

DEALING WITH SECTION 197 IN BUS CONTRACTING ENVIRONMENT

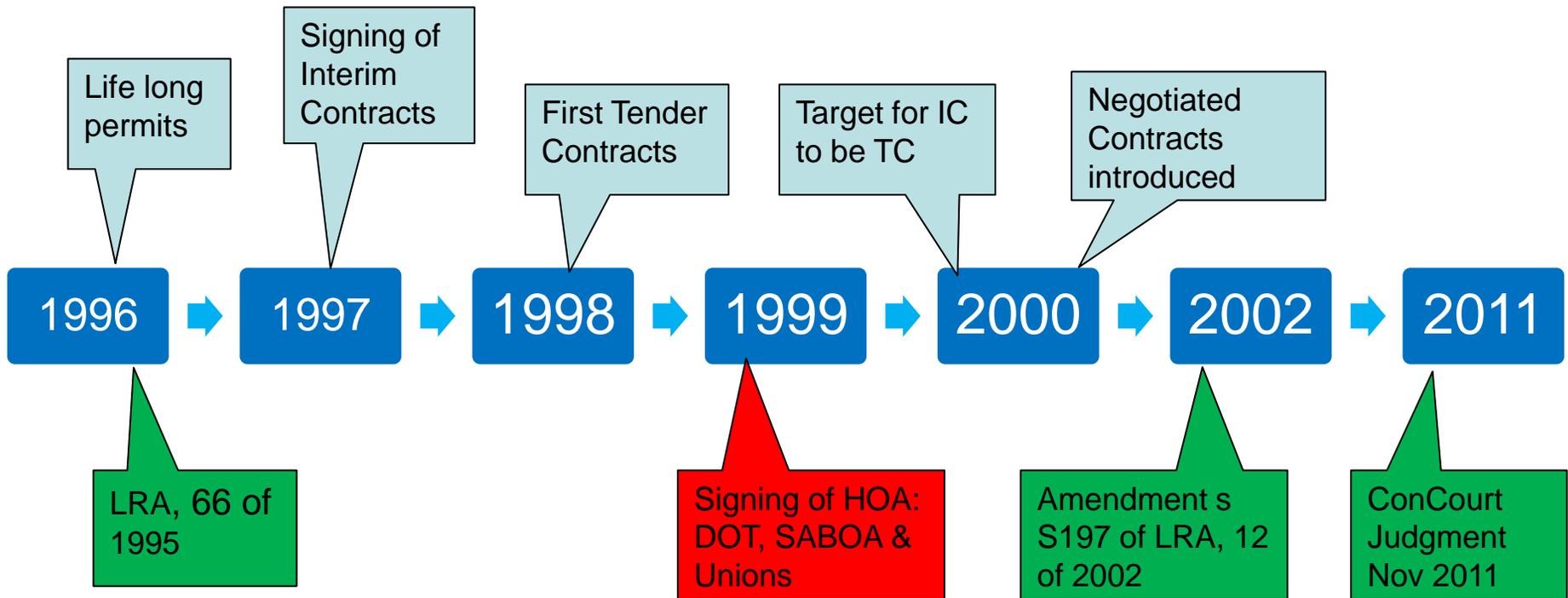
DEPARTMENT OF TRANSPORT

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Background to Competitive Tendering



Labour Issues in Bus Contracts

- Experience with the tender contract system:
 - A massive drop in wages for employees
 - A huge reduction in the employees benefits
 - Large scale outsourcing of functions by successful tenderers leading to serious job losses in the bus industry
 - Labour costs (which comprises approximately 40% of the total cost) became the main area of competition
 - The more a tenderer could cut the labour cost in his tender the better his chances of winning a tender

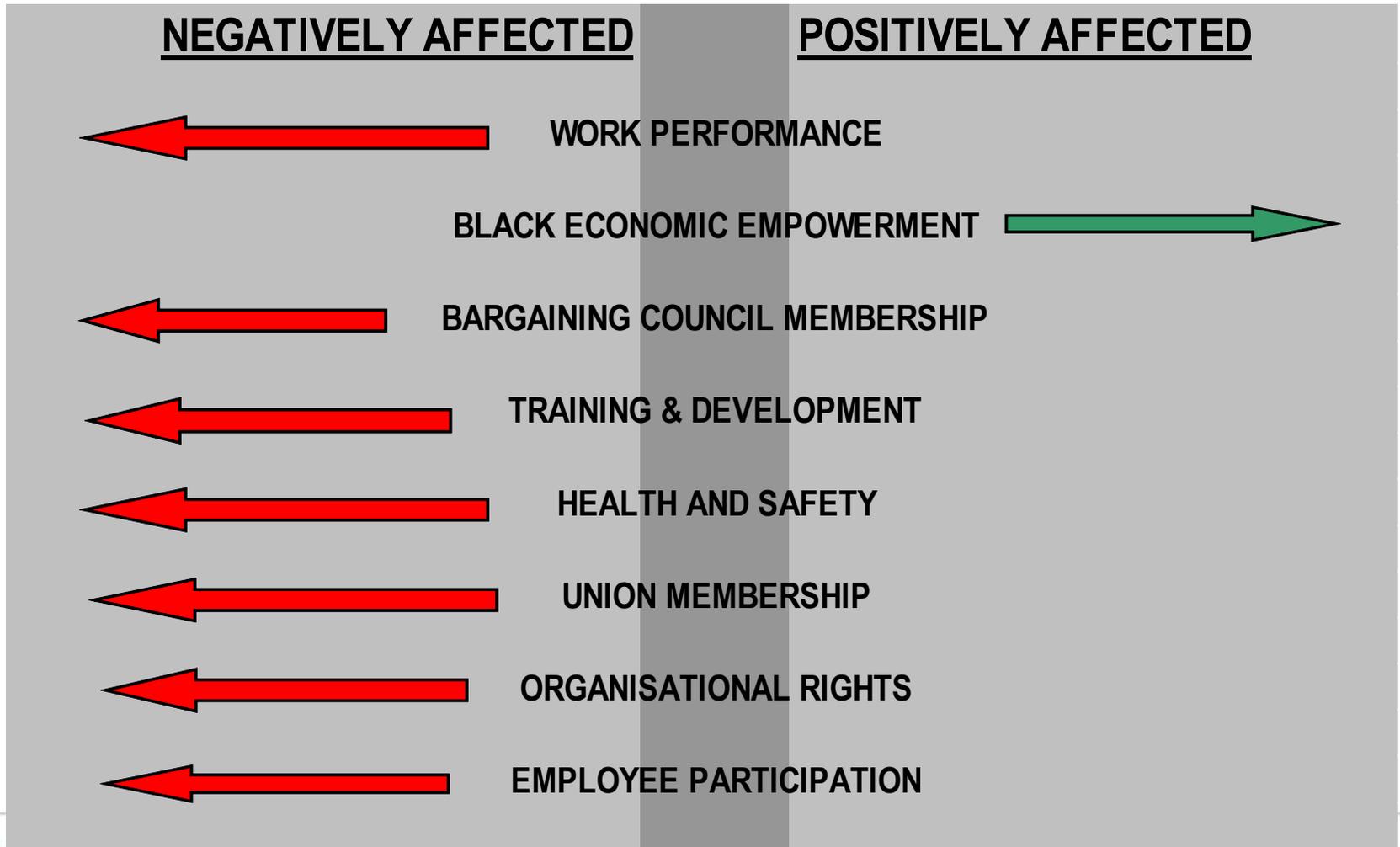
Effect Of Tender System On Labour

Research WBS – 60 Key Role Players in Bus Industry



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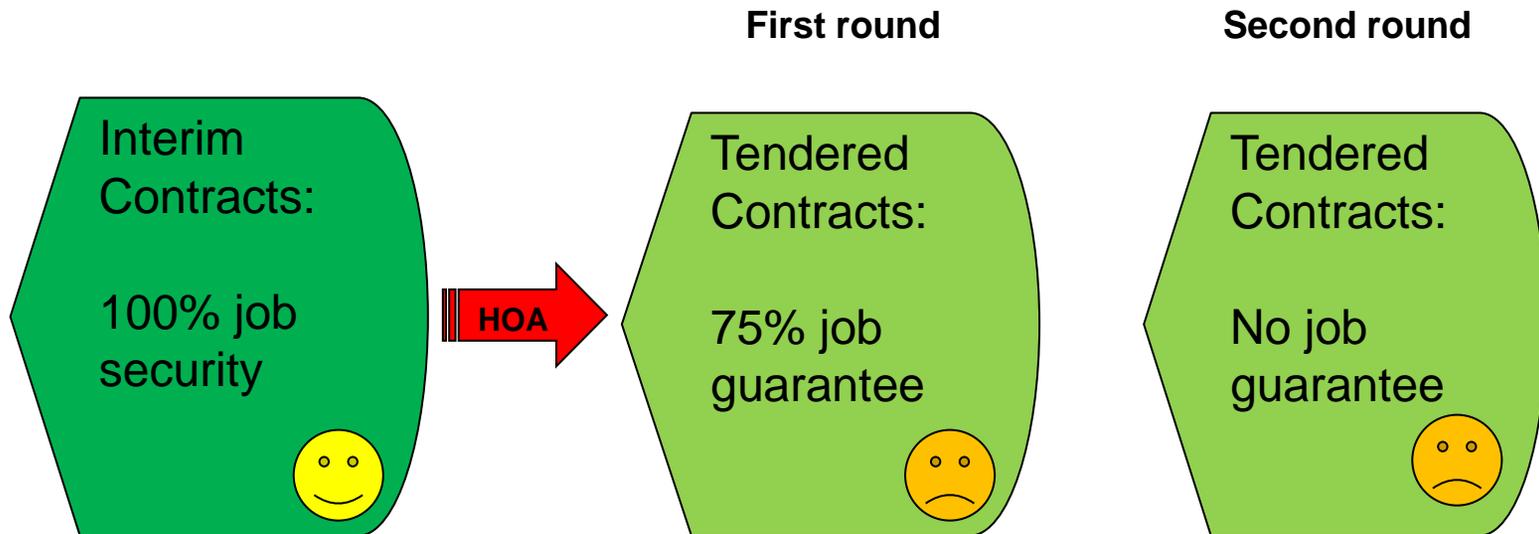
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Heads of Agreements

- It was signed to govern the handling of labour issues in the transition from IC to TC
- It broadly regulated macro issues as agreed to by parties (job security, subcontracting, retrenchment etc.)
- It was not premised on continuity of employment or the fact that contracts would automatically transfer
- It envisaged a clean break in the service of the existing employees
- The intention was never to diminish the rights of workers
- It however proved not to be successful in handling critical labour issues
- Organised labour requested a review of the Agreement
- From 2000 to 2011 parties spent lot of time trying to solve the problems in the HOA without any success

Heads of Agreements cont...



Section 197 of the LRA

- The following is an extract of section 197 of the Labour Relations Act, 12 of 2002 :
 - (1) *In this section and in section 197A –*
 - (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.*
 - (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 the 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*

Section 197 of the LRA cont...

(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 employee's continuity of employment and an employee's contract of employment continues as if with the old employer.

LRA and the Constitution

- One of the primary objectives of the LRA is to give effect to and to regulate the fundamental rights entrenched in the Constitution of the Republic of South Africa, 1996
 - “Everyone has the right to fair labour practices” – Section 23(1) Bill of Rights
- This right applies to all employees including those who work for businesses that are transferred, guaranteeing them continued employment based on their previous terms and conditions
- Any law (and/or conduct) that is inconsistent with this provision is invalid
- It is against this background that the scope of s197 must be determined

Application of Section 197

- All provisions of the LRA (including s197) should be interpreted in terms of the declared purpose of the Act:
 - “*to promote economic development, social justice and labour peace*”
- A proper approach to the construction of s197 is to construe the section in the light of its purpose and the context in which it appears in the LRA
- S197 is located in chapter VIII of the LRA which deals with dismissals and unfair labour practices
- S197 both in its original (Act 66 of 1995) and amended (Act 12 of 2002) forms provides for the automatic transfer of employees in cases where there was a transfer of the whole or part of a business, trade or undertaking as a going concern
- A transfer could occur by contract or through a tender process but what matters is the consequence of what occurs

Application of Section 197 cont...

- The primary objective of s197 is to protect employees whose security of employment and rights are in jeopardy as a result of a business transfer (protect workers against job losses)
- It is premised on the continuity of employment of workers not interrupted by the transfer of business
- In line with the objectives of the entire LRA and the purpose and spirit of the Constitution (Bill of Rights) s197 outlaws unfair labour practices

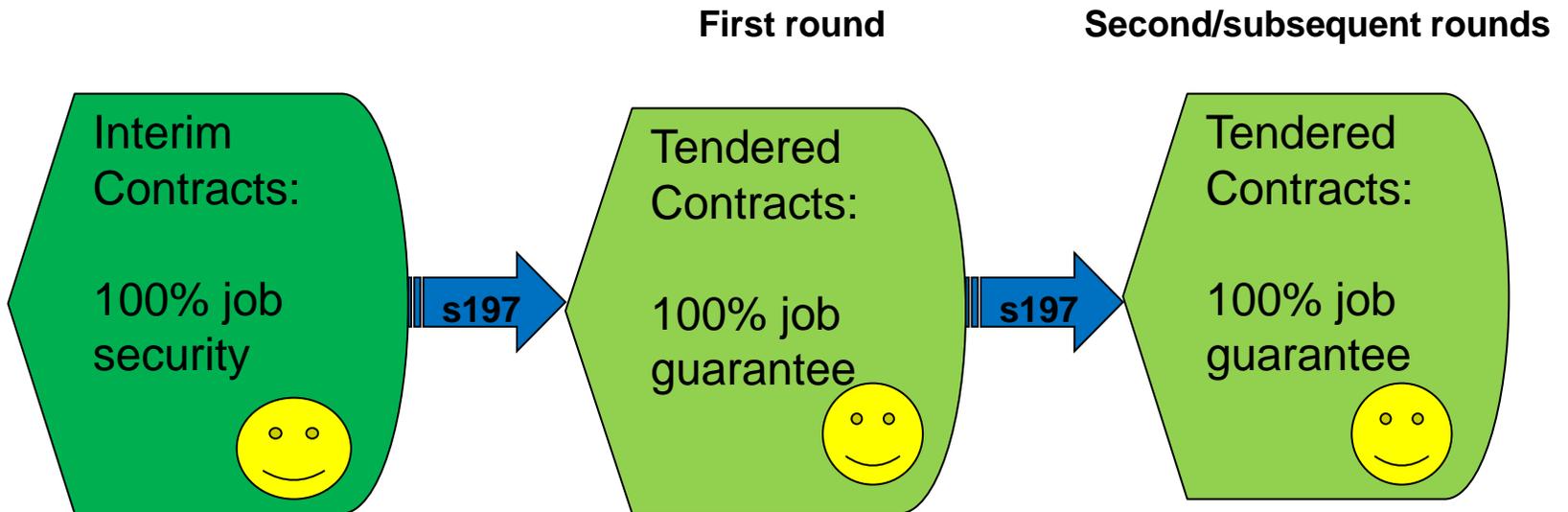
Constitutional Court Judgement

- In the Concourt Judgement decided on 24 November 2011 the court dealt with the proper interpretation of s197 of the LRA
- Section 3 of the LRA obliges any person interpreting the LRA to adopt a construction that complies with the Constitution and public international law while at the same time giving effect to the LRA's primary objects
- The rights guaranteed in s197 are enjoyed by the workers and the employers, and consequently the provision serves a dual purpose of advancing both their interest. These interests may sometime come into conflict
- The section achieves its purpose by preserving all contracts of employment between the workers and the owner of the business transferred as a going concern
- In this way the workers' employment is safeguarded and on the other hand a new owner is guaranteed a workforce to continue with the operation of the business

S197 vs HOA

- There is a glaring conflict between the provisions of the HOA and s197 regarding security of employment
- Whilst the intention of the HOA was not to diminish workers' rights it unfortunately offends the provisions of s197 in many ways (clean break, 75% job guarantee)
- The HOA was concluded primarily in an attempt to regulate work security of employees in the event contracts were to change hands
- Where an agreement seeks to regulate the continuity of employment of workers affected by the transfer of business the provisions of s197 are automatically triggered
- In this case s197 should apply in the contracting environment of subsidised public transport services

Section 197 in Bus Contracts



Conclusion

- The transactions envisaged by the parties when they concluded the HOA are all governed by s197 of the LRA
- Government has a general obligation to respect the constitutional rights of workers which includes the right to fair labour practice
- It also has a general obligation to respect the constitutional right of employers to conduct business
- S197 should apply in the tendering process for bus contracts
- Government has a responsibility to create an enabling environment that will facilitate the smooth transition in respect of the application of s197
- This may be achieved by structuring tender documents in such a way that enable competing tenderers to assess their liability with respect to taking over of obligations in terms of s197 facilitating disclosure of information (adapting tender processes, designing of contracts, etc.)

THANK YOU



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