

Beware when implementing Corona Induced Business Takeovers



The destructive effect on businesses by the lockdown has resulted in many business takeovers and mergers implemented to cut costs.

However, section 197 of the Labour Relations Act (LRA) requires the new employer, in a takeover as a going concern, to take over all the employees of the old employer. A takeover of an enterprise “as a going concern” essentially means that the new employer is carrying on the same business as the old employer after a takeover.

In such a case the new employer is required to take over the old employer’s staff with all their years of service and all their old terms and conditions intact. Due to this heavy burden and for other reasons, the new employer often wishes to retrench excess employees or requires the old employer to carry out the retrenchments before the takeover.

However, section 187(1)(g) of the LRA prohibits any retrenchment (or any other dismissal) related to a takeover as a going concern. Such terminations are deemed to be automatically unfair dismissals. This means that the dismissed employees could claim reinstatement or up to 24 months remuneration in compensation. It is important to stress that the provisions of sections 197 and 187 of the LRA apply not only to businesses but to all employers including government departments, welfare organisations, NGOs and all other enterprises that employ staff.

The purpose of this legislation is to preserve jobs by preventing employers from rationalising their workforces in circumstances of a takeover. However, because such legislation tends to discourage

takeovers, rescue bids for enterprises that are going under will also be discouraged. Such enterprises will often have to close down. Then, instead of a limited number of employees being retrenched during a rationalisation, all the employees will lose their jobs.

In the case of *Rubin Sportswear vs SACTWU and Others* (2004, 10 BLLR 986) the new employer agreed that it would not change any of the terms and conditions of the employees. However, after the takeover, the new employer declared, without any agreement, that the retirement age of the employees would be 60. When some of the employees turned 60 they were forced to retire and therefore claimed that they had been automatically unfairly dismissed. Their claim was based on the view that:

their terms and conditions had been unilaterally changed by the employer in the circumstances of a takeover of a going concern and that they had been discriminated against on the grounds of their age.

Both the Labour Court and the Labour Appeal Court found in favour of the employees and required the employer to pay compensation to the retired employees.

The Labour Appeal Court made the same finding in similar circumstances in the case of *Cash Paymaster Services (Pty) Ltd vs Browne* (2006, 2 BLLR 131). The employer was ordered to pay most of the employee's legal costs plus compensation in the amount of R684 621.

In *SAMWU vs Rand Airport Management Company (Pty) Ltd and Others* (2005, 3 BLLR 241) the employer wished to outsource its security and gardening services to contractors without having to transfer their gardeners and security staff to the contractors. The Labour Court found that such outsourcing would not constitute takeovers as going concerns as gardening and security were not truly parts of the employer's business. This decision left the employer free to implement the outsourcing. However, the Labour appeal Court overturned this decision and said that:

If the outsourcing went ahead it would constitute a transfer as a going concern

The employer would not be allowed to dismiss any of its employees as a result of the transfer.

The combination of sections 187 and 197 of the LRA have virtually closed the door on the practice of selling a business or outsourcing a service and then retrenching employees whose jobs become redundant as a result. Those employers who ignore this law will do so to their cost. Employers considering takeovers, buy outs, mergers or contracting/outsourcing arrangements are therefore advised, before implementing any transfers, to utilise their labour law experts to:

Analyse and explain the meaning of sections 197 and 187 of the LRA as well as of the developing case law in this area

Explain the significance of these laws for the specific circumstances of the employer

Work out a strategy for completing the takeover without infringing the ever tightening labour legislation.

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