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Buying or selling a company: what happens to the employees?

In the event that a company/business is sold as a 'going concern', *section 197 of the Labour Relations Act* becomes applicable.

Section 197 of the Labour Relations Act regulates the transfer of a business and the rights of all employees affected by the transfer. In terms of *section 197,* a 'business' includes the whole or a part of any business, trade, undertaking or service, while 'transfer' means the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern, which can also be referred to as the business changing hands.

How is the 'going concern' determined?

The test for determining a 'going concern' is a comparison of the business before and after the transfer and establishing whether it remains sufficiently the same. For *section 197* to be applicable, three elements must be present, namely:

- The business is transferred from one employer to another employer;
- The transfer includes the whole or a part of a business; and
- The business is transferred as a going concern.

What are the effects of a transfer as a going concern?

When the transfer takes place as a going concern, the new employer automatically replaces the old employer.

How to minimise the risks for both the old and the new employer while remaining compliant

- All rights of the employees of the old employer are protected when the business is transferred to the new employer. Thus, all rights and obligations that applied between the old employer and an employee shall remain in force between the new employer and the employee.
- On transfer, the new employer automatically replaces the old employer with regard to all contracts of employment (verbal or otherwise) with immediate effect.
- Any action taken by the old employer before the transfer shall be seen as having been taken by the new employer, including the unfair dismissal of an employee or any unfair labour practice or act of unfair discrimination.
- The employee's years of service will not be interrupted; thus the continuity of employment and an employee's contract of employment shall continue to apply under the new employer.
- The conditions of employment may not be less favourable under the new employer than they were under the old employer.
- Any collective agreement that had been concluded with the old employer, shall be applicable and remain in force under the new employer, such as an agreement reached with a trade union.

What do the above terms mean for the new employer?

The terms as set out above do not imply that the new employer may not, by agreement with the employee, change some of the conditions of employment. However, the emphasis is on ‘by agreement’ with the transferred employee.

Section 197(6) of the Labour Relations Act (LRA) allows parties to negotiate and agree on the amendment of the conditions for the transfer. Such an agreement must be concluded between the old employer, new employer and any party that would have been consulted in terms of *section 198 of the LRA* (consulting parties in a retrenchment procedure). If no such agreement had been reached, the old employer is automatically replaced by the new employer.

What are some of the aspects that the old employer and new employer must agree on before the transfer?

Section 197(7) of the LRA stipulates a few points on which the old and new employer will need to agree before the transfer takes place, namely:

- All leave accrued by the employees;
- The *severance pay* due to the employee should such employee be retrenched on the date of the transfer;
- Any other payments accrued by the employee that have not yet been paid to him/her.

In the absence of an agreement, the old employer is jointly and severally liable with the new employer for payments to be made to any employee as contemplated in section 7, as well as for any claim concerning any term or condition of employment that arose prior to the transfer.

What are the obligations of the employers after the transfer took place?

- For a period of 12 months after the transfer took place, the old and new employer shall be jointly and severally liable in the event of an employee becoming entitled to a payment in terms of dismissal related to the operational requirements of the employer or in the event of liquidation or sequestration. This shall not be applicable if the old employer can prove that he/she had complied with the terms as set out in *section 197 of the LRA*.
- In the case of an employee who resigns because the conditions of employment under the new employer are less favourable than under the old employer, it will be deemed a dismissal in terms of *section 186(1)(e) of the LRA.* A dismissal in terms of *section 186(1)(e)* refers to constructive dismissal where the employee resigned because the employer had made continued employment intolerable for the employee.
- Dismissal for a reason related to a transfer of a business as a going concern shall automatically be deemed an unfair dismissal in terms of *section 187(1)(g) of the LRA*. In the case of an automatically unfair dismissal, the employee could claim for up to 24 months' wages as compensation.

In conclusion, extensive responsibility is placed on the new employer in instances where employees are automatically transferred in terms of *section 197* to ensure that the transfer occurs in accordance with the regulations of the *LRA*.

SERR Synergy assists businesses and employers to ensure that the correct procedure is followed in terms of the relevant labour legislation and to mitigate the employer's risks in terms of a section 197 transfer.

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Sources: Labour Relations Act 66 of 1995