Transfer of Business or Part thereof in Germany and South Africa- a Comparison of § 613a of the German Civil Code (BGB) and section 197 of the Labour Relations Act (LRA)

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A. Chapter 1: Introduction

The title of this mini-thesis is "Transfer of Business or part thereof in South Africa and Germany- a Comparison of § 613a of the German Civil Code (BGB)[1] and Section 197 of the Labour Relations Act (LRA) [2]".

One reason why comparing the transfer of business or part thereof in South Africa and Germany is such an important topic is, that economic relations between the two countries are very intensive. Germany is one of the most important trade partners of South Africa and many German companies are operating in South Africa[3]. The topic of transfer of business or part thereof in both countries is therefore a very important issue to a company's decision to operate a business in South Africa.

Especially in the field of the transfer of business or part thereof, where a balance has to be found between many different interests, such as the managerial prerogative of the employer and the protection of the employee, it can be very useful to gain new insight.

The transfer of an employing enterprise from the control of one legal person to another raises two basic issues for labour law. First, what is the impact of such a transfer upon the rights, individual and collective, of the workers as against their employer? The second issue is what role the employees are to play in the decision-making process which leads to the transfer of control.

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[1] Hereinafter § 613a

[2] Act 66 of 1995, referred to as section 197 hereafter

[3] The trade volume between South Africa and Germany amounts to 8 Million Euros. At present there are about 450 German companies operating in South Africa. See under <http://www.bundesregierung.de/dokumente/-,413.593623/Artikel/dokument.htm>.

The main focus will be on two specific problems in the field of transfer of business or part thereof, namely outsourcing[4] and the power to object to a transfer[5].

In my mini- thesis, I will examine the different ways in which transfers of businesses or parts thereof are regulated in both countries. There are many similarities as well as differences concerning the transfer of businesses or parts thereof in Germany and South Africa which I will identify. The paper will not only show differences and similarities, but will also analyse the reasons for these differences. The thesis will focus on transfer of businesses in solvent circumstances.

There are several areas of uncertainty concerning the transfer of business or part thereof in South Africa. In an attempt to reduce these uncertainties, the courts and several authors have turned to foreign jurisprudence. In this regard the European Directive[6] plays an important role. Therefore, European jurisprudence concerning the transfer of business or part thereof will also be considered.

Furthermore, the thesis will analyse the historical background of legislation and jurisdiction concerning transfer of business or part thereof in both countries in order to gain a deeper understanding of several problems, especially concerning outsourcing and the power to object, that existed in the past as well as today.

B. Chapter 2: Transfer of Business or Part thereof

I. Legal Origins

1. Germany

[4] Outsourcing is a process whereby activities traditionally carried out internally are contracted out to external providers (Domberger *The Contracting organization A Strategic Guide to Outsourcing* (1998) 12). Outsourcing is an exercise that is becoming increasingly common-place. This practice has advantages, eg. cost saving, increased flexibility etc., as well as disadvantages, such as loss of skills and loss of corporate memory. Especially the employees in the parts of businesses that are outsourced are in a weak position. Can the contracting out of a service be seen as the transfer of a business?

[5] The power to object provides the employee with a right to refuse to be transferred.

[6] Council Directive 2001/23/EC (the Acquired Rights Directive).

Before § 613a was enacted, the general rules about the taking-over of a contract applied. According to these rules, a taking-over of a contract is possible if all the persons concerned agree. As for the transfer of the employment relationships, it was not regarded as necessary that the employees approved. The transferee and transferor though had to consent to the transfer of the contracts of employment[7]. In contrast to this view, a few authors[8] held that the employment relationships transferred ipso iure.

The initial impulse for § 613a was the idea to bind the transfer of a business or part thereof on the consent of the works council[9] since businesses were acquired occasionally just to close them down at once[10]. This, however, has not become law.

In the version that finally became a statute the thought was to close a gap in the dismissal protection by providing an automatic transfer of the employment relationships[11]. § 613a was enacted on the 1st of January 1972[12]. In this version, the collective consequences of a transfer were not mentioned. Also, the dismissal provisions of the present § 613a subsection (4) were missing. An adjustment of § 613a became essential due to Directive 77/187 EEC[13] issued by the European Community in 1977. Article 3 no. 1 of the Directive provided that "*following the transfer, 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*

[7] BAG 1955 AP Nr.1 zu § 613a
[8] Dietz (1967) *BetrVG* (4th ed.) § 1 at para69; Nikisch (1961) *Arbeitsrecht* Bd. I 657
[9] Richardi R, Wlotzke O (2000) *Muenchener Handbuch zum Arbeitsrecht Band 2: Individualarbeitsrecht II* § 124 225
[10] BT-Drucksache VI/1786 59
[11] Richardi R, Wlotzke O (2000) *Muenchener Handbuch zum Arbeitsrecht Band 2: Individualarbeitsrecht II* § 124 225
[12] BGBl. I 1972 p.13
[13] Directives define results to be achieved, but, as a rule, leave to the Member States the choice of form and methods of incorporating the defined objectives into national law. Therefore, directives must, in principle, be implemented by the national legislator. The time period for implementing the directive is specified in the directive as a rule. By way of exception, the principles set forth in a directive may also become directly applicable. This will be the case if the directive is worded precisely enough so that legal claims may be directly derived from this and the time limit stipulated in the directive for its implementation has expired.

observing such terms and conditions with the provision that it shall not be less than one year".

According to article 4 no. 1 of the Directive "*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 organizational reasons entailing changes in the work force*".

Article 6 of the Directive includes a duty to inform the employees' representatives about the transfer and article 7 allows for a more favourable provision for employees in national law.

Directive 77/187/EEC was implemented into German Law by act of law on the 13th of August 1980[14]. It came into effect on the 21st of August 1980. Subsection (1) sentence 2-4 and subsection (4) have been added.

Directive 77/187/EEC was amended on the 19th of June 1998 by the Council Directive 98/50/EC[15].

The new Council Directive 2001/23/EC[16] was implemented on the 12th of March 2001 and lays down far reaching duties of the employer when there is a transfer of business. It especially provides information to the employees affected by the transfer.

Directive 2001/23/EC was recently incorporated into German law with effect from 1st of April 2002.

§ 613a, as it is today, reads as follows:

§ 613a BGB Rights and obligations upon the transfer of a business

[14] BGBl. I 1980 p. 1308

[15] Council Directive 98/50/EC reflects the series of judgements by the ECJ interpreting Directive 77/187/EEC. Council Directive 98/50/EC does not alter the scope of the original Directive 77/187/EEC as interpreted by the ECJ. It specifies which transfers qualify under the Directive. Furthermore it includes, amongst others: the Directive's application to subcontracting operations, transfer from the public to the private sector and the Directive's requirement for consultation and the grant of a negotiation period for employee representatives in circumstances of insolvency. See under <http://www.jura.uni-augsburg.de/prof/moellers/materialien/materialdateien/010_europaeische_gesetze/eu_richtlinien/ril_1998_050_eg_betriebsuebergang_aenderung_en/>

[16] This amendments introduced by Directive 98/50/EC now form part of a consolidated Directive 2001/23/EC.

(1) Where a business or part of a business is transferred to another owner by means of a legal transaction, the new owner enters into the rights and obligations arising from the employment relationships in existence at the time of the transfer. Where these rights and obligations are regulated by means of the legal standards set in a collective bargaining agreement or by a works agreement, they shall become an integral part of the employment contract between the new owner and the employee and may not be altered to the detriment of the employee until one year has elapsed following the date of transfer. Sentence 2 shall not apply if the rights and obligations in the relationship with the new owner are regulated by means of the legal standard set in another collective bargaining agreement or another works agreement. The rights and obligations may be altered prior to the expiration of the period pursuant to sentence 2 if the collective bargaining agreement or the works agreement has ceased to exist or, if neither party is bound to a collective bargaining agreement, within the scope of application of another collective bargaining agreement, the application of which is agreed upon between the new owner and the employee.

(2) The former owner shall be jointly and severally liable together with the new owner for those obligations pursuant to subsection (1), which arises prior to the date of transfers and become due before the expiration of one year after that date. Where such obligations become due after the date of transfer, the previous owner shall be liable for them, however only for the fraction of the total assessment period reflecting the time elapsed before the transfer date.

(3) Subsection (2) shall not apply if a legal entity ceases to exist by virtue of merger, division and transformation.

(4) Any termination of an employee's employment relationship by the former employer or the new owner on account of the transfer of a business or part of a business shall be invalid. The right to terminate the employment relationship for other reasons remains unaffected.

(5) The former employer or new owner shall inform the employees affected by a transfer in writing prior to the transfer with respect to:

1. the date or planned date of the transfer,
2. the reason for the transfer,
3. the legal, economic and social ramifications of the transfer for the employers and
4. the prospective measures to be taken with respect to the employees.

(6) The employer may object to the transfer of the employment relationship in writing within one month after receiving the notification pursuant to subsection (5). The objection may be declared to the former or the new owner.

2. South Africa

Before 1995 there was no statutory provision regarding the protection of employees in case the employer's business was transferred. Very limited protection was granted by section 22 (5) (a) of the Manpower Training Act[17], which provided for an automatic transfer of apprenticeship entered into with a partnership when the partnership dissolves and the business is continued by a new person or partnership. Another provision that safeguarded employee's rights in the event of a transfer was section 12 of the Basic Conditions of Employment Act[18],

[17] Act 56 of 1981
[18] Act 3 of 1983

which provided for a transfer of the employee's accrued leave benefits when a business was transferred, provided that the new employer retained the employee's services[19].

Under common law, it was not possible to automatically transfer an employee's contract of employment without his or her consent since the employment contract is of a personal nature. One has to bear in mind though, that under common law the new employer was not obliged to re-employ the employees but he or she could unilaterally terminate the contract provided the new employer gave notice of termination to give the employee time to regulate his or her affairs[20]. In case there was no offer of re-employment by the new employer the employees had to turn to the old employer for compensation if there had been a breach of contract. Therefore employees were not really protected by the common law.

The need for a statutory provision to safeguard employees rights was obvious. Therefore[21], a new Labour Relations Act was passed in 1996. It contained section 197, aimed, amongst others, at ensuring security of employment when a business is transferred[22]. Therefore the automatic transfer of the employment contracts to the new employer was intended by the section. Another important issue was that the terms and conditions of employment remained intact with the new employer and that the fairness of dismissal was regulated when a business is transferred.

After a few years it became clear that section 197 had several shortcomings[23]. Especially the courts[24] undermined its original purpose, namely provide employment protection. As a result authors as well as courts called for an amendment of section 197 to provide greater clarity.

[19] Blackie & Horwitz "Transfer of contracts of Employment as a result of Mergers and Acquisitions: A Study of Section 197 of the Labour Relations Act 66 of 1995" (1999) 20 *ILJ* 1387 (1392)
[20] *Putco v Radio Guarantee Co* (1985) 4 *SA* 809 (A)
[21] The new LRA was not passed simply due to this specific problem. Its purposes are summed up in section 1.
[22] *Schutte & others v Powerplus Performance (Pty) Ltd and another* (1999) 20 *ILJ* 655 (LC); According to *NEHAWU v University of Cape Town & others* (2003) 2 *BLLR* 154 (CC) section 197 has a dual purpose. It facilitates the commercial transactions while at the same time protecting the workers against unfair job losses (at par 53).
[23] Some of these shortcomings are discussed below.
[24] *NEHAWU v University of Cape Town & others* (2002) 4 *BLLR* 311 (LAC)

The new section 197[25] came into force in 2002, based to a large extent on the European Directives 77/187/EEC and 2001/23/EC. It mainly attempts to ensure that the section operates as originally intended, especially that employment protection is given to a larger extent. It also provides for more flexibility to the parties affected by the section[26].

Section 197 of the Labour Relations Act, 1995 reads as follows:

(1) In this section and in section 197 A-

(a) 'business' includes the whole or a part of any business, trade, undertaking or service; and

(b) 'transfer' means the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern.

(2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6) –

(a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;

(b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;

(c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer;

[25] Due to the lenght of this thesis s 197 A and B will not be considered.
[26] Bosch G, Mohamed Z "Reincarnating the vibrant horse? The 2002 amendments and transfer of undertakings" (2002) *Law, Democracy and Development* Vol. 6 85

(d) the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer.

(3) (a) The new employer complies with subsection (2) if that employer employs transferred employees on terms and conditions that are on the whole not less favourable to the employees that those on which they were employed by the old employer.

(b) Paragraph (a) does not apply to employees if any of their conditions of employment are determined by a collective agreement.

(4) Subsection (2) does not prevent an employee from being transferred to a pension, provident, retirement or similar fund other than the fund to which the employee belonged prior to the transfer, if the criteria in section (14) (1) (c) of the Pension Fund Act, 1956 (Act No. 24 of 1956), are satisfied.

(5) (a) For purpose of this subsection, the collective agreements and arbitration awards referred to in paragraph (b) are agreements and awards that bound the old employer in respect of the employees to be transferred, immediately before the date of transfer.

(b) Unless otherwise agreed in terns of subsection (6), the new employer is bound by –

(i) any arbitration award made in terms of this Act, the common law or any other any other law

(ii) any collective agreement binding in terms of section 23; and

(iii) any collective agreement binding in terms of section 32 unless a commissioner acting in terms of section 62 decides otherwise.

(6) (a) An agreement contemplated in subsection (2) must be in writing and concluded between –

(i) either the old employer, the new employer, or the old employer and the new employer acting jointly, on the one hand; and

(ii) the appropriate person or body referred to in section 189 (1), on the other

hand.

(b) In any negotiations to conclude an agreement contemplated by paragraph (a), their employer or employers contemplated in subparagraph (i), must disclose to the person or body contemplated in subparagraph (ii), all the relevant information that will allow it to engage effectively in negotiations.

(c) Section 16 (4) to (14) applies, read with the changes required by the context, to the disclosure of information in terms of paragraph (b).

(7) The old employer must –

(a) Agree with the new employer to a valuation as at the date of transfer of –

(i) the leave pay accrued to the transferred employees of the old employer;

(ii) the severance pay that would have been payable to the transferred employees of the old employer in the event of a dismissal by reasons of the employer's operational requirements; and

(iii) any other payments that have accrued to the transferred to the transferred employees but have not been paid to employees of the old employer;

(b) conclude a written agreement that specifies –

(i) which employer is liable for paying any amount referred to in paragraph (a), and in the case of the apportionment of liability, the terms of that apportionment; and

(ii) what provision has been made for any payment contemplated in paragraph (a) if any employee becomes entitled to receive a payment;

(c) disclose the terms of the agreement contemplated in paragraph (b) to each employee who after the transfer becomes employed by the new employer; and

(d) take any other measure that may be reasonable in the circumstances to ensure that adequate provision is made for any obligation on the new employer that may arise in terms of paragraph (a).

(8) For a period of 12 months after the date of the transfer, the old employer is jointly and severally liable with the new employer to any employee who becomes entitled to receive a payment contemplated in subsection 7 (a) as a result of the employee's dismissal for a a reason relating to the employer's operational requirements or the employer's liquidation or sequestration, unless the old employer is able to show that it has complied with the provisions of this section.

(9) The old and new employer are jointly and severally liable in respect of any claim concerning any term or condition of employment that arose prior to the transfer.

(10) This section does not affect the liability of any person to be prosecuted for, convicted of, and sentenced for, any offence.

II. Scope of § 613a and Section 197

1. Germany

a) Protective Purpose of § 613a BGB

§ 613a, as it is today, is based on Directive 77/187/EEC and Directive 2001/23/EC. Its spirit and purpose is to ensure that existing working relationships continue to exist if someone else acquires a business or part of the business and to avoid that the acquirer takes over only the efficient part of the old workforce[27]. Therefore, § 613a is based on the idea that the working relationships and the concrete needs of the workplace are in balance and is supposed to ensure a complete protection of vested rights[28].

b) Criteria that must be satisfied

To determine if § 613a is applicable in certain cases there has to be a 'business' or 'part of a business' which is capable of being transferred. Therefore the terms 'business' and 'part of a business' are defined in the following section.

[27] *Berg and Busschers v Besselsen* (1988) *ECR* 2259 (ECJ); BAGE 32, 326
[28] BAGE 35, 104

aa) Business or Part of a Business: Concept of the organizational Unit

In former times the Federal German Labour Court (BAG) understood the term business as an organizational unit within which an employer, on his own or jointly with his employees, continuously pursued certain operational objectives by means of tangible and intangible resources[29].

It tried to differentiate between essential and inessential resources, concerning the question if a business or single economic goods have been transferred[30].

The BAG was of the opinion that, as for the term business, only the neuter and immaterial resources, such as buildings, tools, raw materials, machines, vehicles, know-how and good will etc., which form the economic substrate, with which the entrepreneur can generate net profit, are important[31]. The neuter and immaterial resources were important for a business if the new owner, with their help and the help of the employees could pursue the business objective[32]. It was not required that all economic goods, which belonged to the business hitherto, transfer to the new owner. Inessential parts of the business assets did not have to be considered[33]. With regard to this jurisdiction, the question always was, which resources are essential or inessential for § 613a?

The BAG stated that it is sufficient when the new owner can continue the business or part of the business essentially with the operating resources that had been taken over[34].

The weakness of the traditional interpretation of the term business became clear through the jurisdiction of The European Court of Justice (ECJ), which has a special meaning concerning the interpretation of § 613a, given its preliminary ruling authority concerning Directive 2001/23/EC (former Directive 77/187/EEC). The ECJ and the courts in Germany proceed on

[29] BAG 1976 AP Nr. 4 zu § 613a
[30] Willemsen H J "Der Grundtatbestand des Betriebsuebergangs nach § 613a BGB" (1991) *RdA* 206
[31] BAG 1994 *NZA* 612; BAG 1995 *NZA* 27
[32] Willemsen H J "Der Grundtatbestand des Betriebsuebergangs nach § 613a BGB" (1991) *RdA* 206
[33] BAG 1994 *NZA* 612
[34] BAG 1994 AP Nr. 2 zu § 613a BGB

the principle that Community law prevails over national law. Therefore it is necessary to take a close look at the jurisdiction of the ECJ. Where there is a conflict between Community law and national law, the national law may not be applied.

The ECJ does not define the terms 'business' or 'part of a business' but focuses on the economic entity when dealing with 'businesses' or 'part of businesses'.

In *Rygaard* the court held that for the regulations to apply, there must be a transfer of "*a stable economic entity whose activity is not limited to performing one specific works contract*"[35].

In *Süzen*[36] the ECJ made an attempt for the first time to define the term 'economic entity'. It held that the term 'economic entity' means an "*organised grouping of persons and assets enabling an economic activity which pursues a specific objective [to be exercised]*"[37].

According to the ECJ[38] the transfer of a transfer of a business or part of a business does not occur merely because its assets are disposed of; decisive is the maintenance of the identity of the economic entity. Meanwhile the BAG follows the opinion of the ECJ[39].

Under the influence of the *Süzen* judgement the Directive 77/187/EEC was altered. The amendments to the Acquired Right Directive, introduced by Directive 98/50/EC, reflect the definition given in *Süzen* in so far as the term economic entity is determined to mean "*an organised grouping of resources which has the objective of pursuing an economic activity, whether or not the activity is central or ancillary*"[40].

The Directive applies to public and private undertakings engaged in economic activities whether or not they are operating for gain[41].

[35] *Rygaard* C-48/94 (1995) *ECR* I-2745 (ECJ) at par 20
[36] *Süzen v Zehnacker Gebaeudereinigung GmbH Krankenhausservice* (1997) *IRLR* 255 (ECJ)
[37] *Süzen v Zehnacker Gebaeudereinigung GmbH Krankenhausservice* (1997) *IRLR* 255 (ECJ) at 255
[38] *Spijkers v Gebroeders Benedik Abbatoir CV* C-24/85 (1986) *ECR* 1119 (ECJ)
[39] Preis U, Steffan R "Neue Konzepte des BAG zum Betriebsübergang nach § 613a BGB" (1998) *DB* 315
[40] Article 1 1(b) Directive 2001/23/EC
[41] Article 1 1(c) Directive 2001/23/EC

'Part of a business' was seen by the BAG as a separable unit of tangible or intangible assets of the business with which an independent business purpose could be pursued[42]. The ECJ interpreted 'part of a business' to mean that a service or activity supporting the main undertaking, or even a peripheral activity, could be included, provided that the activity was separable and retained its identity after the alleged transfer[43]. In contrast to the former approach of the BAG[44] also auxiliary functions are to be considered when dealing with a transfer of 'part of a business'.

Crucial for the question if a 'part of a business' exists, is therefore, whether the economic subunit fulfils purposes that can be seen as disposable and autonomous functions[45]. Important is that concrete workplaces are bound to the unit[46] and that it is possible that the unit can be the object of a separate contractual disposal[47].

Examples of the sale of a 'part of a business' are the sale of the sales and marketing department, of the IT department and a restaurant that is run in addition to a hotel[48].

bb) Transfer

§ 613a applies if a business or undertaking or a part of a business is transferred to a new owner.

§ 613a is only applicable if the transfer of a business or part of a business takes place by means of a legal transaction. According to the ECJ and the BAG, the term 'legal transaction' has to be interpreted rather broadly so that § 613a can assure a complete protection of vested rights[49].

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[42] Ziemons H "EuGH-Rechtsprechung versus unternehmerische Entscheidungsfreiheit" (1995) *ZIP* 989
[43] *Watson Rask and Christensen v ISS Kantinservice A/S* C-209/91 (1992) *ECR* I-5755 (ECJ)
[44] BAG 1989 *NZA* 799
[45] BAG 1975 *Betriebs Berater (BB)* 468
[46] BAG 1999 AP Nr. 69 zu § 613a BGB
[47] BAG EZA Nr. 66 zu § 613a BGB
[48] BAG 1997 AP Nr. 16 zu Richtlinie 77/187 EEC
[49] Schiefer (2002) *Outsourcing, Auftragsvergabe, Betriebsübergang* (4th ed.) 370

According to the BAG, the legal transaction has to refer to the transfer of the actual power of use and disposal. It is crucial that the transfer is based on the will of the affected factory owner. There is no transfer by means of a legal transaction if the transfer is implemented automatically by a norm or an administrative act[50].

A transfer of a business or part of a business occurs when there is a change in the person of the business owner. The former owner has to cease his or her economic activities in the business or part of the business[51]. The kind of legal transaction which leads to the change of ownership is not important.

The legal transaction required for § 613a usually consists of an agreement between the former business owner and the acquirer. It is not compulsory, though, that the legal transaction has to be between the old and the new employer. To give effect to the spirit and purpose of the law and to avoid the circumvention of the norm also indirect contractual relationships have to be considered. The agreement has to be differentiated from the legal transaction as such, which legitimates the change of ownership, for example a contract of sale or a lease. It is possible that the legal transaction takes place some time after the transfer of the business or part of the business[52]. Therefore the legal transaction, which leads to the change of ownership, does not have to be effective[53]. The essential point is that the new owner must be able to continue the business under his own name[54].

The criterion 'through a legal transaction' makes it clear that § 613a is not applicable to transfer of businesses through an act of state or by act of law. Especially universal succession is not included[55].

[50] BAG 1995 *NZA* 222
[51] Schiefer (2002) *Outsourcing, Auftragsvergabe, Betriebsübergang* (4th ed.) 370
[52] BAG 1989 *NZA* 679
[53] Schiefer (2002) *Outsourcing, Auftragsvergabe, Betriebsübergang* (4th ed.) 370
[54] Schiefer (2002) *Outsourcing, Auftragsvergabe, Betriebsübergang* (4th ed.) 370
[55] Schiefer (2002) *Outsourcing, Auftragsvergabe, Betriebsübergang* (4th ed.) 370

An exception is the universal succession in terms of § 324 German Company Transformation Act (UmwG)[56]. According to this paragraph § 613a subsection 1 and subsection 4 are applicable when there is a merger, business unit division or an exchange of assets.

cc) Indicators to determine the Identity of the economic Entity

After it has been established that an economic entity has been transferred it is decisive to determine whether the entity in question retained its identity after it has been transferred, since the aim of Directive 2001/23/EC and § 613a is to ensure continuity of employment relationships within an economic entity, regardless of any change of ownership.

(1) Criteria to test the Effectiveness of the Transfer

Criteria to test if a transfer of a business has taken place in such a manner that the entity retains its identity were laid down in *Spijkers v Gebroeders Benedik Abbatoir CV*[57] which concerned a transferor company that had entirely ceased its activity and dissipated its goodwill by the time it had sold its assets, a slaughterhouse and the premises. There it was held that the decisive criterion for establishing whether there is a transfer for the purposes of the Directive is whether the business in question retains its identity after the transfer.

The court held, that "*[...] a transfer of an undertaking, business or part of a business does not occur merely because its assets are disposed of. Instead it is necessary to consider, in a case as the present, whether the business was disposed of as a going concern, as would be indicated, inter alia by the fact that its operation was actually continued or resumed by the new employer, with the same or similar activities. In order to determine whether those conditions are met, it is necessary to consider all the facts characterising the transaction in question, including the type of undertaking or business, whether or not the business's tangible*

[56] This section determines that the transformation provisions do not override the general transfer provisions laid down in § 613a BGB.

[57] *Spijkers v Gebroeders Benedik Abbatoir CV* C-24/85 (1986) *ECR* 1119 (ECJ)

assets, such as buildings or moveable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities are suspended. It should be noted, however, that all those circumstances are merely single factors in the overall assessment which must be made and must therefore not be considered in isolation"[58].

The key test is whether there is a transfer of an economic entity that retains its identity after the transfer. Where there is a loss of identity, the Directive will not apply.

When making a factual decision as to whether a transfer has taken place, the type of business carried on and the production or operating methods employed should be considered to assess the weight to be attached to each of the *Spijkers* criteria.

The Spijkers judgement was basically confirmed in *Watson Rask and Christensen*[59], *Redmond Stichting v Hendrikus Bartol*[60], *Landsorganisationen i Denmark v Ny Molle Kro*[61] and *P Bork International v Foreningen of Arbejdsledere I Danmark*[62].

In accordance with the decisions of the ECJ the BAG[63] has also come to accept in the meantime that the question if there is a transfer of a business or part of a business in the way that the economic entity retains its identity is to be examined by the following criteria[64]:

1. Type of business
2. Take over of tangible operating resources
3. Value of intangible assets taken over

[58] *Spijkers v Gebroeders Benedik Abbatoir CV* C-24/85 (1986) *ECR* 1119 (ECJ) at para 13
[59] *Watson Rask and Christensen v ISS Kantinservice A/S* C-209/91 (1992) *ECR* I-5755 (ECJ)
[60] *Dr Sophie Redmond Stichting v Hendrikus Bartol and others* C-29/91 (1992) *ECR* I-03189 (ECJ)
[61] *Landsorganisationen i Danmark for Tjenerforbundet i Danmark v Ny Molle Kro* 287/86 (1987) *ECR* 05465 (ECJ)
[62] *P Bork International v Foreningen of Arbejdsledere I Danmark* (1988) *ECR* 3057 (ECJ)
[63] BAG 1997 *NZA* 1050
[64] This list of factors is not exhaustive.

4. Take over of employees
5. Transfer of customer or business relations
6. Similarity between the activities carried on before and after the transfer
7. Period for which the activities are suspended

The general principles concerning the weighing up of certain factors laid down in the *Spijkers* case and adopted by the BAG apply to the transfer of a business as well as to the transfer of part of a business.

(2) Requirements on the Identity of the Economic Entity

A complete identity between the business or part of the business before and after the transfer is not necessary. Even if single assets, such as machines, premises or patents etc are not transferred, there can still be a transfer of a business or part of a business. It is important though that there is still an organizational unit which can be individualised[65]. Here the type of business continues to be relevant for the definition of a transfer of business or part of a business in that different operating methods may require a different emphasis in the overall assessment. The conceptual classification of the business as manufacturing, service, trading or mixed business is not the crucial criteria to determine which assets are essential for the continuation of the business but it can be an helpful indication[66].

(3) Guidelines of the BAG

The transfer of an economic entity that retains its identity after the transfer is always given if the exercised functions are actually carried on or resumed by the new owner with similar activities[67]. Since the circumstances are rather problematic in a lot of cases, the 8th Senat[68] of

[65] BAG 1987 *NZA* 123
[66] BAG 1994 *NZA* 612
[67] *Redmond Stichting v Hendrikus Bartol* C-29/91 (1992) *ECR* I-3189 (ECJ); *P Bork International v Foreningen of Arbejdsledere I Danmark* (1988) *ECR* 3057 (ECJ)

the BAG, partly with reference to the views of the ECJ, has elaborated a guideline[69] in form of specific cases for different types of businesses to give some guidance.

(a) Trade and Service Enterprises

(aa) Take-over of the Majority of Employees

An important indication of an entity that retains its identity after a transfer is the take-over of the majority of the employees by the new employer. This applies especially for sectors where an economic entity is able to function with no significant tangible or intangible assets involved, which are labour intensive sectors, e.g. cleaning, where manpower is essential[70].

Until 1995[71] the BAG saw the transfer of the employees as a legal consequence and not as a criterion of the transfer of a business[72]. The problem of this definition was that the intended purpose of § 613a is to close a gap in the dismissal protection and to avoid that employees lose their workplace even though the workplace still exists with the new owner[73]. The legal consequences of § 613a are supposed to affect the acquirer who wishes to capitalise on the economic advantages of the transferred entity[74]. Therefore the employees should also belong to the transferred business.

The ECJ on the other hand held in *Süzen* that "*in labour-intensive sectors, a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity, and such an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their number and skills, of the employees specially assigned by his predecessor to*

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[68] The 8th Senat is a special chamber of the BAG that is responsible, amongst others, for jurisprudence concerning the transfer of businesses.
[69] Annuß G "Der Betriebsübergang nach "Ayse Süzen"" (1998) *NZA* 70
[70] *Süzen v Zehnacker Gebaeudereinigung GmbH Krankenhausservice* (1997) *IRLR* 255 (ECJ); *Sànchez Hidalgo and others* (1998) *ECR* I-8237 (ECJ); *Hernández Vidal and Others* (1998) *ECR* I-8179 (ECJ)
[71] BAG 1994 *NJW* 612, BAG *NZA* 1985 775
[72] BAG 1988 *NZA* 170
[73] Staudinger J (1999) *Kommentar zum Buergerlichen Gesetzbuch mit Einfuehrungsgesetz und Nebengesetzen: Zweites Buch, Recht der Schuldverhaeltnisse §§ 611-615* (13th ed.) § 613a at par 41
[74] Preis in Dieterich M et al (2004) *Erfurter Kommentar zum Arbeitsrecht* (4th ed.) § 613a at par 5

that task. In those circumstances, the new employer takes over a body of assets enabling him to carry on activities of the transferor undertaking on a regular basis."[75].

Meanwhile the BAG gave up its restrictive view concerning the transfer of the employment relationships[76]. It now takes the view, like the ECJ, that the take-over of the majority of the workforce and the acquirer continuing the business with the same or similar activities are important and strong indications of the fact that a transfer of business or part of a business has taken place. It has to be considered, as a restriction, that the importance of the criterion 'take-over of the majority of employees', is dependent on the kind of business[77].

However, in labour-intensive sectors, such as service enterprises, a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity. Important is that the acquirer is not only supposed to continue the activity; he also has to take over a major part, in terms of their number and skills, of the employees specially assigned by his predecessor to that task[78]. In this context the succession of only a function, for example the loss of a service contract to a competitor, was controversial over the past years. The main issue was whether transfer of a mere function was enough to say that there is an economic entity within the meaning of Directive 77/187/EEC, or whether the whole organisation had to be taken over. Besides, it was not clear whether a single person could be regarded as the 'majority of the employees'[79]. This problem is discussed later.

Problematic is that it has not been established yet when one can speak of 'the majority of the employees'. The BAG[80] tried to concretise the term, applying it not only to the structure of the business but also to the qualifications of individual employees. The more qualified the

[75] *Süzen v Zehnacker Gebaeudereinigung GmbH Krankenhausservice* (1997) *IRLR* 255 (ECJ) at 256
[76] since BAG 1997 *NZA* 1050
[77] BAG 1997 *NZA* 1050
[78] *Suezen v Zehnacker Gebaeudereinigung GmbH Krankenhausservice* 1997 *IRLR* 255 (ECJ); see also BAG 1999 *NZA* 420
[79] *Schmidt v. Spar- und Leihkasse der frueheren Aemter Bordesholm, Kiel und Cronshagen* 1994 *IRLR* 302 (ECJ)
[80] BAG 1998 *NZA* 638

employees, the smaller can be the number of employees that are taken-over[81]. The legal uncertainty concerning the number of employees can be shown by the fact that the BAG once held, even though the employees were basically similar qualified, that 83 % of the employees that were taken over were considered sufficient to say that there had been a transfer but in another case 75% were not considered to be enough to say that there had been a transfer[82].

According to the BAG it is relevant if the acquirer is able, by taking-over the employees voluntarily, to maintain the business without extensive organisational effort and own personnel and if the business, from the view of an outsider, basically retains its identity[83].

In a recent decision[84] the ECJ confirmed its jurisprudence, especially *Süzen*, concerning the take-over of the majority of the employees. That case dealt with the take-over of part of the personnel from the former owner of a cleaning contract. The defendant, Temco Service Industries, stated that a transfer within the meaning of the Directive had not taken place since no assets were taken over. The ECJ held though that the Directive may apply to a situation where there is a change in undertaking carrying out a cleaning contract, even though the contract does not involve any transfer of assets between the two undertakings but part of the staff is taken over by the new employer, provided that they are an essential part in terms of numbers and skills of the staff assigned to the contract.

There is no protected transfer if the acquirer takes-over the majority of the workforce but deploys them for a totally different purpose from the transferor even though he takes advantage of the economic entity[85].

(bb) Take-over of 'Know-How Carrier'[86]

[81] BAG 1999 8 *AZR* 306/98
[82] BAG 1999 *NZA* 420
[83] BAG 1999 *NZA* 147
[84] *Temco Service Industries SA v Imzilyen* (2002) *ECR* I-969 (ECJ)
[85] BAG 1999 *NZA* 420
[86] Know-How Träger (German), means 'knowledge carrier'

Another important indication of the assumption that a business has been transferred or that the entity retained its identity is the dissemination of methodological and specialised skills[87]. The BAG interprets the take-over of special trained and skilled personnel, especially managers and highly skilled employees, as an indication of a successor establishment within the meaning of § 613a. The BAG applies this rule to the concrete knowledge[88] and the individual employee is seen only as a 'know-how carrier'[89]. Therefore, the individual employees do not, as a rule, belong to the business or part of the business. In certain cases though, the individual employees may have a special meaning for the continuation of the old business since they may be regarded as intangible assets who can use their special knowledge for the acquirer[90]. There is thus a relationship between number and quality.

In a judgement in 1999[91], the BAG clarified its view concerning this particular problem. The case concerned the take-over of several lecturers and freelancers, who worked at a school for advanced vocational training. In this case, the BAG stated that, even though the lecturers were highly skilled and experienced in what they did and a transfer was admitted on its merits, the requirements of a transfer of a business or part of a business were not met since only 50% of the staff were intended to be taken over.

(cc) Take-over of Clients and Suppliers

Clients of the business and relationships with suppliers are important factors to be considered when determining whether there has been a relevant transfer. Especially in relation to trade and service enterprises the BAG[92] holds that obtaining intangible assets and the possibility to take-over the regular customers, customer records, firm and brand names as well as business relations to third persons, namely relations to suppliers and supply sources, their own

[87] Annuß G "Der Betriebsübergang nach "Ayse Süzen"" (1998) *NZA* 70
[88] BAG 1995 *NJW* 73
[89] BAG 1994 *NZA* 612
[90] BAG 1994 *NZA* 1144
[91] BAG 1999 8 *AZR* 485/97
[92] BAG 1999 *NZA* 147

goodwill and the position of the business in the market, are important to determine if there has been a transfer- or, rather, if they can be regarded as essential assets with which an independent business purpose can be pursued.

The Labour Court (LAG) Düsseldorf[93], for example, held that a transfer of a business or part of a business had taken place in a case where a doctor's surgery along with its patient's files was taken-over.

On the other hand, the BAG[94] has held that the placing of a new catering contract cannot be regarded as a transfer within the meaning of § 613a if the new contractor, who merely continued the activity of the former contractor, offers a service which he provides on the premises and with the equipment of the client without having additional economic advantages and without having the possibility to determine the utilisation of the equipment. In the end he or she did not take over client relations.

The BAG decided in the same way in a case where the issue was the external processing of orders of a customer service which was formerly run by a department store[95]. The new contractor did not take over employees or assets and therefore no customer relations. The only thing that was taken over was the contract.

(b) Manufacturing

When there is a manufacturing business, the take-over of tangible assets is an important indication for a transfer[96] provided that human know-how is not key part of it[97].

Therefore, for manufacturing businesses mostly tangible assets such as machines, vehicles, buildings, land etc. are essential. Everything that allows for a effective production has to be considered when determining whether there has been a relevant transfer[98].

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[93] LAG Düsseldorf 2000 *NZA-RR* 353
[94] BAG 1998 *BB* 696
[95] BAG 1998 *NZA* 536
[96] see BAG 1994 AP Nr.2,14,39,42,43 zu § 613a
[97] *Oy Liikenne AB v Liskojarvi and Juntunen* (2001) *ECR* I-745 (ECJ)

Only the take-over of assets by the acquirer, though, is not enough to conclude that there has been a transfer. One has to look for an organisational connection that goes beyond particular assets[99]. In certain cases, however, there can be a relevant transfer when only a single asset, for example a seagoing vessel[100], a special machine etc. is taken over.

There can also be a relevant transfer where the company name or trade mark rights are not taken over[101]. If only office equipment or machines for the workshop are taken over, there is no relevant transfer[102].

In a recent decision[103] by the BAG, the parties argued about the consequence of a take-over of freight vehicles including a driver. The car pool consisted of 12 freight vehicles but was closed down. According to the BAG, the acquirer did have the possibility to continue the activity but the vehicles were merely assets and could not in itself constitute the transfer of part of a business.

(c) Mixed Businesses

The BAG has created another group, the so- called mixed businesses which exist when there is a business that is service and production business at the same time[104]. A characteristics of the transfer of a mixed business is the actual continuation of the business purpose.

(aa) Possibility to continue the Business

Until 1997, the BAG was of the opinion that it is sufficient to assume that a relevant transfer has taken place if the acquirer had the possibility to continue the business purpose. Therefore it was decisive for the transfer of a business that the new proprietor was able to continue the

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[98] BAG 1999 *NZA* 147
[99] Richardi R, Wlotzke O (2000) *Muenchener Handbuch zum Arbeitsrecht Band 2: Individualarbeitsrect II* §124 at par 47
[100] BAG 1998 *NZA* 97
[101] BAG 1985 AP Nr. 42 zu § 613a
[102] BAG 1985 AP Nr. 42 zu § 613a
[103] BAG 1999 8 *AZR* 718/98
[104] BAG 1995 *NZA* 165

business or part of the business essentially with the operating resources that had been taken over. The BAG justified its view by stating that the only important point is the transfer of an entity which is able to function. The motivation of the acquirer must not be considered, otherwise the duty to continue the business required by § 613a could be easily circumvented[105].

(bb) Actual Continuation of the Business

According to some commentators this view was too broad[106]. It was demanded, especially as to the closure of a business, that the will of the acquirer to continue the business as a matter of fact, had to be considered before one could say that a relevant transfer had taken place. Otherwise there would be a protection of vested rights to the disadvantage of the acquirer that would go to far[107]. The implementation of § 613a can only lead to a sensible outcome if the acquirer in fact continues the business in question[108].

This latter view was subsequently adopted by the BAG. It now requires the actual continuation of the business or part of the business, so that it is not sufficient to rely on the possibility to continue the business or part of the business. The BAG therefore follows the established jurisdiction of the ECJ[109]. It has to be noted that it is irrelevant if the same or similar business activity is only temporarily continued by the acquirer. The purpose which is intended to be pursued with a transfer of a business or part of a business is not important. Even if the acquirer has the intention to close down the business, there is still a transfer in case the business or part of the business is continued for some time[110].

(d) Similarity between the Activities carried on before and after the Transfer

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[105] BAG 1987 *NZA* 419
[106] Preis U, Steffan R "Neue Konzepte des BAG zum Betriebsübergang nach § 613a BGB" (1998) *DB* 315
[107] Henssler M "Aktuelle Rechtsprobleme des Betriebsübergangs" (1994) *NZA* 915
[108] Annuß G "Der Betriebsübergang nach "Ayse Süzen"" (1998) *NZA* 70
[109] established jurisdiction since *Spijkers*
[110] BAG 1995 *DB* 1133

Also the similarity of the activity carried on before and after the transfer is important to determine if there has been a relevant transfer of a business or part thereof.

Concerning this problem, the BAG[111] had to decide a case where a restaurant which served German meals before it was transferred was continued by the new owner as a restaurant with Arabian specialities. Even though the new owner continued to run the bowling alley which belonged to the restaurant and had the same clubs using it as before, the BAG came to the conclusion that there had been no transfer of a business or part thereof. It based its decision on the facts that even though tangible assets, especially fixtures, were involved, the activity carried on after the transfer was not similar to the activity before the transfer. It also held that there had been no taking-over of the main customers.

(e) Period for which the Activities are suspended

Usually there is no transfer within the meaning of § 613a if a business or part thereof is closed down prior to the transfer. Closure and transfer are mutually exclusive[112].

To answer the question if a closure of a business or part of a business has occurred, and therefore the entity loses its identity or if there is only a dispensable discontinuity, the duration of the discontinuity has to be considered[113]. A period of time that is extensive in economic terms militates against a transfer of business or part of a business. On the other hand the reopening of the business or the resumption of the production by the acquirer at once suggest that there is no serious intention to close the business. The BAG has given a specification concerning the period of time with regard to fashion stores and restaurants. It held that there is no relevant transfer where a fashion store was continued after a closure of nine months[114]. Also the continuation of a restaurant after a closure of six months cannot be regarded as being consistent with a relevant transfer since there was an essential economic

[111] BAG 1997 *DB* 2540
[112] BAG 2003 *NZA* 93
[113] Picot G, Schnitker E (2001) ***Arbeitsrecht bei Unternehmenskauf und Restrukturierung*** (1st ed.) 130
[114] BAG 1997 *NZA* 1050

interruption, even though the acquirer focused on the same clientele[115]. An interruption is relevant in economic terms if the clientele is lost during the interruption and has to be acquired again[116]

2. South Africa

a) Protective Purpose of section 197

The spirit and purpose of section 197 is to ensure the continuity of employment if the employer changes[117] and to facilitate commercial transactions[118]. The automatic transfer of employment contracts has been controversially decided in some cases but was placed beyond doubt by the amendments to section 197 in 2002.

b) Criteria that must be satisfied for Section 197 to apply

Section 197 applies to a transfer of a business. According to section 197 (1) (a) a business includes "*the whole or a part of any business, trade, undertaking or service*". Transfer is understood as "*the transfer of a business by one employer ("the old employer") to another employer ("the new employer") as a going concern*" [section 197 (1) (b)].

aa) Transfer

First of all, section 197 requires a transfer. The court in *Schutte & others v Powerplus Performance (Pty) Ltd and another*[119] made it clear that the meaning of the word "transfer" has to be understood wider than only a sale. "*A business or part of a business, may be transferred in circumstances other than a sale. These may arise in the case of merger,*

[115] BAG 1997 *DB* 2540
[116] BAG 1997 *DB* 2540
[117] *Schutte & others v Powerplus Performance (Pty) Ltd and another* (1999) 20 *ILJ* 655 (LC) at 664 A; *Foodgro, A Division of Leisurenet LTD v Keil* 1999 (20) *ILJ* 2521 (LAC)
[118] *NEHAWU v University of Cape Town & others* (2003) 2 *BLLR* 154 (CC) at par 53
[119] *Schutte & others v Powerplus Performance (Pty) Ltd and another* (1999) 20 *ILJ* 655 (LC)

takeover or as part of a broader process of restructuring within a company or a group of companies. Transfer can take place by virtue of an exchange of assets or a donation"[120].

It does not matter if the transfer takes place by a series of two or more transactions[121].

bb) Business or Part thereof

Concerning the terms 'business' or 'part of a business' the South African courts have been guided by the approach adopted by the ECJ, especially in *Spijkers v Gebroeders Benedik Abbatoir CV*[122] as well as by the Acquired Rights Directive. Therefore it is important if there is an economic entity which is capable of being transferred. The transfer of a business as a whole is rather unproblematically. Difficulties have arisen from the practice of 'outsourcing'. It is not clear when an outsourcing practice amounts to a transfer of a 'part of a business, trade, undertaking or service' within the meaning of s 197[123].

cc) Going Concern

Different from the German position s 197 requires that a "going concern" must be transferred. The first time where an explicit interpretation was made of the term "going concern" in South Africa was in *Schutte & others v Powerplus Performance (Pty) Ltd and another*[124].

Before that, the labour courts mentioned the phrase "going concern" only in an obiter dictum. In *Manning v Metro Nissan- a Division of Venture Motor Holdings Ltd*[125], as an example, the Court held that the term "going concern" was adopted to distinguish a sale of a business or part thereof from a sale of assets or shares. It stated that, to establish that there has actually been a transfer, the business must be "active and operating".

[120] *Schutte & others v Powerplus Performance (Pty) Ltd and another* (1999) 20 *ILJ* 655 (LC) at 671 A-C
[121] Smit N "The Labour Relations Act and transfer of undertakings: The notion of a transfer" (2003) *De Jure* 342
[122] *Spijkers v Gebroeders Benedik Abbatoir CV* C-24/85 (1986) *ECR* 1119 (ECJ)
[123] This problem is discussed below in Chapter 2 III 3.
[124] *Schutte & others v Powerplus Performance (Pty) Ltd and another* (1999) 20 *ILJ* 655 (LC)
[125] *Manning v Metro Nissan- a Division of Venture Motor Holdings Ltd* (1998) *ILJ* 1181 (LC)

In *Miriam Kgethe & Others v LMK Manufacturing (Pty) & another*[126] the Labour Appeal Court held, in relation to the phrase "going concern", that there is a transfer if the transferee proceeds with the business on the same premises where the transferor has carried out its business.

However, Seady J in the *Schutte* judgement analysed foreign law, especially the *Spijkers*[127] judgement and came to the following conclusion to determine whether a business was transferred as a "going concern":

"*An approach for determining whether a business has been transferred [as a going concern] can be distilled from the discussions of the ECJ and the English courts. It is an approach that examines substance and not form; that weighs the factors that are indicative of a transfer of a business against those that are not; that makes an overall assessment of the facts, not treating any one as conclusive in itself*"[128].

Seady J approved to the test used by the ECJ, namely if

- the economic entity remained in existence
- its operation had been taken over
- the same or similar activities are being continued[129].

This definition reflect the approach of the ECJ whether an economic entity retained its identity after a transfer.

In *NEHAWU v University of Cape Town & others*[130] Mlambo J was of the opinion that the phrase "going concern" meant nothing more than "continue in actual operation". Stating this he referred to the case of *General Motors SA (Pty) Ltd v Besta Auto Component*

[126] *Miriam Kgethe & Others v LMK Manufacturing (Pty) & another* (1998) *ILJ* 524 (LAC)
[127] *Spijkers v Gebroeders Benedik Abbatoir CV* C-24/85 (1986) *ECR* 1119 (ECJ)
[128] *Schutte & others v Powerplus Performance (Pty) Ltd and another* (1999) 20 *ILJ* 655 (LC) at 667 I- 668 A
[129] *Schutte & others v Powerplus Performance (Pty) Ltd and another* (1999) 20 *ILJ* 655 (LC) at 672 D-E
[130] *NEHAWU v University of Cape Town & others* (2000) 7 *BLLR* 803 (LC)

Manufacturing (Pty) Ltd & Another[131], where Kannmeyer J quoted with approval the following passage from an important Australian judgement:

"*The words 'as a going concern' are merely intended to mean that the shop is being kept open instead of being closed up, and that the customers are being kept together, so that if the purchaser wishes to keep on the business he can do so; that ... the vendors only propose to sell the stock and fixtures, and they leave it to the person who buys to decide whether he will carry on the business or not, and that meanwhile, lest the purchaser should care to carry on the business, they keep it open till he takes his choice. In some cases they shut up the shop prior to the sale; in others they keep it 'going' so that the trade may not be broken and dispesed*"[132].

The Constitutional Court in *NEHAWU*[133] basically affirmed the view of Seady J in *Schutte* and held: "*In deciding whether a business has been transferred as a going concern regard must be had to the substance and not the form of the transaction. A number of factors will be relevant to the question whether a transfer of a business as a going concern has occurred, such as the transfer or otherwise of assets both tangible or intangible, whether or not workers are taken over by the new employer, whether customers are transferred and whether or not the same business is being carried on by the new employer. What must be stressed is that this list of factors is not exhaustive and that none of them is decisive individually. They must all be considered in the overall assessment and therefore should not be considered in isolation*"[134].

3. Summary and Comparison

[131] *General Motors SA (Pty) Ltd v Besta Auto Component Manufacturing (Pty) Ltd & Another* (1982) 2 *SA* 653 (SE)
[132] *Ferne v Wilson* (1900) 26 VLR 422 at par 437 as cited in *NEHAWU v University of Cape Town & others* (2000) 7 *BLLR* 803 (LC) at para 33
[133] *NEHAWU v University of Cape Town & others* (2003) 2 *BLLR* 154 (CC)

[134] *NEHAWU v University of Cape Town & others* (2003) 2 *BLLR* 154 (CC) at par 56

§ 613a as well as section 197 are employment protection provisions. Their main goal is the protection of the employment relationships if someone else acquires the business, and to find a balance between the employer's interest in the economic efficiency of the business and the employee's interest in job security.

As for the term business or part of a business or undertaking both countries have an almost identical approach in focusing on the economic entity.

The German Labour Courts completely adopted the approach developed by the ECJ and later by the Directive when defining the term business or part of a business or undertaking.

The ECJ and the BAG have developed guidelines for different kinds of business to determine if the entity in question retained its identity after the transfer and therefore if a relevant transfer has taken place. These guidelines are flexible.

Although the South African Courts have not expressly considered the factors laid down in the *Spijkers* judgement in all cases their approach involves very similar criteria. Guidelines or a test to determine whether a business or part thereof has been transferred are missing in South African jurisprudence. An attempt to develop a consistent test was made in the *Schutte* case where the judge has held that form has to be examined over substance. Factors that are indicative for a transfer had to be weighed up against those who are not. Seady AJ referred to the jurisprudence of the ECJ as well as to the Directive and the United Kingdom TUPE regulations, which result from the Directive, and follows their approach but does not make an own approach which would be applicable for South Africa.

One has to bear in mind that the BAG as well as the ECJ have worked with the problem of transfer of undertakings for several decades now. The guidelines have been developed over years. Section 197 has been in force since 1996. It was, as it is now, only enacted in 2002. It cannot be expected that a relevant test can be developed in such a short period of time. Matters like this have to be evolved over several years. What kind of test will be developed in

South Africa remains to be seen. Quite certain is that it will probably be very similar to the test of the ECJ and the BAG since it is submitted that section 197 is based to a large extent on the Acquired Rights Directive and the TUPE regulations. Besides, the approach in *Schutte* and *NEHAWU* (CC) makes it clear that the Directive plays an important role in interpreting section 197. A flexible test would be appropriate.

When it comes to a transfer South Africa, the Directive and Germany follow a wide approach. In Germany it does not matter what kind of legal transaction has caused the transfer. The application of § 613a is not limited to a sale of a business or part thereof. A transfer can also be effected by means of a donation, a lease or some other kind of disposition. Important is that there is a change in the legal or natural person responsible for carrying on the business. It does not matter if the transfer takes place by one or a series of transactions. In Germany emphasis is placed more on the result on a transaction but not on the change of ownership as such.
In South Africa transfer is defined in section 197. It has to be said though that the definition contained in s 197 is not very helpful. It only makes clear that transfer means the transfer of a business by the old employer to the new employer. Taking just the wording of this definition it is not clear what kind of transactions are included. It can also be understood that only transactions between the old and the new employer are included and not indirect transactions. An interpretation of the term transfer by the court is therefore needed. Seady AJ made it clear in the *Schutte* case that the legislator wants a transfer to be understood wider than including only a sale. Important is that the business is taken over by the new employer. The kind of transaction which leads to the change of ownership is irrelevant. In South Africa it also does not matter if a transfer is effected by one or a series of transactions.

In both countries a change of the majority of shareholders in a company is no relevant transfer since there is no change in the identity of the employer. There is also no relevant transfer when only assets are transferred.

Concerning a transfer there is no difference in German and South African law since both countries have adopted the approach developed by the ECJ and the Directive.

One difference between Germany and South Africa when it comes to a transfer is, that the transfer of an undertaking, business or part of a business to another employer referred to in section 197 (1) (b) is one "as a going concern" whereas § 613a refers to a transfer of a business or part of a business by means of a legal transaction. The Directive also does not contain the phrase "as a going concern".

The expression "going concern" has been subject to several interpretations. Basically it means that the business must continue to be in operation after the transfer even though there might have been a short closure. However, the same or similar activities must be continued after the transfer.

The question in this context is if the inclusion of the term "going concern" in section 197 adds any specific meaning to the section.

The common interpretation of a "going concern" strongly reminds of the criterion "similarity between the activities carried on before and after the transfer" laid down in the *Spijkers* judgement and adopted by the BAG and, therefore, if the business in question has retained its identity after the transfer.

It seems that the term "going concern" finds applicability in cases where a business or part thereof is closed down prior to the transfer. The South African labour courts have not provided any indication yet if section 197 is applicable in cases of closure or if the shutdown prior to the transfer is only one factor that has to be weighed up against other factors to determine if a business has been transferred. Also uncertain is for what period of time a

business or part thereof has to be closed to state that it is not a "going concern" anymore. Taking the interpretation of the term "going concern" by the *Spijkers* and the *NEHAWU* judgement it is probably supposed to mean that a closure prior to the transfer is only one factor that has to be weighed up against other factors to determine whether a relevant transfer has taken place.

The BAG deals with this specific question in taking the criterion "period for which the activities are suspended" into account to determine if a business or part thereof has been transferred. According to it an economically extensive period of time militates against a transfer of a business or part of a business.

In conclusion it is suggested that the term "going concern" does not provide for greater clarity when interpreting section 197. It was originally adopted to distinguish the sale of a business from a sale of assets or shares. Its interpretation in *Schutte* and *NEHAWU* simply reflects part of the *Spijkers* criteria. These criteria though relate to whether what has been transferred is an economic entity retaining its identity after a transfer.

III. Outsourcing

One problem that arises in determining whether a part of a business has been transferred is that in many cases the transferee does not want the consequences of § 613a or section 197 and that, rather, an activity is being outsourced. As a consequence the employees do not enjoy the special protection of § 613a or section 197 since the consequences laid down in these regulations only apply to a relevant transfer.

Outsourcing is defined as a process whereby activities traditionally carried out internally are contracted out to external providers[135]. Outsourcing mostly affects service enterprises and

[135] Domberger *The Contracting Organization A Strategic Guide to Outsourcing* (1998) 12

ancillary functions. Many enterprises transfer, for example, their accounting department to foreign countries[136].

Restructuring and reorganisation of business have always been common. In former times it was traditional to do as much as possible in one's own business. For example, legal departments as well as advertising departments were extended, so no external firm was involved. Nowadays outsourcing is a method which is increasingly common and the outsourcing market is growing and evolving faster than ever before. Almost all activities that a business can handle more cost-effective are outsourced to external providers[137]. Contactors often offer better performance by means of their specialised enterprise. They also try to lower costs as much as possible.

But there are not only advantages when it comes to outsourcing. Possible risks are loss of control, loss of know-how and competency and loss of image. Furthermore, the costs and the time involved when it comes to outsourcing can be quite high. There can also be problems concerning the personnel in the course of the transfer[138].

Outsourcing involves two competing interests, namely the need of the employer to restructure and the protection of employees in case of business restructuring.

In *Fawu v General Food Industries Ltd*[139], the court acknowledged that outsourcing is an important management strategy that promotes the efficient operation of the business. On the other hand, it stated that, from a trade union point of view, the power to outsource is also the power to destroy[140].

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[136] Stueck V "Outsourcing- K.o. durch die Rechtsprechung?" (2004) *Arbeit und Arbeitsrecht* 10
[137] Ziemons H "EuGH-Rechtsprechung versus unternehmerische Entscheidungsfreiheit" (1995) *ZIP* 987
[138] Stueck V "Outsourcing- K.o. durch die Rechtsprechung?" (2004) *Arbeit und Arbeitsrecht* 10
[139] *Fawu v General Food Industries Ltd* (2002) 10 *BLLR* 950 (LC)
[140] *Fawu v General Food Industries Ltd* (2002) 10 *BLLR* 950 (LC) at 967

The difficulty when it comes to outsourcing is that usually no tangible or intangible assets are involved. The economic entity is made only of the activity and the workforce engaged to perform it. As a consequence, many of the factors to determine whether a transfer has taken place are inappropriate in outsourcing cases. The only factors that can be taken into account to answer the question if part of a business has been transferred is the continuation of the activity and the transfer of the workers.

The main question in cases of outsourcing is, when such a service or activity constitutes part of a business or undertaking.

1. Development of the ECJ jurisprudence concerning Outsourcing

Probably the most controversial area concerning the question of the application of the Acquired Rights Directive and therefore § 613a has been in outsourcing cases. The Directive tries to find a balance between employment protection and managerial prerogative. In the judgements *Watson Rask*[141] and *Christel Schmidt*[142], two quite old judgements, the ECJ considered contracts with external providers as a transfer of a part of a business. As a consequence the Directive and § 613a applied. To ensure more labour market flexibility the ECJ has changed its approach subsequently.

a) Watson Rask[143]

Watson Rask is one of the first cases where the ECJ ruled that ancillary activities exclusively rendered for the benefit of the transferor do not per se preclude the applicability of the Directive. This case dealt with the contracting out of services. ISS, a catering contractor, had a contract under which it became fully responsible for managing a canteen which was run in-house before. Philip's, who ran the canteen before, paid ISS in return a fixed monthly sum

[141] *Watson Rask and Christensen* C-209/91 (1992) *ECR* I-5755 (ECJ)
[142] *Schmidt v Spar- und Leihkasse der frueheren Aemter Bordesholm, Kiel und Cronshagen* 1994 *IRLR* 302 (ECJ)
[143] *Watson Rask and Christensen* C-209/91 (1992) *ECR* I-5755 (ECJ)

and allowed ISS to use the premises free of charge. Philip's retained ownership of the canteen. As a result of this, Ms Rask was dismissed and claimed unfair dismissal because she refused to accept a change to her employment conditions. Ms Christensen also complained about the changes imposed by the new management. One issue the ECJ dealt with in this case was if there was a transfer when Philip's contracted out the canteen service. The ECJ found that the Directive applies to a situation where there is contracting out of an operation.

b) Christel Schmidt[144]

One sensational judgement especially in Germany was the case of Christel Schmidt.

The tenor of the judgement reads as follows:

"*The cleaning operations of a branch of an undertaking can be treated as a "part of a business" within the meaning of Article (1) 1 of EEC Directive 77/187, where the work was performed by a single employee before being contracted out to an outside firm*"[145].

The facts of the case are as follows: Mrs Schmidt was employed as a cleaning lady by the Spar- und Leihkasse der früheren Ämter Bordesholm, Kiel und Cronshagen at a monthly wage of DM 413,40. She was the only cleaning lady employed at a bank in Wacken. The Defendant took this branch over on the 1st of July 1990. In February 1992 Mrs Schmidt was dismissed because the bank was renovated and extended and the bank decided to contract out the cleaning to a firm called Spiegelblank, which already cleaned its other premises. Spiegelblank offered Mrs Schmidt reemployment at a higher monthly wage. Mrs Schmidt rejected this offer since she would earn a lower hourly wage under the conditions offered by Spiegelblank. Mrs Schmidt challenged her dismissal in court, on the ground that her dismissal was not socially justified under the law on protection of unfair dismissal. The Labour Court held that the savings bank could dismiss her based on operational reasons.

[144] *Schmidt v Spar- und Leihkasse der frueheren Aemter Bordesholm, Kiel und Cronshagen* (1994) *IRLR* 302
[145] *Schmidt v Spar- und Leihkasse der frueheren Aemter Bordesholm, Kiel und Cronshagen* (1994) *IRLR* 302 at 302/303

Mrs Schmidt went to appeal before the Schleswig-Holstein Labour Court. The court wondered whether the transfer of the cleaning operations is a transfer of a part of a business with respect to the Council Directive. It referred the following question to the ECJ for a preliminary ruling:

"*1. May an undertaking's cleaning operations, if they are transferred by contract to a different firm, be treated as part of a business within the meaning of Directive 77/187/EEC?*

2. If the answer to question 1 is in principle in the affirmative, does that also apply if prior to the transfer the cleaning operations were undertaken by a single employee?"[146].

To the great astonishment of German lawyers and contrary to the opinion of the German government the ECJ found that the transfer of the cleaning operation was a transfer of a part of a business even though the work was performed by a single employee.

The astonishment of the German government was based on the fact that the term "business or part of a businesses" was defined differently in German law. The ECJ understood under the term "business" an economic entity. In the case at hand, the ECJ held that the business retained its identity after the transfer. It said that "*[t]he retention of the identity is indicated, inter alia, by the actual continuation of resumption by the new employer of the same or similar activities. In the present case, the similarity in the cleaning work performed before and after the transfer, which was reflected in the offer to re-engage the employee in question, was typical of an operation which comes within the scope of the Directive and which gives the employee whose activity has been transferred the protection afforded by the Directive*"[147].

The jurisprudence of the ECJ caused a lot of criticism and uncertainty, especially in Germany. It was said that this judgement meant the end of outsourcing. This judgement could be understood as meaning that every transfer of a single activity has to be classified as a transfer of a business or part of a business.

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[146] *Schmidt v Spar- und Leihkasse der frueheren Aemter Bordesholm, Kiel und Cronshagen* (1994) *IRLR* 302 (ECJ)

[147] *Schmidt v Spar- und Leihkasse der frueheren Aemter Bordesholm, Kiel und Cronshagen* (1994) *IRLR* 302 (ECJ) at 303

Great activity took place and the European Commission submitted a proposal for the amendment of the Directive. In Article 1 I 2 of the Directive's draft it was explicitly formulated that the transfer of only an activity does not constitute a transfer of a business or part thereof. As a result the amending Council Directive 98/50/EC of 29th of June 1998 reads in article 1 paragraph 1 b): "*[...] there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.*"

c) Ayse Süzen[148]

It was against the background of the *Schmidt* case that the German court again referred the question if a transfer of part of a business has taken place to the ECJ in *Süzen*.

The facts of the case are as follows: Zehnacker had a contract to clean a school in Bonn Bad-Godesberg. Mrs. Süzen was employed by Zehnacker. The school terminated the cleaning contract with effect from 30th of June 1994. The cleaning was contracted out to Lefarth. As a result, Mrs Süzen together with seven other cleaners, was dismissed when Zehnacker lost the contract. Mrs Süzen claimed that her dismissal had been invalid and relied on Directive 77/187/EEC.

The Labour Court in Bonn referred the following questions to the ECJ for a preliminary ruling:

"*1. On the basis of the judgement of the Court of Justice of 14 April 1994 in case C-392/92 Schmidt and 19 May 1992 in case C-29/91 Redmond Stichting, is Directive 77/187/EEC applicable if an undertaking terminates a contract with an outside undertaking in order then to transfer it to another outside undertaking?*

[148] *Süzen v. Zehnacker Gebaeudereinigung GmbH Krankenhausservice* (1997) *IRLR* 255 (ECJ)

2. Is there a legal transfer within the meaning of the Directive in the case of the operation described in Question 1 even if no tangible or intangible assets are transferred"[149]?

In order to determine if Mrs Süzen's dismissal was lawful the court had to determine whether a transfer of a business or part of a business had taken place in the case at hand. If so, Mrs Süzen's employment relationship would continue unchanged with the intervener.

The Advocate-General argued, in reference to existing case law, especially *Schmidt*, that it is possible that a transfer like the one in the case at hand can fall within the scope of the Directive. He stated though that this case constitutes an opportunity to reflect on the criteria laid down in earlier rulings. For him, "*to transfer the facilities (of whatever kind) required by an undertaking to another body is a decision in competitive circumstances, which ensures a choice between several competing rivals*"[150]. In the reason for its decision, the ECJ, to the great relief of the German lawyers, held that the transfer of just an activity is not enough to assume that an economic entity had been transferred. "*The mere loss of a service contract to a competitor cannot by itself indicate the existence of a transfer within the meaning of the Directive*"[151].

d) Sanchez Hidalgo[152] and Hernandez Vidal [153]

The ECJ followed its approach in *Süzen* in two later cases, namely *Sanchez Hidalgo* and *Hernandez Vidal*, which have almost identical judgements. There the ECJ held that, for there to be a transfer, the new employer must take over a body of assets which enables the new employer to carry on the activities. The ECJ concluded that an economic entity "*cannot be reduced to the activity entrusted to it. Its identity also emerges from other factors, such as its*

[149] *Süzen v. Zehnacker Gebaeudereinigung GmbH Krankenhausservice* (1997) *IRLR* 255 (ECJ) at 255
[150] *Süzen v. Zehnacker Gebaeudereinigung GmbH Krankenhausservice* (1997) *IRLR* 255 (ECJ) at 257
[151] *Süzen v. Zehnacker Gebaeudereinigung GmbH Krankenhausservice* (1997) *IRLR* 255 (ECJ) at 256
[152] *Sànchez Hidalgo and others* (1998) *ECR* I-8237 (ECJ)
[153] *Hernández Vidal and Others* (1998) *ECR* I-8179 (ECJ)

workforce, its management staff, the way in which work is organised, its operating method or indeed, where appropriate, the operational resources available to it"[154].

e) Oy Liikenne AB v Liskojarvi and Juntunen[155]

Maybe the most striking case of the post-*Suezen* cases is the *Oy Liikenne* case.

The question of this decision again was whether there was a transfer within the meaning of the Directive.

The case concerned the operation of seven bus-routes, previously operated by a contractor , which were transferred to Oy Liikenne. The incoming contractor used its own buses. It also took over 33 of the 45 dismissed drivers who applied for work and 18 further drivers but on less favourable terms. No assets were transferred apart from some uniforms.

After repeating the principles laid down in *Suezen*, and later repeated in *Sanchez Hidalgo* and *Hernandez Vidal,* that in certain labour-intensive sectors an entity may retain its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part of the workforce, the ECJ held, that: *" bus transport cannot be regarded as an activity based essentially on manpower, as it requires substantial plant and equipment. The fact that the tangible assets used for operating the bus routes were not transferred from the old to the new contractor therefore constitutes a circumstance to be taken into account*[156].

[...] However, in a sector such as scheduled public transport by bus, where the tangible assets contribute significantly to the performance of the activity, the absence of a transfer to a significant extent from the old to the new contractor of such assets, which are necessary for

[154] *Sànchez Hidalgo and others* (1998) *ECR* I-8237 (ECJ), *Hernández Vidal and Others* (1998) *ECR* I-8179 (ECJ) at par 30

[155] *Oy Liikenne AB v Liskojarvi and Juntunen* (2001) *ECR* I-745 (ECJ)

[156] *Oy Liikenne AB v Liskojarvi and Juntunen* (2001) *ECR* I-745 (ECJ) at para 39

the proper functioning of the entity, must lead to the conclusion that the entity does not retain its identity"[157].

Surprisingly, since the majority of the workforce did transfer and the same service was provided on the same routes, the ECJ held that there has been no transfer of a business or part of a business. The BAG probably would have found that a business or part of a business had been transferred since not only a major part of the workforce transferred but also, as the most important asset, the exclusive right to operate buses on specific routes.

As a reason the ECJ stated that bus-transportation is an activity which is not based essentially on manpower. It ruled against a transfer because there was no transfer of key assets, namely buses. Doing that, it elevated this one factor (assets) above the others contrary to its earlier decisions[158] where it had held that all the facts characterising the transaction in question have to be considered and none of these factors should be considered in isolation.

It is not clear what degree of manpower and equipment is necessary in an undertaking to conclude whether the entity has retained its identity after a transfer.

f) Abler[159]

In a recent decision the ECJ made clear that a purposive approach will be followed in situations where service contracts change hands. Service providers who receive a service contract but want to avoid the effect of the Directive and, consequently, of § 613a may find that, even if they do not take over any assets or employees, the ECJ will still find that there has been a transfer of a business or part of a business.

The facts of the case were as follows: The 22 plaintiffs worked for a catering service, which supplied the patients and the staff of an Austrian hospital with meals. The production of the meals took place in the rooms of the hospital. The company provided all aspects of the

[157] *Oy Liikenne AB v Liskojarvi and Juntunen* (2001) *ECR* I-745 (ECJ) at para 42
[158] Especially *Spijkers v Gebroeders Benedik Abbatoir CV* C-24/85 (1986) *ECR* 1119 (ECJ)
[159] *Carlito Abler and Others v Sodexho MM Catering Gesellschaft mbH* C-340/01 (2003) *ECR* 00000 (ECJ)

catering services, including e.g. drawing up the menus and buying, preparing and serving the food. The hospital provided the premises on which the company worked, and the water, energy and equipment which it used. After preceding disputes, the hospital terminated the contract with the catering service. The hospital then engaged the defendant for the supply of the meals. It also worked in the rooms of the hospital and was provided with water, energy etc., but took over neither the employees nor goods and supporting documents from the former service provider. The former service provider dismissed its employees after that. The employees then alleged that their working relationship continued with the defendant.

In first instance, the action of the employees was dismissed because, according to the court, there was no transfer of a business or part of a business. The appeal court was of a different opinion. On appeal the Austrian Highest Law Court referred the question if a transfer of a business or part of a business within the meaning of Directive 77/187/EEC had taken place, to the ECJ for a preliminary ruling.

Surprisingly, since all that had transferred was the activity and the permission of the hospital to use its facilities when engaging in the activity; and none of those engaged in the activity and none of the materials owned by the transferor were taken over by the transferee, the ECJ answered in the affirmative. It held that catering cannot be regarded as an activity which is only based on manpower. Catering requires a significant amount of equipment. The tangible assets had been taken over by the defendant. On account of her commitment to prepare the meals in the kitchen of the hospital, the transfer of the premises and the stock is sufficient to say that a transfer of an economic entity had taken place. Besides that, the plaintiff took over the customers of its predecessor. That was the reason why the failure to take over the staff was not important in the case at hand.

In the past, services such as catering were not be seen by the ECJ as being dependent on personnel for their identity, but dependent on assets. In the *Abler* case the fact that these did not change hands did not prevent a transfer of an undertaking taking place.

2. German Approach

The *Schmidt* decision of the ECJ had great influence on the BAG jurisprudence concerning contracting out. As shown earlier, the BAG had always held that the transfer of employees or contracts of employment was a legal consequence of transfer but not a criterion in deciding whether a transfer had taken place. It had also held, that the take-over of just a function is never a relevant transfer of a business or part thereof.

In a decision of 1994[160], as a result of the *Schmidt* judgement, the BAG held that the take over of a relevant number of the employees at a service undertaking, was deemed to indicate strongly that there was a transfer of a business or part of a business. In the judgement the BAG reasoned very strangely in order not to depart from the previous line of decisions. It argued as follows: The know-how in the heads of the employees has to be seen separately from the subjects of the know how. This know-how was treated as an intangible asset which had been transferred with the employees and would constitute the transfer of the business or part of the business. Fortunately, the view held in *Schmidt* was given up in the later judgements of the ECJ, especially in *Süzen*.

Logically, the BAG[161] followed the approach of the ECJ in *Süzen*. It added though that the take-over of a major part of the workforce should not be the only factor to be taken into account to determine if a relevant transfer has taken place. This would go against the spirit and purpose of the Directive and § 613a, since the protection of the employment relationships cannot be dependent on the offer of the acquirer to further employ the employees or not[162].

[160] BAG 1994 *DB* 1144
[161] BAG 1999 *NZA* 147
[162] BAG 1998 *NZA* 638

Otherwise it would be quite simple for the transferee to avoid the application of the Directive and § 613a by not taking over any or by taking over only a few employees.

It is now clear that, as a rule, the loss of a service contract and the take-over of a function, previously performed by a third party, cannot be seen as a transfer of a business or part of a business[163]. There can be a relevant transfer though if other criteria, which suggest that the economic entity has retained its identity, are present[164]. If tangible assets are taken over in addition to the contract awarded, there can be a transfer of a business or part of a business. This applies especially if a major part of the employees are taken over in addition[165].

If the performance of the job requires the utilisation of work equipment and facilities provided by the client, an evaluation has to take place if these assets can be assigned to the contractor's own business. Only then do they have to be considered when answering the question if a transfer has taken place[166].

The assignment of a security contract, as an example, including the take-over of safety facilities of the object which has to be guarded, is not a transfer of a business or part of a business as long as the safety facilities are only there to serve the fulfilment of the contract and are not assets of the contracted company[167].

The assignment of a catering contract is also not regarded as a transfer of business or part thereof if the contractor offers a service that he or she performs on the facilities of the client without receiving an additional economic advantage and without being able to determine the kind and extent of the utilisation of the facilities[168]. This might be seen differently in the future with respect to the *Abler* decision.

[163] This will be seen differently in the future with respect to *Abler*.
[164] Schiefer (2002) *Outsourcing, Auftragsvergabe, Betriebsübergang* (4th ed.) 364
[165] BAG 1999 8 *AZR* 306/98
[166] Schiefer (2002) *Outsourcing, Auftragsvergabe, Betriebsübergang* (4th ed.) 365
[167] BAG 1998 8 *AZR* 775/96
[168] BAG 1998 *BB* 696

If there is a succession of a mere function, the take-over of assets or the transfer of a dependent part of the business the employment relationships stay with the business that is outsourcing. In those cases the outsourcer usually intends to dismiss his or her employees based on operational requirements.

With respect to the entrepreneur's managerial prerogative the labour courts allow such a step. The labour courts are entitled to investigate if there is such an entrepreneurial decision and if through its implementation the employment opportunities become unnecessary.

Accepted entrepreneurial decisions, amongst others, in Germany are:

- Winding up of a cleaning department and its transfer to an outside firm[169].
- Transfer of demolition works from a building contractor to a subcontractor[170].
- Contracting out of the accounting department and transfer to a tax consultant's bureau[171]
- Spin-off of a business' canteen[172].
- Abandonment of a firm's car pool and the transfer of eighteen vehicles as well as the transport logistics to an outside firm[173].
- The step-by-step shifting of ready-to-wear clothing to production plants abroad[174].
- Award of a contract concerning delivering and assembling of furniture from a furniture dealer to an outside firm[175].
- Awarding of painting work previously done by a single employee to an outside firm[176].
- Authorisation of external lawyers instead of employing in-house lawyers[177].

[169] BAG 1980 7 *AZR* 1093/77
[170] BAG 1999 *NZA* 1095
[171] BAG 1998 *AuR* 2002
[172] BAG 1998 *NZA* 532
[173] BAG 2000 8 *AZR* 145/99
[174] BAG 1997 2 *AZR* 657/96
[175] BAG 1998 8 *AZR* 623/96
[176] BAG 1999 2 *AZR* 740/00
[177] Stueck V "Outsourcing- K.o. durch die Rechtsprechung?" (2004) *Arbeit und Arbeitsrecht* 13

- Shutdown of a hospital's laboratory with 1,85 employees and award to an external laboratory[178].

The entrepreneurial decision cannot be verified itself but only if it is improper, unreasonable or arbitrary[179].

The main examples of abuse are[180]:

- Violation of Rights
- Violation of collective agreements[181]
- Violation of works agreements and employment contracts
- Cases of circumvention of § 613a[182]

In practice, the defective realisation of the entrepreneur's concept is often indicated by the fact that, because of an employee's dismissal, the remaining staff have to work overtime or casual workers are employed in order to get the work done[183].

The first step is to determine if an entrepreneurial decision, for example the contracting out of a cleaning operation and transfer to another company, has been taken. Here the so called 'exchange dismissals' play an important role. An entrepreneurial decision to increasingly hire subcontractors in order to carry out customer orders, for example, does not justify the dismissal of employees if the organisational structure of the business does not change but the aim is to carry out the work by cheaper employees of the subcontractor[184].

[178] BAG 2002 2 *AZR* 489/01
[179] BAG 1997 *NZA* 776
[180] Stueck V "Outsourcing- K.o. durch die Rechtsprechung?" (2004) *Arbeit und Arbeitsrecht* 12
[181] for example contractual provisions concerning the period of working time
[182] for example adjournment of employment opportunities across the group
[183] Stueck V "Outsourcing- K.o. durch die Rechtsprechung?" (2004) *Arbeit und Arbeitsrecht* 12
[184] LAG Duesseldorf 2004 - 6 (8) Sa 1723/03

The existence of an entrepreneurial decision has to be answered in the negative if the employer only intends to give up his or her formal position as employer but continues to give orders to the employees concerning their work performance[185]. The fact that the outsourcer has an element of control over the contractor, though, is only natural and is not an indication that there has not been a relevant transfer with the consequences of §613a.

In essence, the outsourcing party must not only outsource the activity, but he or she especially has to transfer his or her right to give instructions towards the employees to the service provider to a certain extent. Otherwise the courts may find that there has been an unfair dismissal since a relevant transfer of business or part of a business has taken place with the consequences of § 613a. There is no clear rule to what extent the outsourcer has to give up his right to give instructions to say that there has not been a transfer. The labour courts decide on a case by case basis.

The second question to be asked is if the entrepreneurial decision is improper, unreasonable or arbitrary. Concerning this question, the jurisprudence of the Labour Courts has become more strict over the years: Even though the external processing of orders to an outside firm because of rationalisation cannot automatically be seen as a decision that is improper, unreasonable or arbitrary, the employer has the burden of proof that this is not the case[186]. Since it is natural that contracting out is more cost-effective than keeping the employees, the outsourcer has to prepare a targeted and economic well-founded forecast in terms of future manpower requirements and its proof[187]. If there is no cost saving, an urgent requirement for the abolition of the job cannot be acknowledged[188]. In a case of the LAG Duesseldorf[189], the outsourcer merely stated that the contracting out of the public relations department was 50%

[185] BAG 1997 *BB* 260
[186] LAG Muenchen – 8 Sa 1245/97
[187] Stueck V "Outsourcing- K.o. durch die Rechtsprechung?" (2004) *Arbeit und Arbeitsrecht* 13
[188] LAG Duesseldorf 2002 *AuA* 238
[189] LAG Duesseldorf 2002 *AuA* 238

more cost-effective than the keeping of the full-time employees. The statement only was not enough for the Labour Court. The employer failed to prove that this was true.

The objection of an employee that the outside firm does the outsourced work more expensively and is not as reliable as before cannot be considered. The Labour Courts are not allowed to examine if an entrepreneurial decision is necessary and purposive. It is not their duty to dictate to the entrepreneur a better or more correct business policy. The structure of a business and if and how someone wants to run his or her business is part of everyone's managerial decision which is laid down in the Constitution[190].

3. South African Approach

In contrast to the ECJ and the BAG, very little has been said in South African case law about outsourcing.

The first case where the Labour Court had to deal with outsourcing in the context of section 197 was *Schutte & others v Powerplus Performance (Pty) Ltd and another*[191], where the judge held that the purpose of section 197 was to protect the right of workers through continuity of their employment.

In the absence of South African cases, the Labour Court looked at cases in Europe and the United Kingdom.

The employer, whose main business was renting out vehicles, had outsourced its service and maintenance work to a service provider. As a consequence the employer closed its workshop. The employees refused to accept their employer's attempt to retrench them, and filed for a

[190] BAG 2003 *NZA* 549; BAG 1999 *NZA* 1095
[191] *Schutte & others v Powerplus Performance (Pty) Ltd and another* (1999) 20 *ILJ* 655 (LC)

declaratory order to the effect that their contracts of employment had been transferred. They were of the opinion that the transaction amounted to a relevant transfer within the meaning of section 197.

Seady AJ found that it was not necessary on the facts of the case to decide if the "*outsourcing of an activity or service is in itself sufficient to constitute a transfer of a business as a going concern*"[192]. She stated though that a transfer of business had taken place in the case at hand. This was due to the fact that not only the service or function of the workshops were transferred, but several assets as well as the workplace itself were taken over by the transferee.

Therefore, the contracts of employment of the applicants had transferred to the party to whom the function of serving vehicles had been outsourced.

The first time the Labour Court did consider whether outsourcing is a transfer of business or part of a business within the scope of section 197 was in *NEHAWU v University of Cape Town & others*[193]. In this case the court changed its position.

The facts of the case were as follows: The University had decided to outsource certain of its non-core activities, such as gardening, cleaning and sports ground maintenance. After a process of consultation with a number of service providers to undertake these activities, it gave notice to the employees that had been engaged in the affected activities that their employment would be terminated due to operational requirements. Some of the affected employees applied for positions with the companies to whom the contracts had been awarded, and most of them were hired. The conditions of employment offered were predictably less favourable.

[192] *Schutte & others v Powerplus Performance (Pty) Ltd and another* (1999) 20 *ILJ* 655 (LC) at 671I-672A
[193] *NEHAWU v University of Cape Town & others* (2000) 7 *BLLR* 803 (LC)

The union approached the Labour Court and stated that the outsourcing of the functions concerned constituted a transfer of a part of the university's business as a going concern. As a result the contracts of the employees affected had been automatically transferred from the University to the service provider. The Labour Court dismissed the application.

In his judgement Mlambo J gives a detailed definition of the term outsourcing. In his opinion outsourcing "*involves the putting out to tender of certain services for a fee. The contractor performs the outsourced services and in return is paid a fee for its troubles by the employer. Where outsourcing occurs the employer pays the contractor a fee to render the services outsourced as opposed to paying salaries or wages to a group of employees to render the outsourced service. An outsourcing transaction is usually for a fixed period of time at the end of which it again goes to tender and the existing contractor could lose the contract to another contractor*"[194].

It has to be noted that this definition is a restrictive definition.

Mlambo J stated that all factors should be taken into account when one has to determine if there has been a transfer of a business or part thereof. After examining the *Schutte* and the *Foodgro* judgement he further said that the courts had so far been of the opinion that section 197 was an employee protection provision and therefore the contracts of employment transfer automatically. Mlambo J though came to a different conclusion and found that section 197 does not give rise to automatic transfer.

However, concerning outsourcing he first examined the European cases *Schmidt* and *Süzen*. After analysing these cases as well as the *Spijkers* case and the Directive, he concluded that it is important to examine the substance of the transaction and not its form. All factors pointing

[194] *NEHAWU v University of Cape Town & others* (2000) 7 *BLLR* 803 (LC) at par 30

in either direction should be weighed up and an overall assessment should be made without treating any individual fact as decisive.

Mlambo J continued and stated that the decisions of the ECJ do not provide a consistent test. This finding was especially based on the difference of the approaches followed in *Schmidt* and *Süzen.* As a consequence, he found, not expressly relying on the approaches of the ECJ, that there is a difference between outsourcing and a sale of a business:

"*In my view the sale of a business, legal transfer thereof to another employer or merger is markedly different to outsourcing. [...] In the case of a sale or legal transfer the business or part thereof changes hands permanently and the transferring or selling entity receives a consideration for the business that is transferred. The situation is different when it comes to outsourcing. The outsourcing party retains some control over the outsourced service, for example the standard of performance or service delivery must meet certain criteria set by the outsourcing party. At the end of the contract the outsourcing party could decide to perform the services itself and not invite further tenders. [...] The fact that "the university ha[d] retained some control over the outsourced services militates against a conclusion that a transfer ha[d] taken place as contemplated by s 197(1)(a)*"[195].

He stated though that it is possible that some outsourcing exercise, which is of permanent nature, can amount to a transfer of business. This is especially possible in cases where there is a transfer of assets and the outsourcing party relinquishes the control and the power to dictate standards of the outsourced service.

In the case at hand, however, it was found that UCT did not transfer the functions as a whole but other related functions were retained. Therefore, there was no outsourcing of each service but only parts of each. Although the outsourced services were identifiable economic entities, they shared the identity of the services not outsourced by the university.

[195] *NEHAWU v University of Cape Town & others* (2000) 7 *BLLR* 803 (LC) at par 31

The other factors that militated against the outsourcing of the services were, according to Mlambo J, that the outsourcing was not permanent, the outsourcer received no consideration for transferring the outsourced activity to the contractor and that the University retained some control over the outsourced services.

Consequently, the transaction in question was not considered a transfer of business or part thereof within the meaning of section 197.

This decision effectively removed outsourcing from the application of section 197 by drastically curtailing the protection it offered in all commercial transfers of businesses. For this reason it was criticized.

Bosch[196] for example, cannot see why the retention of control is an indication that there has been no transfer. In his opinion, it is only natural that outsourcing involves an element of control by the outsourcer towards the contractor. Therefore the retention of control is more an indication for a transfer rather than the other way around[197].

Furthermore, Mlambo J differentiated outsourcing from a relevant transfer by saying that a transfer is permanent but outsourcing only for a limited period of time. In outsourcing cases only the opportunity to perform the service is transferred and therefore not the business itself. This argument clearly refers to the stability of the economic entity after the transfer.

It is submitted that it is not clear why the permanence of a transfer should be a factor which leads to the conclusion that section 197 is not applicable[198]. Considering the fact that section 197 is a provision that gives effect to the right of fair labour practices laid down in section 23

[196] Bosch G "Two Wrongs Make It More Wrong, Or A Case For Minority Rule" (2002) 119 (3) *South African Law Journal* 501

[197] Bosch G "Two Wrongs Make It More Wrong, Or A Case For Minority Rule" (2002) 119 (3) *South African Law Journal* 504

[198] Bosch G "Transfer of Employment in the Outsourcing Context" (2001) 22 *ILJ* 840

(1) of the Constitution, it should have a wide coverage. This right applies to "everyone"[199]. One also has to bear in mind that section 197 is an employee protection provision.

Mlambo J also stated that none of the services which were transferred was a completely different economic entity. Therefore, there has not been a transfer of a part of a business.

This would mean that there can never be a transfer in terms of section 197 if a business or part of a business is divided well enough.

The decision in this case has the effect that, as a rule, outsourcing would never qualify as a transfer in terms of section 197 since what is being transferred cannot amount to an independent business.

According to Mlambo J there can be two cases where outsourcing of a service can be viewed as a relevant transfer: the transfer of assets and the relinquishing of control by the outsourcer. Since it is hard to believe that the outsourcer totally gives up control over the contractor, there seems to be no room for a relevant transfer in outsourcing cases.

On appeal[200] the LAC confirmed the decision of the Labour Court. The only issue that it decided, though, was whether section 197 provided for an automatic and obligatory transfer of contracts of employment when the underlying transaction assumes the form of a transfer as a going concern, or whether the section was permissive in the sense that the transferor and transferee employees could agree that it should apply.

The union applied to the Constitutional Court for leave to appeal. The Constitutional Court[201] overruled the interpretation given to section 197 by the Labour Appeal Court. The Constitutional Court left open the question whether a transfer of business or part thereof has taken place. According to the court, a number of factors should be taken into account and a

[199] Bosch G "Transfer of Employment in the Outsourcing Context" (2001) 22 *ILJ* 844
[200] *NEHAWU v University of Cape Town & others* (2002) 4 *BLLR* 311 (LAC)
[201] *NEHAWU v University of Cape Town & others* (2003) 2 *BLLR* 154 (CC)

determination made on a case by case basis. It held, regarding the purpose of transfer provisions, that "*[s]ection 197 strikes at the heart of this tension and relieves the employers and the workers of some of the consequences that the common law visited on them. Its purpose is to protect the employment of the workers and to facilitate the sale of business as going concerns by enabling the new employer to take over the workers as well as other assets in certain circumstances. The section aims at minimising the tension and the resultant labour disputes that often arise from the sale of businesses and impact negatively on economic development and labour peace. In this sense, section 197 has a dual purpose, it facilitates the commercial transactions while at the same time protecting the workers against unfair job losses*"[202].

Another case that dealt with the question if section 197 applies in outsourcing cases was *Samwu v Rand Airport Management Co (Pty) Ltd & Others*[203]. In this case, the employer outsourced security and garden services at an airport. He gave the employees in those divisions letters of retrenchment and advised them that they could apply for positions within the contracting companies. The contractors offered different conditions though. The applicants sought an order that their contracts of employment should have been transferred to the contractor in compliance with section 197.

The court held that section 197 does not apply where only an activity is outsourced. "*A service for the purpose of s197 (1) (a) must embody an entity with a separate management structure with its own goals, assets, customers and goodwill and that, accordingly, the transfer of the "gardening function" of the Rand Airport did not constitute a part of business as defined and that there was no transfer of this function as a going concern*"[204]. It also stated that the gardening functions were part of the respondent's non-core activities and that the

[202] *NEHAWU v University of Cape Town & others* (2003) 2 *BLLR* 154 (CC) at par 53
[203] *Samwu v Rand Airport Management Co (Pty) Ltd & Others* (2002) 12 *BLLR* 1220 (LC)
[204] *Samwu v Rand Airport Management Co (Pty) Ltd & Others* (2002) 12 *BLLR* 1220 (LC) at 1226

transferee and transferor did not agree on the taking-over of the employees. Besides that, following the *NEHAWU* decision, outsourcing was for a limited time only.

This judgement, too, has not gone without criticism[205]. First of all section 197 does not distinguish between core and non-core activities. The amended section 197 (1) (a) states that a business includes the whole or part of any business, trade, undertaking or service. The words 'or service' assume that also non-core activities should be included when it has to be determined if a business or part thereof has been transferred. Also, nothing is said in the section about a time limit. Besides that, the fact that transferor and transferee did not a agree on transferring the employees cannot be relevant any longer in the light of the Constitutional Court judgement in *NEHAWU*[206]. To say that there must be an entity with a separate management structure with own goals, assets, customers and goodwill is too strict[207].
Therefore Bosch suggests[208] that the following should be taken into account to decide whether the relevant entity is part of a business within the meaning of s 197:

"• *The entity must be an 'identifiable component or unit of a business, be it a division, a branch, a department, a store or a production unit', something severable from the rest of the employer's business.*

• *Utilising the terminology of the European Court of Justice, the entity in question must be sufficiently structured, 'an organised grouping of persons and assets' which facilitates the exercise of an economic activity i.e. support functions are covered.*

• *It is not necessary that the entity be a discrete profit centre. It need not be 'economically viable if conducted independently of any other commercial activity'* "[209].

[205] Du Toit D et al (2003) *Labour Relations Law* (4th ed) 431
[206] *NEHAWU v University of Cape Town & others* (2003) 2 *BLLR* 154 (CC)
[207] Du Toit D et al (2003) *Labour Relations Law* (4th ed) 431
[208] Bosch G "Business restructuring: some important labour law issues" under <www.lexisnexis.co.za/ ServicesProducts/presentations/PAPER.DOC>
[209] Bosch G "Business restructuring: some important labour law issues" under <www.lexisnexis.co.za/ ServicesProducts/presentations/PAPER.DOC 4>

4. Summary and Comparison

When it comes to outsourcing the ECJ and the BAG try to find a balance between the flexibility of contracting out and the guarantee of employment protection. The most important judgements in this regard are *Schmidt*, *Süzen* and *Abler*.

In *Schmidt* the ECJ extended the applicability of the Directive and employment protection too far. If there is a transfer within the meaning of the Directive as soon as an incoming contractor continues an activity it would in principle be impossible for companies to outsource their activities without the new employer taking over the employees. This does not provide for much labour market flexibility.

In the *Süzen* judgement, on the other hand, the ECJ decided rather restrictively. The decision can be understood as suggesting that job losses are even encouraged since the transferee can easily avoid the application of the Directive in not taking any or only a few employees over. Therefore the BAG stated that the take-over of the workforce should not be the only factor to be taken into account to determine if a relevant transfer has taken place. Complete flexibility in contracting out bears a high risk of creating two different labour markets, namely one of employees with permanent and therefore secure jobs and another of those with temporary, insecure jobs. Those with insecure jobs would be the unskilled since outsourcing usually occurs in labour-intensive sectors where no special skills are needed.

In its further judgements the ECJ basically followed its approach made in *Süzen* but decided differently in the *Oy Liikenne* case. Also the recent *Abler* decision was not in line with its other decisions and sets a new precedent. It made clear that the degree of importance attached to the *Spijkers* factors will vary according to the activity carried on.

It seems that the ECJ has not laid down a consistent test when it comes to outsourcing. The same has to be said of the BAG. Even though it developed some guidelines to determine if a

relevant transfer within the meaning of § 613a has taken place or whether, rather, an activity has been outsourced, it is bound by the decisions of the ECJ. The conflict can be shown by the fact that the BAG has held so far that under certain circumstances the award of a catering contract cannot be regarded as a transfer of business or part thereof. The ECJ, on the other hand held, despite its previous jurisprudence, decided in *Abler* that the award of a catering contract is a transfer within the meaning of the Directive even though the work was performed on the facilities of the client. The BAG will have to change its jurisprudence concerning this specific problem.

Not much has been said about outsourcing in South Africa so far. Before the decision of the Constitutional Court in the *NEHAWU*[210] case the courts had not even tried to find a balance between the protection of workers and labour market flexibility.

However, the Labour Court decision in the *NEHAWU* case practically has the effect that outsourcing will never qualify as a transfer of business or part thereof. This surely provides for labour market flexibility but there is no protection for the affected workers at all. Unfortunately the Labour Court in *Samwu* felt bound by the *NEHAWU* judgement. The current position is that either a transfer of assets along with the service or a loss of control by the outsourcing party is needed for there to be a transfer within the meaning of section 197. In practice both instances hardly ever occur. Even though the Constitutional Court overruled the Labour Court and the Labour Appeal Court it was only concerned with the automatic transfer of the contracts of employment in terms of s 197 and with the question what constitutes the transfer of business as a going concern but not with the view expressed by Mlambo J concerning outsourcing. The Constitutional Court did not make a statement if outsourcing is a transfer within the meaning of section 197. Therefore the decision of the Labour Court in *NEHAWU* is so far the most important case that dealt with this specific issue.

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[210] *NEHAWU v University of Cape Town & others* (2003) 2 *BLLR* 154 (CC)

It has to be noted that the *NEHAWU* case (LC) as well as the *Samwu* case were decided under the old section 197. The amended section 197 includes the word 'service' when defining the term business. The intention of the legislator was to widen the scope of section 197. This might help the courts to take the protection of the employees into account when they have to decide whether an outsourcing practice amounts to a transfer within the meaning of section 197.

After all it can be concluded that the ECJ and the BAG decide quite employee friendly in outsourcing case. It has to be noted though that there are many uncertainties in the jurisprudence of the ECJ and the BAG. So far they have failed to give clear guidelines.

How the South African courts decide in the future when it comes to outsourcing remains to be seen.

IV. The effects of a transfer and the power to object

1. Germany

a) The effects of a transfer

The effects of § 613a can only occur, when all elements of the section are fulfilled. These elements are described in § 613a I1 as follows: "*Where a business or part of a business is transferred to another owner by means of a legal transaction...*". The further provisions of the article deal with the individual and collective effects of the transfer of a business.

aa) Passing of the Employment Relationship

If a transfer of business has taken place, the employment relationship will pass over to the acquirer ipso iure[211]. The employment relationship with the old employer expires. Under §

[211] By operation of law

613a subsection (1) sentence 1, the acquirer succeeds to the rights and duties arising from the existing employment relationships. The contractual relationship as a whole passes over. Therefore the acquirer must fulfil all obligations arising from the transferred employment relationships as if he were the original contracting party. There need not be approval by the employees[212].

§ 613a applies only to existing employees. If the employment relationship is terminated, prior to the transfer § 613a does not apply. Hence, former employees and retirees who still have claims under a pension fond are not included[213]. The same applies to GmbH (private limited company) managing directors or members of the management board of stock corporations[214]. Problems can arise if an employee is not bound to a special unit but is working in several parts of the business (*Springer*). As a basic principle the employment relationship follows the part of the business which is transferred. Employment relationships of employees who were employed in the transferred part of the business pass over. In cases were it may not be quite clear whether the employment relationship is part of the business that is transferred, the BAG primarily refers to the will of the concerned persons and secondly to the function of the relevant part of the workplace[215].

bb) Distribution of Liability

Not only is there a substitution of the contractual party on the employer's side; § 613a also provides for a division of liability between the transferor and the transferee. The transferee is liable for all obligations arising from the employment relationships that are passed on to him or her.

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[212] BAG 1987 *NZA* 382; the employees' right to object supra
[213] BAG 1987 *NZA* 559
[214] Erman (2004) *Bürgerliches Gesetzbuch* (11th ed.) § 613a at par 42; Wank in Richardi R, Wlotzke O (2000) *Muenchener Handbuch zum Arbeitsrecht Band 2: Individualarbeitsrech II* § 124 at par 37
[215] BAG 1986 *NZA* 93

The transferee will be liable for all claims including those which arose before the business was transferred. § 613a I1 does not contain a restriction that the acquirer is liable simply for claims that arise in the future. It follows from subsection (2) sentence 1, that the omission of a restriction is not an accidental slip. In this section it is said explicitly that the former employer is "*jointly and severally liable together with the new owner*".

The acquirer is additionally liable for all claims arising from a pension fund[216].

The former employer is liable solely for claims arising from the employment relationships that have already ended at the time the business was transferred. Employment relationships that have already ended at the time of the transfer are not passed to the transferee. For claims that become due after the date of transfer, the previous owner shall be liable for them only for the fraction of the total assessment period reflecting the time elapsed before the transfer date.

The transferor and transferee are jointly and severally liable, according to § 613a subsection (1) sentence 1, for obligations that arose prior to the date of transfers and become due before the expiration of one year after that date.

Where transferee and transferor are jointly liable, they are liable as co-debtors [§§ 421-426 BGB]. Hence, an employee can assert his or her claims either against the seller or the acquirer.

Who is liable in the internal relationship between the transferee and the transferor will depend on what they have agreed on in the transfer agreement on the internal allocation of risks.

If such an agreement is absent, the seller and the acquirer are liable in equal shares[217]. Usually one can determine who is liable through the interpretation of the contract.

cc) Impact on the Employee Representative Bodies

In the case of a pure transfer of the whole business, the works council[218] has no codetermination right. A transfer of business in itself is not an operational change within the

[216] BAG 2000 AP Nr. 6 zu § 613a BGB
[217] § 426 I 1 BGB

meaning of § 111 Works Council Constitution Act[219] (BetrVG)[220] and therefore not subject to codetermination[221].

If the transfer is accompanied by an operational change, for example split-up or merger of businesses, codetermination rights might exist.

The sale of only a part of the business is generally a split-up of the business and would therefore be an operational change subject to codetermination[222] [§ 111 BetrVG sent. 2 no. 3 BGB]. To this extent, the works council's determination rights[223] must be respected.

A transfer of a business in itself has no effect on the works council as a governing body or its members. If only parts of a business is sold off, the works council has an interim mandate for all parts of the former undertaking. As soon as a new works council has been elected in the transferred part of the business the interim mandate ends[224].

dd) Continued Application of Collective Norms

§ 613a subsection (1) sent. 2-4 also covers the effects of a transfer of business on the collective provisions applicable in the seller's business[225]. If the business passes over as a whole and retains its identity, the collective agreements concluded before the business was transferred remain in force.

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[218] The works council (Betriebsrat) is the most important codetermining body under the Works Constitutional Act (BetrVG). The works council is an elected employee representational body that has its own rights vis-á-vis the employer. It exercises most of the codetermination rights.

[219] Lingemann S, v. Steinau-Steinrück R, Mengel A (2003) *Employment & Labor Law in Germany* 39

[220] § 111 BetrVG (**Operational Changes**) reads as follows: In companies with more than 20 regular employees eligible to vote, the owner shall promptly and comprehensively inform the works council of planned operational changes which could result in significant disadvantages for the personnel or a considerable part of the personnel and confer with the works council with respect to the planned operational changes. In companies with over 300 employees the works council may engage a consultant to assist it; § 80 para.4 applies mutatis mutandis. Operational changes within the meaning of sentence 1 include: 1. cutback or closure of the entire works or significant parts of the works; 2. relocation of works or considerable parts of the works; 3. amalgamation with other works or the split-up of works; 4. fundamental changes in the oranization, purpose or technical facilities of the works; 5. introduction of fundamental new work methods and production processes.

[221] BAG 1987 *NZA* 523; BAG 1980 *DB* 743

[222] BAG 1997 *NZA* 898

[223] Right to negotiate a conciliation of interest and a social plan

[224] Lingemann S, v. Steinau-Steinrück R, Mengel A (2003) *Employment & Labor Law in Germany* 39/40

[225] Works agreements and collective bargaining agreements

If only a part of the business passes over and does not retain its identity, the works agreements previously concluded for the employees will be transformed into individual contractual provisions for each employee[226]. They have the same status as the provisions of the contract of employment. The reason for this is that the employees need to be protected in case the acquirer is not bound to the collective rights.

However, according to § 613a subsection (1) sent. 3, if the transferee's business has works agreements with identical parameters, they will replace the work agreements that had been in force in the transferor's business.

If the collective bargaining agreement was negotiated between the employers association and the trade union, regional collective agreement, the transferee must belong to the employer's association in charge. The transferor's membership of the employer's association is a right that is strictly personal and can therefore not be passed automatically to the acquirer when the business is transferred[227].

If a company-union agreement is in force, it will not continue to apply on a collective basis after the transfer. The reason for this is that the transferee will normally not have been a party to that agreement. Hence, the provisions in the collective bargaining agreement which usually apply collectively will be transformed into provisions of the individual contract of employment and continue to have effect on this basis, [§ 613a subsection (1) sent. 3]. Under these circumstances, it will not be feasible to modify them to the employee's disadvantage until one year following the date of transfer [§ 613a subsection (1) sent. 2].

ee) Dismissal

§ 613a subsection (4) prohibits the termination of the employment relationship by the former employer or the new owner on account of the transfer of a business or part of a business. The

[226] Preis in Dieterich M et al (2004) *Erfurter Kommentar zum Arbeitsrecht* (4th ed.) § 613a at par 108
[227] Lingemann S, v. Steinau-Steinrück R, Mengel A (2003) *Employment & Labor Law in Germany* 40

right to terminate the employment relationship for other reasons[228] remains unaffected. The objective is to protect employees if a business is transferred.

When a business is transferred, a dismissal will only be invalid if it is due to the transfer. A dismissal is due to the transfer, when it is the primary reason for the dismissal[229]. It is assumed that a dismissal is because of a transfer if the transfer and the dismissal are closely linked in time[230].

This limitation of the principle of the freedom of contract[231] on the employer's side is justified by the principle of social justice and the welfare state (Sozialstaatsprinzip)[232].

b) The right to object to a transfer

The right to object to a transfer has been developed by case law on the assumption that forcing a new employer upon the employees against their will would be in violation of their fundamental rights[233]. It is clear that an employee has an interest in the person for whom he or she is working.

aa) The position before 2002

Before 2002 the existence of a right to object was controversial.

If a business is being transferred, the transfer of an employment relationship takes place by operation of law without the consent of the employees. The clear-cut wording of § 613a in this regard has to be corrected through a teleological reduction[234], so that the individual employees may object to the transfer of the employment relationship.

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[228] For example misconduct or operational requirements
[229] Schiefer V "Rechtsfolgen des Betriebsuebergangs nach § 613a" (1998) *NJW* 1817
[230] BAG 1986 *DB* 1290
[231] Article 2I and 14I Grundgesetz (GG); German Constitution
[232] Article 20I and 28I GG
[233] Article 1, 2, 12 and 14 GG
[234] The interpretive principle of teleological reduction comprises that a rule contained in the law, but which is too broadly interpreted according to the meaning of the words, is reduced to the appropriate area of application according to the purpose of the regulation or contextual spirit of the law (Larenz, Methodenlehre der Rechtswissenschaft 5th Ed. p. 375).

Primarily, this follows from Art. 2 of the German Constitution (GG)[235] and Art. 1 GG[236]. These provisions prohibit that human beings become mere objects of the state. They are to decide freely what they want or not. It would be incompatible with Art. 1 and 2 GG to force a new employer upon an employee against his or her will[237].

Not allowing an employee to object to the transfer of his or her employment relationship would be in conflict with Art. 12 GG[238] as well.

The German Constitution also incorporates the principle of freedom of contract[239]. Therefore, every employee can choose freely with whom he wants a working relationship.

That is why the BAG has acknowledged the right to object in permanent jurisprudence[240].

Bauer[241] stated that the jurisprudence of the BAG concerning the right to object was not in accordance with European law[242]. According to him this was shown in a judgement of the ECJ in 1988[243], where Article 3[244] of the Directive was interpreted as an automatic process which the employees were not able to influence.

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[235] Art. 2 GG reads as follows: **Article 2 (Rights of liberty).**
(1) Everyone has the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral code.
(2) Everyone has the right to life and to inviolability of his person. The freedom of the individual is inviolable. These rights may only be encroached upon pursuant to a law.

[236] Art. 1 GG reads as follows: **Article 1 (Protection of human dignity)** (1) The dignity of man is inviolable. To respect and protect it is the duty of all state authority.
(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
(3) The following basic rights bind the legislature, the executive and the judiciary as directly enforceable law.

[237] BAG 1998 *NZA* 750; BAG *AP* Nr. 96 zu § 613a BGB

[238] Art. 12 GG reads as follows: **Article 12 (Right to choose an occupation, prohibition of forced labor)**
(1)All Germans have the right freely to choose their trade or profession their place of work and their place of training. The practice of trades and professions may be regulated by law.
(2) No one may be compelled to perform a particular work except within the framework of a traditional compulsory public service which applies generally and equally to all.
(3) Forced labor may be imposed only in the event that a person is deprived of his freedom by the sentence of a court

[239] Article 2I and 14I GG

[240] BAG 1976 AP Nr. 55 zu § 613a BGB; BAG 1975 *NJW* 1378; BAG 1978 *NJW* 1635

[241] Bauer J-H (1990) "Kein Widerspruchsrecht der Arbeitnehmer bei Betriebsuebergang" *NZA* 881

[242] European Directive 77/187/EEC, now 2001/23/EC

[243] *Berg and Busschers v Besselsen* (1988) *ECR* 2559 (ECJ)

[244] Article 3 (1): 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 Article 1 (1) shall, by reason of such transfer, be transferred to the transferee.

In that case, there had been a transfer of a bar from the defendant to a partnership. The partnership failed to pay the plaintiff's salary. Therefore they attempted to hold the defendant, the old employer, liable for the outstanding payments even though the transfer had taken place nine months before. The plaintiffs alleged that the transfer had taken place without their consent and that they therefore remained in the employment relationship with the transferor.

The *Hoge Raad der Nederlanden* stayed the proceedings and requested for a preliminary ruling of the ECJ on the following questions (amongst other things) : "*1 . (a) Must Article 3 (1) of the abovementioned directive be interpreted as meaning that, in so far as it is not otherwise provided in the directive or by the Member States, after the date of transfer the transferor is no longer liable for the obligations arising from the employment contract?*

(b) If the answer to that question is in the affirmative: Must that provision therefore be interpreted as meaning that the consent of the employee is required for that legal consequence (that is to say, that the transferor is no longer liable) to take effect? (c) If not, must that provision be understood as meaning that the legal consequence does not occur where the employee lodges an objection, with the result that he remains in the employ of the transferor"[245]?

The ECJ affirmed an automatic transfer of the employment relationship. The intention and the wishes of the employees and a possible objection of the employees do not have to be considered. The court held:

"*As the Court has consistently held, most recently in its judgment of 10 February 1988 in Case 324/86*[246] *this directive is intended to safeguard the rights of workers in the event of a*

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

[245] *Berg and Busschers v Besselsen* (1988) *ECR* 2559 (ECJ) at par 5

[246] *Foreningen af Arbejdsledere i Denmark v Daddy's Dance Hall A/S* (1988) *ECR* 739 (ECJ)

change of employer by making it possible for them to continue to work for the transferee under the same conditions as those agreed with the transferor . Its purpose is not, however, to ensure that the contract of employment or the employment relationship with the transferor is continued where the undertaking' s employees do not wish to remain in the transferee' s employ "[247].

The question arose in Germany if this decision could be seen as negating the previously accepted right to object[248]. It has to be said that, in the case at hand[249], the question was whether the transferor could be held liable for payments that were due at a time where the employees had already worked for the transferee. A positive answer of the ECJ would not have confirmed a right to object but would have confirmed that a transferor is liable even for claims that are way in the past[250]. To say yes to this could have led to "unsaleable businesses". Therefore the ECJ could not have answered differently.

Even though the liability of the transferee was discussed in the case at hand, the ECJ emphasized that Directive 77/187/EEC did not aim at the continuation of the employment relationship.

However, the statement only referred to Article 3 of the Directive, which led to the conclusion that Article 3 did not contain a right to object. This did not mean, though, that the national law could not go further and provide employees with such a right.

[247] *Berg and Busschers v Besselsen* (1988) *ECR* 2559 (ECJ) at par 12

[248] Bauer J-H (1990) "Kein Widerspruchsrecht der Arbeitnehmer bei Betriebsuebergang" *NZA* 881; Meilicke X "EuGH zu § 613a BGB: Widerspruch des Arbeitnehmers hindert nicht Übergang des Arbeitsverhaeltnisses" (1990) *DB* 1770

[249] *Berg and Busschers v Besselsen* (1988) *ECR* 2559 (ECJ)

[250] The German § 613a II holds that the former owner shall be jointly and severally liable together with the new owner for those obligations pursuant to subsection (1), which arises prior to the date of transfers and become due before the expiration of one year after that date.

Article 7 of Directive 77/187/EEC[251] provides that the Directive "*shall not affect the right of the Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees*".

An employee's right to object to a transfer would be a more favourable provision within the meaning of Article 7. An additional right is always the more advantageous alternative.

In the case at issue, that is Article 3 of the Directive, the automatic transfer of the employment relationship to the transferee on the one hand, and the BAG jurisprudence concerning § 613a, which adds to the automatic transfer the capacity to stay with the old employer in case of an objection on the other.

It is not apparent why the right to object should not be added in the national provisions.

This view was confirmed in the case of *Katsikas* v *Konstantinidis*[252] where the Court was asked to determine whether an employee is entitled to object to the transfer of his or her contract of employment or employment relationship to the transferee.

The facts of the case were that Mr Konstandinitis transferred his business, a restaurant, to Mr Mitossis. Mr Katsikas, a chef, refused to work for the new owner and was therefore dismissed by Mr Konstandinitis. An action against Mr Konstandinitis was then brought in the national court.

The matter was brought to the ECJ to decide.

Regarding this issue, the Court considered that the Directive does not preclude an employee from deciding to object to the transfer of his or her contract of employment or employment relationship and that in the event of an employee deciding on his or her own account not to continue with the contract of employment or employment relationship with the transferee, the Directive does not require the Member States to provide that the contract or relationship be

[251] now art 8 of Directive 2001/23/EC

[252] *Katsikas* v *Konstantinidis* (1992) *ECR* I-6577 (ECJ)

maintained with the transferor. In such cases, it is for the Member States to determine what the fate of the contract of employment or employment relationship should be.

In the *Merckx*[253] case, the Court upheld this ruling and emphasised that the Directive does not require the Member States to provide that the contract or employment relationship is to be maintained with the transferor.

The facts of the case were as follows: Mr Merckx and Mr Neuhuys worked as salesmen with Anfo Motors, which was a Ford dealer. Anfo Motors decided to discontinue its activities, and it informed the plaintiffs of its decision. It also informed them that Ford would in the future be working with an independent dealer, Novarobel, which would include the areas previously covered by Anfo Motors, and that their contracts of employment would be transferred to this independent dealer. Both, Mr Merckx and Mr Neuhuys, objected to the transfer and refused to work for Novarobel. They then brought an action against Anfo Motors and subsequently Ford, claiming compensation for breach of contract, unlawful dismissal, and redundancy, as well as their pro-rata entitlement to their end of year bonus. Anfo Motors counter-claimed for payment by Mr Merckx and Mr Neuhuys of compensation for breach of contract. The cases ultimately went to the Court of Appeal in Brussels which referred a question to the Court of Justice concerning whether or not there had been a "transfer of undertaking" within the meaning of the Directive.

In its judgment the Court, dealt with three main issues, namely whether or not there had been a transfer of an undertaking within the meaning of the Directive; whether or not there had been a legal transfer and finally the extent to which employees can prevent the transfer of their contract or employment relationship.

[253] *Albert Merckx and Patrick Neuhuys v Ford MotorsBelgium SA and others* (1996) *ECR* I-1253 (ECJ)

The final question considered by the Court concerned the extent of the employee's power to object to the transfer of his or her contract or the employment relationship. In this respect, the Court referred to previous rulings and pointed out that the Directive does not oblige the employee to continue his or her employment relationship with the transferee, as an obligation of that kind would endanger the fundamental rights of the employee. The Court then went on to say that it is up to the Member States of the European Union to decide the fate of the contract of employment or the employment relationship in cases where the employee decides not to transfer.

bb) The position today

As of April 2002 § 613a has been amended to adopt, amongst others, European standards[254]. New subsections (5) and (6) have been added.

(1) Duty to inform

Now the seller is obliged, according to § 613a subsection (5), to inform each employee, even if there is a works council, before the transfer of the business in a form similar to written form[255]. He has to disclose information about the following: the date or planned date of the transfer, the grounds for the transfer, the legal, economic and social consequences of the transfer of business for the employee, the intended measures to be taken with respect to employees. The employer also has to inform the employees about their right to object to the transfer and about the period available to object.

(a) Date or planned Date of the Transfer

[254] Article 7 VI of the European Directive 2001/23/EG. Art 7 (6) reads as follows: The member states require that the affected employees, in case there is no employees represantative in the business, are to be informed about the following: the date or the planned date of the transfer; the reason for the transfer; the legal, social and economic consequences of the transfer and the intended measures to be taken with the respect to employees.
[255] see § 126b BGB

Since the employees are to be informed about a planned transfer, the question is what happens if the intended date is postponed or cancelled.

First of all, it is suggested to see if the postponement is a fundamental aberration[256]. If this is the case, the notification has to be repeated if this could influence the employees' right to object[257] in that their decision might be changed by knowledge of the later date.

The criteria of such an interpretation are not quite clear. It is possible that an employees' decision may be different even if there is only a slight postponement of the intended date.

It does also not seem right, as some authors argue, to inform the employees only once no matter how much the intended date has changed[258]. Also changes which do not affect the date of the transfer but only the provisions in § 613a subsection (5) no. 2-4 should be disclosed to the employees.

Otherwise the protection of the employees would be incomplete.

(b) Reason for the Transfer (§ 613a subsection (5) no. 2)

It is not quite clear what the notification about the reason for the transfer of the business means. It is submitted that the minimum requirement of the information is on what kind of legal transaction the transfer is based, for example a sales contract or a donation contract[259].

It is questionable if employees have to be informed about economic reasons for the transfer as well. Partly this is denied by the literature[260]. Worzalla[261] states that economic reasons for a transfer are not relevant to the right of the employee to object. In case the employee receives a termination of his or her employment contract by his or her old employer based on operational

[256] Kroell M "Die Änderungen des § 613a BGB" (2002) *PersR* 392
[257] Worzalla N "Neue Spielregeln bei Betriebsuebergang-Die Aenderungen des § 613a BGB" (2002) *NZA* 354
[258] That is what Bauer J-H, von Steinau-Steinrueck S-S "Neuregelungen des Betriebsübergangs: Erhebliche Risiken und viel mehr Bürokratie!" (2002) *ZIP* 463 say though
[259] Adam R. F. "Die Unterrichtung des Arbeitnehmers ueber einen Betriebsuebergang und sein Recht auf Widerspruch" (2003) *AuR* 444
[260] Grobys M "Die Neuregelungen des Betriebsübergangs in § 613a BGB" *BB* (2002) 727; Worzalla N "Neue Spielregeln bei Betriebsuebergang-Die Aenderungen des § 613a BGB" (2002) *NZA* 354
[261] Worzalla N "Neue Spielregeln bei Betriebsuebergang-Die Änderungen des § 613a BGB" (2002) *NZA* 354

grounds after he or she has objected to the transfer, he or she cannot claim the social injustice of the dismissal with reference to the economic reasons for the transfer of the business.

On the other hand, the employees may have an interest knowing the economic reasons in order to decide if they really want to dissent. In case the former employer is not able to employ an employee any longer because of operational reasons, the employee will think very carefully if he or she really wants to object.

Especially in cases of insolvency the employee will think twice if he or she wants to veto the transfer since the old employer will probably dismiss him or her lawfully because of operational reasons.

Therefore, one has to say that information of the economic background of the transfer is a very important issue for the employees to know. Hence, the employees should be informed about the economic circumstances regarding the transfer of a business.

(c) Legal, Economic and Social Consequences of the Transfer (§ 613a subsection (5) no. 3)

The employees also have to be informed about the legal, economic and social consequences of the transfer. This includes the whole content of § 613a and therefore also the right to object and its deadline[262] since all information, which the employees should receive according to § 613a subsection (5), exists to enable the employees to decide whether they want to object to the transfer or not. It would be irrational not to mention the right to object since all would be in vain if the employees did not know why they get informed and therefore failed to meet the deadline. One cannot assume that the employees know about their right to object. This right

[262] Willemsen H-J, Lembke M "Die Neuregelung von Unterrichtung und Widerspruchsrecht der Arbeitnehmer beim Betriebsuebergang" (2002) *NJW* 1162

was controversial before it was regulated in 2002, even though it was granted to employees because of their constitutional rights[263].

Even though it is not mentioned in the wording of § 613a, the employees have to be informed that the transformation of the collective agreement declarations into individual employment contract does not take place if the buyer of the business is bound by the same collective agreement as the seller.

The employees also have to be informed about:

- The staying or change of the rights and obligations of the working relationship.
- The liabilities of the former and the new employer regarding the employees.
- The protection against dismissal.

(d) Intended Measures to be taken (§ 613a subsection (5) no. 4)

The duty to provide information about intended measures to be taken with respect to the employees assumes that the measures have to be in a stage of concrete planning[264]. It includes restructuring, production changeover, closure of the business as well as movement of operations and negotiations about a social plan or reconciliation of interests[265]. It is also necessary to provide information about planned dismissals and objecting employees.

(e) Information to be given before the Effective Date

The disclosure of information to the affected employees has to take place before the business is being transferred.

The question is, what consequences arise if the employees are informed after the business is transferred? Most of the literature supports the view that the duty to inform can and must be

[263] Adam R. F. "Die Unterrichtung des Arbeitnehmers ueber einen Betriebsuebergang und sein Recht auf Widerspruch" (2003) *AuR* 444

[264] Worzalla N "Neue Spielregeln bei Betriebsuebergang-Die Aenderungen des § 613a BGB" (2002) NZA 354; Grobys M "Die Neuregelungen des Betriebsübergangs in § 613a BGB" (2002) *BB* 727

[265] see § 111 ff BetrVG (Works Constitution Act).

fulfilled also after the business has been transferred[266]. Some state, though, that the employees are entitled to object without any deadline if the notification did not arrive on time[267].

The second opinion does not make much sense. The buyer and seller of the business should have the possibility to inform even after the business is transferred and therefore start the deadline from the date the employees are informed correctly. The former and the new employer are, in case of delayed information, liable for any damages caused by the delay. Otherwise the delayed information would not have any consequences[268].

(f) The Nature of the Right of Information

The duty to inform is a real contractual obligation. As a result, if a violation occurs, the employees are entitled to claim for compensation[269].

(g) The violation of the Right of Information

In case the notification of the employees does not take place as required, the transferor as well as the transferee of the business are liable for any damages caused. The affected employees can demand from the former employer and the buyer of the business to restore the condition that would have existed if the information had been correct according to §§ 280, 249 BGB[270].

It is questionable in which cases damage actually is caused. There should be a causal link between the wrong information and the employee's decision. Otherwise, there is no reason for compensation.

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[266] Willemsen H-J, Lembke M "Die Neuregelung von Unterrichtung und Widerspruchsrecht der Arbeitnehmer beim Betriebsuebergang" (2002) *NJW* 1163; Franzen M "Informationspflichten und Widerspruchsrecht beim Betriebsübergang nach § 613a Abs.5 und 6 BGB" (2002) *RdA* 265

[267] Bauer J-H, von Steinau-Steinrueck S-S "Neuregelungen des Betriebsübergangs: Erhebliche Risiken und viel mehr Bürokratie!" (2002) *ZIP* 491

[268] Adam R. F. "Die Unterrichtung des Arbeitnehmers ueber einen Betriebsuebergang und sein Recht auf Widerspruch" (2003) *AuR* 443

[269] Willemsen H-J, Lembke M "Die Neuregelung von Unterrichtung und Widerspruchsrecht der Arbeitnehmer beim Betriebsuebergang" (2002) *NJW* 1161; Franzen M "Informationspflichten und Widerspruchsrecht beim Betriebsübergang nach § 613a Abs.5 und 6 BGB" (2002) *RdA* 262

[270] § 249 BGB regulates the type and scope of Compensation. It reads as follows: A person who is obligated to pay compensation shall restore the situation which would have existed had the circumstances leading to the compensation had not occurred.

If the wrong information has an influence on the right to object, though, and it is not clear whether such influence is the reason for the decision of the employee, the buyer/seller of the business have the burden to prove otherwise[271]

(2) The Statutory Right to Object

Since the amendments in 2002, the employee's right to object to a transfer is regulated. This has not been done to meet European standards but was seen as a logical consequence since the duty of the employer to inform and the employees' right to object stand in a reciprocal relationship[272].

(a) The Nature of the Right to Object

The exercise of the right to object is a declaration, necessary to be received and a right of the employee to alter the legal relationship. As a right to alter a legal relationship, the right to object cannot be declared conditionally[273]. An objection under a condition is therefore legally invalid.

The employee does not have to use the word "objection". An objective observer would only need to understand what is meant by the declaration of the employee. The declaration has to be clear-cut[274].

(b) Recipient of the Objection

According to § 613 a VI 2 BGB the objection can be declared to the transferor or transferee of the business. Previously, the question to whom the declaration should be made was controversial. Some have argued that it should be either the seller, before the business is sold,

[271] Henssler M, Willemsen H-J, Kalb H-J (2004) *Arbeitsrecht Kommentar*, Köln: Verlag Dr. Otto Schmidt § 613a at par 341
[272] BT-Dr 14/7760, p 43
[273] Worzalla N "Neue Spielregeln bei Betriebsuebergang-Die Aenderungen des § 613a BGB" (2002) *NZA* 356
[274] Worzalla N "Neue Spielregeln bei Betriebsuebergang-Die Aenderungen des § 613a BGB" (2002) *NZA* 356

or the buyer, after the business is sold[275]. Another opinion was that the recipient may be either the buyer or the seller of the business, as is currently the position[276]. Therefore the buyer and the seller of the business have to take care to inform the other party about an employees' objection. Should he or she fail to inform the other party, the objection will still be effective.

(c) Format of the Objection

According to § 613a VI 1, the employee needs to object to the transfer in writing. Before the right to object was codified, the employee could inform the other party orally or simply refuse to start working for the new employee[277]. Now the objection has to meet the requirements of § 125 BGB. The reason for this is that, on the one hand, the employee should be made aware what he is signing[278] and, on the other hand, the production of evidence is easier if the question arises if an employment relationship has been transferred or not[279]. If it is not in writing, the objection is invalid.

(d) Deadline

According to previous jurisprudence the employee could object to the transfer of the employment relationship either before the transfer of the business took place or at the time of the transfer of the business. He or she did not have to object within a certain period of time from the time he or she knew about the fact that the business is being transferred if he or she was not asked to. After the business was transferred the employee had to object without delay. The situation was different, though, in cases where the employee did not know anything about

[275] Palandt (2004) *Bürgerliches Gesetzbuch* (63rd ed.) § 613a at par 49
[276] Loritz K-G "Aktuelle Rechtsprobleme des Betriebsübergangs nach § 613a BGB" (1987) *RdA* 79
[277] BAG 1990 *NZA* 32
[278] BT-Dr 14/7760 p. 43
[279] BT-Dr 14/7760 p. 43

the transfer. The courts then allowed him or her to object within a period of three weeks from the time he or she had knowledge of the transfer[280].

Now the objection has to take place one month after the employees have been informed as described above in writing[281].

Assuming the employees are informed either by the previous or the new employer some time before the business is transferred, they cannot wait to object until the date of the transfer since it is necessary that the old and the new owner gain legal certainty. If the notification is incorrect or incomplete, the time period does not start to run. The reason for this is that the duty to inform on the employers' side and the right to object on the employees' side stand in a reciprocal relationship[282].

In the event of incorrect or incomplete information, the employee needs to exercise his right to object only from the time on when he is informed correctly. From that time on, he or she has a new deadline of one month to object to the transfer[283].

During the legislative procedure, it was suggested to codify a six month deadline during which the right to object had to be exercised even in cases where the information was incorrect or incomplete. It seems to make sense in cases of incorrect or incomplete notification to apply the notion of § 5 III 2 KSchG[284]. According to this paragraph, the protection of unfair dismissal action can only be brought for within 6 month after the deadline of § 5 I KSchG[285] has expired. If the employee gets this absolute deadline, even in cases

[280] BAG 1998 *NZA* 750
[281] see 613a BGB subsection (6)
[282] BT-Dr 14/7760 p. 43
[283] see to the former jurisdiction BAG 1998 *NZA* 750
[284] § 5 III KSchG reads as follows: The petition shall be permitted only within two weeks after the hindrance has been removed. Once six month has elapsed following the missed deadline, the petition may no longer be filed.
[285] § 5 I KSchG reads as follows: Where despite exercising all reasonable efforts under the circumstances, an employee was hindered from filling a complaint within three weeks of receiving notice of dismissal, the complaint shall accepted retroactively for filling upon request.

where his or her employment is under discussion, it does not make sense to treat the right to object any different[286].

It is fictitious that the information should be deemed to be received at the time when the enterprise is transferred. From that time on the deadline of six months plus the one month deadline of § 613a VI should start to run. Normally every employee would have had the opportunity to inform him- or herself about the consequences of a transfer. Right now employees can exercise their right to object years after the business has been sold by saying that the information they received was incorrect or incomplete. Such a consequence would be unacceptable for the employer since he is not able to gain legal certainty[287].

Therefore it is suggested[288] that the right to object has to be exercised within seven months after the business has actually been transferred, no matter if the notification is not provided or incorrect.

(e) Abdication

The employee cannot in advance renounce his right to object to any kind of transfer that might take place in the future[289]. Where a particular transfer is going to take place, the employer and employee can agree on abandonment of the right to object[290]. Such abdication has to be in form of a contract between the parties[291].

(f) Legal Consequences of an Objection

[286] Worzalla N "Neue Spielregeln bei Betriebsuebergang-Die Aenderungen des § 613a BGB" (2002) *NZA* 357
[287] Worzalla N "Neue Spielregeln bei Betriebsuebergang-Die Aenderungen des § 613a BGB" (2002) *NZA* 357
[288] Worzalla N "Neue Spielregeln bei Betriebsuebergang-Die Aenderungen des § 613a BGB" (2002) *NZA* 357
[289] Preis in Dietrich M et al (2004) *Erfurter Kommentar zum Arbeitsrecht* (4th ed) § 613a at par 86
[290] BAG 1998 *NZA* 750
[291] Adam R. F. "Die Unterrichtung des Arbeitnehmers ueber einen Betriebsuebergang und sein Recht auf Widerspruch" (2003) *AuR* 444

When it comes to the legal consequences of an objection one has to distinguish between an objection that is declared before the transfer takes place and one that is declared after the transfer.

(aa) Before the Transfer takes place

If an employee exercises his or her right to object, the employment relationship with the seller will continue. If it is not possible for the seller him- or herself to retain the employee, e.g. because the entire business has been sold, he or she can dismiss the objecting employee on operational grounds since the workplace itself transfers to the transferee.

Problems can occur if the seller has retained part of the business. In that case he or she cannot simply dismiss the objecting employee based on operational requirements. These employees are protected by the Protection against Unfair Dismissal Act (KSchG). According to the Act an employee can only be dismissed after a "social selection" has taken place.

If the seller cannot retain the objecting employees, it may be necessary to carry out a social selection between the objecting employees and those employees who are not affected by the transfer. If it becomes evident that an objecting employee is, due to social factors, more in need of protection than others, that employee may oust employees in another part of the seller's business[292].

If the objecting employee has no reasonable basis for his or her objection he or she does not need to be included in the social selection between him or her and employees who are not affected by the transfer[293].

(bb) After a transfer

[292] Lingemann S, v. Steinau-Steinrück R, Mengel A (2003) *Employment & Labor Law in Germany* 38
[293] BAG 1999 *NZA* 870

If the employee objects within the deadline and in the prescribed form after the business has been transferred, the employment relationship with the new owner is changed ex post facto and the employment relationship to the old employer is restored[294].

2. South Africa

a) The Effects of a Transfer

Section 197 subsection (2) of the Labour Relations Act regulates the effects of a transfer. In case a transfer of business has taken place, Subsection (2) lists the following four consequences:

1. the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer [s 197 (2) (a)];

2. all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee [s 197 (2) (b)];

3. anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or an act of unfair discrimination, will be considered to have been done by or in relation to the new employer [s 197 (2) (c)];

4. the transfer does not interrupt an employee's continuity of employment [s 197 (2) (d)].

[294] BAG 1994 *NZA* 360

Any of these consequences can be varied by a collective agreement between the employers and the relevant employees representatives [s 197 (6)].

aa) Transfer of the Employment Relationship

The question if section 197 of the Labour Relations Act provides for an automatic transfer of the employment relationship was highly controversial for many years. Although it was widely accepted that section 197 was modelled on the European provisions, there was previously no consensus whether section 197 provided for the automatic transfer of the contracts of employment or the employment relationship.

(1) The previous position

The previous section 197 began by prohibiting the transfer of contracts of employment from one employer to another without the employee's consent, unless:

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

(b) the whole of any part of 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 avoid winding up or sequestration for reasons of insolvency.

The previous section 197 was the product of a political compromise reached within parliament. Its scope and potential effect concerning the transfer of contracts of employment or the employment relationship was far from clear[295].

[295] Le Roux "Consequences arising out of the sale or transfer of a business: Implications of the Labour Relations Amendment Act" (2002) Vol 11 No 7 *Contemporary Labour Law* 61

Generally it was thought that, if a business was transferred as a going concern, the employment relationships passed over automatically to the acquirer whether or not the transferee wanted to employ them[296].

The issue was first considered in the case of *Schutte & others v Powerplus Performance (Pty) Ltd and another*[297] where the judge held that the primary purpose of section 197 was to protect the rights of the workers through continuity of their employment. Hence, the Labour Court concluded that, if a transfer of business as a going concern takes place, the employment relationships pass over automatically to the transferee. The transferee and the transferor cannot by agreement prevent the transfer of the employees.

This view was confirmed in a majority decision of the Labour Appeal Court in *Foodgro, A Division Of Leisurenet LTD v Keil*[298], where it was held that the purpose of s 197 was the protection of employees against loss of employment when their employer transferred his or her business as a going concern. Therefore section 197 (1) (a) and (b) provide for the automatic transfer of an employee's contract of employment.

However, in the decision of *NEHAWU v University of Cape Town & others*[299] the Labour Court was of the view that there is no transfer of the employees' contracts unless the transferee and the transferor agreed to it.

The matter went on appeal[300], where it was held that the transfer of the employment relationships is entirely dependent on the employers' consent. The court pointed out that section 197 (1) (a) is permissive. If the new employer is not willing to take over the employment relationships he or she is not obliged to do so.

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[296] *Foodgro, A Division Of Leisurenet LTD v Keil* (1999) 20 *ILJ* 2521 (LAC); *Success Panelbeaters & Service Centre CC t/a Score Panelbeaters & Service Centre v NUMSA & Another* (2000) 6 *BLLR* 635 (LAC); *Schutte & Others v Powerplus Performance (PTY) LTD & Another* (1999) 20 *ILJ* 655 (LC); *Manning v Metro Nissan- a Division of Venture Motor Holdings Ltd* (1998) 19 *ILJ* 1181 (LC)

[297] *Schutte & others v Powerplus Performance (Pty) Ltd and another* (1999) 20 *ILJ* 655 (LC)

[298] *Foodgro, A Division Of Leisurenet LTD v Keil* (1999) 20 *ILJ* 2521 (LAC)

[299] *NEHAWU v University of Cape Town & others* (2000) 7 *BLLR* 803 (LC)

[300] *NEHAWU v University of Cape Town & others* (2002) 4 *BLLR* 311 (LAC)

The Labour Appeal Court was then overruled by the Constitutional Court[301] which decided that it is not possible to transfer a business in terms of section 197 without the affected employees. The Constitutional Court held that the LAC had considered section 197 only with regard to the interests of employers. But also the interests of the employees, namely work security, had to be considered. Therefore the Constitutional Court was of the opinion that section 197 had an automatic and obligatory effect. The intentions of the employers were irrelevant. The transfer would take place by operation of law.

(2) The Position today

Section 197 has been completely overhauled in the amendments that came into effect on 1. August 2002[302]. Now section 197 explicitly provides for an automatic transfer of the contracts of employment or the employment relationships in subsection (2) (d). Subsection 197 subsection (2) (d) reads as follows:

(2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6)-

(d) the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer.

This wording leaves no doubt that the new employer has to take over all the employees if a transfer of a business or part of a business as a going concern takes place, whether or not he or she wants to. All persons that have the status of an employee are transferred. If only a part of a business is transferred it is not clear which employees should be transferred with that part of a business.

The phrase unless "otherwise agreed" does not refer to an agreement between the transferor and transferee but to an agreement with the employees or their representatives concluded in terms of subsection 6 [s 197 (2)].

[301] *NEHAWU v University of Cape Town & others* (2003) 2 *BLLR* 154 (CC)
[302] The Labour Relations Amendment Act 12 of 2002

The new employer steps completely into the footsteps of the old employer. This contains not only the terms and conditions of employment but also disciplinary records, contractual claims and other reciprocal obligations arising from the employment relationship[303].

What is not quite clear is the meaning of the wording "immediately before" the transfer in section 197 (2) (c). The question that arises is, whether this also includes contracts that existed prior to the date of transfer but which no longer exist at the time of the transfer.

It is suggested that "immediately before" should be understood as including the period between commencing negotiations preceding the transfer and the date of the transfer itself[304]. If there are no negotiations it will probably mean that only contracts that existed at the time of the transfer are to be considered.

bb) Liability

The liability of the old and the new employer is laid down in section 197 subsections (7) and (8). An obligation is placed on the old employer to agree with the new employer prior to the transfer on the employees to be transferred, to a determination of accrued leave pay at the time of transfer, the level of entitlement to severance pay in case of retrenchment and any other accrued pay [section 197 (7) (a) (i-iii)]. They have to lay down in writing which employer will be liable for the payments mentioned above [section 197 (7) (b) (i)]. This agreement has to be disclosed to all employees that are affected by the transfer [section 197 (7) (c)]. The transferor must make sure that the transferee takes adequate provisions for its liability concerning these payments. If the old employer does not comply with these provisions, and an employee is retrenched after the transfer or loses his work because of the insolvency of the new employer, the old employer remains jointly liable for a period of 12 months after the transfer for any of these payments [section 197 (8)]. Additionally, the

[303] Du Toit D et al (2003) *Labour Relations Law* (4th ed) 432

[304] Bosch G, Mohamed Z "Reincarnating the vibrant horse? The 2002 amendments and transfer of undertakings" (2002) *Law, Democracy and Development* Vol. 6 90

transferor and the transferee are jointly liable for claims concerning terms and conditions of employment that arose prior to the transfer [section 197 (9)].

This means, that the employee can choose which employer he or she wants to claim from.

cc) Continued Application of Collective Norms

Section 197 also deals with rights and obligations that arise from collective agreements and arbitration awards. According to section 197 (5) (a), collective agreements and arbitration awards that bound the old employer with respect to the employees to be transferred "immediately before the date of transfer" become binding on the new employer. Included are arbitration awards made in terms of the LRA, the common law and any other law, [section 197 (5) (b) (i)]. It is submitted that this provision is dispensable since all rights and obligations that employees attain from them would in any event be transferred [section 197 (2)][305]. Terms and conditions of employment contained in a collective agreement then become part of the contracts of employment of the employees falling within its scope.

It is not quite clear what happens to collective agreements which concede rights, for example collective bargaining and organisational rights, to a union. Under the previous section 197 it was held that there is no transfer of such rights[306]. Although the new section 197 regulates the transfer of collective agreements that bound the employer "in respect of the employees to be transferred", nothing is said about the transfer of rights and obligations existing between a trade union and an employer. Hence, this implies that a union's recognition or organisational right which are contained in a collective agreement but do not bind the employer with regard to the transferring employees will have to be reacquired by the exercise of industrial power[307].

dd) Dismissal

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[305] Du Toit D et al (2003) *Labour Relations Law* (4th ed) 435

[306] see *Telkom Directory Services (Pty) Ltd v CWU obo Panyane* (1998) 8 *BALR* 1116 (IMSSA)

[307] Bosch G, Mohamed Z "Reincarnating the vibrant horse? The 2002 amendments and transfer of undertakings" (2002) *Law, Democracy and Development* Vol. 6 90

Employers transferring the whole or parts of their business to another employer do not have the option of retrenching all or some of the workers if the acquirer wants to take over the business without them.

According to section 187 (1) (g) LRA, a dismissal of an employee is automatically unfair if the reason for the dismissal is a transfer, or a reason related to a transfer contemplated in section 197 or section 197A. A dismissal based on other reasons, for example misconduct, and in accordance with a fair procedure remains unaffected.

Problems can arise in cases of dismissals based on operational requirements [section 189 LRA]. First of all, the requirements laid down in section 189 have to be complied with if a dismissal for operational reasons is contemplated in the context of a transfer of a business[308]. The old employer is not authorised to dismiss employees on demand of the new employer or on the basis of the operational requirements of the new employer[309]. The reason for this is that employers should be kept from circumventing the provisions of section 197, for example to get a better price [310]. Often it is not quite clear what the real reason for a dismissal is. In such cases it is suggested that the test laid down in *SACWU v Afrox Ltd.*[311] should be applied. That is whether there is a casual link between the transfer of the business and, if the answer is in the affirmative, whether it is the main, dominant or proximate reason for the dismissal[312].

b) The right to object to a Transfer

Section 197 does not provide the employee with a right to object to the transferral of his or her contract of employment. This position stands in contrast to the common law principle that an employee shall be able to choose who he wants to work for. It has not yet been established whether a right to object to a transfer exists in South African law. Of course, an employee can

[308] *Fourie & anothet v Iscor Ltd* (2000) 11 *BLLR* 1269 (LC)
[309] *Western Cape Workers Association v Halgand Properties CC* (2001) 6 *BLLR* 693 (LC)
[310] Du Toit D et al (2003) *Labour Relations Law* (4th ed) 436
[311] *SACWU v Afrox Ltd* (1999) 10 *BLLR* 1005 (LAC)
[312] Bosch G, Mohamed Z "Reincarnating the vibrant horse? The 2002 amendments and transfer of undertakings" (2002) *Law, Democracy and Development* Vol. 6 94

always resign from the employment relationship. The result of a resignation is though that the employees are not entitled to receive possible compensation for unfair dismissal or severance pay unless s 186 (1) (f) applies.

aa) Common law

Under the common law, the contract of employment is viewed as a personal contract between the employer and the employee. If this relationships end, the same happens to the contract of employment[313]. Being a personal contract, the employee's rights can not simply be transferred to another employer without the employee's consent[314].

In the English case *Nokes v Doncaster Amalgamated Collieries* a miner had been transferred into an employment relationship with the acquiring company without his consent. The employee objected to the transfer. The court held that the employer could not sue the employee for breach of contract since no contract existed between him and the employee. The non-existence of the contract is based on the personal nature of the employment contract.

The Court in *Nokes v Doncaster Amalgamated Collieries* found that the contract of employment was of personal nature for two reasons.

First of all, it was stated that a free citizen is entitled to choose who he or she wants to work for. Therefore, the rights of his or her service cannot be transferred without his or her consent. This rule applies no matter how excellent the new master might be. The Court also held that it is a mistake to think that people, whether they are servants or landlords or authors do not attach importance to the identity of the company which they deal with[315] The freedom to choose one's employer distinguishes the servant from a serf[316].

[313] *Nokes v Doncaster Amalgamated Collieries* 1940 AC 1014 CA
[314] *East Rand Exploration Co v Nel* 1903 TS 42
[315] *Nokes v Doncaster Amalgamated Collieries* 1940 AC 1030 CA
[316] *Nokes v Doncaster Amalgamated Collieries* 1940 AC 1026 CA

According to the common law, employees have either to be dismissed lawfully and fairly and be offered reemployment, or else their contracts of employment have to be renewed with their consent[317].

In the case of a renewal, a new arrangement has to be established between all parties. Therefore the consent of the employees is absolutely necessary. When dealing with a dismissal and an offer of reemployment the employees also have to agree to the new terms and conditions of employment[318].

The right to choose one's employer includes the right to object to a transfer.

bb) Case law

The rule in *Nokes v Doncaster Amalgamated Collieries* that no man can be "compelled to serve a master", has found approval in several South African Industrial Court cases.

In *Ntuli v Hazelmore Group*[319], a proprietor sold a nursing home to the respondent's close corporation. The respondent took over the undertaking in the understanding that she was free to engage her own staff. She explained that there would have to be redundancies. Eventually 17 employees were retrenched; the main reason for the retrenchments was that the employees were not able to work in the new "rota" system that was introduced. After retrenchment four employees applied for reinstatement in terms of section 43 LRA[320].

The Court acknowledged that it was clear that the transferor of an undertaking cannot transfer his obligations under a contract of employment to the transferee without the consent of the affected employees. The employees are not obliged to accept service with the transferee against their will.

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[317] Jordaan "Transfer, Closure and Insolvency of Undertakings" (1991) 12 *ILJ* 942
[318] Jordaan "Transfer, Closure and Insolvency of Undertakings" (1991) 12 *ILJ* 944
[319] *Ntuli v Hazelmore Group* (1988) 9 *ILJ* 709 (IC)
[320] This was the previous LRA which laid down a general unfair labour practice.

The Court stated that "*The transferee should also be involved in [...] consultations or at least consult separately with the employees and their union. An agreement which may be arrived at would ordinarily be enforced by the Courts. Such an agreement could provide for the possibility of retrenchments following the transfer of the undertaking*"[321].

If there is no agreement of that kind, the employer may terminate the contract of employment on notice. The dismissal would only be fair when compensating the employees if there was no possibility of continuing the employment relationship. The Court held further that the employees would have no right to claim for compensation if the employment relationship continued and the only difference was the change of the employer. However the Court accepted that there might be exceptional cases where an employee has good reasons for not accepting the acquirer's offer.

The Court in *Ntuli v Hazelmore Group* referred in its judgement to the case of *Kebeni & Others v Cementile Products (CISKEI) (Pty) LTD & Another*[322]. There the court mentioned amongst others that in the case of a transfer of business one option could be that "*all existing contracts of employment would be deemed to have been transferred to the new employer who would be obliged to retain all existing employees without discrimination, save that an individual employee may have the option not to continue his employment relationship with the transferee*"[323].

In *Foodgro, A Division of Leisurenet LTD v Keil*[324] the Court concluded that in some cases[325] a right to refuse to a transfer of the contracts of employment exists. The provisions of section 197 primarily aim at protecting employees when a transfer of business takes place. In case an

[321] *Ntuli v Hazelmore Group* (1988) 9 *ILJ* 719 (IC)
[322] *Kebeni & Others v Cementile Products (CISKEI) (Pty) LTD & Another* (1987) 8 *ILJ* 442 (IC)
[323] *Kebeni & Others v Cementile Products (CISKEI) (Pty) LTD & Another* (1987) 8 *ILJ* 442 (IC) at 450 B-D
[324] *Foodgro, A Division Of Leisurenet LTD v Keil* 1999 (20) *ILJ* 2521 (LAC)
[325] According to the Court no right to object is recognised under s 197 (2) (a) for solvent undertakings but the right to contract out of the transfer is allowed under s 197 (2) (b); this case was decided before the amendments in 2002 came into effect.

employee does not wish to be transferred to a new employer he or she should not, with reference to public policy, be forced to continue his or her working relationship with the transferee.

The above mentioned cases were decided under the old section 197. Section 197 (1) provided that an employment contract may not be transferred from one employer to another without the employee's consent, unless this occurs in the circumstances envisaged in section 197 (1) (a) or (b). The new section 197 does not contain the expression "without the employee's consent". This might help the Courts to acknowledge a right to object.

cc) The Right to object and the Constitution

Because of the inadequacy of the common law, namely the termination of the contract of employment without a right of compensation, the automatic transfer of the contracts of employment when a business is transferred is now regulated by the LRA. The question is, though, if such a compulsory transfer can be constitutional if there is no option for an employee to object to his or her transfer.

Section 23 of the Constitution guarantees every person the right to fair labour practice. Section 22 contains a fundamental right to choose one's trade, occupation or profession. Section 13 guarantees freedom from slavery, servitude and forced labour[326].

As stated before the common law provides an employee with the right to object to the passing of his or her contract of employment. This constitutes the significant difference between a

[326] Constitution of the Republic of South Africa 108 of 1996

servant and a serf[327]. Employees have the right to engage freely in economic activities. This includes freedom of contract[328] and therefore the right to choose one's employer.

Slavery is not only an historical problem but still exists today in several forms. Slavery does not only mean ownership. The International Labour Organisation (ILO) has adopted the Forced Labour Convention 29 of 1930. In Article 2 (1) of the Convention forced or compulsory labour is defined as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily". Also the European Convention for the Protection of Human Rights states in article 4 (2) that no one shall be required to perform forced or compulsory labour.

To limit an employee's right to engage into economic activity for the person he or she chooses would be unconstitutional.

The Labour Relations Act gives expression to the right of fair labour practices in several provisions. Here, the provision in question is section 197. To be constitutional section 197 has to be interpreted in a way that it complies with the Constitution.

Section 36 of the Constitution allows a limitation if the limitation is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". S 36 (1) states, that following factors have to be taken into account before a fundamental right may be limited: the nature of the right; the importance and the purpose of the limitation; the relation between the limitation and its purpose, and less restrictive means to achieve the purpose.

The limitation on the employee's right, namely the compulsory transfer of his or her contract of employment in section 197 (2) (d), aims at putting the employee into a better position than

[327] *Nokes v Doncaster Amalgamated Collieries* 1940 AC 1014 CA

[328] Smit N "Should Transfer Of Undertakings Be Statutory Regulated In South Africa?" (2003) Vol.14 No2 *Stellenbosch Law Review* 223

under the common law. The intention is to avoid automatic termination of the employment contract and therefore to provide for job security for the employees when a transfer of business takes place. Even though the automatic transfer of the contract of employment is now regulated by section 197 there is still no option for employees to choose not to transfer. It is difficult to believe that forcing an employer upon an employee against his or her will is reasonable and justifiable under section 36.

However, section 197 (2), which prescribes the automatic transfer of contracts of employment in subsection (d), is flexible. If there is an agreement in terms of s 197 (6) the transfer not only of rights and obligations but also of the contracts of employment can be altered. It is then open to the parties to decide whether the contracts of employment transfer automatically to the acquirer. The problem is though that the parties in section 189 (1)[329] are exclusive. It contains a hierarchical list of potential parties. The individual employees will very seldom be party to an agreement within the meaning of subsection (6)[330].

Even though it is possible for employees not to transfer when there is an agreement within the meaning of subsection (6), such a provision confines the autonomy of the individual. It has to be borne in mind that the contract of employment is of very personal nature. Because of that to choose not to transfer should be acknowledged as an individual and not a collective choice.

From this it follows that section 197 does not provide that a single employee can object to his or her transfer. This stands in contrast to the Constitution, international law as well as the common law, which states that the consent concerning the transfer of employment of all

[329] S 197 refers to the parties in 189 (1) in subsection (6) (a) (ii). The agreements in s 197 (6) (mostly collective agreements) must be in writing and concluded between the relevant employee representatives (named in s 189 (1)) and either the old employer, the new employer, or the old and the new employer acting jointly.

[330] Its is quite possible that a situation may arise where an individual employee does not wish to transfer but is not able to object since the relevant trade union has already accepted the automatic transfer of all contracts of employment, or, the other way around, an employee wishes to transfer but the trade union already agreed that the contracts of employment do not transfer.

parties is necessary. Employees are always in a weaker bargaining position than employers. Therefore they deserve special protection.

dd) Legal Consequences of an Objection

Should the employee object to a transfer, it is not quite clear what happens.

There are three possible consequences. The objection can lead to either a resignation of the employee, a termination of the contract by the employer or the employment contract continues with the transferor.

The United Kingdom has adopted the first position. Regulation 5 (4B) of the Transfer of Undertakings Protection of Employment (TUPE) Regulations[331] states that 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. The exercise of the right to object means that the employment terminates upon transfer without compensation.

An employee remains able, though, under subregulation (5) to take advantage of his common law right to sue for repudiation and/or constructive dismissal in the case of a transfer which involves substantial change to his or her working conditions to his or her detriment. However, no such right shall arise when the only reason for the objection is the change of the identity of the employer.

This position is to the disadvantage of the employee. Should he object he is not better of than some worker whose business is sold over his or her head. The right to object is worthless if it is treated as a resignation without the possibility to claim for compensation.

[331] Transfer of Undertakings (Protection of Employment) Regulation of 1982

Another possibility could be to treat an objection as a constructive dismissal if the employee has good reasons to object to a transfer. Section 186 (1) (f) LRA states that a dismissal also includes circumstances where "an employee terminated a contract of employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer". This wording does not deal with the situation, though, what happens in cases where an employee objects to the transfer of his or her contract of employment but does not terminate it.

The third possible option is to treat the objection, as in Germany, in such a way that the employee stays with the transferor as his or her employer. The contract is legally unaffected by the transfer. The disadvantage of this position is that the transferor often has no need for the employee since he or she sold the business and the workplace no longer exists. Therefore, in most cases, the employee will be dismissed on operational grounds. The advantage of this position is that an employee receives unemployment benefits in case he or she is dismissed on operational grounds. Should he or she terminate the contract him- or herself he or she will not receive those benefits for three months.

In all countries[332] there have to be good grounds for an objection. Otherwise the employees do not receive any benefits.

In South Africa the labour courts will have to develop guidelines as how to treat an objection. All the above mentioned possibilities have advantages and disadvantages. The employee-friendliest alternative certainly is that the employee who objects remains with the seller of the business.

[332] Other than in Germany the right to object exists in the United Kingdom.

3. Summary and Comparison

The effects of a transfer in Germany laid down in § 613a on the one hand are:

- Transfer of the employment relationships
- Transfer of rights and obligations that existed between the employees and the old employer
- Distribution of liability between the old and the new employer
- Continued application of collective rights and duties
- Prohibition of dismissal because of the transfer
- Duty to inform on the employer's side
- The employees' right to object

The most important effects of a transfer in South Africa laid down in section 197 (2) (a-d) on the other hand are:

- Automatic transfer of contracts of employment
- Transfer of existing rights and obligations
- Consideration of anything done by the old employer before the transfer, including the dismissal of an employee or the commission of an unfair labour practice or an act of unfair discrimination, as having been done by the new employer
- Continuity of employment
- Prohibition of dismissal

On the first sight the effects of section 197 appear to be very similar to the effects of § 613a. Both sections contain the most important aspects of the Acquired Rights Directive.

First of all the sections provide for the automatic transfer of the contracts of employment. It has to be noted though that § 613a does not stipulate for this explicitly but begins with saying in subsection (1) sentence 1 that the new owner enters into the rights and obligations arising

from the employment relationships where a business or part thereof is transferred to another owner by means of a legal transaction. Section 197 states in subsection (2) (d) that an employee's contract of employment continue with the new employer as with the old employer.

Even though the automatic transfer of the contracts of employment is not mentioned in § 613a it goes without saying. The reason why it is expressly mentioned in section 197 almost certainly is that the automatic transfer of the contracts of employment was far from clear until the amendments of the section came into operation in 2002. Before the decision of the Constitutional Court in *NEHAWU* the courts partly tried to undermine the purpose of section 197 in stating that it does not provide for the automatic transfer of the contracts of employment.

In both sections the new owner enters into the rights and obligations arising from the employment relationships. In Germany this applies to employment relationships that exist "at the time of the transfer" whereas section 197 speaks of all contracts of employment in existence "immediately before" the transfer. It is not clear how "immediately before" has to be understood. It is submitted that it encloses the period between commencing negotiations and preceding the transfer and the date of the transfer itself. If there are no negotiations it seems sensible to refer to the date of the transfer itself. In Germany § 613a pertains also only to employees that are active "at the time of the transfer".

However, in Germany as well as in South Africa the new employer completely steps in the footsteps of the old employer.

When it comes to liability of the old and the new employer Germany and South Africa have a similar approach in providing for a division of liability.

First of all § 613a states that the transferee is liable for all obligations arising from the employment relationship that are passed on to him or her. This includes claims which arose before the business was transferred. The old employer is liable only for claims arising from the employment relationships that already ended at the time of the transfer. Concerning claims that become due after the date of the transfer the old employer is liable for them only for the fraction of the total assessment period reflecting the time elapsed before the date of transfer. Transferor and transferee are jointly and severally liable for obligations that arose prior to the date of transfer and become due before the expiration of one year. They are liable as co-debtors. Transferor and transferee usually agree on who is liable in the relationship inter se. If not, they are liable in equal shares. The liability is compulsory. Therefore the transferor and transferee cannot dispose the liability in the transfer agreement.

Section 197 basically provides for the same but expresses it in a far more complicated way in subsection (7). The old employer must agree with the new employer to a valuation of accrued leave pay, severance pay, that would have been paid by the old employer and any other payments that have accrued to the employees and that are still unpaid at such time. The old employer than has to conclude an agreement that specifies which employer will be liable for the listed payments. This agreement has to be disclosed to the employees. The old employer is jointly and severally liable with the new employer for a period of 12 months if he or she does not comply with the provisions in subsection (7). The transferor and transferee cannot exclude this joint and several liability. The transferor and transferee are also jointly and severally liable in respect of any claim that arose prior to the transfer [subsection (9)].

It is noticeable that such detailed provisions are made in s 197 (7) even though section 197 (2) (b) already provides that all the rights and obligations between the old employer and each employee continue in force as if they had been rights and obligations between the new employer and each employee. One could have thought that section 197 (2) (b) already includes the provisions listed in section 197 (7). It appears that the agreement in terms of

subsection (7) is supposed to enjoy preference over section 197 subsection (2). It is submitted that the effect of subsection (7) is to encourage the employers to agree on the amounts that are due, which are often in dispute, and to provide for the old employer to remain jointly and severally liable in certain circumstances despite subsection (2) since in terms of subsection (2) all liability would transfer to the new employer.

Possibly employees should be able, despite a contrary agreement between the old an the new employer in terms of section 197 (7), to claim payments, for example accrued leave pay, from the new employer under section 197 (2). Who is liable then in the relationship inter se has to be negotiated between the old and the new employer. Since section 197 is a provision that is, amongst others, supposed to protect employees when a transfer takes place it seems sensible that employees should be able to claim from either the transferee or the transferor despite a possible contrary agreement. It is possible, for example, that the employer who is supposed to make the payments is insolvent. If employees are bound by the agreement between the old and the new employer, it would be a contract imposing a burden on a third party. Such a contract cannot be binding on a third party. Since the employees are not a party to a s 197 (7) agreement it is only logicallly to say that the employers cannot overrule s 197 (2), nor take away employees' rights.

In Germany, however, no special agreement concerning specific payments between transferor and transferee is necessary. It is clear that the transferee enters into rights and obligations arising from the employment relationships. This also includes the payments that are listed in the South African section 197. Who is liable in the relationship between the two employers is not the employees' concern.

A possible reason for this difference concerning the liability is that a business might be sold more easily if the transferor takes over the responsibility for paying the payments listed in section 197 subsection (7) (a).

§ 613a subsection (1) as well as section 197 (8) provide for joint and several liability of transferor and transferee for a period of twelve months after the date of transfer, even though § 613a speaks of all obligations that arose prior to the transfer and become due before the period of one year has elapsed whereas section 197 (8) only refers to claims contemplated in subsection (7) (a) as a result of the employee's dismissal because of the employer's operational requirements, liquidation or sequestration. S 197 (9) also makes reference to joint and several liability in respect of any claim concerning any term and condition of employment that arose prior to the transfer.

As to the continued application of collective norms Germany and South Africa have a quite similar approach.

Section 197 (5) (a) stipulates that the new employer is bound by any arbitration award made in terms of the act, common law or any other law, any collective agreement binding in terms of section 23 LRA and any collective agreement binding in terms of section 32 LRA.

§ 613a also provides for the passing-over of the collective agreements concluded before the transfer where the rights and obligations are regulated by means of the legal standard set in a collective bargaining agreement or by a works agreement. In Germany a distinction is made between the transfer of the whole business, when works agreements remain in force, and the transfer of part of a business, when the works agreements become part of the employees' contracts if the part of the business that is transferred does not retain its identity.

Both countries provide for the transfer of collective agreements. § 613a provides that, under specific circumstances, certain agreements will be transformed into individual contractual provisions for each employee. In South Africa, terms and conditions of employment contained in a collective agreement become part of the contracts of employment of the employees falling within its scope.

In South Africa collective agreements which concede rights to a union have to be reacquired by industrial power.

In Germany, if the parties to the collective bargaining agreement were the trade union and the transferor, the transferee has to become part of the company agreement by substitution with the transferee. In other cases, the terms of the collective bargaining agreement will be transferred into contractual provisions for each employee.

When it comes to dismissing employees during or because of a transfer there is basically no difference between § 613a and the South African approach. Section 197 itself does not contain provisions regulating dismissal in these circumstances, which is dealt with in section 189 (1) (g). A dismissal in both countries is invalid if it is because of the transfer. In Germany a dismissal is due to the transfer if dismissal and transfer are closely linked in time. A dismissal for reasons other than the transfer remains unaffected. There is no clear rule in South Africa. However, according to section 187 (1) (g) LRA, a dismissal is automatically unfair and, therefore, attracts more compensation [s 194], if the reason for the dismissal is a transfer, or a reason related to a transfer.

§ 613 a provides that the employees have to be informed about: the date or planned date of the transfer, the grounds for the transfer, the legal, economic and social consequences of the transfer of business for the employee and the intended measures to be taken in respect to employees. Section 197 does not contain a duty to inform the employees.

However, several judgements have held that an employer should inform and consult with the employees prior to the transfer. The Industrial court in *NUTW v Braitex*[333], for example, stated that an employer has the duty to inform the employees well in advance of the possible

[333] *NUTW v Braitex* (1987) 8 *ILJ* 794 (IC)

transfer. Furthermore the old employer and the transferee should involve employees or their representatives in negotiations about the transfer[334].

The new section 189 (1) (a) LRA also requires that an employer must consult with the parties listed in the section. The duty only arises in instances where an employer contemplates the dismissal of one or more employees for reasons based on the employer's operational requirements. A general duty to inform and consult is not mentioned. Where the contemplated transfer is likely to result in dismissals, because the new employer will not be able to employ all the employees and the old employer is aware of that, the old employer should consult. Otherwise the new employer may face a claim of unfair dismissal. Nevertheless, a general duty does not exist.

It is very astonishing that section 197 (2) and (5) can be made subject to a contrary agreement in terms of subsection (6) between:

- either the old employer, or the new employer, or the old and the new employer acting jointly, on the one hand; and
- the appropriate person or body referred to in section 189 (1) on the other

but no rights concerning information and consultation is granted to the individual employees affected by the transfer. Section 197 is an employees' protection provision. Therefore it is very strange that individual employees have almost nothing to say in the decision making process.

Information should be granted to employees compulsorily regarding:

- the date or planned date of the transfer
- the reasons for the transfer
- consequences of the transfer for the employees
- measures to be taken in respect to the employees.

[334] see also, amongst others, *NUMSA v Metkor Industries* (1990) 11 *ILJ* 1116 (IC)

The right to object to a transfer has always been accepted in Germany and is granted to employees, provided they have a good reason, by § 613a (6) since 2002. In case an employee decides on objecting to his or her transfer he or she stays in the employment of the transferor. This might not be the most practical position but most certainly the employee-friendliest.

Section 197 does not contain a right to object explicitly. It has been shown, though, that the right to dignity and the right not be subject to forced labour laid down in the constitution as well as the principle of freedom of contract makes it impossible not to acknowledge an employee's right to object to a transfer. So far the courts have not dealt with the constitutionality of this specific problem. A decision not to transfer can only be made by one of the parties listed in section 189 (1) LRA but not by a single employee. The contract of employment and therefore the right to choose one's employer is of very personal nature and should not be subject to a decision made by the parties listed in section 189 (1) LRA. The only possibility a single employee has in terms of the LRA to refuse to transfer is to claim a constructive dismissal in instances where he or she is provided with conditions or circumstances that are substantially less favourable to him or her than those provided by the old employer [section 186 (1) (f) LRA].

Since the right to object is almost non-existent in South African law the consequences of an objection are also far from clear. An objection can be treated as a resignation, a dismissal or the employee stays with the transferor. The courts need to find precise criteria as to how an objection should be treated. The employee- friendliest alternative is that the employee stays in the employment of the transferor.

As mentioned before the protection offered by section 197 (2) and (5) (b) may be altered by a contrary agreement in terms of 197 (6). Section 197 (2) contains the most important protection for employees.

§ 613a on the other hand contains cogent law[335] which means that the transfer of the employment relationships cannot be eliminated by agreement between the old and the new employer or by a works agreement or a collective agreement. However, the freedom of disposition in respect of the employment relationship on the employee's side remains. An employee is therefore able to conclude a termination agreement either with the transferee or the transferor[336]. It is controversial under which conditions it is allowed to conclude agreements with the employees concerning their individual terms and conditions of employment to their disadvantage. The jurisprudence allows such agreements only if there is a good reason.

It is very unfortunate that section 197 allows for contrary agreements to the disadvantage of the employees without including them in the decision making process. Such a provision stands in contrast to spirit and purpose of the norm.

D. Chapter 3: Conclusion

All in all it seems that § 613a provides for a very strong protection of employees when it comes to a transfer whereas section 197 is much more employer friendly.

The fundamental distinction between employment law in Germany and South Africa is to be explained by the fact that Germany is a civil law country whereas South Africa is a common law country. Germany shares the social issues and political history of the EC which aims at increasing the protection of workers in the EC. Therefore the BAG has interpreted the law in a very similar manner as the Acquired Rights Directive has been interpreted.

It is submitted that section 197 is based on a large extent on the Acquired Rights Directive as well as on the United Kingdom TUPE regulations.

[335] BAG 1975 5 AZR 444/74, AP Nr. 2 zu § 613a BGB; Dieterich M et al (2004) *Erfurter Kommentar zum Arbeitsrecht* (4th ed.) § 613a at par 82

[336] Henssler M, Willemsen H-J, Kalb H-J (2004) *Arbeitsrecht Kommentar* § 613a at par 248

Even though it might be useful for South Africa, due to the long experiences of the European countries, to study foreign provisions concerning the transfer of a business or part thereof, each country has its own specific needs and circumstances. Therefore, to draw too much attention to foreign provisions could be quite dangerous since the circumstances and labour conditions of the European countries are quite different from the circumstances and conditions in South Africa.

However, both positions have advantages and disadvantages. From a business perspective the South African approach is much more appropriate to support competition and economic growth since it is much easier for an employer to sell a business in South Africa than it is in Germany. As there is increased market competition on a global level there is more pressure on businesses to reduce labour and other costs and increase profits. Section 197 provides for flexibility in making, for example, the effects of subsection (2) subject to a contrary agreement in terms of subsection (6).

In Germany employees are in a much better position when in comes to a transfer than in South Africa. It has to be said though that the policy in Germany to protect employees very strongly in the event of a transfer has proved to be not very beneficial to the economy. The provisions in Germany can be a burden on the employer who acquires a business or part thereof. Investors will think twice to acquire a business in Germany since so many obligations are placed on them. The transferee's and transferor's freedom to make economic decisions is reduced to a large extend. Besides, although § 613a protects jobs of workers in the event of a transfer, it does very little to promote employment opportunities for those who are unemployed. The employer who acquires a business has to be aware that labour is a fixed factor.

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