

## **OUTSOURCING DOES CONSTITUTE THE TAKEOVER OF A BUSINESS!!**

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The Labour Relations Act (LRA) was amended in 2002 to include a “service” as part of a going concern for purposes of section 197 of the LRA. This sparked a major controversy on two issues:

- 1) Does “service” include even internal services of a business insignificant to the service provided by the business to outsiders (for example, non-core departments such as cleaning and gardening)?
- 2) Does outsourcing of these minor, internal services to contractors constitute the takeover of a going concern for the purposes of section 197 of the LRA?

Where an undertaking (or part thereof) of any kind is transferred to another undertaking as a going concern section 197 of the Labour Relations Act (LRA) comes into effect. This forces the new entity to take over all the obligations of the old undertaking.

However, not all transfers qualify under this legislation because not all are transfers ‘as going concerns’. It is vital for employers to know which transfers do and do not fall under this legislation because they need to know:

- whether the new employer will be forced to take over all the old employer’s employees and
- whether the new employer will have to recognise and preserve all the benefits, remuneration, working conditions, years of service and other rights of the employees.

Unfortunately the LRA does not define what a transfer ‘as a going concern’ is. This causes great confusion and sparks many disputes between employers on the one hand and employees and trade unions on the other. That is, takeovers often cause loss of jobs and employees are often desperate to stay on with the new enterprise. On the other hand, the new entity very often already has its own staff and wants to avoid the expense of taking on additional employees.

However, the statutes are not clear enough to tell the parties whether the new entity must or must not comply with section 197 of the LRA. We have therefore offered below our view as to what circumstances would be likely to characterise a merger or takeover as the transfer of a going concern.

- If the new undertaking continued the running of the business as a going concern in much the same way as it had been run before the takeover this would point to the takeover of a going concern.

- Such a takeover would also be likely to qualify if the new undertaking served the same client market as did the old undertaking.

While the sale of a business as an operating entity has normally been considered to qualify under the heading of a section 197 transfer it has been uncertain whether the outsourcing of an enterprise to a contractor without selling the entity constitutes the transfer of a going concern.

This uncertainty sprang primarily from the contradictions in court decisions on this issue. For example, in the case of *Schutte & others vs Powerplus Performance (Pty) Ltd and another* (1999, 20 ILJ 665) the labour Court found that the takeover of a company's motor workshop by a contractor did constitute the takeover of a going concern and forced the contractor to take over all the workers attached to the motor workshop employees.

However, in the case of *NEHAWU vs University of Cape Town & Others* (2000, 1 BLLR 803) the Labour Court found that the outsourcing of the university's cleaning, maintenance and gardening functions did not constitute the takeover of a going concern because the university did not transfer its equipment and other assets to the contractor and because the outsourcing was not of a permanent nature.

Again, in *SAMWU and others vs Rand Airport Management Company (Pty) Ltd & others* (2002, 12 BLLR 1220) the Court found that the transfer of part of an employer's structure that did not comprise a recognisable entity did not constitute the transfer of a going concern.

However, the Labour Appeal Court in *SAMWU and others vs Rand Airport Management Company (Pty) Ltd & others* (2005 3 BLLR 241) overturned the earlier Rand Airport case decision and the Constitutional Court, in *NEHAWU vs University of Cape Town & Others* (2003, 24 ILJ 95) overturned the earlier University of Cape Town decision.

It appears that the legal pendulum has swung far in favour of the view that outsourcing of services (even internal, non-core services) constitutes the takeover of a going concern. This adds yet another heavy burden for employers and contractors who are now constrained in terms of the employment conditions employees transferred to a contractor and the prohibition on retrenching such employees.

Due to the complex nature of the section 197 legislation and the powerful constraints on contractors and other employers nobody should enter into takeovers or outsourcing agreements before consulting reputable experts in the labour law field. Our experience is that employers have found to their cost that going it alone is far more costly than getting the right advice.

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