

Defining the lines for automatic transfer of employees

 By [Johan Botes](#)

4 Oct 2018

Do employees automatically transfer from an old service provider to a new service provider when the client replaces the one with the other? The Labour Appeal Court (LAC) recently engaged low gear to provide proper traction on the automatic transfer of employees.



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The Labour Relations Act (LRA) provides for automatic transfer of employees following the transfer of a business (or part of a business) as a going concern. Our local version of the Transfer of Undertakings and Protection of Employment (TUPE) Regulations in the United Kingdom, or Acquired Rights Directive in the European Union, is section 197 of the LRA. Section 197 provides protection of employment to employees where their employer is taken over by another business, or where a portion of their employer's business is transferred to another. This aspect has been the source of considerable juridical attention when it comes to a change in service providers. Whilst it is relatively settled that employees will transfer where the entire business is taken over, sold or otherwise transferred, it is not as clear in respect of changes in service providers.

In *Imvula Protection and others vs University of South Africa*, the LAC heard an appeal of the original court's judgment. The labour court originally held that the university had not taken over the business of the security service when it terminated the service agreement, insourced some of the functions and appointed another provider to perform other functions. The case turned on what constituted a business for the purpose of section 197.

The LAC was at pains to highlight the unique nature of the case - including the university's decision to employ the majority of the security guards in the light of protests against outsourcing during the "Fees Must Fall" campaign that swept tertiary institutions during 2015. The university did not take over infrastructure or assets involved in managing the security guards or service but instead required a new service provider to provide managers and supervisors for the overall management of the security staff. The appellants argued that the university employing the majority of the security staff triggered the automatic transfer provisions, especially when considering that the assets required for them to perform their work were insignificant.

In its judgment delivered on 25 September 2018, the LAC held that the business of providing security at the campuses constituted more than merely a group of guards patrolling the premises. The business included management, equipment or strategy with regard to their deployment. The university did not take over any of these, hence it did not take over the business of providing security. As a result, the termination of the service provider agreement and employment of the majority of the guards did not constitute a transfer of a business as a going concern on these facts. The old service provider had to deal with its remaining staff in the normal course - redeploy them or terminate their service due to redundancy or operational requirements.

Employers keen to get in the right gear when facing business transfers should consider the nature of the business they will hand over or accept. From the original labour court judgment and the LAC's views it is clear that the courts appreciate that most businesses require assets of various shapes and forms to conduct the business. Absent a transfer of assets, most transfers of a portion of the business will not meet the requirements of section 197 (that it must be a business or identifiable portion of it) that is transferred as a going concern. Structuring transactions accordingly will assist in avoiding unwanted consequences. In appropriate circumstances and if properly structured, employee transfers can take place manually and not automatically.

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