

## **THE POSITION OF THE EMPLOYEE WHEN A BUSINESS IS TRANSFERRED: WHAT IS THE LABOUR APPEAL COURT'S VIEW?**

Until recently, the interpretation and application of section 197 of the Labour Relations Act, which deals with the position of employees during transfer of a business in a buy and sell transaction, has caused much uncertainty.

Following up on the series of articles on labour law and labour relations, this instalment focuses on the implications of the latest labour appeal court decision on the position of employees during transfer of a business. The Labour Appeal Court recently had the opportunity to cast light on this matter in the dispute between the trade union NEHAWU and the University of Cape Town. This involved the University's decision to contract out certain non-key functions. Although the decision was not unanimous, with the two acting labour court judges ruling in favour of the University and the Judge-President in favour of the trade union, the decision casts greater clarity on the intention underlying section 197.

This section makes provision for the employees of the seller business to be automatically transferred to the buyer on the same conditions of employment that applied before the transfer, unless agreed otherwise, if the business is sold as a going concern.

Two key issues needed to be decided upon in this case, namely (a) whether contracting out of services if the transfer of a business, of part thereof, as a going concern is involved, falls within the scope of section 197; and (b) whether, as in a previous ruling by the Labour Court, section 197 only applies where the transferring parties (old and new employer) agree that the employees are to be transferred with the business. The latter ruled that only if the employees are included in the transfer, may it be said that the business exists as a going concern and section 197 would consequently apply.

The majority in the labour appeal court ruled that section 197 only applies when the business is transferred as a going concern. In such a case, the employees are transferred with their rights and duties unchanged; unless it was agreed with the new employer beforehand that it would change. A business can however only be regarded as being transferred as a going concern if the employees are transferred with the business.

Whether this would happen, or not, needs to be decided by the transferor (old employer) and the transferee (new employer). If the agreement is that the transferor (old employer) would first dismiss the work force, and thereafter transfer the business without employees, there is no transfer of a going concern and section 197 is therefore not applicable.

If, however, the employees are included in the transfer, section 197 becomes applicable and the employees must be taken over on the same conditions as before, unless new conditions had been agreed to beforehand. This applies when all the employees, or a material part of the work force, are included in the transfer.

Due to the majority decision on this point, the Court did not have to rule on the issue under (a) above, i.e. whether contracting out of services falls within the scope of section 197. This issue is therefore still being governed by the Labour Court, in other words it does not fall within the scope of section 197.

The minority opinion was that as soon as an agreement exists on the transfer of the business itself, the transfer of the employees to the new employer follows automatically, notwithstanding the intention of the transferor and transferee.

The implication of this finding may in all probability change as soon as the amended section 917 comes into operation later this year. The amendments concerned make provision for the automatic transfer of employees as soon as an agreement between the transferor (seller) and transferee (buyer) exists to transfer the business as a going concern, unless it is agreed with the employees beforehand that they will not be transferred. It would thus not be sufficient for the seller and buyer to agree unilaterally that some employees will not be transferred: the consent of the employee will also be required to avoid his/her transfer.

Both the implications of the Appeal Court ruling, as well as the law amendments serve to emphasize that professional advice should be sought concerning the staff implications during take-overs, transfer of businesses and contracting out non-key functions before any agreements in this regard are finalised.

In the next instalment, the pitfalls for buyers of businesses will be discussed from a practical point of view in terms of section 197 of the Labour Relations Act.