

Contract Transfers are Section 197 Takeovers



Section 197 of the Labour Relations Act (LRA) places heavy responsibilities on the employer who takes over the business (or part thereof) of another employer as a going concern. This section forces the new employer to take over all the labour related obligations of the old employer.

The term “business” in this context includes any employer’s undertaking be it big, small, profit-making or non-profit, unionised or not, private or government.

However, not all takeovers fall 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.

Where the transfer agreement itself labels the takeover as ‘a transfer of a going concern’ this would be

significant.

Where the new entity took over the assets of the old entity and continued to serve the same users of the business as had been served by the old entity this would indicate a section 197 transfer.

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 of a going concern 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 clients or the same client market as did the old undertaking.

Where a section of an undertaking is transferred this could also qualify as a takeover of a going concern under certain conditions. In the case of Crossroads Distribution (Pty) Ltd t/a Jowell's Transport vs Clover SA (2008,6 BLLR 565), Clover had a contract to provide transport and logistical services to Woodlands Dairy. When Clover terminated its contract with Woodlands Dairy, Woodlands awarded the contract to another company called Crossroads. Crossroads wanted all of Clover's employees in the transport & logistics section to be transferred into its employ because the transfer of the contract from Clover to Crossroads constituted a takeover of a going concern but Clover wanted to retain the services of some of them. The Labour Court found that:

Second generation takeovers do not normally constitute takeovers as going concerns and therefore do not fall under section 197 of the LRA.

The fact that, after the take over Clover allowed Crossroads to use its premises and sold some of the furniture at the premises to Crossroads did not mean that this was a takeover as a going concern.

While the LRA provides that transfers of a service can constitute takeovers as going concerns for purposes of section 197 the transfer of contracts cannot constitute such a takeover.

However, in the case of Aviation Union of South Africa & others vs SAA (Pty) Ltd & others the Labour Appeal Court decided that transfers of services to contractors do constitute section 197 takeovers and that second generation transfers of services from the outgoing contractor to the new one also fell under section 197.

This means that would-be buyers of businesses as well as contractors looking to take over catering, security, cleaning, construction and other services do not know if they are coming or going. Due to these concerns such employers should not enter into takeovers 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.

To register for our 16 July webinar on Investigating in the Covid Environment please contact Ronni on ronni@labourlawadvice.co.za or 0845217492.