express provision to the effect that the contracts of all employees transfer automatically from the old employer to the new employer whereas there is no such express provision in par (a) is no indication that it was never intended that in the situation to which par (a) applies the new employer would not, upon the transfer of the business in the circumstances referred to in ss(1)(a), become a party to the contracts of employment that the old employer had with each employee. It was necessary, in the case to which par (b) applies, that there be an express reference to contracts in respect of a par (b) situation because in such a case there is not one regime of consequences upon the transfer of the business but two regimes. The one regime is in respect of the contracts of all employees existing before the transfer of business and the other is in respect of all rights and obligations and things done by or in relation to the old employer before the transfer.

[76] In a ss(2)(b) situation the contracts of all employees automatically transfer to the new employer but all the rights and obligations between the old employer and each employee remain the rights and obligations between the old employer and each employee and anything done by, or, in relation to, the old employer is **"considered to have been done by the old employer."** This is different from par (a) in that the transfer of a business in the circumstances referred to in s (1)(a) triggers only one regime of consequences for all rights and obligations which would include rights and obligations provided for in a contract of employment. The regime is that all the rights and obligations existing between the old employer and each employee continue in force and the new employer steps into the shoes of the old employer. Because there is one regime of consequences in the case of the transfer of a business in a ss(2)(a) situation, a phrase was necessary that would encompass everything, hence the reference to **"all the rights and obligations between the old employer and each employee".**

[77] Subsection (2)(b) reads thus:-

> **"If a business is transferred in the circumstances envisaged by subsection (1)(b), unless otherwise agreed, the contracts of all employees that were in existence immediately before the old employer's winding up or sequestration transfer automatically to the**

> **new employer but 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 and anything done before the transfer by the old employer in respect of each employee will be considered to have been done by the old employer".**

[78] It seems to me that the provision of par (a) of ss(2) clearly provide something that changes the position that obtains as at the end of ss(1). Par (a) of ss(2) states what happens to the rights and obligations existing between an employee and his employer when his employer transfers the business, trade or under taking as a going concern. It is a provision that deals with a situation where there is a change of employer in a business in solvent circumstances. That is why ss(2)(a) says all the rights and obligations continue as if they were rights and obligations between the new employer and each employee.

[79] Paragraph (a) of subsection (2) is clear. It says that **"all the rights and obligations between the old employer and each employee at time of the transfer continue in force as if they had been rights and obligations between the new employer and each employee and, anything done before the transfer by or in relation to the old employer will be considered to have been done by or in relation to the new employer."** The terms of par (a) are very wide. The question is whether they are wide enough to

include the rights and obligations arising out of the contracts of employment between the old employer and each employee without the old and/or new employer's agreement being required.

[80] I have already said that the phrase **"as a going concern"** does not necessarily entail that the employer and the new employer have agreed that the workforce will be taken over by the new employer. On that basis I am of the view that the answer to this question depends on whether it can be said that, when par (a) of subsection (2) says **"all the rights and obligations between the old employer and each employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and each employee,"** this excludes the rights and obligations arising out of the contract of employment between the old employer and each employee. In my judgement there is, and can be, no justification in the provisions of s197 or of the Act as a whole for any suggestion that the wide terms of the second part of par (a) to ss (2) exclude rights and obligations arising out of the contract of employment between the old employer and each employee. The terms of par (a) are wide enough to include the contractual rights and obligations arising out of the contract of employment between the old employer and each employee. Par (a) refers to **"all"** rights and obligations. That must include statutory rights and obligations as well as any rights and obligations arising out of delict. This must also mean that, if an employee had a right to sue the old

employer before the transfer, that right continues in force but now against the new employer. If the Act intended to exclude certain rights and obligations from the dispensation provided for in ss(2)(a), it would have said so expressly as it did in ss(2)(b). There it made an express provision because it intended such a regime of consequences.

[81] Par (a) continues and provides towards the end that **' anything done before the transfer by or in relation to the old employer will be considered to have been done by or in relation to the new employer."** This is aimed at firmly entrenching the new employer in the shoes of the old employer in every respect. It seems to me that the result is that if, for example, the old employer had dismissed an employee before the transfer, the new employer would be considered to have dismissed such employee. The result hereof is that, if such a dismissal is found, after the transfer of the business, to have been unfair, any order of reinstatement would probably have to be made against the new employer.

[82] This innovation in our law was made in order to protect employees from losing their jobs when their employer transfers his business or part thereof to another as a going concern. I think the provision appearing at the end of par (a) that visits the new employer with the consequences of the sins of the old employer was aimed at discouraging the old employer from doing anything either alone or in collusion with the new employer that would prejudice the employee before or after the transfer of the business. The disincentive would be that, after the transfer of the business, liability attaches to the new employer for whatever the old employer may have done in relation to any employee before the transfer.

[83] By virtue of the words **“unless otherwise agreed”** appearing in par (a), it is open to the old employer (and maybe, the new employer) to negotiate with the employees or their representatives contemplated in sec 189(1) a dispensation of rights and obligations different to the statutory ones that would otherwise continue in the absence of a different agreement. Such agreement could even include that the employees’ contracts of employment are terminated by agreement and in return the employees are paid certain packages. The agreement could well allow the employees to resign or it could be to the effect that the old employer pays the employees a certain package in return for their agreeing that their employment with the new employer will be on the basis that they are new employees and the rights and obligations between each one of them and the new employer are new rights and obligations completely different from those that existed between the old employer and each employee.

[84] If the old employer and the employees or their representatives are not able to reach agreement varying the statutory dispensation on the rights and obligations, in my view, either party may resort to industrial action in order to put pressure on the other to agree to its demands of what should happen. By the same token, the employees or their representatives and the new employer may reach an agreement that varies the statutory dispensation of rights and obligations that would otherwise be taken over by the new employer in respect of each employee.

[85] The manner in which the new employer may seek to operate the business may be such that he has to reduce the workforce for operational requirements or that for the business to operate in a viable manner the terms and conditions of

employment of the workforce must be changed. The new employer would be entitled to dismiss all or some of the employees if there were good operational requirements to do so and he complied with the requirements of sec 189. He may also institute a lock - out against the employees to put pressure on them to agree to different terms and conditions of employment. If they are not prepared to accept changes to their terms and conditions of employment and there are acceptable reasons for the changes to their terms and conditions of employment, the new employer may dismiss them lawfully and fairly and employ a workforce that will be prepared to work on the terms and conditions of employment that are required for the operational needs of the business. The employees may also go on a strike to change their terms and conditions of employment for the better.

[86] If the proposition that a reference to a transfer of a business **"as a going concern"** necessarily means that the transferor and the transferee have agreed that the workforce is being taken over by the transferee were correct, this would mean that **"all the rights and obligations between the old employer and each employee at the time of the transfer"** that ss (2)(a) refers to can only **"continue in force as if they had been rights and obligations between the new employer and each employee"** if the transferee was happy to have the rights and obligations from the old employer and each employee attaching to him. If the new employer does not want such rights and obligations attaching to him, he would say no to the workforce coming over to him. Once he said no to the workforce coming over to him, ss 2(a) would not apply. This cannot be right. In any event the proposition that only if the new employer and the old employer have reached agreement that the new employer takes over the workforce can the

business be said to be transferred as a going concern seeks to give the phrase **“going concern”** a meaning different from the meaning given to the phrase by various English dictionaries as already shown above.

[87] Another difficulty with this proposition is this. Like ss(2))a), which has a pre- condition that must occur before the consequences set out therein can follow, ss(2)(b) also has a pre - condition which, upon occurrence, gives rise to the consequences set out therein. In ss(2)(a) the pre-condition is that a business is transferred in the circumstances referred to in ss(1)(a). In ss(2)(b) the pre - condition that the business is transferred **“in the circumstances envisaged by subsection (1)(b).”** There is something common in both provisions. That is that the business is being transferred as a going concern. The difference between the circumstances in which the business is transferred under ss(1)(a) and those in which it is transferred under ss(1)(b) is that the transfer occurs in solvent circumstances under ss(1)(a) but under insolvent circumstances under ss (1)(b).

[88] This means that the circumstances envisaged by ss(1)(b) for the transfer of a business include the circumstance that the business is being transferred **“as a going concern”.** On this proposition the position must be that under ss (2)(b) read with ss (1)(b) the old employer and the new employer agree that the latter will take over the workforce. Subsection(2)(b) provides that, if a business is transferred in those circumstances, unless

otherwise agreed, **“ the contracts of all the employees that were in existence immediately before the old employer’s winding up or sequestration transfer automatically to the new employer”**. If to transfer a business **“as a going concern”,** which appears in both ss(1)(a) and ss(1)(b), necessarily means that the old employer and the new employer have agreed that the workforce is being transferred together with the business to the new employer, it would have been unnecessary for the Act to also provide, as it does, in ss(2)(b) that the contracts (which must include contracts of employment) of all the employees transfer automatically to the new employer. It has been suggested that**”automatically”** in ss (2)(b) means without the employee’s consent and does not mean without the consent of the employee and of the old employer and the new employer. I cannot agree. The word **“automatically”** in ss(2)(b) must be given its ordinary meaning which is that something occurs on its own. It means what it says. It means without anyone’s consent or intervention. If the Act intended to say without the employee’s consent, it would have said so clearly as it did in ss (1) and would in all probability have used precisely that expression which it had just used in ss (1).

[89] There is a suggestion that it would be unfair if the meaning of ss(2)(a) was that the workforce of the old employer is imposed on the new employer irrespective of the wishes of the two employers. This suggestion is based on the concern for only one side to the transaction, namely, the employer side and totally ignores the side of employees. Because of this, it leads to a result that seeks to protect only the interests of employers and does little to balance the interests of both the employer

side and the employee side.

[90] The proposition that in terms of s 197 the agreement of the old employer and the new employer that the employees will be taken over by the new employer is required before the consequences set out in the second part of ss(2)(a) may follow means, in my view, that the new employer must, before he can agree to take over the employees, decide whether he is happy to not only take the workers on the same terms and conditions but also to take over from the old employer all liability for all the latter's actions and omissions **"done before the transfer by the old employer"** in relation to each employee. It seems to me that the effect of this is that on this proposition, if the new employer decides to take over the workforce, he would be prepared to also take over from the old employer the latter's liability for all his **"sins"** of the past.

[91] If the business transferee would like to take over the employees but not the liability of the old employer for its sins, he must not agree to take over the employees at all. He would need to let the old employer terminate the contracts of employment of the employees so that, thereafter, he can offer the employees the same contracts. In that way he gets the workers but not the liability for the old employer's sins. If I am correct in this analysis, then I can see no reason why any employer would choose the route of agreeing to take over the employees and be burdened with so much else when he can easily get the employees without having to assume liability for someone else's actions and omissions. The result of all of this is that the proposition that the agreement of the old employer and the new employer that the workers will be taken over by the new employer is required before the second part of ss(2)(a) can operate renders ss(2)(a) utterly useless - both to employers and to employees. This is so because the second part of ss(2)(a)would only operate when the old and the new employers

want it to but not when they don’t want it to. I think that would be untenable.

[92] On the construction that I have adopted, s 197 is a particularly useful provision that addresses a problem that has existed in our law for a long time and that has been highlighted in case law (see **Kebeni v Cementili Products (Ciskei) (Pty)Ltd (1987) 8 ILJ 442 (IC))**which the legislature is presumed to have been aware of when seeking to change the legal position. On my construction s197 establishes the following principles:

(a) Ordinarily an employee’s contract of employment cannot be transferred without his or her consent.

(b) When a business is transferred by one employer to another as a going concern in solvent circumstances, neither the consent of the employees nor that of the business transferor and business transferee is required; before the contracts of employment of the employees become contracts between each employee and the new employer unless there is agreement with the workers or their representatives to the contrary, the new employer assumes liability for all the actions done by the old employer in relation to each employee and also acquires any rights that the old employer may have had in relation to each employee; for all intents and purposes the business transferee takes the position of the transferor.

(c) When a business is transferred as a going concern in insolvent circumstances, the contracts of employment transfer automatically to the new employer but the new employer does not assume liability for the actions of the old employer nor does he acquire the rights and obligations that existed between the old employer and each employee; those remain the rights and obligations between the old employer and each employee.

(d) In either case the continuity of employment of the employees is not affected when the contracts transfer.

[93] The proposition that under ss(2)(a) read with ss(1)(a) the business transferor and the business transferee are free to agree to transfer or not to transfer the contracts of employment of employees to the new employer - and that such contracts do not transfer automatically has another weakness. The effect of that proposition is that, where a business is being transferred in solvent circumstances, the employees lose their jobs unless the business transferor and the business transferee agree otherwise but, when a business is transferred in insolvent circumstances, the employees are guaranteed their jobs under the new employer despite any objection from the latter. I would have thought that logic and common sense dictated that, if the Act had to choose in which of the two situations the new employer should be given a right to say no to the employees coming over to him, it would have been in the situation where the business is being transferred in insolvent circumstances than in solvent circumstances. I can see no sense in a construction of sec 197 that lays down a principle that, if a business is being transferred in solvent circumstances, the transferee has a veto to prevent the workforce from coming over with the business but has no right to say no to such a workforce coming over to him when the business is being transferred to him in insolvent circumstances. It is a construction of s 197 that would definitely discourage business people from rescuing failing businesses when they should be encouraged to do so.

[94] In the light of all of this I am satisfied that, when ss(1)(a) and ss(2)(a) of s 197 of the Act are read together, the new employer takes over the contracts of employment of the employees of the old employer without his agreement being required if the business is transferred to him by the old employer as a going concern. Since this is a minority judgement - my Colleagues have reached the opposite conclusion, it is not necessary for me to deal with other issues that would otherwise have required to be dealt with if the conclusion of this Court had been the one I have reached.

RMM Zondo

Judge President

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Held in Cape Town Case No CA 12/00

In the appeal between

National Education, Health and Allied Workers Union	Appellant
and	
University of Cape Town	First Respondent
Supercare Cleaning (Pty)Ltd	Second Respondent
Metro Cleaning Services cc	Third Respondent
Turfmeck cc	Fourth Respondent
Eco Environment (Pty)Ltd	Fifth Respondent

JUDGMENT

VAN DIJKHORST AJA:

1. This judgment deals with the interpretation of section 197 of the Labour Relations Act 66 of 1995 (the act) and its application to outsourcing.

2. The first respondent, the University of Cape Town, after protracted internal deliberations and after abortive consultations with the appellant (the union), on 26 August 1999 resolved to outsource certain of its non-core activities. These were mainly cleaning, gardening and sports ground maintenance services but tea making and photo copying tasks were also affected. The work was contracted out to the second to fifth respondents, entities that specialize in these fields. There were four different contracts with these entities, each being awarded a specialized task. No machinery or equipment was transferred by the university. The university gave notice to 267 of its employees that their services were to be terminated on 30 September 1999 for operational reasons. Retrenchment benefits were paid. During September the affected employees tendered to continue their employment with the university and to commence with the other respondents when the transfer occurred. This offer was rejected but they were invited to apply to the new contractors for employment, the university having stipulated in its contracts with the contractors that the latter would favourably consider their employment..Most of the dismissed employees applied to the respondents for employment and the majority were accepted, but a lesser number reported for duty and as time passed their numbers dwindled.

3. The union instituted urgent proceedings in the Labour Court in which it sought declaratory relief under section 197 of the act (and alternative relief which is not pursued in this appeal and need not be discussed). It sought a declaration that the outsourcing was a transfer of a part of the university's business, trade or undertaking as a going concern as envisaged in section 197(1)(a), that the employment contracts of the affected employees were transferred automatically to the respondents concerned in terms of section 197(2)(a) and that the notice of termination given contravenes section 197(2)(a) of the act and is of no force and effect. (The application is vague in some respects. There is no information about the identities or number of employees affected by each of the four contracts. There is no clarity about

the detail of the apportionment of duties between the four contractors. The relief sought does not specify which contracts of employment are to be declared transferred to which respondent. The matter was, however not argued on this basis and I will not discuss this aspect further. The notice of motion refers to a transfer whereas, on the union's version there were four.)

4. The Labour Court dismissed the application. Mlambo J held that the sections referred to only provide for a transfer of rights and obligations from one employer to another in a transfer of a business as a going concern when those employers agree that the contracts of employees will be transferred. The learned judge, however, held that he was bound by the contrary decision of this court in Foodgro (a division of Leisurenet) v Keil (1999) 20 ILJ 2521 (LAC). He found on the facts that the outsourcing did not constitute a transfer of the whole or part of a business as contemplated in the section and thus refused relief. No costs were awarded. Hence this appeal. The first and second respondents have noted cross appeals on the costs issue. There was no appearance for the other respondents.

5. Section 197 of the act reads as follows:

"(1) A contract of employment may not be transferred from one employer (referred to as "the old employer") to another employer (referred to as "the new employer") without the employee's consent, unless-

(a) the whole or any part of a business, trade or undertaking is transferred by the old employer as a going concern; or

(b) the whole or a part of a business, trade or undertaking is transferred as a going concern-

(i) if the old employer is insolvent and being wound up or is being sequestrated; or

(ii) because a scheme of arrangement or compromise is being entered into to avoid winding up or sequestration for reasons of insolvency.

2 (a) If a business, trade or undertaking is transferred in the circumstances referred to in subsection (1)(a), unless otherwise agreed, all the rights and obligations between the old employer and each

employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and each employee and, anything done before the transfer by or in relation to the old employer will be considered to have been done by or in relation to the new employer.

(b) If a business is transferred in the circumstances envisaged by subsection (1)(b), unless otherwise agreed, the contracts of all employees that were in existence immediately before the old employer's winding-up or sequestration transfer automatically to the new employer, but 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 and anything done before the transfer by the old employer in respect of each employee will be considered to have been done by the old employer.

(3) An agreement contemplated in subsection (2) must be concluded with the appropriate person or body referred to in section 189(1).

(4) A transfer referred to in subsection (1) does not interrupt the employee's continuity of employment. That employment continues with the new employer as if with the old employer.

(5) The provisions of this section do not transfer or otherwise affect the liability of any person to be prosecuted for, convicted of, and sentenced for, any offence."

6. For the sake of brevity I use the word "business" as including trade and undertaking and a part thereof. I use "sale" to include exchange, donation or some other contract in terms of which a business is transferred.

7. The section commences with a restatement of the common law rule that a contract of employment may not be transferred without consent of both parties thereto. It immediately creates an exception to this rule in one instance only, the transfer of a

business as a going concern. This much is clear from sub-section (1). In such a case the consent of the employee is not necessary. This drastic inroad upon the common law rule evidences an intention on the part of the legislature that transfers of businesses as going concerns be facilitated. Having in ss(1) provided for the transfer of contracts of employment without the consent of the employees, the legislature was obliged to spell out the consequences. This it did in the following subsections. This is the scheme of section 197 taken as a whole.

8. The key to the interpretation of the section is in my view the fact that the section deals with the transfer of contracts without the consent of employees and is silent about the agreement of employers inter se. This is a strong indication that that aspect was not statutorily amended.

9. My reasoning is further as follows:

Ss(1) clearly deals with <u>consensual</u> transfers of contracts of employment between employers without the consent of the employee, which it prohibits except in a limited field.

Unless there is a clear indication to the contrary in following subsections viz that the section no longer deals with consensual transfers only, that remains the position throughout the section.

Ss (2)(a) in its referral back to ss(1)(a) gives no sign of a change of intention; on the contrary. Ss (2)(b) refers to“ automatic” transfer only in the context of the transfer of a business <u>and not in the context of the transfer of a trade or undertaking</u> and then only in the context of insolvent circumstances. In this context “automatic” must therefore mean “without the consent of the employee”. To hold otherwise would mean that in the case of an insolvent business contracts of employment are transferred whether the new employer wants that or not, but in all other cases they can only be transferred consensually between employers. This would be absurd.

The concept “transfer as a going concern” implies an agreement between employers on what is or what part is transferred. This obviously will include agreement on the labour force.

There is therefore no room for automatic non-consensual transfers between employers of employees which are not intended to be part of the going concern. [Those not intended do not form part of the “part” of the going concern transferred.]

10. The key phrase in this section is “going concern”. Lack of emphasis thereon or a misunderstanding thereof leads to misinterpretation of the section. A business is a going concern only if its assets, movable and immovable, tangible and intangible, are utilized in the production of profit (or, in the case of an undertaking, the attainment of its goals).In every business its employees are a vital component and in labour intensive industries the major asset. To say that there can be a sale of a business as a going concern without all or most of the employees going over is to equate a bleached skeleton with a vibrant horse. A going concern is ”one in actual operation” cf General Motors SA (Pty) Ltd v Besta Auto Component Manufacturing and another 1982 (2) SA 653 (SE) 657C-G. The Concise Oxford Dictionary defines it as a “ business already in operation”. That can not be the case where there is no workforce. In West’s Legal Thesaurus and Dictionary “going concern ” is defined as “an existing solvent business operating in its ordinary and regular manner”.(For present purposes the word “solvent” must be disregarded.)

11. Purchasers and sellers of businesses as going concerns are at liberty

to define what is included in that concept, and generally do. (cf Smithfield Cold Storage Co v Kamp 1920 AD 183; General Motors SA v Besta Auto and Another supra which concerned movables and work in progress.) When used in section 197(1) the phrase "going concern" must necessarily include the employees and where the seller and purchaser negotiate and agree on a sale as a going concern of a business or part thereof, the necessary implication is that they agree that the employees or a material part thereof are part and parcel of the transaction.

12. In the absence of a provision like section 197(1), upon the transfer of a business even as a going concern all contracts with the old employer would be terminated and new contracts would have to be negotiated with the purchaser of the business. This held detrimental effects for all parties and only benefit to the purchaser. The latter had the hassle of negotiations and the administration of new contracts but also had the considerable advantage that he could in this way cut his labour costs. The old employer was saddled with the retrenchment procedure and severance payments. The employees were the worst off. They were confronted with a take over and lost their employment. But the section is not without advantage to employees.

13. Every transfer of a business as a going concern is preceded by a definition of what is sold. The parties determine what exactly the business comprises and in the case of a part, what part. As it is a going concern the seller and the purchaser both know that employees are taken over, who they are and what their conditions of employment are. This is not only the case in the normal commercial transfers dealt with in section 197(1)(a), but also in abnormal transfers arising from insolvency dealt with in section 197(1)(b). In the latter case the trustee or liquidator will define what he puts on sale as a going concern and inform intending purchasers

of the contracts of employment to be taken over.

14. It is therefore clear that the question of a non consensual or automatic transfer of employment contracts between seller and purchaser does not and cannot arise in either case. The word "automatically " in section 197(2)(b) refers to the fact that the consent of the employee is not required.

15. In section 197 (2) the most important question of the position of employees is addressed. When contracts of employment become freely transferable, the continued existence of rights and obligations has to be assured. In the case of normal commercial transfers the employee goes over with all rights and obligations intact. Even existing disciplinary warnings and accrued leave retain their validity in respect of the new employer in terms of section 197(2)(a). In contradistinction thereto section 197(2)(b) provides (in the case of businesses only) that upon transfers in insolvent circumstances only the employment contracts are transferred whereas the existing rights and obligations remain behind, to be exercised viz a viz the old employer or his estate.

16. The rigidity of the provisions of section 197(2) may be ameliorated by agreement with the person or body (eg the trade union) that has to be consulted by the employer upon dismissals for operational requirements referred to in section 189(1). This is provided for in section 197(3).

17. Counsel for the appellant sought to negate the effect of section 197(1) by arguing that it states a prohibition on transfers of employment contracts coupled with an exception to the general rule, introduced by the word "unless". It does not determine whether the transfers are automatic i.e. without the consent of the purchaser and seller or not. That answer is to be sought in section

197(2). When reading that section the first part of section 197(1) to which it refers, is to be ignored and the focus is to be solely on the phrase in (a). Such approach would, according to the argument, lead to the conclusion that all transfers, whether there is agreement or not to include the workforce, would be covered by the section. This argument is in my view fallacious. It totally ignores the meaning of the phrase “as a going concern”.Furthermore, had it been the intention to refer only to the portion in paragraph (a) and not to the first part of the sub-section introduced by (1) the section would have referred to paragraph (a) of sub-section (1) and not to sub-section (1)(a).

18. Counsel for the appellant sought to bolster his case by copious reference to the case law of the European Court of Justice interpreting the Acquired Rights Directive 77/187/EEC adopted in 1977 by the European Commission. This directive also gave rise to the British Transfer of Undertakings (Protection of Employment) Regulations 1981 SI 1981/1794 (TUPE) and its concomitant spate of jurisprudence. The directive was amended in 1998 by the European Commission’s Council Directive 98/50/EC. I will not quote the texts of these legislative provisions. Those that preceded our act are to be found in *Foodgro supra* 2525H to 2527D. The case law is discussed in Schutte & others v Powerplus Performance (Pty) Ltd & another (1999) 20 ILJ 655 (LC) . It can safely be accepted that the drafters of our legislation were fully aware of the content of the directives and the manner of their interpretation by the courts. But it should always be bourne in mind that our act is the product of extensive negotiations in Nedlac and that the courts should not attempt judicially to obliterate compromises which in their view do not go far enough.

19. In *Foodgro* at 2527G Froneman DJP stated that “ the usefulness of these comparative provisions should not be overstated. The

differences in wording from section 197 are quite obvious, as is the fact that they find their applications in societies different in history and development from our own." The learned judge did, however, point out that these provisions were aimed at the protection of employees as he had concluded the provisions of section 197 were. To these observations one should add a reference to the principle of interpretation that a material difference in wording from previous statutes is an indication of a different goal.

20. I turn now to the reasoning in the *Foodgro* case. The issue which came up for decision was whether an employee who had consented to the transfer of the business in which she was employed to a new employer and who had worked for him for some months, could voluntarily validly sign a new contract of employment with that employer whereby she lost her accrued years of service. The answer in both the majority and minority judgments was a clear negative. In both judgments it is based on section 197(4) which lays down that a transfer referred to in section 197(1) does not interrupt the employee's continuity of employment. The question whether contracts of employment are automatically transferred whether the seller and purchaser want that or not, was never an issue as the lady concerned was transferred with her consent and both old and new employers agreed on the transfer.. Any remarks by Froneman DJP in the majority judgment which are sought to be thus interpreted were *obiter* and we are not bound thereby. Nevertheless they warrant close attention. In that case counsel for Foodgro contended that the ease with which businesses are transferred is very important for the economic well-being of the country and therefore the employees should be permitted to contract out of onerous provisions in section 197. The reference was clearly to section 197(4). Froneman DJP countered this argument by holding that the pursuit of economic development by means of a particular interpretation of the act is qualified by the

goals of social justice, labour peace and the democratization of the workplace. The learned judge referred to Kebeni v Cementile Products (Ciskei) (Pty) Ltd (1987) 8 ILJ 442 (IC) where safeguards in the transfer agreement deeming all existing contracts of employment to be transferred to the purchaser were required and held that the provisions of section 197 were primarily aimed at the protection of employees. His reasons (at 2525D to G) were:
(a) If the aim was to assist purchasers to acquire businesses without incurring obligations to employees section 197 was unnecessary as the common law catered adequately for that situation.
(b) "The provisions relating to automatic transfers of contracts of employment (s 197(1) and (2)) and the non-interruption of an employee's 'continuity of employment' (s 197(4)) secure advantages not previously enjoyed by employees."
(c) Even after automatic transfers of contracts of employment under s 197 employees may still unilaterally resign.
(d) New employers become subject to the additional sanctions or remedies under the act upon transfer of the employment contract.

21. This reasoning can be answered as follows:
(a) The fact that the purchaser's position in a consensual transfer has now become more onerous than under the common law is no ground for holding that the legislature intended to burden him still further.
(b) This is correct but if this statement is intended to hold that automatic transfers occur not only in cases of consensus thereon between seller and purchaser, no reasons are advanced.
(c) & (d) This is correct whichever interpretation is followed.
This is the sum total of the learned judge's reasoning. There is no reference to or interpretation of the phrase "going concern" in its context. The question whether the intention behind section 197 can be derived from section 197(1) itself, was not considered. Nor was it necessary as the focus was on section 197(4), correctly in my

view.

22. Conradie JA who gave a minority judgment emphasized that section 197 is a useful provision for the new employer and the old employees alike, held that the intention was that a transfer should not operate so as to terminate existing contracts of employment and found that modification was permitted but not replacement in terms of sections 197(2) and 197(4).

23. I hold therefore that the decision in *Foodgro* does not stand in the way of a finding by this court that section 197 (1) is to be interpreted so as to limit its scope to cases where the transfer follows upon an agreement between seller and purchaser defining the subject matter of the sale as the business as a going concern (i.e. employees included).

24. It was argued by counsel for the appellant that such an approach would open the door to intentional avoidance of the operation of section 197 contrary to the intention of the legislature by the dismissal of all employees prior to the sale and their re-employment thereafter.
There are three answers to this objection. First: It presupposes an intention behind the section which is not to be found therein. Second: This avoiding action brings with it all the negative consequences of the old order for the seller which he may well wish to avoid. Third: If it is really a transfer of a going concern with the workforce included but for economic reasons shrouded in a two-stage process whereby stage one is the dismissal of the employees with a tacit or secret understanding that they will be re-employed by the purchaser (so as to avoid payment of retrenchment benefits) and stage two is their re-employment, the court will shred the shroud and adjudicate upon the real transaction. The applicabilty of section 197 (2) will depend upon the facts of each individual case.

25. It follows that Mlambo J in the Labour Court was correct in his interpretation of the section that consensual transfer of contracts of employment is a prerequisite for its operation. It is not necessary to go further. It was conceded by counsel for the appellant that such a finding would dispose of the appeal.

26 The appeal must therefore be dismissed with costs. There is a cross-appeal against the Labour Court's refusal to award costs when dismissing the application. The second respondent's submissions are: The appellant is not an individual employee but a large trade union and thus unlikely to be discouraged by the making of a costs order from approaching the Labour Court in future.(cf Malandoh v SABC (1997) 18 ILJ 544 (LC)). The appellant and the second respondent do not have an ongoing relationship which may be damaged by the making of a costs order (cf Afrox Ltd v SA Chemical Workers Union and Others (2) (1997) 18 ILJ 406 (LC)). There are no special considerations or considerations of fairness in this case which counteract the general rule that costs follow the result. (cf National Union of Mineworkers v East Rand Gold and Uranium Company Ltd 1992 (1) SA 700 (A) 739 A-F; Cargo Motors v Hamilton (1996) 17 ILJ 113 (LAC)).

There is force in these submissions. The learned Judge a quo did not give reasons for his decision to make no costs order and there is no indication in the judgment that these factors were duly considered. In my view it is incorrect to apply a rule of thumb on costs mechanically. The second respondent is entitled to its costs in the Labour Court**.** In the case of the University, first respondent, there is an ongoing relationship with the appellant. I doubt that this relationship will be affected to a larger extent by an adverse costs order than it has probably been affected already by this case itself. The other factors mentioned are also present in the first respondent's case. There is no reason to differentiate between the two respondents. The first respondent is entitled to its costs in the Labour Court.

27 The following order is made:

1 The appeal is dismissed with costs.

2 The cross-appeal is upheld with costs. The costs order of the Labour Court is set aside and the following order is substituted therefor: “The applicant is ordered to pay the costs of the respondents.”

3 The costs in both this Court and the Labour Court will include the costs of two counsel.

Van Dijkhorst AJA

I concur:

Comrie AJA

For Appellant: MJD Wallis SC
instructed by Cheadle Thompson and Haysom
For First Respondent: WRE Duminy SC and RGL Stelzner
instructed by Deneys Reitz
For Second Respondent: PJ Pretorius SC and AM Breitenbach
instructed by Bowman Gilfillan Inc
(initially by Findlay & Tait Inc)

Date of hearing: 25/5/2001

Date of judgment: 7 February 2002