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Mergers, acquisitions, corporate takeovers and staff restructuring: the devil is in the deal detail

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South Africa's corporate landscape has seen an uptick in transactional activity this year, marked by a mix of strategic mergers, acquisitions, and, in some cases, distressed sales. While some companies are expanding through key partnerships and acquisitions, others are offloading assets at lower valuations, driven by economic pressures and industry challenges. The one constant in all of these transactions is the workforce that is, invariably, the backbone of the business. Labour laws are always strongly protective of the rights of employees, and especially in the case of these kind of corporate takeovers, the type of deal which is reached must be carefully analysed to determine what impact, if any, the deal may have on staff, and what protections may be available to workers.

The primary distinction that is important to take into account when considering employees' rights in the face of a corporate takeover, is whether the transaction relates to the sale of the shares of the corporate target, or whether the business of the target is being sold. The distinction may seem academic, or the wording a semantic distinction, but from a legal perspective these are two substantially different cases and have significantly different legal outcomes.

In the case of a sale of shares, there is in fact very little impact on the staff, and news of a corporate takeover in these circumstances generally has no consequence on the legal relationship between the employer and the employees. This is for the reason that the company or corporate entity which is the employer remains essentially unchanged internally, and the company retains its assets and business and keeps servicing its business contracts. The seller is not the company itself; the seller is the shareholder, and what is being sold are the shares in the company. All that changes is the identity of the shareholder, or shareholders, which hold the shares of the company. For example, a global group of companies may, for any number of reasons such as the desire to move away from a South African or regional marketplace for its goods or services, decide to sell the South African company out of its group. For a number of reasons, this may be easiest to achieve by selling the shares which the global group owns in the South African company. When the shares of the South African company is sold in this manner, the shareholder changes from the old global group, to the new purchaser of the shares. For staff of the South African company, it is important to note that the South African company continues to exist, and the contracts of employment which the South African company has concluded with its staff, remain unaffected. The South African company will continue operating its business, and the employees will continue working on that business. Minor issues could arise, such if the South African company was entitled, as a member of the previous global group, to participate in specific group schemes or benefit structures. It may be that after a sale of shares, the result of which is that the South African company exits the group, it and its staff may no longer be allowed to participate in these group structures. Deal advisors and lawyers should always take these larger structural issues into account when considering this type of share sale deal.

In the case of a sale of business (which can take the form of the whole of the business, or any portion thereof which can form an independent economic activity) what happens from a legal perspective is fundamentally different from the sale of shares discussed above. In this case the company is the seller, and it is selling its business, or a part of its business. After the transaction has been completed, the business will no longer be housed in or owned by the company, and the business will have transferred to a new owner and will be housed in a new company. Bearing in mind then that the contracts of employment of the staff who worked in that business are entered into with the company (which has now sold its business, but that business has now exited the company) employees could find that there is no work for them do if they remain employed by

the company. This could be prejudicial to these employees, but luckily, South African labour laws intervene at this point and provide strong protection for affected staff. In these circumstances, under section 197 of the Labour Relations Act, 66 of 1995 (LRA), when a business is transferred as a going concern, the purchase of the business, which is considered to be the new employer, automatically takes over all employment contracts from the seller, which is considered to be the old employer. The rights and obligations between the old employer and the employees remain the same and are transferred to the new employer. Any actions taken by or against the old employer, such as dismissals or unfair labour practices, are considered to have been done by or in relation to the new employer. The transfer does not break the continuity of employment, and employees' contracts continue with the new employer as if nothing changed.

The definition of what constitutes the transfer of a business as a going concern has intentionally not been provided for in the LRA. What has been provided is a definition of business to include the whole or part of any business, trade, undertaking or service. The LRA defines the transfer as the transfer of a business by one employer to another as a going concern. In effect, what is transferred must be a business in operation "so that the business remains the same but in different hands". Whether such a transfer has taken place is a matter of fact which must be determined objectively in light of the circumstances of each transaction.

In order to protect employees, the terms and conditions of the employees who transfer to the new employer must be on the whole no less favourable to the employees, than the terms and conditions in effect while employed with the old employer. In addition, the old employer and the new employer must also agree on the value of certain employee liabilities (the value as at the date of transfer of the leave pay accrued to the transferred employees of the old employer, the severance pay that would have been payable to the transferred employees of the old employer in the event of their dismissal by reason of the employer's operational requirements, and any other payments that have accrued to the transferred employees but which have not been paid to employees of the old employer) and the agreement between the old and new employer as to which of them will assume these liabilities must be disclosed to the employees, so that they know which party will satisfy their claims.

When advising on mergers, acquisitions, or business sales, deal advisors must carefully consider the legal implications for employees, as the structure of the transaction significantly impacts their rights. All aspects of the impact of the type of deal on employees must be taken into account, and considered for the purposes of all affected persons, both the company, its shareholder group, any potential purchaser of shares or a business, and the employees at the heart of the workforce, must be assessed before a legal structure is decided on, and professional deal advice and legal support should always be sought before a transaction is concluded.



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