

EMPLOYMENT LAW ALERT

27 JUNE 2022



CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

Do employers need to retrench fixed-term employees at the end of their contracts?

In *Dumisani Yeko v Red Mining South Deep (Pty) Ltd* (LC) JS633/18 [2022], the employer dismissed the fixed-term employee following the termination of the tender rail contract awarded to it by a joint venture, Gold Fields. The duration of the employee's employment was linked to the rail contract.



FOR MORE
INSIGHT INTO
OUR EXPERTISE
AND SERVICES

Do employers need to retrench fixed-term employees at the end of their contracts?

In Dumisani Yeko v Red Mining South Deep (Pty) Ltd (LC) JS633/18 [2022], the employer dismissed the fixed-term employee following the termination of the tender rail contract awarded to it by a joint venture, Gold Fields. The duration of the employee's employment was linked to the rail contract.

After Gold Fields terminated the contract, the employer initiated a retrenchment process and retrenched the employee. Fixed-term employees were given the opportunity to apply for a position under the new company that won the tender, Flint. However, the employee was unsuccessful and referred an unfair dismissal dispute.

The court considered three issues in light of the Labour Relations Act 66 of 1995, as amended (LRA):

1. Whether the employee was unfairly retrenched in terms of section 189A?
2. Whether a transfer in terms of section 197 of the LRA occurred?
3. Whether the employee was afforded any protection in terms of section 200B?

In referring to section 189(1) and (3) and section 186(1) of the LRA, which govern retrenchments, the court held that a termination of a fixed-term employment contract either by effluxion of time, or by the happening of an event, did not amount to a dismissal in terms of section 186(1) of the LRA. The employer did not have to follow the section 189A retrenchment process in these circumstances.

In this case, the termination as per the contractual term did not constitute a dismissal in terms of section 186(1) of the LRA. Thus, it was unnecessary for the employer to have followed the retrenchment process.

Section 197 of the LRA provides that contracts of employment of existing employees are automatically transferred to new employers where there is a sale of a business as a going concern. "Transfer" is defined as the

transfer of a business by one (the old) employer to another (the new) employer. Notably, this provision only applies to the transfer of a business. The court held that it did not apply to the transfer of a short-term service that was lost by one company and awarded to another company. The takeover of the old employer's employees by the new employer was also not decisive in causing such to be a transfer. Only the service contract was taken over by the new employer, and not the old employer's business. As a result, no transfer had occurred, and Flint was not the new employer of the employee.

EMPLOYER OBLIGATIONS

However, the court noted that this lacuna defeats the purpose of section 197 as it is intended to safeguard security of employment. Because section 197 did not apply to transfers of tenders by way of the loss and award of contracts, fixed-term employees were not afforded any protection.

Do employers need to retrench fixed-term employees at the end of their contracts?

CONTINUED

Despite the lacuna, the court noted that section 200B of the LRA does provide some protection for fixed-term employees in this scenario.

Section 200B imposes liability for employers' obligations and provides that an employer includes one or more persons who carry on associated or related activity or business by or through an employer if the intent or effect of their doing so is or has been to defeat the purpose of the LRA directly or indirectly.

Where an employer falls within this definition, should there be more than one employer of an employee, they may be held jointly and severally liable for any failure to comply with the obligations of an employer.

The court concluded that this would require determining whether Gold Fields was also the employee's employer, and whether it could be held jointly and severally liable for any failure to comply with the obligations of the primary employer.

However, the court could not make a pronouncement on this point as the employee's cause of action did not rely on section 200B and as he did not allege that Gold Fields was an employer. As a result, the employee's case was dismissed.

It is clear from this judgment that where fixed-term employment contracts are terminated by effluxion of time, or by the happening of an event specified in the contract, employers do not have to follow a section 189A retrenchment process. Additionally, and depending on the facts of the matter, no transfer will have occurred where a service contract is awarded to a new entity. However, the effect of this judgment is that employers may face joint and several liability in terms of section 200B of the LRA even if they are not the contracted employer.

**AADIL PATEL, ANLI BEZUIDENHOUT
AND GABY WESSON**



OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:



Aadil Patel

Practice Head & Director:
Employment Law
Joint Sector Head:
Government & State-Owned Entities
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com



Anli Bezuidenhout

Director:
Employment Law
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com



Jose Jorge

Sector Head:
Consumer Goods, Services & Retail
Director: Employment Law
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com



Fiona Leppan

Joint Sector Head: Mining & Minerals
Director: Employment Law
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com



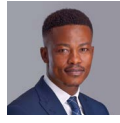
Gillian Lumb

Director:
Employment Law
T +27 (0)21 481 6315
E gillian.lumb@cdhlegal.com



Imraan Mahomed

Director:
Employment Law
T +27 (0)11 562 1459
E imraan.mahomed@cdhlegal.com



Bongani Masuku

Director:
Employment Law
T +27 (0)11 562 1498
E bongani.masuku@cdhlegal.com



Phetheni Nkuna

Director:
Employment Law
T +27 (0)11 562 1478
E phetheni.nkuna@cdhlegal.com



Desmond Odhiambo

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com



Hugo Pienaar

Sector Head:
Infrastructure, Transport & Logistics
Director: Employment Law
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com



Thabang Rapuleng

Director:
Employment Law
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com



Hedda Schensema

Director:
Employment Law
T +27 (0)11 562 1487
E hedda.schensema@cdhlegal.com



Njeri Wagacha

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com



Michael Yeates

Director:
Employment Law
T +27 (0)11 562 1184
E michael.yeates@cdhlegal.com



Mohsina Chenia

Executive Consultant:
Employment Law
T +27 (0)11 562 1299
E mohsina.chenia@cdhlegal.com



Faan Coetzee

Executive Consultant:
Employment Law
T +27 (0)11 562 1600
E faan.coetzee@cdhlegal.com



Jean Ewang

Consultant:
Employment Law
M +27 (0)73 909 1940
E jean.ewang@cdhlegal.com



Ebrahim Patelia

Legal Consultant:
Employment Law
T +27 (0)11 562 1000
E ebrahim.patel@cdhlegal.com

OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:



Asma Cachalia

Senior Associate:
Employment Law
T +27 (0)11 562 1333
E asma.cachalia@cdhlegal.com



Jordyne Löser

Senior Associate:
Employment Law
T +27 (0)11 562 1479
E jordyne.loser@cdhlegal.com



Tamsanqa Mila

Senior Associate:
Employment Law
T +27 (0)11 562 1108
E tamsanqa.mila@cdhlegal.com



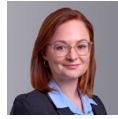
Christine Mugenyu

Senior Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E christine.mugenyu@cdhlegal.com



Dylan Bouchier

Associate:
Employment Law
T +27 (0)11 562 1045
E dylan.bouchier@cdhlegal.com



Abigail Butcher

Associate:
Employment Law
T +27 (0)11 562 1506
E abigail.butcher@cdhlegal.com



Rizichi Kashero-Ondego

Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E rizichi.kashero-ondego@cdhlegal.com



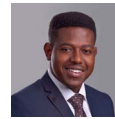
Biron Madisa

Associate:
Employment Law
T +27 (0)11 562 1031
E biron.madisa@cdhlegal.com



Peter Mutema

Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E peter.mutema@cdhlegal.com



Kgodisho Phashe

Associate:
Employment Law
T +27 (0)11 562 1086
E kgodisho.phashe@cdhlegal.com



Tshepiso Rasetlola

Associate:
Employment Law
T +27 (0)11 562 1260
E tshepiso.rasetlola@cdhlegal.com



Taryn York

Associate:
Employment Law
T +27 (0)21 481 6314
E taryn.york@cdhlegal.com



BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.

Dx 154 Randburg and Dx 42 Johannesburg.

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

©2022 11247/JUN