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OUTSOURCING: NEW DEVELOPMENTS

In terms of our common law, an employer cannot simply transfer an employee's services to another person but requires the employee's consent to do so. In other words, the employee may choose his or her employer. This rule, if not tempered in some way, could hamper the transfer of a business and in some cases even prevent it altogether. Section 197 of the Labour Relations provides an exception to this rule. It provides that, if a 'business, part of a business, trade, undertaking or a service' is transferred to another, the consent of the employees to the transfer is not required. However, before this applies, three key conditions must be satisfied: what is being transferred must be a 'business, part of a business, a service, etc.'; there must be a 'transfer' from one employer to another; and the business be transferred as a 'going concern'. If these conditions are satisfied, the employees are transferred automatically with the business and their terms and conditions of employment, as agreed with the old employer, remain intact. Any material changes to those should be agreed between the employees and the new employer, either before or after the transfer.

Section 197 creates major difficulties of interpretation in practice. One of these is whether 'outsourcing' falls under its scope. Here the courts have moved from a position where outsourcing was regarded as falling outside of the scope of the section, to one that it is dependent on the particular circumstances of each case. The latest authoritative decision on this point is the judgment of the Labour Appeal Court (LAC) in the case of SAMWU and Rand Airport Management Company. In that matter the employer, who experienced financial difficulties, wanted to outsource certain non-core activities, i.e. gardening and security services. An agreement in respect of the former was concluded, but the agreement in respect of the security services had not been finalised at the time the matter landed in court.

One of the questions that arose for decision, was whether section 197 would be applicable to the two transactions. The Labour Court had earlier decided, with regard to the gardening functions, that the section was not applicable. As there had only been a draft agreement with regard to the security service, the court found that transfer had not yet taken place.

On appeal, the LAC held that the gardening services fell within the meaning of the word 'service' as used in section 197 and that the security services would too, if the draft agreement was implemented. The court held further that the effect of the agreements in question in each case was, or would be, to transfer the service concerned as a 'going concern'. This was so, because the services would continue to be provided, to the same employer and for the same purpose as before, only by another party. This, despite the fact that the services were not used for generating profit, or the fact that the new service provider did not take over any assets and would be able to use its own staff to do the work required. The intention of the parties was also not conclusive, the court held. Contrast this with the earlier decision of the Labour Court in the same matter that held that for the section to apply, there must at least be an 'economic entity' capable of being

transferred. The gardening services, said that court, could not be described as an ‘entity’ with its own management structure, own assets, own goals, customers or goodwill and was not intended to make a profit or gain. On top of that, the new service provider had no need for Rand Airport’s employees and could provide the service using its own staff.

What the LAC’s decision signals, however, is that employers who wish to outsource non-core functions and entrepreneurs and others who intend to continue to provide those services to that client for their own account must tread extremely carefully. By the looks of it, the courts are now likely to lean in favour of an interpretation that includes, rather than excludes, outsourcing situations in the ambit of section 197.

Expert advice should therefore be obtained before embarking on outsourcing, bearing in mind that section 197 is usually more of a problem for the new service provider than for the old employer. It is the service provider who will have to employ the staff concerned and continue to provide comparable terms and conditions of employment to them. Those are issues that can be factored into the outsourcing agreement or be agreed with the employees prior to or subsequent to the transfer of their contracts.

A particularly worrying aspect of the LAC judgment is a remark by judge Dennis Davis, who spoke for the court, that it would constitute an automatically unfair dismissal for the new employer to retrench transferred staff afterwards for refusing to accept new, less beneficial terms of employment. This seems to run counter to recent LAC cases that permit retrenchments in cases where the employer can establish a real need for changing terms of employment and the employees concerned steadfastly refuse to agree to the changes. Therefore, also in regard to this aspect of brining terms of employment in line after a business transfer, expert advice is required to avoid the drastic consequences of automatically unfair dismissals.