



EMPLOYMENT

No grout about it: The LAC cements section 197 principles

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Section 197 of the Labour Relations Act has long been one of the most misunderstood and misapplied provisions in South African labour law. Employers frequently assume that because a new contractor introduces different technology, different management structures or new operational methods, the incoming business is fundamentally different from its predecessor. The Labour Appeal Court's recent decision in *Electro Hydro World (Pty) Ltd v Murray & Roberts Cementation (Pty) Ltd and Others* serves as a timely reminder that the enquiry is far more practical than that.

The dispute arose after Sibanye terminated Murray & Roberts Cementation's contract to operate and maintain a grout plant at one of its mining operations following a competitive tender process. Electro Hydro World secured the new contract and argued that it would be operating a substantially different business. It intended constructing two larger, more technologically advanced grout plants, implementing different shift structures, using fewer employees and supplying much of its own equipment. On that basis, Electro Hydro maintained that section 197 was not triggered and that it had no obligation to take over the employment of the 63 employees previously engaged by Murray & Roberts.

Both the Labour Court and, on appeal, the Labour Appeal Court disagreed. In dismissing the appeal, the Labour Appeal Court reaffirmed an important principle that has consistently emerged from section 197 jurisprudence: courts are concerned with substance rather than form.

The starting point remains the familiar three-stage enquiry. There must first be a transfer from one employer to another. Secondly, what is transferred must constitute a business or part of a business. Thirdly, that business must be transferred as a going concern. Whether those requirements are met is determined objectively by examining the reality of the transaction rather than the labels the parties choose to attach to it.

What made this judgment particularly significant was the court's emphasis on identifying the true economic activity being performed. Although Electro Hydro was introducing larger plants, updated technology and different operational processes, the essential commercial reality remained unchanged. Before the tender, Murray & Roberts operated grout plants that produced grout and pumped it underground for Sibanye's mining operations. After the tender, Electro Hydro performed precisely the same economic activity for precisely the same client using the same utilities, raw materials and underground infrastructure

provided by the mine. The fact that the service would now be delivered more efficiently, or at greater scale, did not alter the underlying business.

Equally important was the court's treatment of assets. Electro Hydro argued that many assets had not transferred, including computers, software, furniture, printers, tools and other equipment that it regarded as essential to its operations. The Labour Appeal Court rejected that argument. Section 197 does not require every asset used by an outgoing contractor to pass to the incoming contractor. The relevant question is whether the assets necessary to continue the business transferred. Here, the core operational infrastructure belonged to Sibanye and remained available to the incoming contractor. The office equipment retained by Murray & Roberts was peripheral rather than fundamental to the continuation of the business.

This aspect of the judgment is likely to have broader implications across outsourced services and mining contracts. Businesses frequently redesign operations when taking over contracts. Technology improves. Staffing models evolve. Automation increases. None of these developments necessarily prevent section 197 from applying. The real enquiry remains whether the underlying economic entity continues to exist despite those changes.

For employers, that distinction matters. Winning a tender does not automatically mean that a contractor starts with a clean slate from an employment perspective. Equally, simply changing the way work is performed will not necessarily avoid the automatic transfer provisions contained in section 197.

The judgment reinforces that courts will adopt a practical, commercially realistic approach. They will examine what business is actually being carried on before and after the transaction, identify its essential operational characteristics and determine whether those characteristics have remained intact. If they have, section 197 is likely to follow, regardless of new technology, different equipment or revised organisational structures.

For organisations involved in outsourcing, insourcing or competitive tender processes, Electro Hydro World is a valuable reminder that section 197 cannot be avoided through careful drafting or operational redesign alone. If the same business continues in different hands, and similar assets are used to perform the business activity, the law is likely to recognise exactly that.



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