7 MARCH 2016

EMPLOYMENT ALERT

IN THIS **ISSUE**

FAILURE TO JOIN A NEW EMPLOYER TIMEOUSLY MAY LEAVE EMPLOYEES SITTING WITH WORTHLESS FAVOURABLE ORDERS

Section 197 of the Labour Relations Act, No 66 of 1995 (LRA) provides that if a transfer of business takes place, all the rights and obligations between the old employer and an employee at the time of the transfer continue as if they had been the rights and obligations between the new employer and the employee. The general consequence of this provision is that all employment contracts are automatically transferred from an old employer to a new employer. In addition, an employee that is unfairly dismissed by the old employer is able to enforce an award against a new employer, provided that the new employer was joined to the proceedings in time.

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Does s197 of the LRA automatically substitutes the new employer as the judgment debtor in an award obtained against the old employer?

Section 197 of the Labour Relations Act, No 66 of 1995 (LRA) provides that if a transfer of business takes place, all the rights and obligations between the old employer and an employee at the time of the transfer continue as if they had been the rights and obligations between the new employer and the employee. The general consequence of this provision is that all employment contracts are automatically transferred from an old employer to a new employer. In addition, an employee that is unfairly dismissed by the old employer is able to enforce an award against a new employer, provided that the new employer was joined to the proceedings in time.

An employee's failure to join a known new employer before the Labour Court amounts to a waiver of their right to enforce that order against the new employer.

The courts have recently been faced with instances where employees who seek to enforce awards against new employers have failed to join them - either during CCMA proceedings or at any time before the Labour Court issues an order. The following question then arises: Does s197 of the LRA automatically substitutes the new employer as the judgment debtor in an award obtained against the old employer?

The first time this question was before our courts was in *Ngema and Others v Screenex Wire Waring Manufactures (Pty) Ltd and Another* (2013) 34 ILJ 1470 (LAC) The court took the view that while employees enjoy the same rights against a new employer as they did against an old employer, the employees are still required to take positive steps to join a new employer to enforce those rights. The reason for this requirement is that such a joinder allows a new employer an opportunity to be heard in matters that directly and substantially affect their business. In the *Ngema* case, the employees were dismissed for operational requirements and they were aware that the business was transferred as a going concern. The Labour Court ordered that they be reinstated as their dismissal was substantively and procedurally unfair. This decision was upheld on appeal and, only then did the employees seek to join the new employer and enforce the reinstatement order against it.

As was shown in *Wallejee and Another v FCSA Organisation Services (Pty) Ltd and Another* 2015 36 ILJ 1943 (LC), joinder of a new employer may not take place after judgment has been handed down. Thus, an employee's failure to join a known new employer before the Labour Court amounts to a waiver of their right to enforce that order against the new employer.

In *National Union of Metalworkers of South Africa v Intervale (Pty) Ltd and Others* (CCT 72/14) [2014] ZACC 35 (December 2014), the Constitutional Court held that conciliation is a precondition for the adjudication of any dispute by the Labour Court and failing to cite all employers in a referral to conciliation is not compliant with LRA provisions. This means that an employer who has not been part of conciliation with dismissed employees cannot be joined to an action in the

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The defence that employees have waived their right to enforce an order by not timeously joining a new employer to Labour Court proceedings does not address the merits of the matter.

Labour Court dealing with the alleged unfairness of their dismissal. A non-joinder in conciliation, however, does not preclude employees from joining an employer in the Labour Court, if such an employer is a new employer in circumstances where a business was transferred as a going concern. (See *Kunyuza and Others v Ace Wholesalers* [2015] JS27/12 (Unreported)).

The defence that employees have waived their right to enforce an order by not timeously joining a new employer in Labour Court proceedings does not address the merits of the matter. Although business transferees may escape liability on the preliminary point of non-joinder, they should not bank on such a procedural oversight. Rather, they should take matters into their own hands by ensuring that their sale of business agreements provide sufficient cover in the event that employees look to them as judgment debtors.

Aadil Patel and Sipelelo Lityi

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