

**SOUTH AFRICAN POLICE SERVICE AMENDMENT BILL: TRANSFER OF  
DIRECTORATE SPECIAL OPERATIONS (DSO) ESTABLISHED IN TERMS OF  
THE NATIONAL PROSECUTING AUTHORITY ACT 1998, TO THE SOUTH  
AFRICAN POLICE SERVICE (SAPS)**

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The PSA is of the view that a decision to transfer the DSO should have as aim the strengthening of service delivery in the Public Service.

The unit is currently functioning efficiently, and is rendering an important function that combats crime, in the interest of the citizens of the Republic.

Whereas it can correctly be argued that it is not the role of a trade union to question the decision making of Government in terms of the specific location of the unit, it undoubtedly is the role of a trade union representing affected employees to ensure that such transfer takes place in a fair and justifiable manner.

The PSA is concerned with the apparent transfer of the Special Investigators of DSO to SAPS and the discretion left with the National Commissioner of Police to absorb only selected employees from the DSO in the to be established SAPS special crime fighting Unit which will in future perform the functions of the DSO within the SAPS.

The PSA is of the view that transfers of this nature are sufficiently dealt with by the Labour Relations Act, 1995 (LRA).

Section 197 of the said act provides for the transfer of a business, trade, and undertaking or as in this case, a service.

Section 197 of the LRA further defines a "business" as the 'whole or a part of a business, trade, undertaking or service', while 'transfer' is defined to mean a transfer of a business... as a going concern. This provision outlined in the act is clear that the right of employees to have their contracts transferred is dependent on the transfer of a business as per the definition of the Act and the intention of the Act is to protect employment security during transfers.

From the draft Bill it is clear that the intention is to transfer the entire function performed by the DSO to the SAPS and to provide for the relocation of special investigators and should therefore be dealt with in terms of the LRA.

### **The effect of a Section 197 transfer in terms of the LRA**

Subsection 197(2) lists the following four consequences of such a transfer:

- "the new employer is substituted in the place of the old employer in respect of all contracts of employment in existence just prior to the transfer;
- The rights and obligations in terms of those pre-existing contracts of employment continue between the new employer and the employees;
- All obligations of the old employer arising from the old employer's actions prior to the transfer becomes obligations of the new employer;

- Continuity of employment is maintained.

The question whether the Act provides for the continuity of employment was answered by the Labour Appeal Court in *Foodgro (A Division of Leisurenets) v Keil* [1999] 20 ILJ 2521 (LAC) where it was found that it is not possible to contract out of continuity of employment. This section is therefore clearly aimed at the preservation of rights and the provisions in the draft Bill which refers to “*selected members/ officials*” is therefore contradicting the principles contained in the Labour Relations Act regarding transfers of this nature.

The wording of the SAPS Amendment Bill is therefore in clear contradiction with the above-mentioned sections in the LRA.

Specific references in the Bill which needs amendment are:

- Section 16 (A)5(a) which relates to security screening in terms of Section 2(a) of the National Strategic Intelligence Act.
- Section 16 (A)5(b) which bestows on the National Commissioner subjective and personal discretion without guidelines, the right to evaluate the suitability of persons to join the Priority Unit.
- Section 16 (A)9 which allows the National Commissioner to withdraw a clearance certificate upon receipt of information
- Any other reference to “selected members” of the DSO

The Bill allows for discretionary appointment to the unit. The PSA is of the view that this provision cannot be applied to employees who are currently holding a position in the DSO. This will lead to redundancy based on the employer's preference to transfer employees and not on the operational requirement of the relocation of the unit.

## **Conclusion**

From the above, it is therefore the contention of the Public Servants Association that the inclusion of the provisions in the Bill as mentioned above, is contradicting the Labour Relations Act no 66 of 1995 as amended which underpins an employees' Constitutional right to fair labour practices. The PSA is of the view that the principles contained in Section 197 of the LRA should be applied in respect of staff affected by the transfer.

This implies the following:

- Continuity of employment
- The transfers of contracts of employment
- Continuity of rights and obligations of the employer and employees
- The new employer (SAPS) should take over the contracts of employment of all affected staff, and no selection processes aimed at eliminating serving officials should be applied.

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*Source reference: Essential Labour Law* Fourth Edition 2005 (A C Basson, MA Christianson, C Garbers, P A K Le Roux, C Mischke, EML Strydom