

EMPLOYMENT

Is the alleged transfer of an insolvent business indeed a transfer as a going concern

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Mokhele & Others v Schmidt & Others (JS 564/11) 19 May 2016

ISSUE

Whether the alleged transfer of an insolvent business was indeed a transfer as a going concern, whether the dismissal of the applicant employees had been automatically unfair, and whether those employees had been employed by the old employer "immediately before" the old employer's insolvency.

COURT'S DECISION

In the case of *Mokhele & Others v Schmidt & Others* (JS 564/11) 19 May 2016, the eight applicant employees were employed by Archstone Manufacturers (Pty) Ltd t/a Wonder Rock ("**Archstone**"). In 2011 Archstone (the old employer) went into voluntary liquidation. A few weeks prior to this Archstone had terminated the services of the eight employees when they returned from leave. They were informed that the business had gone into liquidation and that as a result of the bankruptcy their contracts of employment had come to an end. The employees were told that if they wanted to come back to the company it would have to be at a much lower salary. However, certain of Archstone's managerial employees appeared to continue working. Archstone then came to be known as 'Paving Warehouse' (the new employer).

Paving Warehouse did not deny that it was carrying on the same business as Archstone had done before their liquidation, but denied that any transfer had taken place. Instead it was argued that Paving Warehouse simply bought the assets of Archstone.

The employees then referred the matter to the Labour Court claiming that the dismissal was automatically unfair. Section 187(g) of the LRA provides that a dismissal is automatically unfair if the reason for the dismissal is a transfer, or a reason related to a transfer, contemplated in section 197 or 197A of the LRA. Section 197A states that "the new employer is automatically substituted in the place of the old employer in all contracts of employment in existence immediately before the old employer's provisional winding-up or sequestration."

The Court had regard to the Constitutional Court decision in *NEHAWU v University of Cape Town*^[1] which held that the term "going concern" must be given its ordinary meaning – essentially that 'the business remains the same but in different hands'. Furthermore the Labour Court held that one must look to substance, and not the form of the transaction. In applying this test the Labour Court came to the conclusion that Paving Warehouse was fully aware of the implications of a transfer as a going concern, and thus sought to avoid these consequences by purporting to purchase Archstone's assets and not the business itself. For the above reasons the Court found that the business was in fact transferred as a going concern.

The Court also found that the employees' dismissal prior to the liquidation was a means to avoid the consequences of section 197A, and was therefore automatically unfair. Moreover the Court noted that the dismissals were unlawful in that they did not comply with section 197B, which requires an employer to disclose certain information to employees who are likely to be affected by an insolvency.

Lastly, the Court held that the words "immediately before" in section 197A do not mean that the employment contract must be in existence on the very day before the transfer takes place. Such an interpretation would be too literal. This interpretation would undermine employees' protection. To allow such an interpretation would mean that an old employer could simply terminate employees' contracts before the transfer in order to avoid the consequences of section 197A. Such an interpretation could not be countenanced. The employees will therefore be regarded as having been transferred to the new employer.

IMPORTANCE OF THIS CASE

The transaction between Archstone and Paving Warehouse was found to be a transfer as a going concern despite the views of the seller and purchaser. The Court will consider the underlying facts of any such transaction and will decide, based on that analysis, the true nature of the transaction.

The Court will consider why employees are dismissed before such a transaction takes place in order to assess whether the dismissals were affected in order to avoid the application of section 197A or section 197 of the LRA. The Court will determine whether such dismissals undermine section 197 and 197A as the purpose of these sections is to protect employees in situations where a business changes hands.

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[1] 2003 (2) BCLR 154 CC.



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