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# EMPLOYMENT ALERT

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### REVIEW APPLICATIONS AND POST-TRANSFER REALITIES

When contemplating the purchase of a business as a going concern, it is necessary to carry out the appropriate due diligence of the respective business. It is always positive to find that no red flags exist and especially comforting to know that the business has, in the past, successfully defended unfair dismissal claims. There is an arbitration award in favour of the business so you think that there is no cause for concern. Think again! Get those additional warranties.



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# REVIEW APPLICATIONS AND POST-TRANSFER REALITIES

*Of particular relevance, s197(5) of the LRA also provides that the new employer will be bound by any arbitration award, in respect of employees to be transferred, immediately prior to the date of transfer.*

*The applicant became aware of the dispute as the property which became the subject of a writ of execution formed part of the business that had been transferred to it and therefore belonged to the applicant.*



**When contemplating the purchase of a business as a going concern, it is necessary to carry out the appropriate due diligence of the respective business. It is always positive to find that no red flags exist and especially comforting to know that the business has, in the past, successfully defended unfair dismissal claims. There is an arbitration award in favour of the business so you think that there is no cause for concern. Think again! Get those additional warranties.**

Section 197 of the Labour Relations Act (LRA) provides for the automatic transfer of employment rights and obligations which existed immediately before the date of transfer of business and continue in force as if they have been rights and obligations of the new employer. Of particular relevance, s197(5) of the LRA also provides that the new employer will be bound by any arbitration award, in respect of employees to be transferred, immediately prior to the date of transfer.

The purpose of s197(5) of the LRA was scrutinised by the Labour Appeal Court in *High Rustenburg Estate (Pty) Ltd v NEHAWU obo Cornelius & others*.

This dispute spanned approximately 14 years since the dismissal of 18 employees. The dismissals were initially found to be fair by the Commission for Conciliation, Mediation and Arbitration (CCMA) during 2004. Aggrieved by the CCMA's award in favour of High Rustenburg Hydro (Pty) Ltd, (the old employer at the time), National Education Health & Allied Workers' Union (NEHAWU) instituted review proceedings in the Labour Court. Prior to the finalisation of the review proceedings, High Rustenburg Hydro (the old employer), sold its business as a going concern. Subsequent to further commercial transactions, High Rustenburg

Estate (Pty) Ltd (the applicant) became the new employer.

The old employer failed to inform the Labour Court of the transfer of its business during the review proceedings. When the Labour Court set aside the CCMA award, declared the dismissals to be unfair and ordered compensation equivalent to 12 months' remuneration for the 18 employees, the old employer did not pay the compensation, resulting in a writ of execution being issued against property in order to secure payment of the compensation owed to the dismissed employees.

The applicant became aware of the dispute as the property which became the subject of a writ of execution formed part of the business that had been transferred to it and therefore belonged to the applicant.

Further protracted litigation ensued as the applicant argued that NEHAWU was required to obtain a separate declaratory order which held that it was liable for the old employer's debt. The applicant also argued that it was not provided with an opportunity to defend a claim against it when it became the new employer. The applicant was therefore permitted to file a stated case, in which it argued that the writ of execution be set aside.

# REVIEW APPLICATIONS AND POST-TRANSFER REALITIES

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*In the circumstances of the present case where the employees were eventually successful, they could not be denied protection simply because of the timing of the transfer of the business of their old employer.*



Upon hearing the stated case of the applicant, the Labour Court found that the writ of execution was lawfully issued in terms of s197(5) of the LRA and the property of the applicant could validly be sold in execution. It is this order that has become the subject of appeal in the present case.

The Labour Appeal Court was required to evaluate "whether a substitution of an arbitration award made after the transfer of the business from an old employer to a new employer binds the new employer in that the award is deemed to have taken effect at the very least from the date on which it was made, albeit incorrectly".

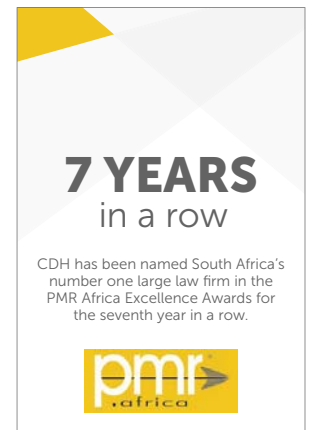
The Labour Appeal Court reiterated that the purpose of s197, in its entirety, was to ensure job security of affected employees when a business is transferred. Therefore, in the circumstances of the present case where the employees were eventually successful, they could not be denied

protection simply because of the timing of the transfer of the business of their old employer.

In essence, the Labour Appeal Court held that the review and substitution of an arbitration award is of full force and effect as if it was done on the date of the arbitration award. Whilst the arbitration award which was initially in favour of the old employer will undoubtedly favour the new employer in terms of s197(5) of the LRA, so too must the reversal of that arbitration award bind the new employer, albeit many years later.

It is, therefore, important for "old and new" employers to take caution in respect of favourable arbitration awards considered during a due diligence of a proposed sale of business, as a reversal of the award will bind the new employer.

**Samiksha Singh**



# Employment STRIKE GUIDELINE

Our Employment practice's new  
EMPLOYMENT STRIKE GUIDELINE  
answers our clients' FAQs.

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Michael Yeates named winner in the **2015** and **2016 ILO Client Choice International Awards** in the category 'Employment and Benefits, South Africa'.



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