

A matter of ongoing concern: Judicial interpretation and misinterpretation of section 197 of the Labour Relations Act

PAUL BENJAMIN

Adjunct Professor of Law, University of Cape Town and Director of Cheadle Thompson & Haysom Inc Attorneys.

1 INTRODUCTION

*'I'm just a soul whose intentions are good,
Oh Lord, please don't let me be misunderstood.'*

Perhaps no section of the Labour Relations Act (LRA) has given rise to such widely divergent interpretations as section 197. In its short life, it has already given rise to two major controversies concerning its application, a Constitutional Court judgment which settled one of those controversies, a Supreme Court of Appeal (SCA) judgment which may well be the source of further controversy, and a book.¹ In addition, Parliament felt obliged to rewrite the clause to make sure we all knew what it meant. What is significant about these controversies is that they concerned the application of the section and effectively emasculated its operation for much of the first decade of our new labour law. To use the metaphor relied upon by Professor Eivance Kalula in his inaugural lecture: it has taken most of the last decade for section 197 to recover from its 'false start'.

I want to look back at these controversies to try and learn the lessons they offer us both about the drafting of the 1995 LRA and its 2002 amendments and for the future interpretation (and perhaps amendment) of section 197. I conclude my paper by predicting certain of the debates that we can anticipate in the future about the efficacy of the LRA and other labour market legislation in the light of the rapid changes in employment relationships in South Africa.

The first controversy concerned the purpose of this section. On the one hand, there were those who recognised its 'labour protection' function. Proponents of this view included prominent counsel (Wallis SC) and judges (Froneman JA, Zondo JP and, in a prescient first judgment on the topic, Seady AJ). On the other hand there were the voluntarists (Judge Mlambo and Judges of Appeal Van Dijkhorst and Comrie) who believed that section 197, unlike any other provision in labour law, allowed employers to contract out of its provisions. Also of this view was Brassey,

¹ Todd C, du Toit D & Bosch C *Business Transfers & Employment Rights in South Africa*.

who adopted the view that the drafters did not know what they were doing.²

That controversy erupted so quickly is understandable. Section 197 does something few other provisions in labour law do – it regulates the relation between two employers. In that regard it is not unique. Its neighbour, section 198, regulates temporary employment services; a recent judgment (which is discussed later) highlights the relationship between these two important sections

This controversy over the purpose of section 197 was resolved twice. Firstly, by the enactment of an amended section 197 in the LRA Amendment Act of 2002 – that clarifies the intent of the original section and introduces a range of novel provisions – and subsequently, by the decision of the Constitutional Court in *NEHAWU v University of Cape Town*.³

2 WHY SECTION 197?

Section 197, according to the Constitutional Court, serves ‘a dual purpose, it facilitates the transactions while at the same time protecting the workers against unfair job losses’.⁴ It facilitates commercial transactions by allowing a species of legal transaction not permitted at common law – the compulsory transfer of a contract of employment from one employer to another. The section protects employees in two ways. Firstly, by preventing employers from relying upon a transfer of any part of a business (whether by outsourcing or any other commercial arrangement) to another employer as a basis for retrenching. Secondly, by providing that where a transaction such as an outsourcing occurs, that transaction cannot be used to reduce terms and conditions of employment. The effect is to limit the use of outsourcing and similar transactions as a basis for gaining competitive advantage – the transfer of employees cannot be used to push down labour costs. Section 197 can also be viewed as preventing two employers from doing what one employer cannot do. Employers who wish to reduce wages have to use the route of collective bargaining and if necessary, industrial action to achieve this purpose.

Our law now unambiguously requires that any transaction involving the transfer of part of a business as a going concern results in the contracts of employees being automatically transferred to the new employer. Unless employees agree not to be transferred, the new employer receives the employees on their existing terms and conditions of employment and must comply with any collective agreement or organisational rights applicable to those employees.

The second controversy was triggered by the judgment in *SA Municipal Workers Union and Others v Rand Airport Management Co. (Pty) Ltd and*

2 Brassey *Employment and labour law* Vol 3: Commentary on the Labour Relations Act A8: 84–95

3 *National Education Health & Allied Workers Union v University of Cape Town & others* (2003) 24 ILJ 95 (CC) (hereinafter *NEHAWU v UCT*)

4 *NEHAWU v UCT* at par 53.

*others*⁵ that deals with whether the outsourcing of services constitutes a transfer. At the time the law was rather confusing. The 2002 amendments had come into effect, but this was before the Constitutional Court decision in *NEHAWU v UCT*. The court therefore applied the interpretation of a "going concern" adopted by the majority by the Labour Appeal Court (LAC) in the *NEHAWU v UCT* decision.⁶ That test did not survive the Constitutional Court decision. The decision of the majority of the LAC was based on the conclusion that because the employees of a company, just like its machines, are one of its assets, a transfer cannot involve a 'going concern' unless the two employers agree to a transfer of the employees. A company (without its employees) was, in van Dijkhorst AJA's bizarre metaphor, a bleached skeleton rather than a vibrant horse.⁷ During the extensive process of developing the 2002 amendments to section 197, none of the parties to the negotiations advanced this construction as a possible interpretation of the provision.⁸

The *Rand Airport* case concerned the outsourcing of gardening services forming part of the maintenance services of the employer. In his judgment, Landman J pointed out that gardening services formed part of the maintenance services and were part of the non-core activities of Rand Airport. He also emphasised the fact that the contract was to be outsourced for a temporary period and Rand Airport did not intend to transfer the applicants working in the garden. As a result he concluded that the 'gardening services' did not constitute 'part of a business' and section 197 was inapplicable.

Landman J stated that he had difficulty in conceiving that a support function could constitute 'a business or part of a business'. To reach this conclusion, he imported the factors relevant to ascertaining whether there is a 'going concern' into the determination of whether the transfer concerns the part of a business. There is no hint in the language of section 197 that supports Landman J's construction.⁹ Likewise, there is nothing in the wording of the section to support Mlambo J's conclusion that the section would not apply to outsourcing because it was not permanent.

On their approach, Parliament elected to discriminate (by a nod and a wink visible to some members of the labour court bench) on a quite irrational basis between different groups of employees. Why should an employee in a canteen of an insurance company be less a part of the company's business than the sale personnel or administrators who eat at

5 (2002) 23 ILJ 2304 (LC). The court found that the gardening services of Rand Airport did not constitute a part of a business and therefore that section 197 did not apply to the outsourcing of those services.

6 Reported as *NEHAWU v University of Cape Town & others* [2002] 4 BLLR 311 (LAC).

7 *Ibid* par 104.

8 The fact that employees should be considered to be assets in the same way as machinery was a construction that was not advanced on behalf of any of the litigants in the proceedings and was not raised by the judges during the hearing of the matter.

9 It is ironic that Judge Landman's well-reasoned decision in *Ntuli & others v Hazelmore Group t/a Musgrave Nursing Home* 1988 (9) ILJ 709 (IC) served as one of the motivations for the inclusion of section 197.

the canteen? Why would employees in core services (who are considerably less likely to be the subject of an outsourcing) be covered by section 197 and not those in non-core services? Why would Parliament provide protection to employees whose employer transfers a part of its business 'permanently' but not where the transfer is for a limited period of time? From a labour protection perspective, these distinctions are utterly arbitrary and irrational.

The *Rand Airport* judgment has now been reversed on appeal by the LAC.¹⁰ The LAC judgment rejects the finding that non-core services do not form part of an employer's business. In reaching this conclusion, the LAC relies, in particular, on the addition of the term 'service' to the elements that are deemed to constitute part of an employer's business. It is suggested that this approach restores section 197 to its original intention and that the cumulative use of the 'business, undertaking or trade' (to which the 2002 Amendments added 'service') was meant to give the section a broad application. It is further suggested that this aspect is satisfied if an identifiable aspect of a business is transferred. It does not matter whether all of the gardeners or some of the gardeners are transferred or whether gardening is part of the employer's core business or not.

The LAC notes that the construction of a 'going concern' applied by Landman J had already been overturned by the Constitutional Court. Ultimately, the court in *Rand Airport* did not have to undertake a complex balancing of the factors outlined in the various judgments to determine whether the transfer concerned a 'going concern'. It resolved the matter on the simple point that no transfer had taken place because, at the time proceedings were instituted, the terms of the transfer agreement had not been implemented or agreed. The court held, however, that where the two employers do not propose such a transfer of employees, the court will have to take a full conspectus of the transaction to determine whether the business retains its identity after the transfer. The fact that employers had made a decision not to transfer the employees would not be a factor that would assist them in the characterisation of the transfer.

Almost a decade into the Act's life, section 197 has finally gotten to first base. We now at least know the test and some of the many factors that will be taken into account. In making that comment, I retain the gnawing suspicion that the SCA judgment in *Telkom v Blom*¹¹ may severely limit section 197's application in the public sector because of the construction of public service pension fund rules. However, a full discussion of that decision is beyond the scope of this presentation.¹²

Why did two distinguished and respected judges adopt an approach that is so obviously at odds with the wording of the section? Why did they both go to such length to exclude outsourcing from being a transfer when

10 *SAMWU & Others v Rand Airport Management Co (Pty) Ltd & Others* (2005) 3 B.I.L.R. 241 (LAC).

11 (2003) 24 ILJ 1475 (SCA).

12 See Todd C, du Toit D & Bosch C at 66-68.

the Act gives them no mandate to do so? There are a number of possible answers and they do raise broader questions.

Perhaps this can be understood as a response to the breadth of the section, that somehow they felt that section could not mean what it said and for that reason they needed to limit its application. As outsourcing (coupled with a reduction in wages) was such a natural part of contemporary labour relations, Parliament could not have meant to stop it. Their response was therefore to develop what the English Court of Appeal described as 'judicial emasculation of the concept of legal transfer'.¹³ It may be some consolation to know that English lawyers had similar difficulties at first in understanding the European Acquired Rights Directive and the British Transfer of Undertakings (Protection of Employment) (TUPE) regulations¹⁴.

A further line of enquiry is to ascertain whether the section gives sufficient guidance to the courts to determine whether particular transactions are covered or not. In its proposals to define a going concern in the 2000 LRA Amendment Bill, the government proposed a test based on the approach adopted by the European Court of Justice in interpreting the European Directive and member country legislation dealing with transfers of business. In terms of the proposed test, transfer of a business would be covered by section 197 if:

- (a) an economic entity, consisting of an organised grouping of resources, that has the object of performing an economic activity is transferred; and
- (b) the economic entity retains its identity after transfer.

Although this was not included in the Bill, it is suggested that it is this type of general test concerning the requirement of an economic entity that retains its identity after the transfer that will be used by the Court. However, the case law has now brought us to this point.

A third reason for the difficulties of interpretation was the manner in which the section was inserted into the Act. By any measure, section 197 was a terse section. The slightly more expansive provision in the January 1995 Draft was clearer and made the section's automatic application to 'going concern' transfers unambiguous. In the process of redrafting the Act, a measure of uncertainty somehow crept in. In fact, it was one of the

13 *Adi (UK) Ltd v Willer* [2001] IRLR 542 (CA).

14 A leading British textbook describes the response as follows – 'Governments, employers and insolvency practitioners simply could not believe that legislation could attempt both to prevent employers from carrying out dismissals in order to effect a sale and to prevent the purchaser from reorganising the business. They were astounded that, for the sake of protecting the contractual expectations of the workforce, legal controls might prevent employers from achieving the maximum value from the sale of the businesses and might block the use of outsourcing of parts of the business in order to take advantage of lower labour costs in the secondary labour market. Initially, the courts shared this disbelief, but before long they accorded respect to the decisions of the ECJ which laid bare the purpose of the Directive'. Collins H, Ewing K and McColgan A *Labour law: Text and materials* (Oxford, Hart Publishing) 2001 at 1068–9.

arguments advanced in *NEHAWU v UCT* that these changes could only be explained by a conscious decision by the legislature not to enact a provision that balanced employer and employee interests and instead to include a provision favouring economic efficiency above all else.

Documents such as the Acquired Rights Directive and TUPE Regulations are very much more detailed and certainly the revised sections 197 and 197A show a greater concern with spelling out the details. I think the initial draft can be criticised for giving inadequate direction to the courts as to the purpose and scope of so innovative a provision in our law. At the same time, once the legislature had opted to use broad terms and enact a far-reaching provision I do not think there was any justification on any of the ordinary canons of construction (whether literal or purposive) for chopping down its application as the Labour Court and the LAC sought to do.

While section 197 is logically located at the end of the dismissal chapter it is insufficiently grounded in the body of the Act. As originally formulated, there was no cross-reference to it in any other section of the Act. This has now been remedied by identifying two categories of dismissal connected with a transfer – an automatically unfair dismissal by reason of a transfer and a new category of constructive dismissal. A proposal to specify the relationship between section 197 and dismissal for operational requirements with greater certainty contained in the 2000 Amendment Bill was not enacted. However, I do not think the failure to do so will cause great difficulty and the court will ultimately have to use the causation test adopted in *SACWU v Afrox*¹⁵ to determine whether the dismissal is as a result of a transfer (and therefore automatically unfair) or occasioned by operational requirements. What a transferor will not be able to do is to terminate employment on account of the transferee's operational requirements. Thus, where the transferee proposes to conduct the business with fewer staff, it will have to accept the transfer of all employees and thereafter engage in retrenchment consultations with some of the transferred employees. This may make less the business efficiency in certain circumstances and can only be avoided by an agreement not to be transferred which employees may accept, for example, in exchange for a higher severance package.

3 HOW IS A SECTION 197 CLAIM BROUGHT?

The Act contains no rules setting out the procedures to be followed when bringing a claim in terms of section 197. In practice, these are frequently brought as a matter of urgency. Employees who have received termination notices because of an outsourcing or similar transaction typically bring an urgent application to have the relevant transaction declared to be a 'going concern' transfer as contemplated by section 197. The application will be brought shortly before or after the date of the transaction depending on the length of the notice the employees received and the

¹⁵ [1999] 10 BLLR 1005 (LAC).

speed with which their union and lawyers are able to respond. There have been occasions (but these are likely to be rare) where union will seek the opposite relief – that the transaction is not covered by section 197 and that the employees remain employees of the original employer. This occurred in *NUMSA v Staman Automatic CC and Another*,¹⁶ which concerned a proposed ‘outsourcing’ of employees a labour broker (temporary employment service provider).

Although applications can be lodged urgently, this is no guarantee that they will be resolved urgently. Matters may be postponed for filing affidavits and then there is the prospect of appeals. This raises the difficult issue for employees who may be offered employment with the transferor at significantly reduced wage rates. Do they accept the job with the hope that they will eventually receive a significant back-pay claim? If they do not accept the offer will they have failed to mitigate their losses? Or do they cut their losses and go elsewhere thereby sacrificing their accumulated service and other benefits, which might be transferred?

Urgent proceedings are brought by way of affidavit. A union seeking to obtain an urgent ruling that section 197 is applicable may not always have adequate information in its possession. The application may have been brought prior to the finalisation of the transaction and the union, not being a party to the negotiations between the two companies, may not be in possession of all the relevant documents and contracts.

The difficulties in bringing an application in these circumstances is well-illustrated by *SAMWU v Rand Airport Management Co (Pty) Ltd and others*.¹⁷ The application was launched eight days prior to the relevant transfers occurring. In the one transaction, the relevant signed agreement was annexed but no evidence was made available to the court that the agreement had been implemented. In the second transaction, a draft agreement was attached but not the final signed agreement. The court found that as no agreement had been concluded at the time the application was brought, they would have to bring further proceedings, several years after the event, establishing the status of the final agreement before obtaining substantive relief. As the applicant had alleged the existence of the agreement, it was therefore required to prove its existence.

The finding is highly significant for the future conduct of section 197 proceedings. Applicants will be obliged to supplement their papers, even after judgment but while appeals are pending, to advise the court on the conclusion of contracts and their implementation. Employers will be obliged to supply this information, and where they do not, the courts will have to grant applications for disclosure of relevant information. Applicants may be well-advised not to institute proceedings until they have obtained copies (or at least evidence of) the relevant transfer agreements. Where these are not forthcoming, an appropriate paper trail will have to be created to explain any delay in instituting action.

16 (2003) 24 *ILJ* 216 (LC).

17 *Supra* (n 5).

One consequence is that the question of whether the transfer involves a 'going concern' will be determined by way of evidence on affidavit. This will generally amount to the version of the employer parties to the transaction as little of this evidence will be in the possession of the union. In some circumstances, it might be advisable for unions not to proceed urgently and, where they allege a transfer, merely proceed in the ordinary course with a claim that the termination is automatically unfair by reason of a transfer.

One of the complexities of section 197 litigation is that employees usually have two claims. First prize will usually be to be transferred on their existing terms and conditions of employment because section 197 is applicable. But if this fails, they have the alternative claim that the dismissal was unfair. One significant difference is that both transferor and transferee are parties to the former claim. However, if it is merely a termination for operational requirements because the relevant transaction falls outside of section 197, only the old employer will be a party. Prior to the 2002 Amendments the former claim would consist of an application for a declarator coupled with a finding that the dismissal was invalid. Under the revised section, the employees remain entitled to declaratory relief which will generally be sought urgently. A complicating factor is that the alternative claims (transfer or unfair dismissal) are based on conflicting constructions of the same transaction and there are specific rules and time-periods for bringing unfair dismissal cases. Therefore, to avoid its potential claim for dismissal prescribing, a union may have to refer the dismissal dispute to the CCMA or bargaining council and then (if necessary) put it on the back-burner while the application in which it claims that the transaction is in fact a transfer is determined.

4 197 DOES NOT GO INTO 198

In *NUMSA v Staman Automatic CC and Another* (2003) (24 ILJ 216 2LC) Landman J was faced with a novel use of section 197. In this case, the employer sought to 'outsource' its employees to a labour broker (temporary employment service provider) named Jobmates. The union argued that the transaction fell outside the terms of section 197 in order to prevent the transfer of its members to Jobmates.

In the decision, Landman J used the approach he adopted in the *Rand Airport* case to conclude that the employees the company sought to transfer to Jobmates did not constitute a part of its business.

That was definitely the right outcome for the case, but there seems to be a much easier route to that conclusion. The application of section 197 requires a transaction in terms of which all rights and duties between employer and employee are transferred to the new employer. This cannot be the case where the purpose of the transaction is to establish a section 198 'labour-broking' arrangement. Section 198(2), in terms of which the temporary employment service is deemed to be the employer, starts with the

words '[f]or the purposes of this Act'.¹⁸ Many aspects of the employers' rights and duties continue to reside with the 'employer/client' at whose workplace the employees work. For instance, in the *Staman* case, after the section 198 triangular relationship had been established, the company would have continued to supervise the work of its former employee and ensure their health and safety in the workplace in compliance with the Occupational Health and Safety Act (OHSA). The definition of an employee and an employer in OHSA are very different from those in the LRA and a 'labour broker' is expressly excluded from the definition of an employer. The employer who supervises the employee at work is the employer for the purposes of OHSA, even though it is not the employer for the purposes of the LRA and Basic Conditions of Employment Act. That type of division of rights and responsibilities is the essence of a triangular relationship – it involves a 'partial outsourcing' of the employer's functions. At a very fundamental level, therefore, section 197 can never be used by an employer to transfer its employees into a section 198 triangular relationship, because the employer does not divest itself of all the rights and obligations of the employer under the contract as is required by section 197(2)(b). Even in respect of those obligations that it intends to transfer to the temporary employment service, the old employer in a *Staman*-type situation retains a joint and several liability in terms of section 198(4) for compliance with minimum conditions of employment in terms of collective agreements and statutes. This is a further indication that section 197 can never be utilised to establish a triangular employment relationship involving a temporary employment service.¹⁹

5 SECOND GENERATION CONTRACTING

In the *Staman* case, Landman J does comment that the outcome may have been different if the employees had been the employees of a contractor. That comment is correct and my view is that section 197 would be applicable where an employer seeks to replace a contractor or a temporary employment service with another one. In such a case, the transfer of the work from the one contractor or employment service may involve the transfer of a 'going concern' and the new contractor will be obliged to take on the old contractor's employees.

This is what is referred to as 'second generation' contracting and it is likely to be issue that will face our courts in the near future, as outsourced contractors come up for renewal and re-tendering. In these circumstances, the application of section 197 offers employees their only prospect of employment security.

18 Todd C, du Toit D & Bosch C *op cit* ignore this point in suggesting (at 46) that it is contrary to the intention and wording of section 198 that the client should be the employer and that a client cannot be a co-employer.

19 This latter argument was raised by Prof Halton Cheadle during a lively debate on the topic at the conference.

As an English author has noted the application of transfer rules in 'second generation' contracting creates a complex interrelationship between procurement regulation and the protection of the rights of existing workers.²⁰ This may become increasingly significant as the codes of practice developed under the Broad-Based Black Economic Empowerment Act become the basis for determining procurement decisions.

6 SECTION 197 AND THE NEW LABOUR MARKET

In this section of the paper I wish to locate section 197 in the broader context of labour market changes in South Africa. The information used by me is drawn from a synthesis report based on the findings of a research project by Department of Labour on the changing nature of work and atypical forms of employment tabled in NEDLAC in 2004. This very significant study concludes that the growth of non-standard employment has eroded the quality of labour protection and that there is a need for a reappraisal of policies and legislative provisions. While the report has to date received very little publicity, its findings and recommendations are likely to dominate the next phase of labour law reform in South Africa.

The project conceptualises the changes in work in South Africa in terms of two inter-related processes – casualisation and externalisation. Both represent shifts from the norm of the standard employment relationship which is understood as being indefinite (permanent) and full-time employment, usually at a workplace controlled by the employer. Casualisation refers to displacement of standard employment by temporary or part-time employment (or both). Externalisation, on the other hand, refers to a process of economic restructuring in terms of which employment is regulated by a commercial contract rather than by a contract of employment. Outsourcing or contracting out (whether under the guise of a section 197 transfer or not) is one mechanism of achieving externalisation. Informalisation refers to the process by which employment is increasingly unregulated and workers are not protected by labour law. 'Informalisation' covers both employees who are nominally covered by labour law but are not able to enforce their rights as well as those who are not employees because they have the legal status of independent contractors. In the case of externalised work, this includes situations where the nominal employer does not in fact control the employment relationship. Again, it is possible to see a potential link between section 197 and the process of informalisation – when the employer to whom the contract is transferred while nominally the employer is in such a position of economic dependence on the former employer that actual control of the employment relationship continues to lie with the former employer.

The reports conclude that changes in the labour market have taken the form of externalisation rather than casualisation. The motor for the

20 See Bovis C 'The compatibility of socio-economic policies with competitive tendering: The case of contract compliance and the transfer of undertakings' in Collins H, Davies P & Rideout R *Legal regulation of the employment relationship* 425-439.

development of externalisation has been an exponential increase in the incidence of labour broking (temporary employment services). In all four sectors²¹ studied firms have restructured to reduce standard employment to a minimum. The wages of workers in externalised employment are significantly lower than those employed in the firms whom they supply with goods or services. The primary benefit for employers has been to reduce labour costs and minimise risks associated with employment. Two forms of labour market segmentation have therefore been produced – between those employed in an enterprise in full-time employment and those who have been casualised (part-time or temporary workers) and between those employed by an enterprise and those employed by labour brokers or contractors. This includes contractors to whom workers have been transferred as a result of a section 197 transfer.

How does this relate to section 197? The study²² does not indicate the extent to which section 197 transfers have been used to externalise employment. However, the most significant finding is that persons in externalised employment earn less than those employed in the firms they supply goods or services to, many of whom may be their previous colleagues. It is likely that the controversies and uncertainty concerning section 197 have lessened its impact to date. Would the section make any difference if properly implemented? At best it represents a temporary barrier to the reduction of terms and conditions of employment. Factors such as weakened (or no) union power in (the often smaller) firms to whom contracts are awarded explain the reductions in earnings.²³

It is worth speculating on the relationship between 197 and 198. While the former offers the prospect of an outsourcing without incurring the costs of retrenchment consultations and benefits, it is severely limiting in respect of any attempt to reduce labour costs. Section 198 probably offers employers who wish to take advantage of informalisation greater flexibility to do so by outsourcing part of their functions as employer.

7 THE FUTURE?

While we now finally know the bundle of factors that must be considered in deciding whether a transfer is of a 'going concern', it is doubtful whether this gives employers sufficient certainty. The TUPE regulations (which are not only the model we used but are also the source of our case law) are about to be amended to try and give greater clarity.²³ The need

21 Retail, mining, household appliances and construction.

22 An example of a political response to the inequality that may flow from outsourcing is the adoption in the United Kingdom of a Code of Practice on Workforce Matters in Local Authority Service contracts which is designed to end the 'two-tier' divide between municipal employees and the employees of contractors performing services for local authorities (see Morris GS 'The future of the public/private labour law divide' in Barnard C, Deakin S and Morris G S, *The future of labour law: Liber amicorum Sir Bob Hepple QC*, Oxford and Portland Oregon 2004 159 at 171).

23 Recent press reports indicate that due to the high number of responses received to the consultation document, TUPE will be not be revised until 2006.

for further amendments to deal with the impact on pension funds has been adverted to by the SCA in *Telkom v Blom*²⁴ but it is unlikely that these amendments or equivalent changes to the pension fund rules would obtain the support of labour whose members would lose out on the prospect of a pay-out on transfer.

BIBLIOGRAPHY

- Brassey N *Employment and labour law* Vol 3: Commentary on the Labour Relations Act (Juta, Cape Town)
- Bovis C 'The compatibility of socio-economic policies with competitive tendering: The case of contract compliance and the transfer of undertakings' in Collins H, Davies P & Rideout R *Legal regulation of the employment relationship*
- Collins H, Ewing K and McColgan A *Labour law: Text and materials* (Oxford, Hart Publishing) 2001
- Morris G S 'The future of the public/private labour law divide in Barnard C, Deakin S and Morris G S, *The future of labour law: Liber amicorum Sir Bob Hepple QC*, (Oxford and Portland Oregon) 2004
- Todd C, du Toit D and Bosch C *Business transfers & employment rights in South Africa* (LexisNexis Butterworths, Durban) 2004

24 *Supra* (n 10).