Employment Law

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South Africa

- Labour inspectors' reach extended to oversight of contributions payable to benefit funds regulated under the Pension Fund Act
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Labour inspectors’ reach extended to oversight of contributions payable to benefit funds regulated under the Pension Fund Act

Section 34A of the Basic Conditions of Employment Act 75 of 1997 (BCEA) regulates the timing of payments by employers to employee benefit funds, including retirement, medical aid and other funds.

Section 34A obliges an employer that deducts amounts from an employee’s remuneration for payment to a benefit fund, to pay such amounts to the fund within seven days of the deduction being made. These provisions are designed to protect employees by ensuring that deducted or promised contributions reach the relevant benefit funds without delay. However, there has been much publicly around employers’ failure to discharge this duty. In previous Alerts we have dealt with such delinquency and the legal implications for defaulting employers.

On 24 December 2003, the then Minister of Labour issued a section 50(1)(a) notice under the BCEA which excluded the application of section 34A to employers and employees in relation to benefit funds regulated under the Pension Funds Act 24 of 1956 (Pension Funds Act).

The effect of that notice was that:

- Labour inspectors were unable to enforce the seven-day payment obligation in respect of retirement fund contributions.

As a result, enforcement of contribution delays fell outside the scope of the BCEA for more than two decades. This exemption created a significant enforcement gap for the Department of Employment and Labour, leaving employees exposed to employers who deducted contributions but failed to transfer them to the appropriate funds.

On 13 January 2026, the Minister of Employment and Labour however, issued a section 50(9)(a) notice withdrawing the 2003 exclusion. This marks a significant regulatory shift. With immediate effect, section 34A of the BCEA now also applies also to benefit funds governed by the Pension Funds Act. Labour inspectors are empowered to verify whether employers have paid contributions into the correct funds, request proof of payment and contribution schedules, and take enforcement action where there is non-compliance.

Practical implications for employers

Employers should review their payroll and contribution processes to ensure compliance. In particular, employers must ensure that Employer contributions are paid within seven days of the end of the applicable pay period. Section 34A of the BCEA however imposes a different trigger date of the seven days compared to the trigger date under section 13A(3) of the PFA. These need to be considered by employers.

Employers should be aware that they are now subject to dual enforcement for non-payment of benefit fund contributions. Under section 34A of the BCEA Labour Inspectors can issue compliance orders and impose administrative penalties. Under the Pension Funds Act: Non-payment is a criminal offence punishable by a fine of up to R10 million, imprisonment for up to 10 years, or both in terms of section 37(1)(c). Also, directors can be held personally liable under section 13A(8).

Imraan Mahomed and Thato Makoaba

New contractor, same business: Labour Appeal Court confirms section 197 application

On 27 November 2025, the Labour Appeal Court (LAC) delivered judgment in the matter of *Electro Hydro World (Pty) Ltd v Murray and Roberts Cementation (Pty) Ltd and Others* (JA132/24) [2025] ZALAC 62, concerning the application of section 197 of the Labour Relations Act 66 of 1995 (LRA) to the transfer of a grout business at a mine shaft. The central issue was: did the transfer of operations from one contractor to another, following a tender process, constitute a transfer of a business as a going concern, thereby triggering the automatic transfer of employees?

Background

The dispute began when a contract for grout plant operations was awarded to a new contractor. The outgoing contractor argued that section 197 applied, resulting in the automatic transfer of 63 employees. The incoming contractor disagreed, stating it would construct its own plants that *"were geographically, technologically and operationally distinct from that of the old plant operated by"* the outgoing contractor, use new methods, engage its own employees and equipment, and build new plants. Thus, no transfer as a business as a going concern occurred.

The tender documents contained a clause which referenced section 197:

> *"In the event that the incumbent service provider no longer requires the services of its employees in the provision of the services … the successful tenderer shall be obliged to abide by its obligations in terms of section 197 of the LRA … "*

The incoming contractor argued that this was a non-binding template provision, while the outgoing contractor contended that it signalled an expectation that section 197 would apply, in the event of a change in service provider.

Labour Court judgment

The Labour Court considered the facts (as the application of section 197 is a preeminent factual inquiry) and found that the business retained its identity. It noted that the mine provided essential utilities and materials to both contractors. The court concluded that despite changes in technology and staffing, the core economic activity remained unchanged, meaning the business was transferred as a going concern and section 197 applied.

The incoming contractor appealed, challenging the test applied by the Labour Court, the weight given to the continuity of services, and the interpretation of the tender clause.

LAC judgment

The LAC affirmed that a holistic factual assessment determines if a business retains its identity after the transfer. It reiterated that the non-transfer of employees or assets is not, by itself, decisive. The application of section 197 depends on the substance of the transaction, not contractual labels.

Key findings

The key findings included that the core infrastructure and economic activity (grout pumping services using client-supplied infrastructure and materials) remained constant before and after the transfer.

Changes in technology, staffing models, or the construction of new plants did not alter the business's essential nature. In addition, the transfer of every asset is not required. Only those assets essential to the continuation of the business are relevant.

Importantly, Western Platinum provided the utilities, materials and storage facilities through which the respondent could carry out its services, including providing electric power, compressed air, potable water, grout ranges and their associated materials, grout bags, grout mixture, the communication system between the work face, and grout plant and storage space for the respondent to store the materials supplied by Western Platinum and used in the performance of the respondent's services.

The incoming contractor would similarly be provided with the above when it was accorded the right to conduct the business subject to the transfer and in terms of the successful award of the tender.

What was thus transferred was the right to conduct the same business, and it is in this context that the court's following statement must then be understood:

> *"In substance, the appellant continues to perform the same core function as that performed by the respondent, the provision of grout pumping services, **using the same inputs supplied** ... The fact that the service is now delivered more efficiently, and at a larger scale across two plants rather than one, does not alter the essential nature of the service being performed [and the context and manner in which it is being performed (i.e. in terms of a contract awarded to render the service (a right) together with inputs supplied to the contractor)]."*

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The reference to section 197 in the tender documentation, while not determinative, supported the expectation that the section could apply, but the ultimate test is factual.

The fact that the incoming contractor did not take over the outgoing contractor's employees or certain office equipment was not dispositive, as the business was asset reliant. The core infrastructure necessary to perform the service – the grout plants (or a right of use), ranges, utilities and raw materials – was owned and supplied by the client for both contractors, meaning the core operational capacity was maintained.

The court dismissed the appeal, holding that the business was transferred as a going concern under section 197, which resulted in the automatic transfer of the employees.

Key takeaways

- Section 197 applies if a business's core economic activity and operational capacity are retained post-transfer, regardless of changes in technology, staffing, operational methods or non-core assets.
- A transfer occurs if the business retains its identity. This identity is assessed by considering components like employees, assets and contracts, although the transfer of any single component is not decisive.
- The factual enquiry is holistic, considering all relevant circumstances, and is not limited to the transfer of specific assets or employees.
- Contractual references to section 197 are relevant but not decisive, the substance of the transaction is what matters.
- Employers and service providers involved in tender processes and business transfers must assess operational continuity to determine if section 197 applies and what their obligations are regarding employee transfers.

This judgment underscores the importance of substance over form in business transfers and the robust protection afforded to employees under section 197 of the LRA.

JJ van der Walt, Sashin Naidoo and Lynsey Foot

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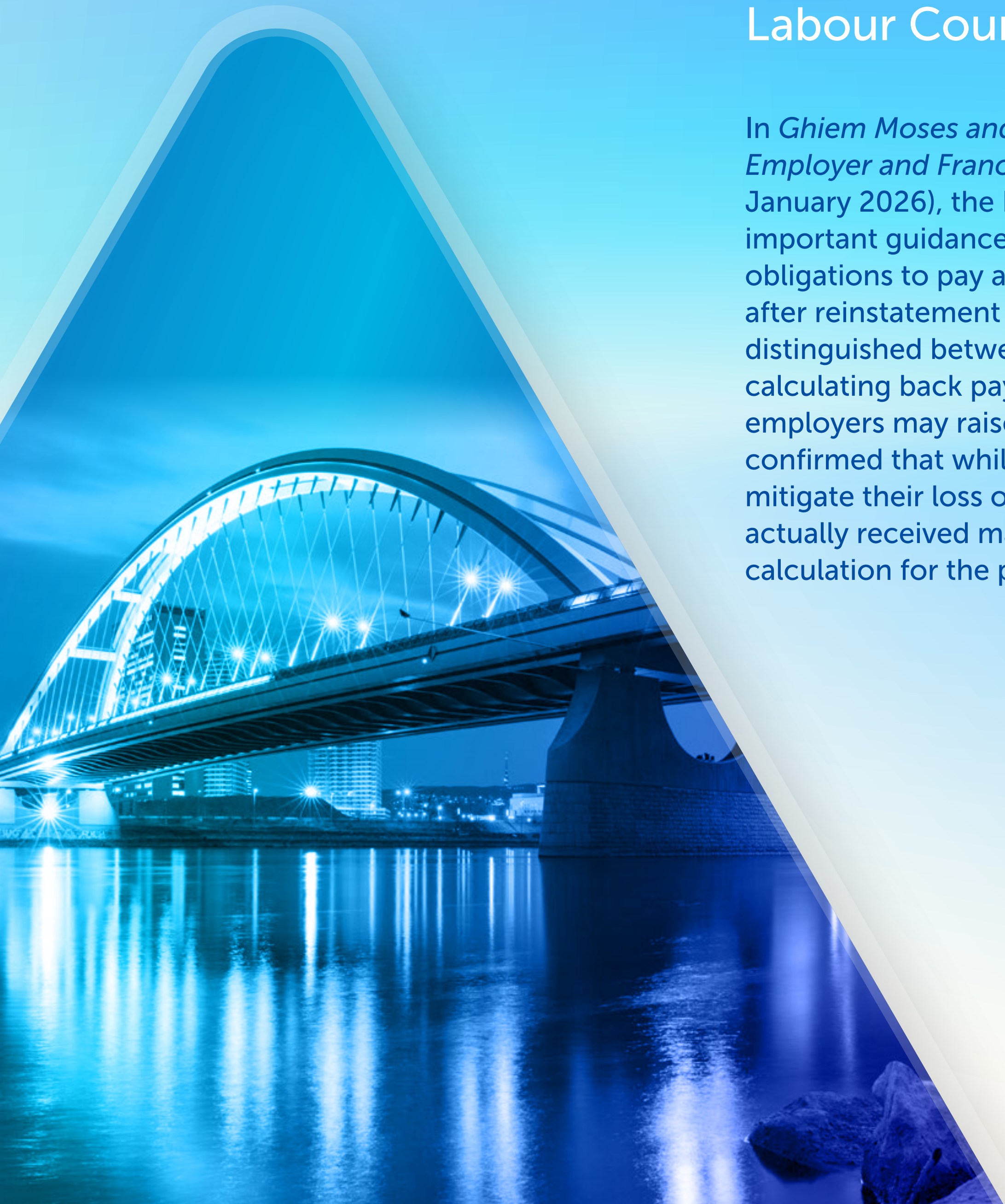

Labour Court clarifies back pay after reinstatement orders

In *Ghiem Moses and 10 Others v the Employer and Francois Wessels* (20 January 2026), the Labour Court provided important guidance on employers' obligations to pay arrear remuneration after reinstatement orders. The court distinguished between two periods for calculating back pay and clarified when employers may raise defences. It also confirmed that while employees need not mitigate their loss of earnings, earnings actually received may be relevant to the calculation for the post-judgment period.

Factual background

Eleven employees successfully challenged their dismissal and obtained a retrospective reinstatement order with effect from 1 November 2020 in the Labour Court judgment of 6 February 2024. The employer's appeals failed, and the Constitutional Court refused leave on 27 October 2025. The employees reported for duty on 3 November 2025, but the employer refused to pay any arrear remuneration until all alternative earnings over nearly five years were disclosed. Nine employees resigned between 4 and 6 November 2025. The employees launched an urgent application to hold the employer and its CFO in contempt for non-payment of arrears. In the alternative, they sought declaratory relief confirming entitlement to full arrear remuneration without deduction.

Key issues determined

Two distinct periods of arrear remuneration were identified. Primarily relying on National Union of Metalworkers of SA on behalf of *Fohlisa and Others v Hendor Mining Supplies* [2017] 38 ILJ 1560 (CC), the court identified:

- Period One: From the retrospective reinstatement date to the judgment date (1 November 2020 to 6 February 2024). Arrear remuneration for this period is a judgment debt. The employer cannot revisit it, as the Labour Court has already determined the extent of retrospectivity. Even if an employee resigns a day after reinstatement, they remain entitled to full arrears for this period.
- Period Two: From the judgment date to the factual reinstatement date (7 February 2024 to 2 November 2025). For this period, the employer may raise defences to a claim for full arrears, including that employees earned income elsewhere and therefore would not, in fact, have rendered services for the whole period.

Dismissed employees have no legal duty to mitigate loss of earnings in this context, but actual earnings during the post-judgment period may be taken into account in determining arrears for Period Two.

Contempt findings

The court found the employer in contempt for failing to pay arrear remuneration for Period One. The employer had an opportunity in the Labour Court judgment of 6 February 2024 to seek limited retrospectivity but did not do so. The court declined to find contempt for Period Two, as there was a genuine dispute requiring adjudication.

The court ordered that:

- The employer was liable for the employees' full arrear remuneration and benefits for 1 November 2020 to 6 February 2024, with interest from 6 February 2024.
- The employer was in contempt of the Labour Court judgment of 6 February 2024 for failing to pay arrears for that period.
- The employer had to calculate and pay the arrears for Period One within seven days.
- For 7 February 2024 to 2 November 2025, the employer had to calculate and pay arrears within 14 days of the employees providing information on income earned from alternative employment.

Key takeaways

- Employers may not withhold all back pay pending disclosure of alternative earnings. Arrears up to the judgment date are a judgment debt and must be paid in full.
- Any challenge to the extent of retrospectivity must be raised before the trial court and cannot be reopened later.
- For the post-judgment period, employers may require disclosure of alternative earnings and make appropriate deductions.
- Resignation after reinstatement does not affect entitlement to arrears up to the judgment date.

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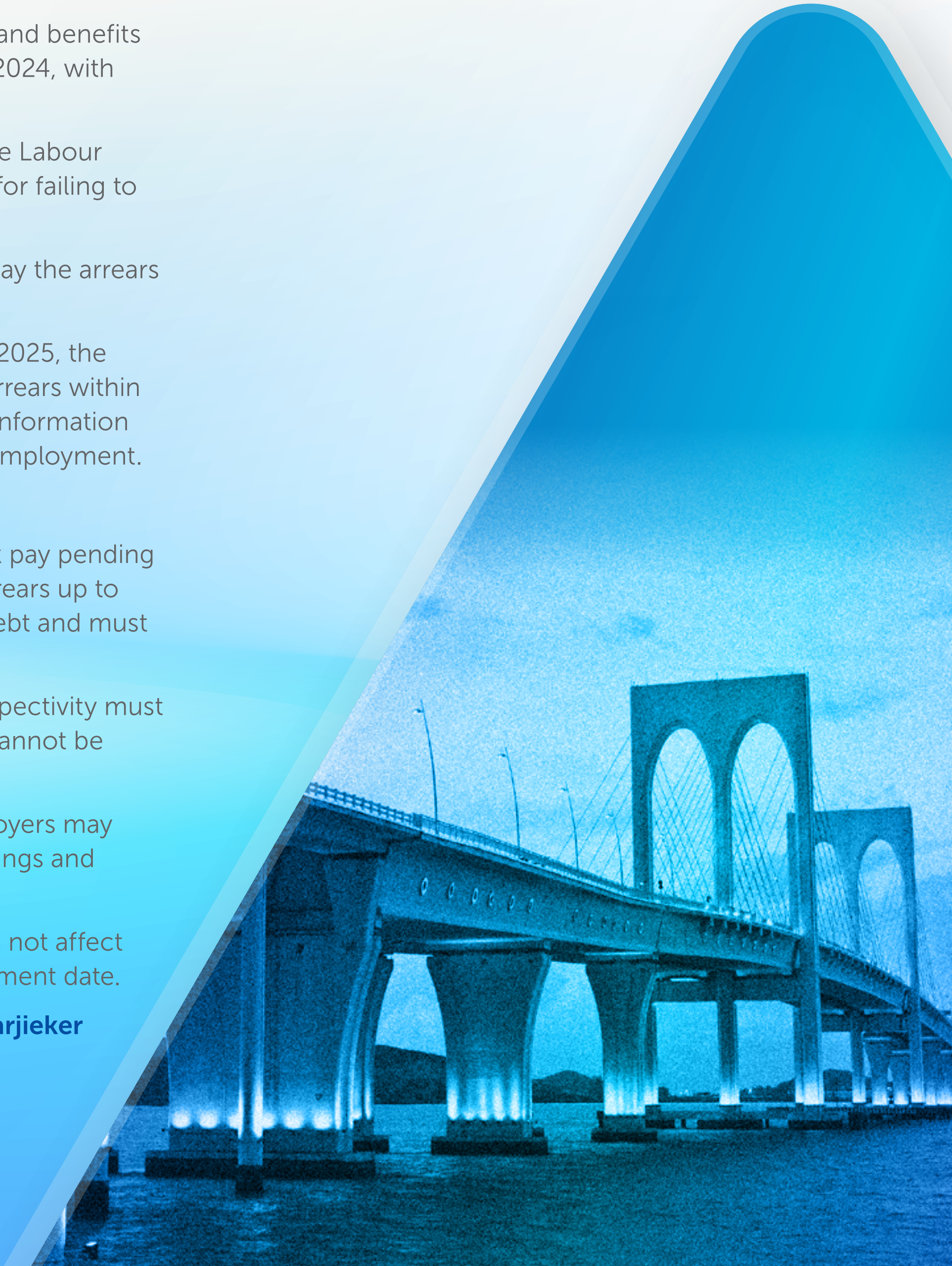

Understanding the legal position around bonuses during protected strikes

Can employers pay bonuses to non-strikers during a protected strike? During a protected strike, tensions rise, and difficult choices are made on both sides. This Alert explores the legal position, with reference to *Solidarity obo C J Arendse and 38 Others v Heineken Beverages (Pty) Ltd*, a recent Labour Court judgment.

The facts and issues in brief

The employer operated a short-term incentive (STI) scheme. After a two-day protected strike by Solidarity members in February 2023, the employer withheld the STI from employees who participated in the strike, while paying it to those who did not. The employer's policy listed "*industrial action*" as a potential disqualifier for the STI.

The issue before the court was whether withholding the STI from strikers breached section 5(1) and 5(2)(c)(vi) of the Labour Relations Act 66 of 1995 (LRA) by discriminating against employees for exercising their right to strike; and whether the employer had justified the differential treatment as a rational, proportionate and legitimate collective-bargaining measure.

What is a non-striking bonus?

A non-striking bonus is an extra payment made only to employees who continued working during a strike. It is intended to recognise attendance and support operations during industrial action.

Is it lawful to pay this bonus?

Yes, but only if justified. The LRA protects the right to strike; it does not, however, categorically forbid incentives for those who work during a strike. An employer must show that any differential treatment is a legitimate and proportionate collective-bargaining tactic, not a punishment for striking or a device to coerce employees out of exercising statutory rights.

What must an employer show?

- A legitimate collective-bargaining purpose: The measure must be aimed at advancing a lawful bargaining objective, not penalising strikers or undermining union rights.
- Proportionality and rationality: The incentive or withholding decision must be:
  - Connected to operational needs during the strike.
  - Reasonable in scale relative to the strike's impact.
  - Temporary and tailored to the strike period or its immediate effects.
- If the benefit is excessive or the detriment to strikers is markedly out of proportion, the measure may be unlawful.

Why was the employer not successful in this case?

The employer withheld the STI from employees who participated in a two-day protected strike. The court held that the employer breached section 5(1) and 5(2)(c)(vi) of the LRA because:

- It offered no concrete evidence showing why withholding the STI was a suitable and proportionate response to the strike.
- It did not demonstrate the operational or financial impact justifying the measure.
- It relied on the policy wording and pre-strike warnings, without substantiating a legitimate, proportionate bargaining rationale. The court ordered the employer to account for the STI calculation and to pay the STI to the affected employees.

What does this mean for employers and employees?

Employers may, in principle, reward non-strikers or withhold a contingent benefit from strikers, but only where they can demonstrate a legitimate collective-bargaining purpose; and a rational and proportionate response supported by evidence (e.g. operational exigencies, production data, the limited and targeted nature of the measure).

Policy clauses and general statements are not sufficient. The employer must justify the measure in the circumstances.

An employee's right to participate in a protected strike remains fully protected. Differential treatment is not automatically unlawful, but it cannot be used to punish or victimise employees for exercising their rights in terms of the LRA. If the employer cannot justify the measure, it will likely be unlawful.

Conclusion

Bonuses for non-strikers or the withholding of contingent benefits from strikers are not per se unlawful. They must be carefully designed, evidenced and proportionate to a legitimate bargaining objective. In this case, the employer failed to justify the withholding of the STI, and the court found a breach of section 5 of the LRA.

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