THE IMPACT ON THE EMPLOYER'S PENSION PROMISE TO ITS EMPLOYEES WHEN IT TRANSFERS ITS BUSINESS AS A GOING CONCERN IN TERMS OF SECTION 197 OF THE LABOUR RELATIONS ACT

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DECLARATION

I declare that this Research Report is my own original work. This paper is submitted to comply with the prescribed requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg.

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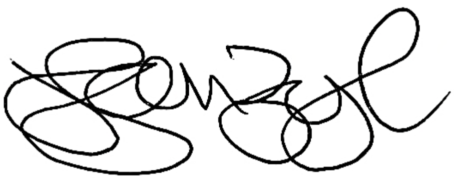

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ABSTRACT

The common law does not protect the interests of employers and employees adequately when an employer transfers its business to a new employer as a going concern. Section 197 of the Labour Relations Act 66 of 1995 guarantees transferring employees' continuity of employment regardless of being transferred to a new employer. Section 197 of the LRA determines that the new employer effectively replaces the old employer. The transfer takes place without the affected employees' consent. New employers may impose different terms and conditions of employment than what employees received from their old employer. Employees' pension rights are major employment benefits that may be impacted by the transfer of business. The new employer's retirement fund may provide benefits that are different to those offered by that of the old employer. While the transfer of business is regulated by labour law, the transfer of affected employees' pension rights is regulated by pension law. This research report discusses how the application of pension law principles ensures that transferring employees' pension rights are not prejudiced by the business transfer over which they had no control. In particular, this report examines the legal recourse available to employees when their existing retirement fund benefits are substantially different from what they were offered by the retirement fund which was associated with their old employer.

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I. INTRODUCTION

This research report aims to expose the impact that the labour consequences of a transfer of business as a going concern in terms of section 197 of the Labour Relations Act ('the LRA')[1] may have on the *pension rights*[2] of the employees affected by such a business transfer. This report evaluates whether transferring employees' pension rights are adequately protected when employers transfer their businesses and their employees become members of retirement funds[3] associated with their new employers.[4]

Part II of this report examines the intersection between labour law and pension law especially with regards to business transfers' potential impact on affected employees' pension rights.

In Part III of this report, the terminology applicable to a retirement fund member's rights and interests during a transfer of business in terms of section 197 of the LRA (and potentially a transfer to the new employer's retirement fund in terms of section 14 of the Pension Funds Act[5] ('the PFA') is discussed in detail. The employment consequences of a transfer of businesses will be discussed in Part IV of this report, with emphasis on the potential impact that the labour legislation may have on employees' pension rights subsequent thereto. Part V of this report will examine whether the protection of employees' pension rights during a transfer to the new employer's retirement fund in terms of section 14 of the PFA is adequate.

In Part VI, the legal recourse available to employees whose pension rights are compromised during a transfer of their employer's business will be highlighted. It will interrogate whether affected retirement fund members can rely on assistance from the Office of the Pension Funds Adjudicator (hereinafter 'the Adjudicator') when they refer a dispute about their pension rights

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[1] Act 66 of 1995; The inadequacy of the common law to regulate the labour consequences of business transfers was, from 1996, addressed by means of statutory regulation through section 197 of the LRA, and from 2002, through amended sections 197, 197A and 197B. Sections 197A and 197B of the LRA deal with the transfer of contracts of employment in circumstances of insolvency and the disclosure of information concerning insolvency respectively. These sections of the LRA may have different consequences to the pension rights of affected employees but do not form part of the subject matter this research report.

[2] In this report the term *'pension rights'* will be used throughout as a collective term to assist an understanding of the nature of transferring employees/members of retirement funds' existing pension rights as well as their future expectations of what benefits they will receive from their retirement funds when they retire. This term was also used by the respective presiding officers in at least four very influential cases that will be analysed in this report, *Telkom SA Ltd & others v Blom & others* (2003) 7 BLLR 638 (SCA), *Younghusband and Others v Decca Contractors (SA) Pension Fund and its Trustees* (2000) 1 BPLR 88 (PFA), *Resa Pension Fund v Pension Funds Adjudicator* (2000) 4 BPLR 355 (C), and *Horn v LA Health Medical Scheme* (2015) 7 BCLR 780 (CC).

[3] In this report the term *'retirement fund'* will be used throughout as a collective term that refers to all different types of 'pension fund organisations' as defined in section 1 of the Pension Funds Act and section 1 of the Income Tax Act 58 of 1962 ('the ITA').

[4] Todd *et al Business Transfers and Employment Rights in South Africa* (2004) at 98.

[5] 24 of 1956.

having been prejudiced by their employer's business transfer in terms of section 197 of the LRA. Part VII concludes the discussion and makes recommendations for law reform.

II INTERSECTION BETWEEN LABOUR LAW AND PENSION LAW

Employment plays a crucial role in the social and economic lives of all South African citizens. Section 23 of the Constitution of the Republic of South Africa, 1996 (hereafter 'the Constitution') guarantees everyone the right to fair labour practices[6] and the right to have access to social security.[7] The connection between section 197 of the LRA and section 23 of the Constitution has been accepted into our law.[8] The relationship between section 197 of the LRA and socio-economic rights however, has not been clarified conclusively by our courts yet.[9]

Retirement funding forms part of our social security system.[10] Social security in the form of retirement funding can be used to alleviate poverty.[11] Notwithstanding the importance of retirement funding, employers are not legally obliged to provide their employees with retirement benefits in South Africa, but there are many employers who do.[12]

This paper is concerned with employees who are forced to exit their retirement funds associated with their old employers when such employers' businesses are transferred to new employers as a going concern. There is a need to determine whether new retirement funds which members joined after a section 197 transfer of business are liable to provide the same pension rights that members would have been entitled to if they remained with their old retirement funds.

Some employers participate in so-called standalone retirement funds that are established exclusively for their own employees only.[13] Some retirement funds are established solely for employees in certain sectors through sectorial determinations in terms of the LRA. A modern trend is for employers to participate in umbrella funds in terms of which an employer's

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[6] Section 23 of the Constitution.
[7] Sections 26 and 27 of the Constitution.
[8] *Schutte & Others v Powerplus Performance (Pty) Ltd & another* (1999) 2 BLLR 169 (LC) para 31.
[9] Todd *et al* op cit note 4 at 58.
[10] TE Manamela *South Africa's Occupational retirement system: A comparative social security perspective* (LLD thesis, University of South Africa, November 2015) available at *https://uir.unisa.ac.za/handle/10500/21043,* accessed on 18 November 2021 at iii.
[11] Marumoagae 'Potential Constitutional concerns regarding employees' rights during business rescue proceedings' (2021) *Stellenbosch Law Review* 496 at 505.
[12] Damant and Jithoo 'The pension promise: pension benefits and the employment contract' (2003) 24 *ILJ* 1 at 4.
[13] Marumoagae 'Retirement funds rivalry, voluntary withdrawal of membership, and transfer of assets during period of employment' (2020) *SA Mercantile Law Journal* 205 at 206.

employees' retirement savings constitute a sub-fund of a bigger umbrella established by large financial institutions.[14]

Generally, retirement funds are characterised into defined benefit funds ('DB funds')[15] and defined contribution funds[16] ('DC funds').[17] With regards to DB funds, the benefits are defined and not necessarily dependent on the contributions whereas with the latter, the benefits depend on the contributions and investments that these retirement funds made.[18] The majority of retirement funds in SA are however DC funds. The nature of the retirement fund being either a DB fund or a DC fund, may play a role in the ultimate benefits that members receive when they exit retirement funds that they joined as a result of the transfer of their old employer's business in terms of the LRA.[19]

Most retirement funds, particularly those operating in the private sector are registered as a 'pension fund organisation' as defined in section 1 of the PFA.[20] Once registered, retirement funds acquire legal personality and can sue or/and be sued in their names.[21] As such, retirement fund are separate entities from the participating or sponsoring employers and/or the members of the fund.[22]

Retirement funds are generally regulated in terms of their rules which must be in line with the Constitution and legislation that regulates them, including any other relevant and applicable

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[14] Ibid; *Association of Mineworkers and Construction Union v Anglo American Platinum Ltd & others* (2018) 39 ILJ 2280 (LC) para 39.

[15] 'Defined benefit category of a fund' is defined in section 1 of the PFA as *'a category of a fund other than a defined contribution category of a fund'*.

[16] 'Defined contribution category of a fund' is defined in section 1of the PFA as a category of members whose interest in the fund has a value at least equal to: (a) the contributions paid by the member and by the employer in terms of the rules of the fund; (b) less such reasonable expenses as the board determines; (c) plus any amount credited to the member's individual account upon the commencement of the member's membership of the fund or upon the conversion from a DB fund to a DC fund or upon the amalgamation of his or her fund with any other fund, if any; (d) plus any other amounts lawfully permitted, credited to or debited from the member's individual account, if any, as increased or decreased with fund return.

[17] Rosemary Hunter 'Pensions and retirement plans in South Africa' *SA Financial Regulation Journal* (13 February 2020) available at *https://financialregulationjournal.co.za/2020/02/13/pensions-retirement-plans-in-south-africa/* notes that fewer than 10% of occupational retirement funds are DB funds.

[18] Todd *et al* op cit note 4 at 101.

[19] Due to the very small number of DB funds left in SA, this report will not deal with a detailed discussion of DB fund to DC fund transfers during a section 197 business transfer. The GEPF is not only SA's largest retirement fund but it is also a DB fund. The GEPF is however not governed by the provisions of the PFA that are relevant to the topic of this report.

[20] Section 4(1) of the PFA; The topic of this report arguably applies to the so-called 'paragraph (a) funds' exclusively as 'paragraph (b) funds' are underwritten funds, and 'paragraph (c) funds' are beneficiary funds that are by their nature not required to deal with the labour law considerations that are discussed in this report.

[21] Section 5(1) of the PFA.

[22] *Telkom* supra note 2 para 16; *Kransdorff v Sentrachem Pension Fund & another* (1999) 9 BPLR 55 (PFA) at 68.

legislation. These rules bind retirement funds, their members, employers,[23] and any person who claims from such retirement funds.[24]

However, retirement funds' rules do not regulate employers' decisions to sell and transfer their businesses or restructure their operations in terms of the LRA. The extent to which employees' pension rights are considered during such transfers of businesses has not yet received adequate academic and judicial attention. The extent to which any reduction of pension rights can be compensated by other employment related benefits that may be brought by the transfer of business, is also not particularly clear.

There is a 'pension promise'[25] which has been made to employees by the old employer which is not always capable of being fulfilled by the new employer and/or its retirement fund after contracts of employment have been assigned to the new employer in terms of section 197 of the LRA. This is because not all pension rights are capable of an unqualified transfer from the old employer's retirement fund to that of the new employer.[26]

III THE PENSION RIGHTS THAT SHOULD BE CONSIDERED DURING A TRANSFER OF BUSINESS IN TERMS OF SECTION 197 OF THE LRA

Retirement funds are deemed to be the rightful owners of all their fund's assets[27] which are generally generated through contributions received from employers and members as well as investment returns arising therefrom. Contributions that are paid by an employer to an employee's retirement fund are considered to be part of that employee's remuneration.[28] The benefit that the employee derives from this is membership of a retirement fund and the

[23] Hunter *et al The Pension Funds Act: A Commentary* (2010) at 253 points out that the rules of a retirement fund are not binding on employers except with regards to their obligation to pay contributions on behalf of their employees. The rules of the fund however represent an agreement between the retirement fund and the employer. In *IBM Pensioners Action Group v IBM South Africa (Pty) Ltd & another* (2000) 3 BPLR 268 (PFA) paras 24 – 25 the Adjudicator confirmed that it was a *'remarkable lapse in legislation'* that the rules of a retirement fund had not been made enforceable against the participating employer.

[24] Section 13 of the Pension Funds Act; *Sasol Limited v Chemical Industries National Provident Fund* (2015) JOL 33910 (SCA) para 13; *Tek Corporation Provident Fund & others v Lorentz* 1999 (4) SA 884 (SCA) para 11.

[25] Damant and Jithoo op cit note 12 point out that here is no definition for the term 'pension promise' but may include: a promise to pay contributions in amounts specified in the employment contract to a fund identified in the contract; a promise to pay contributions determined in terms of the rules of a fund specified in the contract; a promise to pay to a fund identified by the employer from time to time contributions at rates determined in terms of the fund's rules; or a promise that, if the employee remains employed by that employer until retirement (or preretirement death or permanent disablement) an income or lump sum benefit in a specified amount(s) will be payable to them, whether by the fund or by the employer.

[26] *Telkom* supra note 2 para 16.

[27] Section 5 of the PFA.

[28] *Younghusband* supra note 2 at 105; see item 1(e) of the elements of remuneration prescribed by the Minister of Labour in section 35(5) of the Basic Conditions of Employment Act and published in GNR 691 in *Government Gazette* 24889 on 27 May 2003.

contributions that are paid to it. The employee member derives only an expectation or an interest[29] to receive benefits when any of the prescribed exit events as defined in the fund's rules occur so that the benefit can be said to have accrued to the member.[30]

Once the retirement fund receives contributions on behalf of members, these contributions become assets of the fund. This mere fact complicates the discussion of the effect on employees' pension rights during a business transfer in terms of section 197 of the LRA. Members of retirement funds who allege prejudice to their pension rights during their employers' business transfer, are likely to be confronted with the reality that their pension rights are not yet 'benefits' and that the right to receive payment in terms of their funds' rules has not yet accrued to them. It is also generally more difficult to enforce one's right to an interest in a retirement fund than an actual right that has already accrued.[31]

'Benefit' is defined in section 1 of the PFA as any amount payable to a member or beneficiary of a retirement fund in terms of the rules of that retirement fund. There are different kinds of benefits offered by retirement funds that are not only limited to a benefit that a member receives at the time of retirement. Such benefits may include withdrawal, retirement, disability, dread disease, spouse's cover, and funeral benefits. These benefits differ from fund to fund. If the new employer's retirement fund offers benefits that are inferior or are more expensive to administer and maintain than what transferring employees were used in their old retirement fund, it may lead to reduced pension rights by the time these members retire.

The employer's 'pension promise' to its employees, does not mean that the employer retains control over how prospective benefits should be paid to retirement fund members.[32] The employer promises (either in the employment contract, or in the retirement fund's rules, or in a combination of both)[33] that it will create a vehicle by means of which employees can save towards retirement, or expect to be paid insured risk benefits upon contingent events such as the member's death or disability. The employer's 'pension promise' does not guarantee a

[29] *Zono v National Commissioner of Correctional Services N.O & others* (2020) 9 BLLR 923 (LAC) para 13.
[30] *Mine Employees' Pension Fund v Murphy NO & others* (2004) 11 BPLR 6204 (W) paras 34 to 36.
[31] This does not mean that members can be deprived of their rights to their interests in their retirement funds arbitrarily. In *Atkinson and Others v Southern Field Staff Pension Fund* (2000) 4 BPLR 367 (PFA) para 38 the Adjudicator determined that pension rights can include '*property of an incorporeal nature consisting of a complexity of contingent contractual rights, expectations and interests'*, thus potentially opening the door for protection of pension rights under section 25 of the Constitution – depending on the facts of each case - that guarantees that no-one will be deprived of their property unlawfully. This is an interesting observation that can be debated, but falls outside the scope of this report.
[32] Marumoagae 'Do boards of South African retirement funds owe fiduciary duties to both the funds and fund members? The debate continues' *PER / PELJ* 2012 (15)2 554 at 555; Damant G and Jithoo T 'The Pension Promise: Regulating Employer Conduct' (2003) 24 *ILJ* 712-737.
[33] Damant and Jithoo op cit note 12.

specific pension outcome to its employees. The employer's 'pension promise' to its employees may be affected materially if a section 197 transfer of its business requires an exit from the employees' old retirement fund and joining membership of the new employer's retirement.

In the context of transfers between retirement funds in terms of section 14 of the PFA that are occasioned by a transfer of business in terms of section 197 of the LRA, it is crucial to note that all funds registered in terms of the PFA are required to provide for the transfer of amounts that are not less than the prescribed 'minimum benefits' calculated in terms of sections 14A of the PFA. Section 14A of the PFA defines the 'minimum benefit' as the 'member's minimum individual reserve' ('MIR') that must be calculated in terms of section 14B of the PFA. The 'MIR' for members of a DC fund - in the simplest possible terms – translates to the value of the member's account. For members of DB funds, the MIR is calculated as the market value of the member's accrued deferred pension, subject to the prescribed actuarial assumptions that must be used in actuarial determination of the MIR for members of DB funds.[34]

Section 14(1)(c) of the PFA prescribes that the Financial Sector Conduct Authority (hereafter 'FSCA' or 'Authority')[35] may not approve a section 14 amalgamation or transfer unless it is 'reasonable and equitable', and provides full recognition to the rights and reasonable benefit expectations of the members subject to such transfer or amalgamation. 'Reasonable benefit expectations' is not defined in the PFA but was introduced into the PFA to ensure that transferring members' rights are protected optimally.[36] The PFA, when it refers to a reasonable benefit expectation, gives full recognition to a right so that retirements funds have to provide for it fully in its financial statements.[37]

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[34] M Lowther *Beyond the Rubicon – Retirement Fund Transfers in the Minimum Benefits Era* at 9, Pension Lawyers Association Annual Conference 15 – 17 February 2004, available at *http://www.pensionlawyers.co.za/wp-content/uploads/2018/10/MICKEY-LOWTHER-PAPER-BEYOND-THE-RUBICON.01.pdf.* accessed on 16 July 2022, para 4.2; Actuarial assumptions for DB fund members were recently updated by FSCA Communication 33 of 2020 (RF) (to be read with Board Notice 270 of 2013).

[35] The Financial Sector Regulation Act 9 of 2017 ('the FSRA') came into operation on 1 April 2018 and started amending various financial sector laws incrementally in line with National Treasury's overarching 'Twin Peaks' proposed model of regulating the financial industry in SA. For example, in the PFA all references to the 'Registrar of Pension Funds' or to the 'Financial Services Board' must after promulgation of the FSRA now be read as a reference to the Financial Sector Conduct Authority.

[36] Hunter *et al* op cit note 23 at xxv; *Pepcor Retirement Fund and others v Financial Services Board and another* (2003) 8 BPLR 4977 (SCA) para 13.

[37] J Andrew *Actuarial Practice and Conduct with regard to Transfers between Funds, Particularly the Transfer of Actuarial Surplus* Actuarial Society of South Africa Convention, 8 – 9 November 2011 available at *https://www.actuarialsociety.org.za/wp-content/uploads/2019/04/2011-Convention-Andrew.pdf* accessed on 4 March 2021 para 6.15

IV TRANSFER OF A BUSINESS IN TERMS OF SECTION 197 OF THE LRA

The common law contract of employment proved inadequate to protect the retirement benefits of employees when businesses were transferred to new employers. Transferring employers were neither obliged to engage employees[38] nor discuss how their pension rights will be impacted by the contemplated transfer. There was a need for the legislature to regulate the transfer of businesses from one employer to the next through legislation, hence the insertion of section 197 into the LRA.

The Constitutional Court ('CC')[39] described the dualistic objective of section 197 of the LRA as being firstly to promote, aid and facilitate commercial transactions for employers, and secondly, to protect employees against unfair job losses.[40] In *AUSA v SA Airways,*[41] the CC held that section 197 of the LRA is primarily aimed at promoting fair labour practices, the benefits of which are reciprocally enjoyed by both employees and their employers.[42] The employer's main interests are commercial in nature, while employees main interests relate to job security and secured conditions of employment.[43]

(a) What constitutes a transfer of business as envisaged by section 197 of the LRA?

Section 197 of the LRA provides three grounds that must be satisfied for a business to be transferred to a new employer.[44] First, the transaction must amount to a 'transfer'. Second, the entity that is being transferred must qualify as a 'business'.[45] Thirdly, the business must be transferred as a 'going concern'. These three requirements are interrelated but must be kept separate.[46]

The 'transfer'-requirement simply requires the transfer or sale of a business by the old transferring employer to a new transferee employer.[47] The Labour Court (hereinafter 'LC') in

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[38] The LRA still does not prescribe a legal duty on employers to consult with their employees (except if employers want to vary terms and conditions of employment in terms of section 197(3) of the LRA). Bosch 'The employee's right to procedural fairness in the context of transfers of businesses' (2009) 30 *ILJ* 2253 at 2265 advocates the necessity to include a statutory obligation to consult affected employees prior to a section 197 business transfer.
[39] *NEHAWU v University of Cape Town* (2003) 2 BCLR 154 (CC) para 62.
[40] *AUSA v SA Airways* (2011) ZACC 31 paras 35-38; *SA Airways v AUSA* (2011) ILJ 87 (SCA).
[41] Ibid.
[42] *Harsco Metals v Arcelor Mittal South Africa* (2012) ILJ 901 (LC) para 908A.
[43] Smit 'Should transfer of undertakings be statutorily regulated in South Africa?' (2003) 2 *Stellenbosch Law Review* 205.
[44] Bosch 'Balancing the act: fairness and transfers of businesses' (2004) 25 *ILJ* 923 at 928.
[45] Grogan *Dismissal, Discrimination, and Unfair Labour Practices* 2 ed (2007) 485.
[46] Ibid.
[47] Section 197(1)(b); *AUSA (CC)* supra note 40 para 100.

Schutte v Powerplus Performance (Pty) Ltd[48] held that the 'transfer' requirement is not confined to a sale agreement only, but can potentially also include merger, take-over or even part of a wider restructuring exercise within an employer's overall operations.[49] Section 197 of the LRA can also potentially apply when a partner leaves a partnership,[50] or where a new company is formed to take over the business of an insolvent company (even if the new company does not take over the entire assets and liabilities of its predecessor).[51] Whether a transaction or series of transactions satisfies the first transfer requirement needs to be established objectively in each case.[52]

The second requirement is that the transfer must relate to a 'business'. The LC in *FAWU v The Cold Chain (Pty) Ltd*,[53] held that the term 'business' in a section 197 context must be understood far wider than just its ordinary dictionary definition. The inclusion of 'service' in the definition of 'business' in section 197(1)(a) of the LRA has widened the meaning of 'business' so that it has been held to can include the 'provision of assistance or benefit to someone' or even the 'act of helping or benefiting another'.[54] While the transfer of a business as a whole may be a clear-cut transaction, it is not always simple to definitively conclude that the transfer of just a section or component of a business being transferred amounts to a transfer of business that fall under the regulatory prescribe of section 197 of the LRA.[55]

Our courts[56] have accepted the approach adopted by the European and British courts, as expressed in *Spijkers v Gebroeders Benedik Abattoir v Alfred Benedik en Zonen*,[57] where the European Court of Justice (ECJ) determined that the single most significant consideration that courts dealing with transfer transactions must entertain is whether the business being transferred retains its identity after conclusion of the transfer transaction.[58] The CC confirmed

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48 *Schutte* supra note 8.
49 Ibid para 48.2.
50 *Burman Katz Attorneys v Brand NO* (2001) 2 BLLR 125 (LC) para 28.
51 *Hydro Colour Inks (Pty) Ltd v CEPPWAWU* (2011) 7 BLLR 637 (LAC) para 16.
52 *Van der Velde v Business & Design Software (Pty) Ltd (1)* (2006) 10 BLLR 995 (LC) para 20.
53 (2010) 1 BLLR 49 (LC) para 25.
54 *SAMWU v Rand Airport Management Co (Pty) Ltd* (2005) 3 BLLR 241 (LAC) para 17.
55 In *FAWU* supra note 53, the transport and warehousing functions of a business qualified as a 'service' for purposes of section 197 of the LRA despite the fact that these two divisions did not form part of the old employer's 'business' in the traditional sense of the word; *Securicor (SA) (Pty) Ltd v Lotter* (2005) 10 BLLR 1032 (E) para 11.
56 *Schutte* supra note 8 paras 32 - 34; *NEHAWU (CC)* supra note 39 paras 47 - 49.
57 (1986) 2 CMLR 296 (ECJ).
58 *Spijkers* supra note 57 paras 11, 12 and 15 list some of the factual considerations that could be considered as *'the type of undertaking or business, whether or not the business' tangible assets, such as buildings and movable 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 and the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended'.*

this approach in *NEHAWU v University of Cape Town & others* (*'NEHAWU CC'*)[59] where the CC found that the answer to whether a transfer under section 197 of the LRA can only be determined objectively after due consideration of all the factual circumstances that underlie the transfer transaction as a whole.[60]

With regards to the third requirement,[61] the CC in *NEHAWU CC*[62] held that this requirement will been met if the essence of business has remained the same after the transfer, albeit in new hands of ownership.[63] This too is a factual question that requires to be interrogated objectively in light of the factual conditions that apply to each unique transfer transaction holistically. The substance of the transaction weighs heavier than merely its form.[64]

A very practical explanation of the objective test was formulated by the LC in *FAWU,*[65] where the court compared its task to taking an imaginary photograph of the business before the transfer and comparing it with another imaginary photograph taken thereafter. If, from a comparison of these two photographs, one establishes that it is still the same business, except for it now being in different hands after conclusion of the transfer, the requirements of section 197 of the LRA will have been met.[66]

From the sheer volume of cases and academic attention to the three requirements of a section 197 transfer,[67] it can now be concluded that section 197's application to any transfer transaction will be determined objectively, holistically and differentially based on the different factual circumstances of each case individually.[68]

(b) Labour law and section 197 transfers

The application of section 197 of the LRA culminates in four main consequences for employers and employees. First, the reciprocal rights and obligations that existed between the old employer and its employees at the time of transfer[69] remain enforceable as if such rights and

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59 *NEHAWU (CC)* supra note 39 para 55.
60 Ncgobo J quoted from *Kenmir, Ltd v Frizzell and others* (1968) 1 All ER 414 at 418 paras e – g: *'…regard must be had to its substance rather than its form…consideration must be given to the whole of the circumstances…'*.
61 Grogan op cit note 45 at 487 states that our courts relied heavily on foreign jurisprudence to conclude that the going concern question is a matter of substance not form. Not one single factor is conclusive in itself.
62 Supra note 39.
63 *NEHAWU CC* supra note 39 para 56.
64 Ibid.
65 Supra note 53.
66 Grogan 'Franchise transfers: A loophole in section 197?' (2013) 29(6) *ELJ* 4 at 7.
67 Grogan 'Section 197 and outsourcing No magic to the "generation"' (2012) 28(3) *ELJ* 21; Grogan op cit note 66 at 4;
68 Bosch op cit note 44 at 928.
69 Grogan *Workplace Law* 11 ed (2014) 355; The transfer happens on the date when the transaction becomes unconditional regardless of what the agreement between the employers may determine; *AST Holdings (Pty) Ltd v Roos* (2007) JOL 19780 (LAC) paras 32 - 34.

obligations had actually been negotiated between the transferring employees and the new employer themselves from the start.[70] Secondly, anything done 'by or in relation to' the old employer prior to the transfer, is deemed to have been done 'by or in relation to' the new employer themselves.[71] Thirdly, employees' period of employment remains uninterrupted.[72] Lastly, transferring employees' employment contracts continue unaffected with the new employer as if such employment contracts were actually still held between the old employer and the transferring employees.[73]

This translates to a statutory assignment of such employment contracts from the old transferring employer to the new transferee employer.[74] Section 197 transfers the entire employment relationship and not just the mere contracts of employment.[75] Claims based on conduct by the old employer prior to transfer, up to and including the date of transfer, should therefore be brought against the new employer, who is legally liable for them.[76]

(c) Pension law consequences of section 197 transfers

The application of section 197 of the LRA to a transfer transaction leaves a great deal of room for flexibility.[77] The new employer may offer transferring employees different terms and conditions of employment that may not, when considered objectively on the whole, be less favourable than those that they were entitled to as employees of their old transferring employer. A holistic view must be taken of the terms and conditions after transfer and a decision made whether they are on balance less favourable.[78]

The transfer of employees' pension rights from one retirement fund to another, after the transfer of a business in terms of section 197 of the LRA is now specifically catered for in section 197(4) the LRA.[79] Prior to this, the Supreme Court of Appeal ('the SCA') in *Telkom SA Ltd v Blom*[80] held that pension rights cannot be transferred without the employees' consent.

[70] Section 197(2)(b); Grogan ibid.
[71] Section 197(2)(*c*). See also *Anglo Office Supplies (Pty) Ltd v Lotz* (2008) JOL 21185 (LAC) para 16.
[72] Section 197(2)(d). See also *Foodgro v Keil (1999)* 9 BLLR 875 (LAC) para 13.
[73] Section 197(2)(a). This includes the obligation to make payment of the contributions under section 13A of the PFA.
[74] *Horn* supra note 2 paras 99–101 (the transfer may be regarded as an assignment or *ex lege* substitution).
[75] Bosch op cit note 44 at 935.
[76] Grogan *Dismissal* 2 ed (2014) at 164; Section 197(8) provides for joint and several liability between the old and the new employer for a period of 12 months after the transfer in certain instances; *Moore v Telkom SA* (2002) 8 BLLR 761 (LC);.*Anglo Office Supplies* supra note 71 para 21.
[77] Bosch op cit note 44 at 935.
[78] Ibid.
[79] Du Toit 'The transfer of enterprises and the protection of employment benefits in South and Southern Africa' (2004) 8(1) *Law Democracy and Development* 85 at 108.
[80] *Telkom* supra note 2 para 16.

Retirement funds, because they were not parties to the transferring employers' business sale agreement,[81] cannot be compelled to comply with the proposed transfer of assets and assignment of obligations without their consent.[82] What is required is a conscious decision to transfer assets and liabilities from the first retirement fund to the second.[83] If the rules of a retirement fund permit the transfer of its assets and liabilities in respect of some or all of its members, then such section 14 transfer may be concluded without the consent of the affected members.[84]

It is important to note that *Telkom*[85] was decided prior to the 2002 amendments to the LRA. In *Telkom*, the SCA found that as a consequence of the assignment of transferring employees' employment contract from the old to the new employer, the employee's employment by the old employer terminates.[86] The SCA found that the rules of the retirement fund determine what must happen to a member's pension rights if the termination of their employment automatically results in the termination of their membership of their old employer's retirement fund.[87] The end result was that the SCA ruled that the transferring employees were entitled to claim their withdrawal benefits from their old employer's fund. It has now become accepted practice that, despite the judgment in *Telkom*, if transferring employees are able to after the section 197 transfer either remain contributing members of their old employer's retirement fund,[88] or start contributing to their new employer's retirement fund, members should not be entitled to claim payment of benefits from the old/transferring employer's retirement fund.[89]

Section 197(3)(a) of the LRA does not require transferring employees to continue as contributing members of the old employer's retirement fund.[90] Section 197(4) of the LRA makes it clear that the transfer of employees to another retirement fund during transfer of business is not precluded if the criteria in section 14(1) of the PFA are satisfied. While section 197(4) of the LRA refers to transfer of members, it is important to note that section 14 of the

[81] *Eastern Cape Group Municipal Pension Fund & others v National Fund for Municipal Workers & others* (2003) 11 BPLR 5262 (PFA) para 18, in which the Adjudicator pointed out that a retirement fund is not bound by a bargaining council agreement that it was not party to.
[82] Hunter *et al* op cit note 23 at 287 – 288.
[83] Ibid; *Telkom* supra note 2 para 8, where the court said that the fact that section 197 brings about a statutory assignment of contracts of employment does not mean that the rights of the affected employees to benefits in terms of the rules of their fund is taken away.
[84] *Financial Services Board and Another v De Wet (in his capacity as liquidator of the Pepkor Pension Fund) and Others* (2002) 4 BPLR 3259 (C) para 226.
[85] *Telkom* supra note 2.
[86] Ibid para 10.
[87] Ibid para 11.
[88] As 'paid-up' members.
[89] Todd *et al* op cit note 4 at 111.
[90] Ibid.

PFA deals with the transfer of assets and liabilities and not members. It can be argued that members will be transferred in terms of the labour legislation and their pension rights will be transferred in terms of pension law. Our courts have not adequately yet determined the rights (if any) of employees whose pension rights are transferred to new retirement funds after transfer of their employers' businesses. However, the Adjudicator has provided some useful guidance in this regard that cannot be ignored.

In *Younghusband,*[91] the Adjudicator was of the view that transferring employees' pension rights with the new fund do not have to be determined in terms of the old employer's retirement fund rules exclusively.[92] The Adjudicator did not provide guidance on whether the new fund was liable to provide its newly transferred employees with the same pension rights that they enjoyed from their old retirement fund. Unfortunately, the courts which have widely referred to this determination, have also not provided the required guidance yet.

Nonetheless, the Adjudicator was of the view that *'[p]ension benefits are part of the costs of employing labour, they are part of the remuneration which labour receives for services rendered'*.[93] In fact, the Adjudicator categorised pension benefits as deferred payment which amounts to a remunerative promise.[94] The Adjudicator determined that section 14 of the PFA must be applied in conjunction with the statutory security of employment that is guaranteed by section 197 of the LRA.[95] The Adjudicator's approach in *Younghusband* was confirmed by the High Court in *Resa Pension Fund v Pension Funds Adjudicator*.[96]

In his minority judgment in *Horn and Others v LA Health Medical Scheme and Another,*[97] Zondo J (as he then was) was of the view that unless *'... there is a section 197(4) arrangement concerning pension, the business transferor's rights and obligations concerning its employees' pension benefits continue beyond the transfer of a business and are taken over by the business transfer'*.[98] Zondo J also felt that the appellants' reliance on the SCA judgment of *Telkom* was incorrect as this effectively denies the actual objectives of section 197 of the LRA, which is to ensure that affected employees' employment contracts remain uninterrupted by the business transfer as such. Nkabinde J wrote the majority judgment in *Horn* in terms of which the CC

[91] *Younghusband* supra note 2.
[92] Ibid at 109.
[93] Ibid.
[94] Ibid at 105.
[95] *Younghusband* supra note 2 at 106.
[96] (2000) 4 BPLR 355 (C).
[97] *Horn* supra note 2.
[98] Ibid para 139.

dismissed the matter because the interpretation of the retirement fund's rules was deemed not to invoke constitutional issues and the CC's jurisdiction.[99]

There are several practical challenges that may arise in relation to section 197 transfers impacting employees' pension rights which neither the legislature nor the courts have addressed. Transferring employees may be subjected to inferior or more expensive benefits in their new employer's retirement fund. Transferring employees may not be willing to join the new employer's retirement fund.[100] The new employer may have no interest to register as a participating employer of the transferring employees' old or existing retirement fund or could not be participating in any retirement fund at all.[101] Affected employees may be members of the old employer's DB fund while the new employer participates in a DC fund.[102]

These and other challenges reflect the reality of some of the members who are forced to leave funds that they may be happy with and join retirement funds which they potentially may not be happy with. It is also possible that the new retirement fund may provide better benefits. There is no one-size-fits all solution to the practical difficulties listed above. The right solution will depend on the factual considerations of each case. Employers and retirement funds should try to formulate adequate solutions by finding answers to the following questions:

(a) To what extent has the employer's pension promise been incorporated into the affected employees' employment contracts, or the rules of the retirement fund?;[103]

(b) Has the affected employees' employment been assigned to the new employer in terms of the provisions of section 197 of the LRA?

(c) Can the affected employees' pension rights be either preserved in their old employer's retirement fund[104] or alternatively, be transferred to the new employer's retirement fund in terms of section 197(4) of the LRA and section 14 of the PFA?

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[99] *Horn* supra note 2 para 33.

[100] *Brower and Others v Chemical Industries National Provident Fund and Others* (2018) JOL 39987 (PFA).

[101] In *Telkom* supra note 2 the new employer had failed to set up a retirement fund for the transferring employees.

[102] A 'conversion' as defined in section 1 of the PFA as being *'the change of the basis of the retirement benefit from defined benefit to defined contribution, or vice versa'*.

[103] Damant and Jithoo op cit note 12 from 7 explain that there are three possible relationships between pension benefits and employment law: first, where there is no incorporation of pension benefits into the employment contract at all; second, where pension benefits are regarded as wholly incorporated into the employment contract; and third, partial incorporation of pension benefits into the employment contract of only those rules that give meaning to the employer's pension promise.

[104] As 'paid-up benefits'.

(d) If the affected employees' pension rights will be transferred to the new employer's retirement fund, what must the old employer and new employer[105] do to ensure that the requirements of sections 14, 14A and 14B of the PFA are met?

(e) If it becomes apparent that the employees' pension rights in the new retirement fund will not be identical to their pension rights in their old retirement fund:

i. Both employers and their retirement funds must ensure that they at the very least comply with the statutory communication obligations to its affected employees;[106]

ii. Both the old as well as the new employer can decide to engage with the affected employees about their pension rights through collective bargaining in order to ensure that they comply with section 197(3) of the LRA.

V TRANSFERS OF PENSION FUND BUSINESS IN TERMS OF SECTION 14 OF THE PFA

Section 14 of the PFA regulates *'…the amalgamation of any business carried on by a registered fund… or the transfer of any business from a registered fund'*. Section 197 of the LRA also deals with the transfer of 'business' as a going concern. These identical terminologies may create confusion. The transfer of a business as a going concern in terms of section 197 of the LRA has been discussed in detail in Part IV of this report. In pension law however, the 'transfer of business' of a retirement fund has a different meaning. Section 10 of the PFA[107] provides guidance in this regard. The 'business of a pension fund' is any activity which advances the object of a fund[108] contemplated in the definition of 'pension fund organisation' which primarily implies the retirement fund's obligation to provide retirement benefits to its members.[109] A section 14 transfer therefore does not involve the transfer of members.[110]

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[105] Section 197 of the LRA dictates that the old and new employers are jointly and severally liable.
[106] See sections 7C(2)(a) and 7D of the PFA; Circular PF 86.
[107] Section 10 of the PFA reads as follows: *'No registered fund shall carry on any business other than the business of a pension fund: Provided that the registrar may approve of a fund carrying on such other business on such conditions and for such period as he may determine if the registrar is satisfied that this is necessary in order to safeguard an investment made by the fund.*
[108] *Joint Municipal Pension Fund & another v Grobler & others* 2007 (5) SA 629 (SCA) para 13, in which the court said that the purpose of a pension fund is *'to enable members to plan for the occurrence of the various events for which benefits are provided'.*
[109] Hunter *et al The Pension Funds Act: A Commentary* (Hunter Employee Benefits Law (Pty) Ltd (2010) at 231.
[110] Ibid at 284; *Sasol Limited v Chemical Industries National Provident Fund* (2015) ZASCA 113 para 18.

Section 14 of the PFA provides a regulatory framework for the amalgamation and transfer of business[111] between registered funds or registered funds and other financial institutions.[112] This provision provides the FSCA with the power to refuse the proposed transfer of members' assets in certain circumstances.[113] Transfers of assets between funds have no legal consequence unless such transfer scheme has been approved by the Authority in terms of section 14 of the PFA.[114] The scheme or transaction to be submitted by the valuator for the implementation of an amalgamation or a transfer, must, in terms of section 14(2) of the PFA, comply with the following criteria: The scheme must be reasonable and equitable and accord full recognition to the members' rights, reasonable benefit expectations and additional benefits.

Section 14 of the PFA provides the Authority investigative powers[115] to ensure that corporate restructuring arrangements do not affect employees' pension rights unreasonably or unjustifiably.[116] Employees' contributions are part of employees' remuneration, rather than mere gratuities that are provided arbitrarily through the bona fides of a benevolent employer. Employees have a right to insist on minimal prejudice to their accumulated pension credit when their employment relationship is potentially modified solely as result of their employer's commercial restructuring over which they have little or no control.[117]

In the context of transfers of business in terms of section 197 of the LRA, the new employer can require the employee/member to transfer to their fund credit to the new fund. There is no requirement that the new fund should provide identical benefits as the old fund. Instead, compliance with section 14(1)(c) of the PFA is required,[118] as read with the additional requirements in the FSRA Conduct Standard 1 of 2019 (PFA) ('the Conduct Standard').[119]

The Conduct Standard sets out the process to facilitate transfers between registered retirement funds through section 14 of the PFA. This Conduct Standard requires the transferor

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[111] *Resa* supra note 2 para 15.
[112] Hunter *et al* op cit note 23109 at 281.
[113] Hunter *et al* op cit note 23 at 281.
[114] Marumoagae op cit note 13 at 228.
[115] *Pepcor* supra note *36* para 14 states that the function that the FSCA fulfils in terms of section 14 of the PFA serves primarily the public interest. But the FSCA must also ensure that the interests of the affected retirement fund members are protected optimally.
[116] *Resa* supra note 2 para 15
[117] *Younghusband* supra note 2 at 105.
[118] The FSCA must be satisfied that the proposed section 14 transfer scheme complies with the following requirements: it must be reasonable and equitable; it must provide full recognition to the transferring members' existing rights as well as reasonable benefit expectations relating to service prior to the date of transfer (and; any additional benefits) ; the minimum benefit regime; that any fund involved in the transfer will continue to exist and remain in a sound financial condition; that the rules of the funds which are party to the proposed transfer have been carried out and complied with. Once the FSCA has satisfied itself as to compliance with these requirements, it will forward a certificate of approval to the principal officers of each retirement fund that is party to the section 14 transfer scheme.
[119] Marumoagae op cit note 13 at 229.

fund (the old employer's retirement fund) to provide transferring members with all relevant information that they require in order to decide whether there are grounds to object to the proposed section 14 transfer to the new employer's retirement fund.[120] Effective communication by a retirement fund's trustees with the retirement fund's members is one of the most significant tools to establish good governance of retirement funds.[121] The Conduct Standard requires the old employer's fund not only to explain the risks posed by the transfer, but also how transferring employees' existing and/or past service benefits are likely to be impacted by the transfer. The Conduct Standard is aimed at communicating any potential prejudice to transferring members after conclusion of the transfer. Transferring members must receive communication that reflect the transfer value (or a reasonably reliable estimate thereof) of their accumulated pension benefit value as calculated on the effective date of the proposed section 14 transfer.[122]

Members are entitled to a period of no less than 30 days within which they can lodge an objection to the proposed transfer scheme.[123] All objections are required to be included in the official transfer documentary submission to the Authority they have not been resolved. The transferor fund is required to include their responses and comments regarding its efforts to resolve any such objections that have been received from the affected members.[124] Members' right to object to any proposed transfer, read together with the transferring funds' trustees' explanations on how any or all such objections were addressed during the transfer communication phase, is a powerful tool that affected employees can use to address reduction of benefits in their new retirement fund after joining their new employer.[125]

The boards of trustees of both the transferor and the transferee funds are obliged by section 7C of the PFA to ensure that the interests of members are protected at all times.[126]

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[120] Conduct Standard para 5(1).
[121] Section 7D(1)(c) of the PFA; Marumoagae C 'The Need to Adopt Preventative Measures to Combat the Misappropriation of Retirement Fund Assets' 2021 (24) *PER/PELJ* 1-35. at 20.
[122] Conduct Standard para 5(4).
[123] Conduct Standard para 5(5).
[124] Conduct Standard para 5(6)
[125] In *Amplats Group Provident Fund v Anglo American Platinum Corporation Limited and Another* (A5011/2020) (2020) ZAGPJHC 66 para 21, where a full bench found that members' objections to the section 14 transfer must be reasonable and have merit.
[126] Marumoagae op cit note 121 at 11.

The most significant inadequacy of section 14 of the PFA is that it does not impose any legal obligations on either the transferor or transferee employers whose employees' pension rights may be affected adversely during their employers' business transfers.[127]

VI LEGAL RECOURSE WHERE EMPLOYEES' PENSION RIGHTS ARE ADVERSELY AFFECTED DURING SECTION 197 TRANSFERS

(a) Unfair labour practices and automatically unfair dismissals

Unfairness regarding the provision of retirement benefits by an employer can constitute an unfair labour practice.[128] Reduced pension rights to employees after conclusion of s section 197 business transfer may constitute an unfair labour practice.[129]

Material variation or reduction in conditions of employment can potentially constitute a automatically unfair dismissal for purposes of section 187(1)(g) of the LRA.[130] Section 187(1)(c) of the LRA was introduced to remedy any potential prejudice to employers who are forced to alter terms of conditions of employment to employees after conclusion of a section 197 transfer.[131] This provision means that employees cannot be dismissed based on their refusal to accept the new employer's amended conditions of employment after conclusion a section 197 transfer that are on the whole less favourable than the conditions of employment the transferring employees were entitled to with their old employer.[132] This extends to matters involving disputes about employees' contractual rights too.[133] If the employee does not resign but refuses to accept the new benefit structure leading to the employer dismissing the employee, that may amount to automatically unfair dismissal.[134]

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[127] Section 14 and the Conduct Standard only prescribes obligations for the transferor and transferee funds specifically.

[128] Newaj 'Resolving the "benefits" dilemma' 2018 *SA Merc LJ* 91 at 112; *Apollo Tyres South Africa (Pty) Ltd v CCMA* (2013) 5 BLLR 434 (LAC); *Pretorius and another v Transport Pension Fund and others* 2018 ZACC 10 paras 46 – 55.

[129] Bosch op cit note 38 at 2265; Damant & Jithoo op cit note 12 at 9.

[130] Grogan op cit note 45 at 499.

[131] Grogan op cit note 45 at 504.

[132] *NUMSA & others v Fry's Metals (Pty) Ltd* (2005) 5 BLLR 430 (SCA) para 52.

[133] Grogan op cit note 45 at 504.

[134] In *National Union of Metal Workers of South Africa and Others v Aveng Trident Steel (a division of Aveng Africa (Pty) Ltd) and Another* 2020 ZACC 23 the CC however found in three differing but concurrent judgments that the real reason for dismissal has to be established objectively in each case. An employer's offer of adjusted remuneration and merging of jobs and responsibilities was made after an extensive consultative process. The proposal by the employer was reasonable and sensible and it was used as a means of avoiding dismissals. The dismissals were found not to have been automatically unfair as envisaged by 187(1)(c) of the LRA.

Section 197 must be read with section 186(1)(f) of the LRA,[135] which applies if an employee terminated employment based on the new employer's amendment or offer of less favourable conditions of employment compared to those offered by the old employer after the conclusion of a section 197 transfer. If the new employer offers substantially inferior conditions of employment,[136] section 187(1)(g) of the LRA empowers affected employees to either leave employment of the new employer (based on alleged automatically unfair dismissal), or they can opt to negotiate through collective bargaining an improved offer of conditions of employment by the new employer.[137]

There are several reasons why the new employer may want to vary conditions of employment of the transferring employees.[138] There is nothing in section 197 of the LRA that stops the new employer from seeking to change the terms and conditions of the employment that it has inherited.[139] Section 197(3)(a) of the LRA prescribes that such amendments must on the whole not be less favourable.

Unfairly dismissed employees have access to three dispute resolution forums where grievances can be referred to in terms of the LRA: the Commission for Conciliation, Mediation and Arbitration ('CCMA'), bargaining councils authorised by the CCMA to conduct arbitrations, and the LC.[140] The jurisdiction, powers[141] and remedies that are available to aggrieved employees via these LRA dispute resolution forums are extensive.[142] The CCMA is empowered to consider all unfair practices in relation to retirement funds to the extent that they constitute 'unfair labour practices'. It must be observed however that CCMA arbitrators have been reluctant to accept that disputes over pension matters fall within the definition of an unfair labour practice.[143]

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135 Grogan op cite note 69 at 179.
136 Section 197(3)(a).
137 Bosch "A Survey of the 2002 Labour Legislation Amendments: Is There Really 'Something for Everyone?' (2003) 23 *ILJ* 48 at 49: employees must be able to demonstrate that the new conditions are substantially less favourable than those they enjoyed before.
138 Todd *et al* op cit note 4 at 79; these reasons may include a desire to harmonise conditions of employment between transferring employees and existing employees, to mitigate the impact of cumbersome or expensive conditions of employment on the overall business performance, or simply because it is practically impossible to meet transferring employees' previous conditions of employment..
139 Todd *et al* op cit note 4 at 80.
140 Grogan op cite note 76 at 587.
141 Nyenti 'Reforming the South African social security adjudication system: Innovative experiences from South African non-social security jurisdictions' (2016) 19 *PER/PELJ* 1 at 18.
142 Grogan op cite note 76 at 587 - 642.
143 *Thunemann and DHL International* (2003) 24 ILJ 1432 (CCMA) that involved a dispute about post-retirement medical aid contributions (a dispute of interest); *Tola & others and Fleet Africa (Pty) Ltd & another* (2004) 25 ILJ 1122 (CCMA).

(b) *Office of the Pension Funds Adjudicator*

The Adjudicator plays an important role in resolving complaints referred to it in terms of the provisions of the PFA.[144] Her office is intended to be uncomplicated, inexpensive and allow any member/employee the opportunity to challenge the rules, procedures and decisions taken in respect of retirement funds.[145] Because membership of a retirement fund more often than not stems directly from an employment relationship, certain disputes may appear to fall within overlapping jurisdictions of both the Adjudicator as well as the LRA dispute resolution forums (the CCMA or the LC).

The procedures of both the Adjudicator and the CCMA are very similar.[146] An important question to ask before deciding on the appropriate dispute resolution forum is whether the dispute is a dispute of right or whether it is a dispute of interest.[147] The observation must be made in respect of members who want to resolve a dispute about reduced pension rights after a section 197 business transfer, will be able to substantiate that their dispute is one of right as well as one of interest. The first Adjudicator, Professor John Murphy advocates that disputes of interest are always best solved by legislation or collective bargaining, while disputes of right are best solved through adjudication. [148]

The Adjudicator's jurisdiction is limited to matters that qualify as a 'complaint' in relation to a 'complainant' as defined in section 1 of the PFA.[149] A 'complaint' must firstly refer to one or more of the following three elements: the administration of a fund, or to the fund's investments, and/or the interpretation and application of the fund's rules. In addition, and if any one or more of the first three elements have been met, any such complainants will be required to make allegations to substantiate that a decision/s taken by the retirement funds' boards of trustees was ultra vires or an improper exercise of its statutory powers; alternatively that the members suffered prejudice in consequence of the maladministration of the fund; alternatively, that a dispute of fact or law has arisen between the transferring fund members and the funds or any other person (such as the employer, the administrator or the insurer); or

[144] Marumoagae 'The need to provide members of retirement funds which are not regulated by the Pension Funds Act access to a specialised dispute resolution forum' 2019 *De Jure* 115; Mhango 'Does the South African Pension Funds Adjudicator perform an administrative or a judicial function?' (2016) 20 *Law, Development and Democracy* 20.
[145] Hanekom *et al Manual on Retirement Funds and other Employee Benefits* (LexisNexis 2016) at 442.
[146] Ibid.
[147] Ibid at 443.
[148] Murphy 'Alternative dispute resolution in the South African pension funds industry: An Ombudsman or a Tribunal? (2001) 7 *Journal of Pensions Management* (Vol 1) at 31.
[149] As defined in section 1 of the PFA.

that a participating employer failed to comply with its duties in terms of the rules of the fund and/or the provisions of the PFA. The conduct complained about can relate to a dispute of law or fact in relation to either the fund or a party other than the fund.[150] The only requirement is that the complaint must relate to the fund in some way.

The Adjudicator's powers were up to recently restricted to only adjudicate matters of fact and law, not equity. Due to recent amendments to the PFA by the FSRA,[151] section 30D(2) of the PFA now requires the Adjudicator to apply principles of equity 'where appropriate' in disposing of complaints. The fact that the Adjudicator now has equitable jurisdiction does not resolve the question whether the Adjudicator is authorised to deal with labour disputes that arise from contractual arrangements between employees and their employers.[152] The Financial Services Tribunal recently issued a decision that assist understanding what the Adjudicator's equitable jurisdiction should entail.[153] Harms J found that the Adjudicator's equitable jurisdiction can only be used in appropriate cases such as those where the positive law is absent or ambiguous and regard must always be had to the provisions of the prevailing law and legislation.[154] Equitable jurisdiction does not allow the Adjudicator authority to overrule existing statutory provisions.[155]

There will be concurrent jurisdiction between the Adjudicator, the CCMA and the LC in most such cases, and deciding on the most appropriate dispute resolution forum each time is complex and time-consuming.[156] It has been argued that if adjudication of the disputed labour issue qualifies as a 'complaint' in terms of section 1 of the PFA, and resolving such labour issue is all that is required to issue a determination on a pension law issue, then the Adjudicator should assume jurisdiction over such a dispute.[157]

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[150] Hunter *et al* op cit note 23 at 21.
[151] From 1 April 2019.
[152] Murphy op cit note 148 cautions that retirements funds and the Adjudicator should not get involved in 'wage-setting' that should almost always be resolved by the employers and employees through collective bargaining.
[153] *The Municipality Gratuity Fund v West Rand District Municipality and the Pension Funds Adjudicator* case number PFA 97/2019, available at *//www.fsca.co.za/Enforcement-Matters/Publications%20and%20Documents/Decision%20%20The%20Municipality%20Gratuity%20Fund%20and%20PFA%20and%20another.pdf*, accessed on 24 July 2022.
[154] Ibid para 19.
[155] Ibid para 22.
[156] Sue Myrdal *Pension fund dispute resolution an alternative model for the future? p*resentation to the Pension Lawyers Association Conference (February 2004) held at the Cape Town International Convention Centre, available at *http://www.pensionlawyers.co.za/wp-content/uploads/2018/10/SUE_MYRDAL_PAPER_010304*, accessed on 25 June 2022, para 10.3.
[157] Jeram 'The Pension Funds Adjudicator's Jurisdiction over Labour/Employment Issues in Retirement Funds — A Return to the Original Position' (2014) 35 *ILJ* 918 at 925.

VII CHALLENGES AND RECOMMENDATIONS FOR LAW REFORM

The major challenge facing retirement funds during a transfer of business in terms of section 197 of the LRA is lack of a conclusive legislative provision aimed at safeguarding members' rights when their pension rights are adversely affected during their employers' business transfer.[158] It is submitted that certain reforms must be effected to resolve retirement fund members' vulnerability in this regard.

First, the employers' duty of good faith towards the relevant retirement funds, as well as their duty of good faith towards their employees must ideally be incorporated into the LRA as well as the PFA. In a pension law context, it has been argued that the only limitation on the exercise by an employer of its right to restructure its business lies in its duty of good faith towards its employees.[159] It is generally accepted that every contract of employment contains at least a tacit term that an employer will not take arbitrary decisions that may damage the relationship of trust and confidence towards its employees. This duty of good faith guarantees fairness, rationality and accountability by an employer to its employees during business transfers.

Second, the FSCA should expedite promulgation of their Second Draft Conduct Standard on Communication of Benefit Projections to Members of Pension Funds[160] that was published for comment on 8 June 2020.[161] This Draft Conduct Standard potentially will enable members to see realistic claculations of their future retirement benefits and the potential effect of retirement decisions throughout the various phases of fund membership. But most significantly, the uncertainty about actuarial calculations of members' 'reasonable benefit expectations' during a section 14 transfer will be minimised, if not avoided altogether. This Draft Conduct Standard will compel all retirement funds that are governed by the PFA to determine its members' benefit projections using the same actuarial model of calculation. The complex exercise of comparing pension rights offered by the old employer's retirement fund with that of the new employer's retirement fund will be simplified significantly. The employers and retirement funds that are involved in a section 197 business transfer will possibly in future

[158] Marumoagae op cit note 121 at 10.

[159] Damant and Jithoo op cit note 32 at 734; See also Rosemary Hunter *Legislative changes that should be made in order to more properly reflect the pension promise that an employer makes to its employees and to better protect retirement savings (a personal view)* Presentation to Institute of Retirement Funds Conference, September 2004, available at *https://www.bowmanslaw.com/article-documents/Institute-of-Retirement-Funds-Conference-September-2004.pdf*, accessed on 30 November 2021, at 8.

[160] Available at https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Retirement-Funds.aspx, accessed on 23 November 2021.

[161] FSCA Communication 31 of 2020.

only have to compare the benefit projections that have been calculated for each of the transferor and transferee funds' members.

Third, there should be clarity on the most appropriate dispute resolution forum to adjudicate retirement fund disputes that arise in the context of an employment relationship during a transfer of business under section 197 of the LRA. Currently, it appears that the CCMA, applicable bargaining councils and the Adjudicator's office may have concurrent jurisdiction to deal with these issues.[162] The equitable jurisdiction that has been granted to the Adjudicator recently does not resolve the matter conclusively either because the Adjudicator will not be able to issue a determination that disregards the relevant statutory provisions that are codified in terms of the LRA already. Because labour and social security are integrally connected[163] it is submitted that disputes regarding retirement benefits in the context of section 197 transfers of business should be adjudicated by the Adjudicator exclusively, regardless of whether such dispute is classified as a dispute of right or a dispute of interest.[164] This would require an amendment to the definition of 'complaint' in section 1 of the PFA. The current legal position that the Adjudicator does not have jurisdiction to adjudicate a 'complaint' about a section 14 amalgamation or transfer after it has been approved by the FSCA[165] also needs to be rectified.

Fourth, the minimum prescribed information to be provided to members who are transferred under section 14 of the PFA to their new employer's retirement fund during a section 197 transfer, should be improved materially. PF 86 that prescribes the minimum information to be provided to members whose funds are restructuring dates back to 1995. It has now become outdated and does not provide optimal information to transferring members. The current Conduct Standard 1 of 2019 can be expanded fairly quickly and effortlessly to include a separate section with its own prescribed forms that apply to section 14 transfers necessitated by a section 197 transfer between two employers exclusively.

Fifth, in terms of sections 106 and 141 of the FSRA, the FSCA is empowered to issue conduct standards and to publish guidance notices on the application of a financial sector law. Section 142 of the FSRA enables the FSCA to issue interpretation rulings regarding the interpretation or application of a specific provisions of financial sector laws. These tools are

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[162] Jeram 'The Pension Funds Adjudicator – a jurisdictional nightmare' (2005) 26 *ILJ* 1825 at 1852; see also Jeram op cit note 157 at 925.
[163] LG Mpedi 'The evolving relationship between labour law and social security' 2012 *Acta Juridica* 270 at 285.
[164] Myrdal op cit note 156 para 10.11.
[165] *Sage Schachat Pension Fund and Others v Pension Funds Adjudicator and Others* 2004 (5) SA 609 (C) para para 104; Confirmed by the Adjudicator in *Maltman v Natal Joint Municipal Pension Fund (Superannuation) and Another* (2005) 4 BPLR 314 (PFA) at 317A-C and in *Heath v Grinaker-LTA Retirement Plan, Grinaker-LTA Ltd and Lafarge Employees Provident/Pension Funds* (unreported, PFA/KZN/4368/05/CN).

simple instruments that the FSCA can utilise to eradicate any uncertainties with regards to business transfers in terms of section 197 of the LRA and its impact on the relevant financial sector laws.

VIII CONCLUSION

This report demonstrated that in cases where employees are transferred to a new employer in terms of section 197 of the LRA, such transfers of business can have significant consequences for the affected employees' accumulated and future retirement benefits. This is primarily because their rights in this regard are regulated by both our labour law as well as our pension law.

Legal risks to retirement fund members can be mitigated significantly by five relatively small changes to both our labour and our pension law.

It would be unfair of transferring employees to expect that there will be no complications whatsoever whenever their employment contracts are transferred to a new employer in terms of section 197 of the LRA. Transferring employees will however feel empowered as part of this process if elementary requirements of communication sharing and procedural fairness are observed by its old and new employers, as well as the board of trustees of its old and new retirement funds respectively.

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