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Automatic transfers of employment – the strength of Section 197

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Through the introduction of section 197 of the Labour Relations Act, 66 of 1995 (LRA) the idea was introduced into South African law for the first time that where there has been a transfer of the whole or part of a business, trade, undertaking, service, or a part thereof (collectively referred to as a business) as a going concern from one party to another, the employment contracts associated with that business also transfer automatically to the acquiring party.

In doing so the LRA amended the common law position that an employee has the right to choose his/her employer.

This dramatic change to the common law position and a lack of clarity regarding the application of section 197 however brought with it a great deal of confusion and uncertainty.

The application of section 197 has seen a great degree of consideration by the Labour Court, Labour Appeal Court, and even the Constitutional Court due to the importance of the issues at hand, and at least in relation to the standard application of section 197 to transfers of businesses, where this happens by way of a commercial transaction between consenting parties, there is a great degree of certainty and confidence as to how section 197 operates.

Less opaque at times, and more subject to the winds of legal change as they blow, is the application of section 197 in the case of what is known as second generation outsourcing.

Nevertheless, the general understanding of section 197 is that where the business is transferred, the contracts of employment associated with that business go along with the business, and the purchaser becomes the new employer.

At times, the new employer may not be receptive to the application of section 197, but a new case demonstrates that parties to transactions where section 197 applies, and especially the purchaser of such a business, ignores section 197 at its peril.

In the recent case of Njokweni and Others v Mobile Telephone Networks (2023), the Labour Court considered a situation in which MTN took over the running of a pre-paid support call centre from Interaction Call Centres, which had operated this function before the take-over.

The cancellation of the service agreement between MTN and Interaction triggered the application of section 197, and MTN was obliged in law to take over the employment contracts of the Interaction employees.

MTN did not accept that it was obliged to do so and attempted to selectively offer employment to certain of Interaction's employees. It also eventually dismissed a number of employees, after it was forced to accept that section 197 applied but then sought to compel the employees, who were based in Durban and who failed to comply with an instruction to report for duty in Randburg.

When they failed to do so, they were dismissed.

The litigation between the parties took a number of years, and since the original transaction which triggered section 197 had taken place in 2010, MTN sought to argue that the employees were not entitled to any back payment of salaries since they had not tendered their services, and also that any amounts it may owe employees who had been entitled to transfer to it at that time, had also prescribed in law.

The Labour Court confirmed that section 197 operates automatically and unlike other circumstances in which employees may have to tender their services, where a transaction results in section 197 applying, the employment contracts associated with that business transfer without any further action being required on the part of the employees who are entitled to transfer.

The Labour Court also dismissed the technical objections raised by MTN that employee claims had prescribed, since the employees had in fact commenced litigation on these issues, which had interrupted the usual 3 year prescription period.

The case is a strong show of force by the Labour Court to demonstrate that section 197 applies based on the underlying set of facts, and not the whim of the parties.

MTN was ordered to pay the full salaries of each of the employees who should have transferred, for the years from 2010 to 2017.

Employers must be aware of the possible situations in which section 197 can apply and make commercial decisions about their obligations in these circumstances after receiving appropriate legal advice.



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