

Transfer of Undertaking Under Section 16 of the Zimbabwean Labour Act [Chapter 28:01]

T.G Kasuso*

1. Introduction

The contemporary corporate world has evolved to resemble a vicious jungle where “survival of the fittest” is the rule. In order to survive and adapt, businesses have adopted various strategies and business restructuring is one prominent example. Apart from adopting business restructuring as a survivalist strategy, businesses have also restructured due to other reasons such as technological changes, the changed nature of doing business, new management methods, finance related issues and new work methods. Since restructuring entails the act of reorganizing the legal, ownership, operational or other structures of a business for purposes of making it more profitable or better organized for its present needs, it can take various forms. These may include transfers due to sale of business, mergers, acquisitions and takeovers, exchange of assets and outsourcing of non-core functions or business activities.

Changes brought about by business restructuring to the workplace have significant implications to labour relations and employment law. For instance, such changes entail different consequences to both employers and employees. As noted by A van Niekerk¹ et al, “*in many of these instances, one employer transfers business or parts of businesses to another – a situation where commercial interests in greater flexibility and profitability are often in conflict with employee interests in the work security.*” Thus, in a bid to strike a balance between the employers’ interest in flexibility and the employees’ interest in work security,² as well as eliminate problems arising from transfer of businesses, the legislature inserted relevant provisions in the Labour Act (Chapter 28:01), in particular section 16 thereof. With section 65 of the Constitution now guaranteeing the right to fair labour practises, it can now be argued that section 16 of the LA has a strong constitutional backing.

*LLB Hons (UZ), LLM Cand. (UNISA), Lecturer, Faculty of Law, Midlands State University, Gweru.

¹A van Niekerk, MA Christianson et al: *Law @ work* (2012) 325.

²Generally referred to as flexicurity – a portmanteau of flexibility and security.

This article seeks to review the current statutory framework regulating transfer of businesses under the common law, the constitutional framework and Zimbabwe's labour laws. This paper will thus commence with an overview of the common law position followed by a discussion of the constitutional framework. Thereafter, this paper provides an analysis of the purpose of Section 16 and further explores the implications of the transfer of a business from both the employer and employee perspective. Finally the paper makes a comment on the implications of Section 65 of the Constitution on the interpretation of Section 16 before making concluding remarks.

1.2 The Common Law

The common law operates as the background law of labour law in Zimbabwe. Though the application of most labour law principles have been modified by statute, a meaningful study of labour law is not complete without at least a rudimentary understanding of the common law principles. In any event, the position of the law in Zimbabwe is that the employment relationship remains regulated by the common law to the extent that legislation is inapplicable³.

The contract of employment is generally premised on the common law principle of *locatio conductio operarum*.⁴ In essence, this entails that the employment contract is a personal relationship between an employer and an employee and for this reason the relationship may not be transferred or substituted without the consent of the parties' concerned.⁵ Contractually, when an employment contract is transferred from one employer to another there is a cession and delegation of the employment contract and this requires the consent not only of the employee concerned but also the transferor and transferee's employers.⁶

It therefore follows that under common law, in the absence of consent of the parties involved, when a business is disposed of for whatever reason, the employment relationship comes to an end. The sale of a business results in the termination of contracts of employment between the

³ See *Hama v NRZ* 1996 (1) ZLR 664 (S).

⁴ The contract between the master and servant of the letting and hiring of services.

⁵ Beaumont *Coping with corporate re-organisation :Section 197 – Dramatic New Case Law*,(2002)136.

⁶As held in *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] All ER 549 HL, the employees right to choose an employer of his choice is the main difference between forced labour done by a servant and employment.

employer and employee and it is left to the purchaser of the business to decide whether or not to offer the employees re-employment.⁷

In view of the above position, it is clear that the common law does not offer any work security to employees in the event of a sale of business. The common law leaves transferees of business with the right to choose which employees to re-employ subject to the consent of the few chosen employees. An employer acquiring a new business who would want to maintain continuity by retaining the skills and experience of the old employer's employees has to negotiate with the employees and offer new contracts. In the event that the employees reject the offer the new employer will be left with no option but to look for new employees. It is as a result of these inherent inequalities in the common law which did not protect work security or make any commercial sense that the legislature intervened and enacted Section 16 of the LA. Section 16 changed the common law position by providing that certain legal consequences would automatically flow from the transfer of a business or undertaking as a going concern.

1.3 The Legislative Framework

1.3.1 The Constitution

On the 22nd of May 2013, Zimbabwe adopted a new Constitution with an expanded Bill of Rights. The most important section in the new constitution relevant to labour law is Section 65 which specifically deals with labour rights.⁸ Section 65 (1) of the Constitution specifically provides for every person's right to "fair and safe labour practices and standards".

The right to fair labour practices is unique, and the Constitution does not define it. This right could thus be understood from various perspectives, but it is generally not incapable of a precise definition. For instance, it must be noted that the Labour Act is the vehicle for giving effect to the Constitutional right to fair labour practices and is a codification of some of these rights. Since Section 16 was enacted before the adoption of the new Constitution, it follows that

⁷ D du Toit, D Bosch et al *Labour Relations Law :A Comprehensive Guide*, (2006) 447 and J Grogan *Dismissal Law* (2010) 413

⁸ Apart from Zimbabwe, South Africa also constitutionalised labour rights in Section 23 of its Constitution whilst Malawi did the same in Section 31 of its Constitution

it is now reflected in Section 65 of the Constitution. Similar to section 65 of Zimbabwe's Constitution, section 23 of the South African Constitution provides that everyone has a right to fair labour practices. For Zimbabwe, however, some of the important practices which fall under the heading of fair labour practices are the rights of employees on transfer of undertakings under Section 16 of the Act.

In general, the courts have declared that provisions of labour legislation must be interpreted purposively. For instance, the LA is a statute aimed at advancing social justice and democracy in the workplace and in terms of Section 2 A (2); it must thus be construed in a manner that best ensures the attainment of its purposes listed in Section 2A(1)(a)-(f). Given the constitutionalisation of labour rights in Section 65 of the Constitution any provisions of the LA must be interpreted in compliance with the Constitution. Employees are entitled under the Constitution to fair labour practices and this together with the objectives of the Labour Act are to be used in interpreting provisions such as Section 16 of the LA.

As already indicated above, transfer of businesses for whatever reason involve competing interests, that is, the employer's interest in profitability and flexibility and the employee's interest in work security. Since the concept of fair labour practices under Section 65 (1) of the Constitution applies to every person, that is employers and employees, Section 16 must be interpreted in a manner consistent with Section 65 of the Constitution, which is fair. Fairness and rigidity are uneasy bedfellows and some element of flexibility and balance is required.⁹ Though Section 16 is entitled rights of employees on transfer of undertakings, the fair labour practices jurisprudence introduced by Section 65 of the Constitution requires a labour law dispensation that pays due regard to the needs and interests of both employers and employees. The Constitution is the supreme law of the land and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.¹⁰ Accordingly, Section 16 of the Labour Act has to be interpreted and analysed to the extent it is in compliance with the Constitution.

1.3.2 Section 16 of the Labour Act

⁹ Unpublished: L Biggs "The Application of Section 197 of the Labour Relations Act in an Outsourcing Context" *Unpublished LLM thesis, Nelson Mandela Metropolitan University, 2008*, 4

¹⁰Section 2 (1) of the Constitution of Zimbabwe

There is no doubt that section 16 is hugely progressive to Zimbabwe's labour law framework. As noted by Darcy du Toit,¹¹ Zimbabwe is the only Southern African country outside South Africa to have enacted legislation providing for the transfer of contracts of employment upon transfer of a business in the form of Section 16 of the LA. Its scope and application should be the starting point in any discussion of its importance.

Section 16 of the Act regulates the employment related consequences of the transfer of the whole or any part of a business and is titled "rights of employees on transfer of undertaking". Specifically Section 16 of the Act provides as follows;

".. 16(l) Subject to this section whenever any undertaking in which any persons are employed is alienated or transferred in any way whatsoever the employment of such persons shall unless otherwise lawfully terminated be deemed to be transferred to the transferor of the undertaking on terms and conditions which are not less favourable than those which applied immediately before the transfer and the continuity of employment of such employees shall be deemed not to have been interrupted."

Nothing in sub section (1) shall be deemed;-

- a) *to prevent the employees concerned from being transferred on terms and conditions of employment which are more favourable to them than those which applied immediately before the transfer from obtaining terms and conditions of employment which are now favourable than those which applied immediately before, or subsequent to the transfer,*
- b) *to prevent the employees concerned from agreeing to terms and conditions of employment which are in themselves otherwise legal and which shall be applicable on and after the transfer, but which are less favourable than those which applied to them immediately before the transfer.*

¹¹D du Toit 'The Transfer of Enterprises and the Protection of Employment Benefits in South and Southern Africa' (2004) *Law, Democracy and Development* 116.

Provided that no rights to social security, pensions, gratuities or other retirement benefits may be diminished by any such agreement without the prior written authority of the Minister:

- c) to affect the rights of the employees concerned which they could have enforced against the person who employed them immediately before the transfer and such rights may be enforced against either the employer or the person to whom the undertaking has been transferred or against both such persons at any time prior to, on or after the transfer,*
- d) to derogate from or prejudice to violate or evade to attempt to violate or evade in any way the provisions of this section”*

A similar provision to Section 16 is in Section 197 of the South African Labour Relations Act of 1995 (hereinafter referred to as the LRA). The relevant part of Section 197 provides as follows;-

- (2). If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6) –*
- a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;*
 - b) all rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee.*
 - c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer, and*

- d) *the transfer does not interrupt an employees' continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer.*¹²

Both Section 197 of the LRA and Section 16 of the LA were enacted to advance and regulate the exercise of the right to fair labour practices, enjoyed by both the employers and employees. Given the similarity in the wording of Section 197 of the South African LRA and Section 16 of the LA, the jurisprudence developed in interpreting Section 197 is apposite to interpreting Section 16 of the LA.¹³ It is for this reason that this paper heavily relied on South African authorities as there is a dearth of authorities on the same issue in the Zimbabwean jurisdiction.

1.3.2.1 The Purpose of Section 16

As noted above, at common law, the acquisition and transfer of a business that was in operation led to the termination of contracts of employment. If the new owner wished to continue operating the business with the same workers, he would have to conclude new contracts with them. It is this position which was repealed by Section 16 which now regulates the employment related consequences of the transfer of the whole or a part of a business.

Employees have an interest in job security and in recognition of this interest, section 16 obliges the new employer to take all the old employer's employees as an inseparable part of the business bundle that is subject of a transfer. On the other hand, the employer has an interest in flexibility and profitability and an employer acquiring a new business has an interest in the continuity that is achieved by a transfer of employment contracts. The employer would retain the skills and experience of employees of the business that would have been acquired.

As acknowledged by Gubbay CJ in the *Mutare Rural District Council v Chikwena* case, the most important purpose of Section 16 is to protect employees against the loss of employment in the

¹² Section 197 A (i) provides for definitions in the following terms:
In this Section and in Section 197 A –

- a) "**business**" includes the whole or a part of any business trade, undertaking or service, and
- b) "**transfer**" means the transfer of a business by one employer ("**the old employer**") to another employer ("**the new employer**") as a going concern.

¹³ See *Mutare RDC v Chikwena* 2000(1) ZLR 534 (S).

event of a transfer of business.¹⁴ It is unfair and against the right to fair labour practices for an employee to lose his employment for the simple reason that the business has been transferred.

In addition, it should be noted that section 16 has a dual purpose in that on one hand, the workers employment is safeguarded, whilst on the other hand a new owner is guaranteed a workforce to continue with the operation of the business. It is against this background that section 16 must be interpreted. This position is also fortified by comparable or similar foreign instruments and foreign case law interpreting the same, as illustrated below.

In the South African case of *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town and Others*,¹⁵ the Constitutional Court explained the dual purpose of Section 197 of the LRA eloquently and succinctly pronounced that;

“Section 197 strikes at the heart of this tension and relieves the employers and the workers of some of the consequences that the common law visited on them. Its purpose is to protect the employment of the workers and to facilitate the sale of businesses as going concerns by enabling the new employer to take over the workers as well as other assets in certain circumstances. The Section aims at minimizing the tension and the resultant labour disputes that often arise from the sales of businesses and impact negatively on economic development and labour peace. In this sense, section 197 has a dual purpose; it facilitates the commercial transactions while at the same time protecting the workers against unfair job losses...”

An essentially similar provision was almost certainly similarly considered in the EEC case of the *Acquired Rights Directive 77/187 EEC adopted by the European Commission in 1977 and the British Transfer of Undertakings (Protection of Employment), Regulation 1981/1794* which was enacted pursuant to the Directive. Though there are differences in language and context with Section 16, the purpose of the instruments is to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded. These foreign instruments are aimed primarily at the protection of employees.

¹⁴*Schutte and Others v Powerplus Performance (Pty) Ltd and Another* (1999) 20 ILJ 655 (LC)

¹⁵ 2003 (3) SA 1 (CC).

Thus, despite the primary purpose of Section 16 being to protect employees and guarantee work security, it impacts positively on economic development and the protection of labour peace. It is also for these reasons that there is an automatic and obligatory transfer, irrespective of the wishes of the employer parties concerned under Section 16. In the same vein there is no obligation to consult the employees concerned and their consent is not required under Section 16.¹⁶ Security of employment is given priority than an employee's freedom of choice.¹⁷

1.3.2.2 Triggering Section 16 (1)

For Section 16 (1) to be triggered, there must be alienation or transfer of an undertaking in any way whatsoever. It therefore follows that for a transaction to fall within the ambit of Section 16 (1), the following elements must be present at the same time;

- (i) an undertaking, business or enterprise
- (ii) as a going concern
- (iii) is transferred or alienated

Given that the abovementioned three elements must simultaneously be present, courts are obliged to look at transactions holistically in order to determine whether all the elements of Section 16 are satisfied. On another note, the LA does not define these important elements and reliance will be placed on the jurisprudence developed by the courts and definitions from foreign legislation.

1.3.2.3 The meaning of an “Undertaking”

The LA does not provide a statutory definition of an undertaking. However, in *Mutare Rural District Council v Chikwena*, Gubbay CJ relied on South African and Australian case law and interpreted the term undertaking to mean a separate and viable business. In defining the word “undertaking” the court stated as follows;

“The word “undertaking” is of variable meaning. Basically the idea it conveys is that of a business or enterprise. In the Australian case of Top of the Cross (Pty) Ltd v Federal Commissioner of Taxation (1980) 50 FLR 19, Woodward J said at 36:

¹⁶See also *Aviation Union of South Africa and Another v South African Airways (Pty) Ltd and Others* 2012 (1) SA 321 (CC).

¹⁷P Lloyd *Labour Legislation in Zimbabwe* (2006) 52.

“...Frequently, the word “undertaking” is used in circumstances where it could be interchanged with either the word business or enterprise and with varying shades of meaning. Sometimes it is used alone, sometimes by way of distinction from the assets of the owner and sometimes as a synonym for business. Sometimes it is used to embrace the property which is used in connection with the undertaking as well as the debts and liabilities which have arisen in relation thereto....”¹⁸

It must be noted that section 197 (1) (a) of the South African LRA defines the term business to include, “*the whole or any part of a business, trade or undertaking, or service*” and the jurisprudence developed in interpreting this section by the South African courts is apposite to section 16 (1). South African courts have adopted the approach developed by the European Court of Justice (ECJ) in applying European Community Directives on transfer of undertakings and British Courts in interpreting similar legislation. As noted by A van Niekerk,¹⁹ “the ECJ has developed a concept of an “economic entity”, defined as “an organized grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective.”²⁰

In *Spijkers Gebroeders Benedik Abattoir v Alfred Benedik en Zonen*,²¹ the ECJ explained the test of determining whether an entity is an undertaking or business as follows;

“... The decisive criterion is whether the business in question retains its identity. Consequently a transfer of an undertaking; business or part of a business does not occur merely because its assets are disposed of. Instead it is necessary to consider whether the business was disposed of as a going concern, as would be indicated, inter alia by the fact that its operation was actually continued or resumed by the employer, with the same or similar activities....”

From the foregoing it is clear that for Section 16 to be invoked the entity or activity being transferred must amount to an organized grouping of resources which has the objective of pursuing an economic activity. A court will therefore be under an obligation to examine all the

¹⁸ n 13 above, 537.

¹⁹A van Niekerk et al (n1 above, 330.

²⁰See also *Suzen v Zehnacker Gebaudereinigung GmbH Kranken Hausservice* [1997] IRLR 225 (ECJ).

²¹ [1986] 2 CMLR 296.

relevant elements and components that comprise the business such as, goodwill, employees, assets, the way in which its work is organized etc, and determine whether they are sufficiently linked and structured so as to comprise an economic entity capable of being transferred under section 16 (1).

1.3.2.4 As a Going Concern

For purposes of Section 16 (1), an undertaking must be alienated or transferred as a going concern. Section 16 of the LA does not, however, include the term “going concern”. Despite this, the Supreme Court has regarded this element as critical. In *Mutare Rural District Council v Chikwena*,²² the Supreme Court held that a business, trade or undertaking must be transferred as a going concern, “that is to say, what is taken over must be an active and operating business, trade or undertaking.”

South African courts have had numerous occasions to delineate the meaning and scope of the term “going concern”. In the *NEHAWU v University of Cape Town* case, it was held that, the term going concern must be “given its ordinary meaning unless the context indicates otherwise”. What is transferred, the court further clarified, must be a business in operation “so that the business remains the same but in different hands.”²³

If a transaction involving the sale of a business specifies that it is or will be transferred as a going concern, it would constitute sufficient proof of that fact. However if the transaction is silent on this issue, a transfer as a going concern is established with reference to objective facts. The test for determining whether a business is transferred as going concern was laid down in the South African case of *NEHAWU v University of Cape Town*, and is apposite to Section 16 (1).²⁴ In that case, the Constitutional Court of South Africa stated that;

“...in deciding whether a business has been transferred as a going concern, regard must be had to the substance and not the form of the transaction. A number of factors will be relevant to the question whether a transfer of a business as a going concern has occurred, such as the transfer or otherwise of assets both tangible and intangible, whether or not the workers are taken over by the new employer, whether customers are

²²n 13 above, 537

²³n 14 above, 119F

²⁴n 14 above, 119F – 120A

transferred and whether or not the same business is being carried on by the new employer. What must be stressed is that this list of factors is not exhaustive and that none of them is decisive individually. They must all be considered in the overall assessment and therefore should not be considered in isolation...”

In essence there must be transfer of an economic entity that retains its identity after the change of ownership. It requires an examination of the substance and not the form of the transfer²⁵ and determining whether a transfer of a business amounts to a transfer as a going concern is an issue that must be decided on the facts of each case.

There are also circumstances in which there is no transfer as a going concern for purposes of Section 16 (1). Firstly, the mere sale of assets of a business does not amount to transfer of a business as a going concern since there is no operating business being transferred.²⁶ Secondly, it has also been held by South African Courts that the acquisition of a company through a purchase of shares does not amount to a transfer of a business as a going concern.²⁷ A change in shareholding does not change identity of employer and Section 16 (1) is not triggered by a disposal of shares in a company.

1.3.2.5 “Alienated or Transferred”

Once again the LA does not define the terms “alienated or transferred”. Section 197 (1) (b) of the South African LRA defines transfer to mean, “the transfer of a business by one employer (“the old employer”) to another employer (“the new employer”) as a going concern”. In interpreting Section 197 (1) (b), South African courts have held that for the section to apply the business must have changed hands, through a transaction that places the business in question in different hands.²⁸ Thus the word transfer, as noted by A van Niekerk et al, relates to the

²⁵ D Bosch ‘Of Business Parts and Human Stock: Some Reflections on Section 197(1) (a) of the LRA’ (2005) Vol 26 *ILJ* 1865.

²⁶ *Local Resources Trust v Shepherd Takaendesa* HH 317-12, *Malaba v Minaco Stone Germiston (Pty) Ltd and Another* (2000) 21 *ILJ* 1975 (LC) and *Kgethe and Others v LMK Manufacturing (Pty) Ltd and Another* [1997] 10 *BLLR* 1303 (LC).

²⁷ Lloyd (n 17 above) @ 53, *Waverly Blankets Ltd v CCMA* [2003] 3 *BLLR* 236 (LAC) and *Long v Prism Holdings Ltd and Another* (2010) 31 *ILJ* 2110 (LC).

²⁸ *NEHAWU v University of Cape Town* (n15 above).

method of the transfer of a business and two distinct employers must be included in the transaction.²⁹

Alienation or transfer of an undertaking as indicated in Section 16 (1) by use of the word, “in any way whatsoever,” may take many forms, as long as, there is a change of hands in the business. Usual business transfers occur through a sale of business. However other corporate restructuring exercises such as mergers, takeovers, exchange of assets, and outsourcing of business activities,³⁰ donations³¹ and resignation of a partner in a partnership³² are transfers or alienation of businesses for purposes of Section 16 (1).

Determining whether a transfer or alienation as contemplated in Section 16 (1) has occurred is a factual question. It must be determined with reference to the objective facts of each case. In *Aviation Union of South Africa and Another v South African Airways (Pty) Ltd and Others*, it was held that, “for a transfer to be established there must be components of the original business which are passed on the third party”. These components would include the taking over of employees, assets (tangible or intangible), customers, debtors and the business would maintain or continue its activities whilst keeping its identity.

1.3.3 Section 16 (1) and Outsourcing

A notable business practise in the modern world is the outsourcing of non-core functions or business activities so as to maintain a flexible workforce and maximize profits. Outsourcing generally involves contracting with another entity to perform a particular service currently rendered by a specific department at an agreed fee. Support services which are usually outsourced are non-core activities or services such as provision of security; the vehicle maintenance component of a business, catering services, maintenance of grounds, gardening and cleaning services.³³ Section 16 (1) does not deal directly with the question whether

²⁹ A van Niekerk et al (n1 above) 328.

³⁰ *NEHAWU v University of Cape Town* (n 15 above), *Aviation Union of South Africa and Another v South African Airways (Pty) Ltd and Others* (n 16 above) and Wallis 'Is Outsourcing In An Ongoing Concern' (2006) Vol 27 ILJ 1.

³¹ *Tekwini Security Services v Mavana* (1999) 20 ILJ 655 (LC).

³² *Burman Katz Attorneys v Brand NO* [2001] 2 BLLR 125(LC).

³³ Described in *NEHAWU v University of Cape Town* (n 15 above) as the “putting to tender of certain services for a fee. The contractor performs the outsourced services and in return is paid a fee for its troubles by the employer.....An outsourcing transaction is usually for a fixed period of time at the end of which it again goes to tender and existing contractor could lose the contract to another contractor.

outsourcing of services can be a transfer or alienation of an undertaking. The South African courts have made some interesting comments regarding outsourcing. In commenting on the applicability of Section 197 of the South African LRA to outsourcing transactions the South African courts have held that as long as such an agreement amounts to a transfer of the business of the contracting company, Section 197 will apply.³⁴

Given that Section 197 of the South African LRA applies to outsourcing, there is nothing that precludes Section 16 of the LA from being applied to such arrangements. An outsourcing contract will not automatically constitute a transfer of a going concern. For Section 16 to be applicable to outsourcing agreements there must be alienation or transfer of an undertaking as a going concern. It is therefore submitted that Section 16 does not only apply to permanent transfers but also temporary transfers in outsourcing situations.

1.3.4 The Effect of Transfer of an Undertaking as a Going Concern

The text of Section 16 (1) makes it plain that its application is dependent on the existence of a transfer of an undertaking as a going concern. It states that if a transfer contemplated in Section 16 (1) takes place, the legal consequences it specifies will be activated. The main consequences of a transfer of a business as captured in Section 16 (1) are that, "...the employment of such persons shall unless otherwise lawfully terminated be deemed to be transferred to the transferor of the undertaking on terms and conditions which are not less favourable than those which applied immediately before the transfer and the continuity of employment of such employees shall be deemed not to have been interrupted...."

It is clear from the above section that the new employer is automatically substituted for the old employer in respect of all contracts of employment in existence immediately before the date of transfer, unless such contracts have been lawfully terminated. All rights and obligations between the old employer and the employee are included in the basket of what is transferred. As held in the South African case of *Aviation Union of South Africa and Another v South African Airways ((Pty) Ltd and Others* (supra) which is of striking pertinence to Section 16 (1) of the LA,

"This simultaneous transfer of business and contracts of employment does not require any declaration by a court. The employment contracts are automatically

³⁴*NUMSA v Staman Automatic CC and Another* [2003] 11 BLLR 1187(LC) and *COSAWU v Zikthetele Trade (Pty) Ltd* [2005] 9 BLLR 924 (LC).

*transferred together with the business. The person to whom the business is transferred replaces the old employer in terms of those contracts and assumes all obligations of the previous employer. He or she also acquires the contractual rights of the previous employer...*³⁵

From the foregoing, it is clear that the transfer does not interrupt an employee's continuity of employment and Section 16 (1) provides a general rule that employees shall not be offered less favourable conditions on such transfer or alienation. However Section 16 (2) (b) provides an exception to this general rule and it would be proper for employees to accept less favourable conditions. The parties may agree on whatever new terms as long as they are consistent with the nature of employment, and are not illegal or **contra bonos mores**. Other rights such as social security, pensions, gratuities or other retirement benefits may only be diminished or reduced with the prior written approval of the Minister of Labour.³⁶ Under Section 16 (2) (a), there is also nothing that bars the employees from being transferred on more favourable terms and conditions. This conforms to the principle of fairness as parties are given an opportunity to negotiate and make choices which are compatible with their needs.

From a reading of Section 16(1), it is clear that there is no obligation to consult the employees concerned. Their consent to the transfer of their contracts of employment is not required. In the same vein, the new employer has no right to choose which employees to re-employ. The question which then arises is whether this position is fair and in line with the constitutional right to fair labour practices.

In terms of Article 20 of the International Labour Organisation (ILO), Termination of Employment Recommendation 166 of 1982 an employer who contemplates the introduction of major changes in production, programmes, organisation structure or technology that are likely to entail terminations must consult the workers concerned. The LA gives effect to this obligation in Section 2A (1) (e) which provides that the purpose of the Act is to advance social justice and democracy in the workplace by promoting the participation by employees in decisions affecting their interests. This is one of the fair labour practices envisaged by Section 65(1) of the Constitution. It is therefore fair that whenever Section 16 is triggered the employees concerned

³⁵ n 16 above 329.

³⁶ *Dhege v Bell Medical Centre* HB 50-04.

must be consulted and given an opportunity to choose whether they want to be employed by the new owner or not.

From an employer's perspective it can also be argued that fairness demands that the new employer be given an opportunity to choose which employees to offer re-employment. However to avoid defeating the primary purpose of Section 16, that is protecting work security, such a choice must be dependent on viability of the business being transferred. Where a business being transferred is insolvent as a result of the shortcomings of employees it is only fair that the new employer choose who to re-employ. Under such circumstances a new employer who would want to start in a different direction must not be compelled to inherit underperforming employees as this does not make any commercial sense. It must only be in circumstances where the business being transferred is viable, that the contracts of employment must automatically be transferred to the new owner together with the business.

Another disquieting aspect in Section 16(1) is that Section 16 (1) does not prevent the lawful dismissal of employees prior to transfer of the business. In *Mutare Rural District Council v Chikwena*, it was held that, "...S16 (1) permits all or some of the employees to be excluded by agreement from the alienation or the transfer of the undertaking to the new employer". The phrase "deemed to be transferred" makes this clear." Thus, employees excluded from the transfer will have their employment terminated lawfully by the old employer either through mutual termination or through retrenchment³⁷. By allowing employers to exclude some of the employees by agreement, the purpose of Section 16 (1) which is to protect security of employment is defeated.

In terms of Section 16 (2) (c), anything done before the transfer by or in relation to the old employer is considered to have been done by or in relation to the new employer. It is for this reason that any rights which employees could have enforced against the old employer immediately before the transfer may be enforced against the new employer or old employer or against both such persons at any time prior to, on or after the transfer. Requesting an employee to enforce his rights against an old employer who is no longer in business and whose

³⁷ Retrenchment is defined in Section 2 of the LA and is regulated by Sections 12C and 12D of the LA read with the Labour Relations (Retrenchment) Regulations, 2003. Insolvency situations are covered by the retrenchment laws however if the insolvent business is transferred or alienated as a going concern then Section 16 (1) will be triggered and retrenchment laws will not be applicable.

whereabouts may be difficult to ascertain can be an exercise in futility. Since all rights and obligations are transferred to the new employer it is fair that the employee assert his or her rights against the new employer only.

2. Remedies for Breach of Section 16 (1)

In terms of Section 16(3) of the LA, it shall be an unfair labour practice to violate or to attempt to violate or evade in any way the provisions of Section 16 of the LA. An unfair labour practice is defined in Section 2 of the LA. Unfortunately Section 16 (3) seems to contradict Section 16 (1) which allows employers to evade the requirements of Section 16 by excluding other employees. As noted earlier on section 16 (1) does not prevent the dismissal of employees prior to the transfer of a business. By giving employees this opportunity, the legislature literally countenanced the employer to evade provisions of Section 16, thereby diminishing protection of employees. This is inconsistent with Section 16 (3) and the purpose of Section 16 as a whole.

The resolution of unfair labour practices is provided for under Part X11 of the LA and is beyond the scope of this article. In the event that employees are dismissed, where the reason for the dismissal is the transfer of the business as a going concern such employees can claim unfair dismissal through dispute resolution mechanisms established under the LA. If they succeed they would be entitled to a potpourri of remedies such as reinstatement, damages in lieu of reinstatement and back pay. As can be gleaned from Section 16(2) (c) any such claims can be brought against the new employer or the old employer or both.

In the event that there is a dispute relating to whether there has been a transfer of business as a going concern or not (or status of employees concerned) the parties can approach the High Court and seek a declaratory order to the effect that a transaction is subject to Section 16 (1). The Labour Court is a creature of statute and its exclusive jurisdiction is limited only to those matters set out in Section 89 (1) of the LA. In terms of Section 89(6) of the LA, *"no court other than the Labour Court shall have jurisdiction in the first instance to hear and determine any application, appeal or matter referred to in subsection (1)."* Though the Labour Court has exclusive jurisdiction, Section 89 of the LA did not take away the inherent power of the High Court and jurisdiction of the Labour Court remains explicitly confined to the matters enumerated in Section 89(1) (a) – (j). Unfortunately there is no provision in Section 89 (1) authorizing the Labour Court to issue declaratory orders, the High Court remains vested with full and

unimpeded jurisdiction to hear and determine every labour matter other than those referred to in Section 89(1) and (6).³⁸ Thus the High Court can make a declaratory order and declare that a transaction falls or will fall within the scope of Section 16.

This parallel jurisdiction between the Labour Court and High Court defeats the purpose of the LA in Section 2A and that of establishing specialist dispute resolution mechanisms. It evokes concerns regarding legal certainty, forum shopping and undermines legislative intent in enacting certain rights. Section 16(3) creates an unfair labour practice of violating or attempting to violate Section 16. Such an unfair labour practice is resolved through dispute resolution forums under Part X11 of the LA. It therefore follows that there is no need for approaching the High Court for relief. The Labour Court must have exclusive jurisdiction in all labour matters including the granting of declaratory orders in transactions falling under Section 16.

3. Conclusion

It should be noted that despite the fact that Section 16 balances and protects interests of both employers and employees, its primary purpose seems to be to protect interests of employees in job security, and is thus generally in sync with international best practice. Given the constitutionalisation of labour rights in Section 65 of the new Constitution, courts have an obligation to interpret and apply Section 16 (1) of the LA expansively and holistically. It must be interpreted in light of its purpose, as well as the purpose of the LA as evinced in Section 2 A of the Act. There is therefore an obligation on the courts to develop a clear and coherent jurisprudence as to when Section 16 is triggered and the consequences that flow from its application.

Nevertheless, there is still need for the legislature to refine Section 16 (1). For example, Section 16 (1) does not prevent an old employer from excluding some of the employees from the transfer of an undertaking, by simply terminating their contracts. This considerably reduces the protection of employees and defeats the primary purpose of enacting Section 16. Any attempts to evade the consequences of Section 16 must be eschewed and employers must not be given an unlimited right to terminate contracts of employment before the transfer of a business. There

³⁸ *UZ-UCSF Collaborative Research Programme in Women's Health v Shamuyarira* 2010 (1) ZLR 127 (S), *Agribank v Machingaifa and Another* 2008 (1) ZLR 244 (S), *Mushoriwa v Zimbabwe Banking Corporation* 2008 (1) ZLR 125 (H) and *Mazarire v Old Mutual* HH 187-14.

is need to balance interests of both employers and employees. This would entail that employees must be consulted when Section 16 is invoked and given an opportunity to choose whether to accept an offer of re-employment. In the same breadth, a new employer depending on viability of the business being transferred must also be given an opportunity choose employees to re-employ. Furthermore, the remedies available to employers and employees under Section 16 must not be an avenue for forum shopping and parallel litigation. Dispute resolution mechanisms established under the LA must not be divested of their exclusive jurisdiction. They must have jurisdiction to grant declaratory orders not only in matters involving Section 16 but the LA as a whole. In the interim, Courts can only give employees and employers refuge by interpreting Section 16 in a manner that gives effect to its dual purpose. It must be interpreted ebulliently and in the context of the purpose of Section 16, the objects of the LA in section 2A and Section 65 of the Constitution.