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EMPLOYMENT

The employer's responsibility during the transfer of an employee

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Senne and others v Fleet Africa [2016] ZALCJHB 48

ISSUE

One of the automatic consequences of a transfer in terms of section 197 of the Labour Relations Act 66 of 1995 ("LRA") is that the new employer is substituted, or 'steps into the shoes', of the old employer. What is unclear from the legislation, however, is when this occurs. This is a question of fact which must be determined on a case by case basis.

COURT'S DECISION

In the case of *Senne and others v Fleet Africa* [2016] ZALCJHB 48 (12 February 2016), the employees were employed by the City of Johannesburg ("**City**"). On 1 April 2001 the employees were transferred from the City to Fleet Africa in terms of section 197 of the LRA. The City then entered into an outsourcing agreement with the respondent, Fleet Africa, in terms of which vehicle maintenance services were provided to the City. On the expiration of the outsourcing agreement, on 28 February 2012, the vehicle maintenance services were transferred back to the City pursuant to a section 197 transfer.

Between 7 and 18 May 2012, Fleet Africa entered into voluntary retrenchment agreements with the employees. When the employees attempted to enforce the voluntary retrenchment agreements ("agreements") Fleet Africa contended that the agreements were void because at the time of the conclusion of the agreements, they were no longer the employers, and that in fact the City became the employees' employer on the date of expiry of the outsourcing agreement. The court therefore had to determine the date on which the old employer, Fleet Africa, was substituted with the new employer, the City.

The court found that "the existence of an employment relationship is a factual question which must be determined on the available evidence regardless of whether there has been a transfer" in terms of section 197 of the LRA. Furthermore the court held that although section 197 refers to an "automatic" substitution, the substitution is a consequence which is separate and distinct from the transfer of the business. Hence substitution and transfer will not always occur simultaneously, and the timing of the substitution is based on the facts of each case.

Having regard to the facts, the court held that Fleet Africa was indeed the employer of the employee when the retrenchment agreements were concluded. The facts on which the court relied were that after signing the agreements, the employees continued to work for Fleet Africa and continued to receive remuneration from them. The application was allowed and the applicants were entitled to enforce the retrenchment agreements.

IMPORTANCE OF THIS CASE

The court highlighted the fact that section 197 of the LRA does not allow old employers to escape liability merely because a transfer has taken place. Transfer and substitution does not happen simultaneously, and therefore the question of *when* substitution takes place should be considered on a case by case basis.

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