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EMPLOYMENT ALERT

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On 17 March 2016, the Immigration Amendment Bill (Bill) was introduced in the National Assembly by the Portfolio Committee on Home Affairs. The stated purpose of the Bill is to provide adequate sanction for foreigners who have overstayed in the Republic of South Africa beyond the expiry date on their visa and to provide for matters connected therewith.

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Currently, s30(1) of the Immigration Act, No 13 of 2002 (Act) caters for a number of categories of foreigners which may be declared undesirable by the Director-General and which thereafter shall not qualify for a port of entry visa, visa, entry into the Republic or a permanent residence permit. One of these categories, in terms of s30(1)(h), includes those persons who have 'overstayed the prescribed number of times'. The wording of this subsection has created many interpretational challenges in that some have interpreted it to mean that a foreigner must have overstayed beyond the expiry of his or her visa on more than one occasion. However, it was never the legislatures intention to only declare an illegal foreigner undesirable once they have overstayed more than one time. As evident from regulation 27 of the Immigration Regulations, 2014, provision is made for a declaration of undesirability for a particular period of time after a foreigner has overstayed for the first time.

In this respect, regulation 27 provides that a person who overstays for a period not exceeding 30 days may be declared undesirable for a period of 12 months. Furthermore, a person who overstays for more than 30 days may be declared undesirable for a period of five years.

As a result of the confusion, the Bill intends on clarifying the issue of whether an illegal foreigner who has overstayed on only one occasion will be granted a visa or entry into the Republic. The Bill aims to amend the Act by inserting the following subsections into s32 of the Act:

> "(1A) Foreigners who are illegal by virtue of having overstayed, as prescribed, do not qualify for a port of entry visa, a visa, admission into the Republic or a permanent residence permit during the prescribed period.
>
> (1B) Upon application, as prescribed, from outside the Republic by the illegal foreigner contemplated in subsection (1A), the Director-General may waive the disqualification contemplated in subsection (1A) where exceptional circumstances, as prescribed, exist."

This proposed amendment clearly provides that a foreigner who has overstayed in the Republic subsequent to the expiry of his or her visa shall not be granted a visa, permit or entry into the Republic and this eliminates any confusion with regard to the declaration of undesirability in terms of s30(1)(h) of the Act read with regulation 27 of the Immigration Regulations.

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When the employees sought to enforce the retrenchment agreements, Fleet Africa contended that the retrenchment agreements were void because, at the time of the conclusion of the retrenchments agreements, Fleet Africa was not their employer.

In *Senne and others v Fleet Africa* [2016] ZALCJHB 48 the Labour Court was required to determine the date on which the old employer was substituted by the new employer pursuant to a s197 employee transfer.

The employees were employed by Fleet Africa. Fleet Africa had concluded an outsourcing agreement with the City of Johannesburg (City) in terms of which Fleet Africa rendered vehicle service and maintenance services to it. Upon termination of the outsourcing agreement on 28 February 2012, the services were insourced by the City. The City was of the view that s197 was not applicable to the insourcing of the services and accordingly, that the employees did not transfer back to it. The employees had to render services to Fleet Africa and received remuneration from Fleet Africa for rendering the services. Fleet Africa entered into voluntary retrenchment agreements with the employees between 7 and 18 May 2012.

In the interim, an arbitration and an appeal arbitration took place by agreement between the parties to determine whether s197 applied to the termination of the outsourcing agreement. On 29 May 2012, the appeal tribunal determined that s197 was applicable to the termination of the outsourcing agreement and that the employees should have transferred to the City on 1 March 2012.

When the employees sought to enforce the retrenchment agreements, Fleet Africa contended that the retrenchment agreements were void because, at the time of the conclusion of the retrenchments agreements, Fleet Africa was not their employer.

The court stated that the substitution of the old employer for the new employer is a consequence that flows from the transfer of a business as a going concern, however the time at which such substitution will occur is dependent on the facts of each case. Substitution often takes place at the time of the transfer of a business but, there are exceptions to this.

The transfer of a business is a separate concept from the time at which substitution takes place. Although s197 refers to 'automatic substitution', the timing of the substitution is not necessarily instant or immediate. 'Automatic' substitution does not necessarily equate to 'simultaneous' substitution.

The court found that Fleet Africa was the employer of the employees at the time that the retrenchment agreements were concluded because the employees continued to render service to Fleet Africa and received remuneration from Fleet Africa. Therefore, Fleet Africa was the true employer of the employees despite the date of the transfer of business being prior to the date that the retrenchment agreements were concluded. Thus the employees were entitled to enforce the retrenchment agreements against Fleet Africa.

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Old employers cannot escape liability simply as a result of the transfer of business. The court confirmed that the old employer may, in certain circumstances, still remain the true employer even after the date of transfer.

The purpose of s197 is not to absolve the old employer of all liability, but rather, to give employees an 'automatic claim against the new employer'. Old employers cannot escape liability simply as a result of the transfer of business. The court confirmed that the old employer may, in certain circumstances, still remain the true employer even after the date of transfer.

The transfer of a business and the effects of such transfer do not always occur at the same time. The time at which the consequences of such transfer will come into effect is dependent on the facts of each case. Thus to avoid liability post transfer of a business, the old employer must ensure that it does not continue to operate as the employer of the employees who are subject to transfer by virtue of s197. The old employer will not escape employment-related liability simply on the basis that it is considered the 'old employer' in a s197 transfer.

Kirsten Caddy and Sibusiswe Khumalo

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