

Employment Law

ALERT | 12 August 2024



In this issue

SOUTH AFRICA

Transfer or no transfer? A consideration of the provisions of section 197 of the LRA and dismissals that flow from it

For more insight into our expertise and services



**EMPLOYMENT LAW
ALERT**

Transfer or no transfer? A consideration of the provisions of section 197 of the LRA and dismissals that flow from it

Section 197(2) of the Labour Relations Act 66 of 1995 (LRA), amongst other things, states that if a transfer of a business takes place, unless otherwise agreed in terms of section 197(6), the new employer is automatically substituted in the place of the old employer in respect of all employment contracts in existence immediately before the date of the transfer.

The term “*business*” is defined to include the whole or part of any business, trade, undertaking or service.

The term “*transfer*” means the transfer of a business by one employer to another employer as a going concern. There is no definition of “*going concern*” in the LRA.

In instances where the dismissal of an employee flows from a transfer of a business as a going concern, such a dismissal will be termed as an automatically unfair dismissal in terms of section 187(1)(g) of the LRA, thus entitling an applicant party to relief in a sum up to a maximum of 24 months’ compensation.

In light of the above, the Labour Court in *Motor Industry Staff Association and Another v Eastvaal Motors (Pty) Ltd* (JS927/2019) [2024] ZALCJHB 256 (17 July 2024), per Daniels J, came to the conclusion that the dismissal of the second applicant (Helena Stoffberg) was automatically unfair.

Background

MM operated the business of a car dealership in Middelburg, as a franchisee of Ford and Honda.

Stoffberg was initially employed by MM on 23 October 2001 as an accounts administrator. She was later re-employed her on the same salary, but on a half-day basis.

Following the death of the managing director and dealer principle of MM in 2018, MM engaged in discussions with the respondent, East Vaal Motors (EVM), which owned two Ford dealerships. The discussions resulted in the conclusion of an agreement wherein it was agreed that:

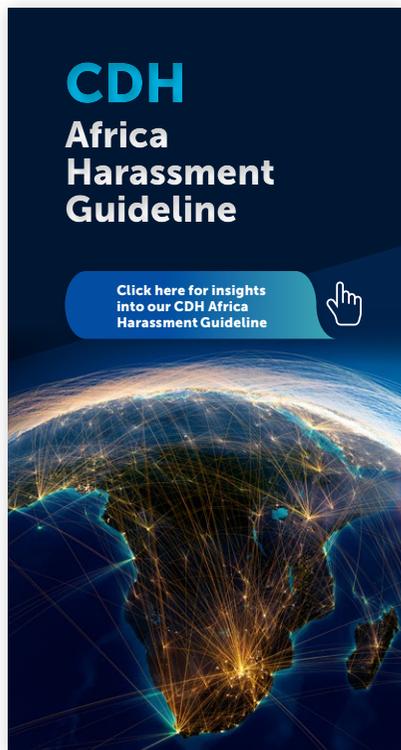
- The business of MM would be continued by EVM, whether under its own name or under the name of MM.
- EVM would purchase the assets of MM that were necessary for the uninterrupted continuation of the business carried on by MM.
- EVM undertook to offer employment to all the employees of MM.
- EVM would take all current and annual leave obligations of MM, as at the effective date of the sale, to a maximum amount applicable in a 12 month leave cycle.

Between January and April 2019, approximately three meetings were held and attended by, among others, EVM, MM and its staff. The purpose of the meetings was to inform the employees of MM that the assets of MM would be sold to EVM, and to encourage them to accept the offers of employment which were (or would be) extended to them by EVM.

EMPLOYMENT LAW ALERT

Transfer or no transfer? A consideration of the provisions of section 197 of the LRA and dismissals that flow from it

CONTINUED



At the meeting that she attended, Stoffberg enquired whether MM would be willing to retrench her and pay her severance pay. She was firmly told that this would not be possible.

On 29 March 2019, EVM furnished Stoffberg with an offer of employment. In effect, the offer was to employ her on a full-time basis at roughly the same salary she earned on a part-time basis. Unsurprisingly, and given that her work hours would increase with no corresponding pay increase, she rejected the offer.

While deciding on how to deal with the matter, Stoffberg was requested to take annual leave. She acceded to this request until her annual leave entitlement was exhausted. Upon returning to work on 3 June 2019, she was informed that she was not employed by EVM.

Proceedings before the Labour Court

At trial, the Labour Court was required to consider whether Stoffberg's dismissal was automatically unfair in terms of section 187(1)(g) of the LRA, and if her dismissal flowed from the transfer of the MM business to EVM.

The court accepted that while EVM did not purchase MM's computer software, management controls and systems, bank accounts or debtors, EVM purchased all the assets that were necessary to immediately commence (or continue) the business of the two dealerships.

In arriving at the conclusion in the judgment, the court considered the three elements required for a transaction to fall within the ambit of section 197 of the LRA, namely (i) a transfer from one employer to another; (ii) that the transferred entity must be the whole or part of a business; and (iii) that the business must have been transferred as a going concern.

Of pertinence for employers are the remarks that the court made, with reference to the supporting authority, when considering the question of whether there had been a transfer of a business as a going concern:

- What is transferred must be a business in operation "so that the business remains the same but in different hands". 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, as per *National Education Health & Allied Workers Union v University of Cape Town and Others* [2003] 24 ILJ 95 (CC).
- A number of factors will be relevant to the question of 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 workers are taken over by the new employer, whether customers are transferred and whether or not the same business is being carried on by the new employer. This list of factors is not exhaustive and none of them is individually decisive.



**EMPLOYMENT LAW
ALERT**

Transfer or no transfer? A consideration of the provisions of section 197 of the LRA and dismissals that flow from it

CONTINUED



- For a transfer to be established there must be components of the original business that are passed on to the third party. These may be in the form of assets or the taking over of workers who were assigned to provide the service, as established by *Aviation Union of South Africa and Another v SA Airways (Pty) Ltd and Others* [2012] (2) BCLR 117 (CC).
- A business can consist of a variety of components, including both tangible and intangible assets, goodwill, a management staff, a general workforce, premises, a name, contracts with particular clients, the activities it performs, and its operating methods. These components do not constitute a closed list, but must be sufficiently connected to one another so as to form an "economic entity" that is capable of being transferred, as per *Road Traffic Management Corporation v Tasima (Pty) Ltd; Tasima (Pty) Ltd v Road Traffic Management Corporation* [2020] 41 ILJ 2349 (CC).

Ultimately, and against the backdrop of the above, the court concluded that the facts overwhelmingly appeared to indicate that there was a transfer of a business as a going concern as EVM conducted the same business, with the same assets, the same customers, the same workforce and from the same premises, without interruption.

Furthermore, EVM recognised the prior service of the employees, as well as their prior leave entitlement, both concessions which could only be understood in the context of a transfer of business as a going concern.

Stoffberg was ordered relief in the sum of 24 months' compensation together with legal costs.

Take Aways

From this case, it is clear that substance precedes form. Regardless of the labels that may be attached to an agreement, in instances where a dismissal arises from the transfer of a business, whether in whole or in part, it may give rise to an automatically unfair dismissal claim, the consequence of which may see an employer having to compensate an employee up in a sum equivalent to 24 months' compensation.

In circumstances where a business passes hands, the "new" employer must ensure that its "new" employees are employed on terms and conditions that are on the whole no less favourable than those which the employees had while in the employ of their "old" employer.

Thabang Rapuleng and Malesela Letwaba



OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:



Aadil Patel

Practice Head & Director:
Employment Law
Sector Head:
Government & State-Owned Entities
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com



Anli Bezuidenhout

Director:
Employment Law
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com



Asma Cachalia

Director:
Employment Law
T +27 (0)11 562 1333
E asma.cachalia@cdhlegal.com



Jose Jorge

Director:
Employment Law
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com



Fiona Leppan

Director:
Employment Law
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com



Imraan Mahomed

Director:
Employment Law
T +27 (0)11 562 1459
E imraan.mahomed@cdhlegal.com



Nadeem Mahomed

Director:
Employment Law
T +27 (0)11 562 1936
E nadeem.mahomed@cdhlegal.com



Yvonne Mkefa

Director:
Employment Law
T +27 (0)21 481 6315
E yvonne.mkefa@cdhlegal.com



Phetheni Nkuna

Director:
Employment Law
T +27 (0)11 562 1478
E phetheni.nkuna@cdhlegal.com



Desmond Odhiambo

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com



Hugo Pienaar

Sector Head:
Infrastructure, Transport & Logistics
Director: Employment Law
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com



Thabang Rapuleng

Counsel:
Employment Law
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com



Njeri Wagacha

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com



Mohsina Chenia

Executive Consultant:
Employment Law
T +27 (0)11 562 1299
E mohsina.chenia@cdhlegal.com



Jean Ewang

Counsel:
Employment Law
T +27 (0)11 562 1499
E jean.ewang@cdhlegal.com



Ebrahim Patelia

Legal Consultant:
Employment Law
T +27 (0)11 562 1000
E ebrahim.patel@cdhlegal.com

OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:



Rizichi Kashero-Ondego

Senior Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E rizichi.kashero-ondego@cdhlegal.com



Jordyne Löser

Senior Associate:
Employment Law
T +27 (0)11 562 1479
E jordyne.loser@cdhlegal.com



Lee Masuku

Senior Associate:
Employment Law
T +27 (0)11 562 1213
E lee.masuku@cdhlegal.com



Leila Moosa

Senior Associate:
Employment Law
T +27 (0)21 481 6318
E leila.moosa@cdhlegal.com



Christine Mugenyu

Senior Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E christine.mugenyu@cdhlegal.com



Kgodisho Phashe

Senior Associate:
Employment Law
T +27 (0)11 562 1086
E kgodisho.phashe@cdhlegal.com



Taryn York

Senior Associate:
Employment Law
T +27 (0)11 562 1732
E taryn.york@cdhlegal.com



Lynsey Foot

Associate:
Employment Law
T +27 (0)11 562 1429
E lynsey.foot@cdhlegal.com



Malesela Letwaba

Associate:
Employment Law
T +27 (0)11 562 1710
E malesela.letwaba@cdhlegal.com



Biron Madisa

Associate:
Employment Law
T +27 (0)11 562 1031
E biron.madisa@cdhlegal.com



Thato Makoaba

Associate:
T +27 (0)11 562 1659
E thato.makoaba@cdhlegal.com



Thato Maruapula

Associate:
Employment Law
T +27 (0)11 562 1774
E thato.maruapula@cdhlegal.com



Sashin Naidoo

Associate:
Employment Law
T +27 (0)11 562 1482
E sashin.naidoo@cdhlegal.com



Alex van Greuning

Associate:
Employment Law
T +27 (0)21 481 6309
E alex.vangreuning@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.

Dx 154 Randburg and Dx 42 Johannesburg.

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

©2024 13786/AUG