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Employment Law ALERT

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Does the lapsing or termination of a fixed-term contract for the provision of a particular service give rise to a transfer in terms of section 197 of the Labour Relations Act 66 of 1995 to competitors who were already performing the same service?



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Terminating a fixed term service contract and the transfer of a business as going concern

Does the lapsing or termination of a fixed-term contract for the provision of a particular service give rise to a transfer in terms of section 197 of the Labour Relations Act 66 of 1995 to competitors who were already performing the same service?

This question was recently considered by the Labour Appeal Court (LAC) in *MTN (Pty) Ltd and Others v CCI SA (Umhlanga) (Pty) Ltd and Others* JA12/2023 [unreported]. The court had to determine if, where a business outsources a discrete business unit, the termination of that relationship triggers section 197. This case iterates that whether a transfer has taken place is dependent on the facts, which must establish the transfer objectively.

This matter was an appeal of a Labour Court judgment in which it was held that there had been a transfer of CCI SA's business as a going concern when its contract with MTN expired. In 2018, MTN outsourced its call centre business to CCI SA for a period of five years. It retained a discreet portion which it performed itself. CCI SA was required to, amongst other things, establish a discrete unit to exclusively service MTN from its Umhlanga and Sandton offices only, although it had offices in other locations. Employees servicing MTN had to be segregated and were held to strict confidentiality and non-disclosure obligations.

If they were deployed out of the MTN business unit, MTN required a six-month sanitization period. The number of employees in the business unit was determined by means of a forecast of the call volumes.

During the first year of the contract, CCI SA was the exclusive service provider. Thereafter, MTN was entitled to, and did, contract other service providers (iBridge Contract Solutions (Pty) Ltd (iBridge), and iSon Xperiences South Africa (Pty) Ltd (iSon)), which were inevitably competitors of CCI SA, to provide the same service. MTN and CCI SA tried unsuccessfully to negotiate an extension of the contract.

Termination of the contract

Upon termination of the contract, calls were redirected to iBridge and iSon. These service providers did not require a transfer of equipment or any other tangible or intangible assets from CCI SA since they were already providing the service, even before the expiry of CCI SA's contract with MTN. CCI SA had returned system access devices and codes to MTN which MTN



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in turn kept in its storeroom. There was also no handover of its historical call records to iBridge or iSon. iBridge and iSon did, however, receive an increase in their call volumes in the wake of the end of the CCI SA-MTN contractual relationship, forcing them to increase their staff complements in order to cope with the additional volumes. About 45 former CCI SA employees joined iBridge.

Did the operational capacity of CCI SA transfer to iBridge or iSon? It was inarguable that there was a discrete MTN business in the hands of the CCI SA, which existed as a going concern and was capable of being transferred. This did not per se prove that that business unit transferred once the contract terminated or that there was anything left to transfer upon expiry of the contract.

The LAC held that the expiry of the contract merely severed the contractual relationship between MTN and CCI SA. A potential trigger of a section 197 transfer was an up-take in calls redirected to iBridge and iSon which would have otherwise been

handled by CCI SA had the contract been extended. The court held that this fact was insignificant. There had to have been a transfer of CCI SA's MTN business unit. The court was not persuaded that a transfer of the business unit had taken place. First, the primary asset – being the contractual entitlement to render the call centre service – had ceased upon expiry of the contract. Second, the tools of trade (secondary assets) had been returned to MTN and kept in its storeroom. They were not transferred to iBridge or iSon. With regard to employees, in the instance of iBridge, which employed 45 of CCI SA's former employees, the court considered this to be too insignificant a number to give rise to a section 197 transfer.

What appears to have weighed materially is that although the consequence of the termination of the MTN-CCI SA contractual relationship was an increase in iBridge and iSon's volume of work, they could perform the service without a need to transfer anything from CCI SA. They had, in any event, already been

performing a similar service for MTN and did not have any components of CCI SA's business in their hands. The MTN business unit had become redundant and there was no transition replacement service provider. Furthermore, CCI SA had moved from being the exclusive service provider after the first year to a competing service provider.

Ultimately, the LAC held that on the facts of this case, there was no transfer as contemplated in section 197. This decision again highlights that there is no binary answer to the question of whether or not a business has transferred as a going concern when an agreement to provide a service is terminated. The facts must be carefully examined in order to determine whether, objectively, the business has transferred.

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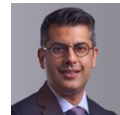
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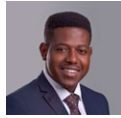
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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