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The termination of service level agreements: the application of Section 197 of the LRA

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Enviroserv Waste Management v Interwaste (Pty) t/a Interwaste Environmental Solutions and Others (P408/15) [2015] ZALCPE 66

Issue

Whether the expiry of a limited duration contract with a service provider and the awarding of the tender for the provision of such services to a new service provider constitutes a transfer of a business as a going concern?

Section 197 of the Labour Relations Act 66 of 1995

The termination of a service agreement on its own does not necessarily entitle the employees of the service provider to have their contracts transferred to the new service provider. If, however, the awarding of the service agreement to a new service provider constitutes a transfer of a business as a going concern under section 197 of the Labour Relations Act 66 of 1995 ("**LRA**") then their contracts will be transferred.

Whether section 197 applies depends on the presence of three factors, namely, "business", "transfer" and "going concern".

Court's Decision

In *Enviroserv Waste Management v Interwaste (Pty) t/a Interwaste Environmental Solutions and Others (P408/15) [2015] ZALCPE 66* (18 December 2015) a contract of services between Enviroserv ("**the Applicant**") and General Motors South Africa Proprietary Limited ("**GM**") expired. Enviroserv undertook GM's on-site waste management. GM subsequently entered into a new contract with Interwaste ("**the Respondent**") for the provision of waste management services.

The Labour Court had to determine whether the conclusion of the latter contract constituted a transfer of a business as a going concern for the purposes of section 197 of the LRA.

The Applicant entered into a three-year waste management service agreement ("**the service agreement**") with GM which expired on 31 December 2015. In August 2015 GM invited tenders for waste management services. The Respondent was awarded the tender.

The Applicant then sent a letter to the Respondent, as the successful bidder, requesting that the Respondent be substituted for the Applicant as the new employer of its 22 employees who was performing their duties at GM in terms of the expiring service agreement. The Respondent refused this request.

Transfer of a business

The Applicant argued before the Labour Court that a transfer of a business as a going concern would take place when the service between it and GM terminated and the Respondent's contract with GM commenced. The Applicant argued that from 1 January 2016 the Respondent would provide the same services to GM as it had, although in a different manner.

In addition, the Respondent would use equipment previously used and procured by the Applicant and returned to GM. It would also use the same office space as was being used by the Applicant. As a result of the Respondent's right to use and control the infrastructure, the Applicant submitted, section 197 of the LRA would be triggered.

The Respondent rejected the Applicant's argument. It argued that when the service agreement between the Applicant and GM ended, the fixed term contracts of the Applicant's employees would expire as a result of the effluxion of time.

Therefore, the Applicant would have no employees to be transferred and the provisions of section 197 would not be applicable. Furthermore, the service that it would be rendering for GM would be different to that provided by the Applicant. Furthermore, when the service agreement ended, the Applicant would retain its whole business and no assets, goodwill or property of the Applicant would be transferred to the Respondent.

The court held that the first question that had to be determined was whether the activities of the Applicant and GM constituted a “business” as envisaged by section 197. The court reasoned that the nature of the waste management industry is one in which businesses win and lose tenders to provide services for a limited period. The court held that the only conclusion that could be reached in this matter was that the Applicant was performing its obligations in terms of a service agreement, limited to a period of three years. This did not, in and of itself, constitute a “business” for the purposes of section 197.

In any event, the court held that if the Applicant's activities did constitute a “business” the services it offered would be different to those offered by the Respondent. The court also dismissed the Applicant's argument that the employees had a reasonable expectation of being transferred to the Respondent. To the extent that the employees did have such expectation, it was an unreasonable one as they were employed on fixed-term contracts, expiring on 31 December 2015.

The court dismissed the application to have the employees transferred to the Respondent.

Importance of the Case

Section 197 of the LRA provides that if a transfer of a business takes place, the new employer will be “automatically substituted for the old employer in respect of all contracts of employment in existence immediately before the date of transfer”.

However, for section 197 to be triggered, three elements must be present, simultaneously.

First, there must be a transfer from one employer to another.

Secondly, the transferred entity must be a business.

Thirdly, the business must be transferred as a going concern.

The expiry of a service contract with a service provider and subsequent entering into of a new contract with a new service provider (by reason of, for example, the awarding of a new tender) does not necessarily mean that such a transaction will fall within the scope of section 197.

It must be determined whether the above three elements are present before one can claim that the contacts of employment of the old employer's employees will be transferred to the new employer.

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