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EMPLOYMENT ALERT

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"LIKE" IT OR NOT: THE RAMIFICATIONS OF THE LANDMARK EU FACEBOOK CASE

On 6 October 2015, the Court of Justice of the European Union declared the safe harbour decision – a scheme which endorsed the protection of personal data transferred from the European Union to complying United States undertakings – invalid.

CDH
CLIFFE DEKKER HOFMEYR

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After various consultations between the applicant (Employer) and its employees, the Employer dismissed certain of its employees including the eight respondents (Employees).

Dissatisfied with their dismissal, the Employees referred a dispute to the CCMA for conciliation. The CCMA failed to resolve the matter. On 12 October 2010, the Employees referred the dispute to the Labour Court.

Shortly after the Employer's opportunity to file its statement of response lapsed, the Employer applied to the High Court for its own winding up. The Employer was accordingly placed under provisional liquidation. The Employer informed the Employees' union of this fact.

The matter lay dormant until March 2013 when the Employees brought an application for default judgment against the Employer. Again, nothing happened until the matter was set down for hearing on 21 May 2014 as an unopposed application. The Employer filed its statement of response along with an affidavit seeking the dismissal of the default judgment on 20 May 2014. The matter was adjourned to be placed on the opposed roll.

The new Companies Act, No 61 of 2008 contains transitional arrangements. Item 10 of Schedule 5 of the Companies Act states that court proceedings that began under the old Companies Act, No 61 of 1973 (Old Companies Act) should continue under the Old Companies Act.

In this case, the Employer's winding up order was granted on 9 November 2010. The new Companies Act came into operation on 1 May 2011. Thus, the legislation which applied and continued to apply in this matter was the Old Companies Act.

At the hearing of the matter, the Employer submitted that in terms of s359(2)(a) of the Old Companies Act the Employees were obliged, within four weeks of the liquidator's appointment, to give the liquidator three weeks' written notice that the Employees intended to continue with their claim. As they had failed to do so, the Employees were deemed to have abandoned their claim.

The Employees argued that the Employer was barred from raising this defence as it had waited almost four years to file its statement of response.

In deciding the matter, the court considered the following two issues:

- if the Employer was allowed to advance its argument that the Employees were obliged to give it notice in accordance with s359(2)(a) of the Old Companies Act; and
- if the consequence of s359(2)(a) of the Old Companies Act rendered the Employees' claim abandoned.

In answering the first question, the court held that the Employer's defence was akin to a special plea. It was therefore entitled to raise it at the hearing of the Employees' application for default judgment.

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RETRENCHED EMPLOYEES FAIL TO NOTIFY LIQUIDATORS

CONTINUED

Should a party fail to give the liquidator three weeks' written notice of their intention to continue with a claim against the liquidated company then the party is deemed to have abandoned its claim.

In light of the above, the court merely looked at the wording of s359(2)(a) of the Old Companies Act which stated that should a party fail to give the liquidator three weeks' written notice of their intention to continue with a claim against the liquidated company then the party is deemed to have abandoned its claim.

The Employees' application for default judgment was accordingly dismissed with costs.

It is worth noting that due to Schedule 5 – 9(1) of the Companies Act, chapter 14 of the Old Companies Act (which deals with the liquidation of companies and includes s359(2)(a)) continues to apply as if the Old Companies Act had not been repealed.

Accordingly, if a company that is involved in an employment related dispute is liquidated, notice is required from the employee or its representative that it intends to continue with its claim.

Terrick McCallum and Lauren Salt

2014
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1st in M&A Deal Flow, 1st in M&A Deal Value, 1st in General Corporate Finance Deal Flow.
2013
1st in M&A Deal Flow, 1st in M&A Deal Value, 1st in Unlisted Deals - Deal Flow.
2012
1st in M&A Deal Flow, 1st in General Corporate Finance Deal Flow,1st in General Corporate Finance Deal Value, 1st in Unlisted Deals - Deal Flow.
2011
1st in M&A Deal Flow, 1st in M&A Deal Value, 1st in General Corporate Finance Deal Flow, Legal Advisor - Deal of the Year.
DealMakers

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of Client Satisfaction amongst African Firms
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5
We are the No.1 Law firm for client service excellence
FIVE YEARS IN A ROW
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by M&A DEAL COUNT in Africa and the Middle East
No. 1 AFRICAN LAW FIRM
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"LIKE" IT OR NOT: THE RAMIFICATIONS OF THE LANDMARK EU FACEBOOK CASE

The European Commission's Directive on Data Protection prohibits the transfer of personal data to non-European Union countries that do not meet the European Union's 'adequacy' standard for privacy protection.

On 6 October 2015, the Court of Justice of the European Union declared the safe harbor decision – a scheme which endorsed the protection of personal data transferred from the European Union to complying United States undertakings – invalid. The landmark decision was set in motion by an Austrian citizen who brought a complaint to the Irish subsidiary authority, objecting to his personal data being transferred from Facebook's Irish subsidiary to the United States.

The European Commission's Directive on Data Protection prohibits the transfer of personal data to non-European Union countries that do not meet the European Union's (EU) 'adequacy' standard for privacy protection. While the United States (US) and the EU share the goal of enhancing privacy protection for their citizens, the two countries have different approaches when it comes to safeguarding personal data.

The concomitant effect is that the Safe Habor scheme allowed US public authorities to interfere with the fundamental rights of EU citizens.

In order to bridge these differences and in order for US organisations to satisfy the Directive's 'adequacy' requirement, the US Department of Commerce, in consultation with the European Commission, developed a 'safe harbor' framework (Safe Harbor). By subscribing to the US-EU Safe Harbor framework, US organisations are able to satisfy EU organisations that there is 'adequate' privacy protection, as defined by the Directive.

Maximillian Schrems, an Austrian citizen created his Facebook profile in 2008. Some or all of the personal data of EU Facebook users, such as Schrems, is transferred from Facebook's Irish subsidiary to the US. Schrems lodged a complaint with the Irish Supervisory Authority, claiming that the US did not offer adequate protection against US public authorities' scrutiny of personal data.

On the strength of the Safe Harbor decision, the Irish Supervisory Authority found that the US offered adequate protection to EU citizens' personal data.

The case was then brought before the High Court of Ireland, which, in turn, referred various questions to the EU's highest court.

The Court of Justice of the European Union (CJEU) declared the Safe Harbor scheme for data transfer to the US invalid. It ruled that the decision did not afford EU citizens adequate protection primarily because US public authorities were not obliged to adhere to the built-in protections of the scheme. In addition, the CJEU pointed out that US public authorities, such as the US's National Security Agency, are encourage to disregard the protections afforded by the scheme where "national security, public interest and law enforcement," demand it. The concomitant effect is that the Safe Habor scheme allowed US public authorities to interfere with the fundamental rights of EU citizens.

In the employment context, the affected companies would be:

- US parent companies which hold data from data subjects in the EU or which obtain data from sources in other parts of the world via Europe;
- HR service providers storing personal data in the US; and
- once the Protection of Personal Information Act, No 4 of 2013 (POPI) comes into force, South African companies transferring data to US companies will have a similar difficulty.

"LIKE" IT OR NOT: THE RAMIFICATIONS OF THE LANDMARK EU FACEBOOK CASE

CONTINUED

In planning for the enactment of the remaining sections of POPI, South African companies should bear the consequences of this judgment in mind.

There are alternative options to comply with the European Directive and national legislation such as:

- the use of approved model contract clauses;
- binding corporate rules in respect of intra company transfers;
- employee consent although not a complete solution; and
- temporarily not transferring data pending a solution between the national data authorities and the EU.

In planning for the enactment of the remaining sections of POPI, South African companies should bear the consequences of this judgment in mind, whether they "Like" it or not.

Faan Coetzee

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