

Employment Law

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SOUTH AFRICA

Business unusual: Transfers of employment contracts in the context of a voluntary liquidation



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Business unusual: Transfers of employment contracts in the context of a voluntary liquidation

On 5 August 2024, the Constitutional Court refused leave to appeal in the matter of *Africa Online Operations (Mauritius) Ltd v Scanlon and Others* 2024 4 BLLR 357 (LAC). Leave to appeal was dismissed for want of jurisdiction and with costs. That means that the judgment of the Labour Appeal Court (LAC) in that matter stands.

The courts were called upon to decide whether there had been the transfer of a business as a going concern in circumstances where the "old employer" had entered into voluntary liquidation and where there was no contractual link between the "old employer" and the "new employer" to indicate a business transfer.

Background

The 14 respondent employees had previously worked for iWay Management Services (Pty) Ltd (iWay). iWay was part of the Gondwana International Networks (GIN) Group and provided shared services, essentially centralised management and support services, to all the operating companies within the GIN Group, including those in Uganda, Kenya, Ghana, Zambia, Namibia, Tanzania and Zimbabwe.

In October 2019, the ECHO Group (ECHO) acquired GIN. The employees of iWay transferred to ECHO International Management Services (Pty) Ltd (EIMS), in terms of section 197 of the Labour Relations Act 66 of 1995, as amended (LRA).

In early 2020, ECHO decided that it would no longer pursue the provision of centralised management services to group companies and that each operating company would add its own or obtain relevant services within their own markets. In light of this, the directors of ECHO and EIMS considered that EIMS had no economic prospects and on 28 February 2020 decided to liquidate EIMS.

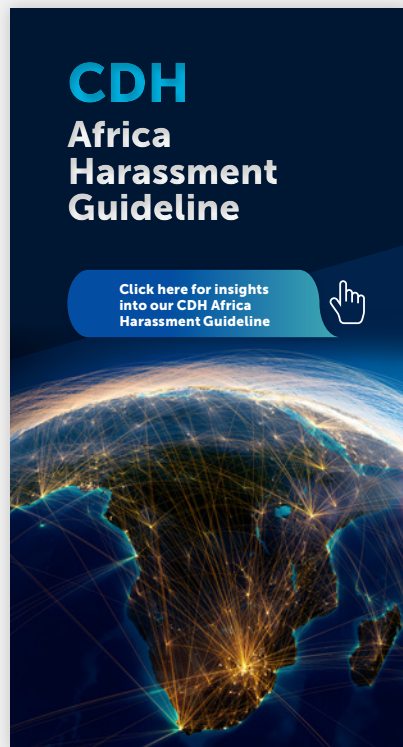
From about March 2020, Africa Online Operations (Mauritius) Ltd (AOOML), a company in the ECHO Group, provided the shared services that had been previously provided by EIMS. To ensure that the operating companies enjoyed the continued services of a number of key EIMS employees, AOOML concluded independent contractor agreements with many of them. These agreements showed that these so-called contractors were to perform the same activities that they did as employees of EIMS.

On 12 March 2020, Jacques Rautenbach, a director of the appellant, wrote to the managing directors of its operating companies, confirming that six of the EIMS employees were now contracted to AOOML, the operating companies would still have access to them and that it would be business as usual.

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Section 197A of the LRA

Section 197(1) of the LRA defines what constitutes a “business” and a “transfer” for purposes of section 197 and 197A, as follows:

- “(a) **“business”** includes the whole **or a part** of any business, trade, undertaking or service; and
- “(b) **“transfer”** means the transfer of a business by one employer (“the old employer”) to another employer (“the new employer”) as a going concern.” (emphasis added)

Section 197A(1) of the LRA states that section 197A applies to a transfer of a business if the old employer is insolvent, or if an arrangement is entered into to avoid winding-up or sequestration because of insolvency.

Section 197A(2) of the LRA states:

“(2) *Despite the Insolvency Act 1936 (Act No. 24 of 1936), if a transfer of a business takes place in the circumstances contemplated in subsection (1), unless otherwise agreed in terms of section 197 (6) –*

- “(a) *the new employer is automatically substituted in the place of the old employer in all contracts of employment in existence immediately **before the old employer’s provisional winding up or sequestration;***
- “(b) *all the rights and obligations between the old employer and each employee at the time of the transfer remain rights and obligations between the old employer and each employee;*

- “(c) *anything done before the transfer by the old employer in respect of each employee is considered to have been done by the old employer;*
- “(d) *the transfer does not interrupt the employee’s continuity of employment and the employee’s contract of employment continues with the new employer as if with the old employer.” (emphasis added)*

The Labour Court

The respondent employees launched an application in the Labour Court for a declarator that their contracts of employment had transferred to AOOML with effect from 1 March 2020.

Before the Labour Court, AOOML argued that a transfer cannot occur by coincidence and that there had to be a deliberate handing over or shifting of a business, as a going concern, for a transfer to take place for purposes of sections 197 and 197A of the LRA. AOOML argued that no business unit had transferred from EIMS to AOOML.



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Furthermore, AOOML argued that it did not perform the same tasks as undertaken by EIMS before its liquidation. While AOOML facilitated certain shared services, these were being rendered by independent contractors who were not part of any business in AOOML that supplied those services.

In respect of whether there had been a transfer, the Labour Court considered paragraph 85 of the Constitutional Court judgment in *Road Traffic Management Corporation v Tasima (Pty) Ltd* 2020 41 ILJ 2349 (CC) (*Tasima*) which held that:

"Section 197 requires that there must be a transfer of the business. A transfer entails the movement of the business from one party to another, and is a concept that was intended to be widely construed. A transfer under section 197 can take the form of a myriad of legal transactions, including mergers, takeovers, restructuring within companies, donations and exchanges of assets. In [National Education Health & Allied Workers Union v University of Cape Town and Others 2003 24 ILJ 95 (CC)], this court held that the substance rather than the form of the transaction is relevant to the determination of whether a transfer has taken place. The mode of transfer is irrelevant, and it is of no consequence whether there is a contractual link between the transferor and the transferee."

The Labour Court had no hesitation in finding that the functions rendered by AOOML after EIMS's liquidation constituted a business and, as such, there was a transfer of a business from EIMS to AOOML.

The Labour Court held that, while there was no sale, seeing as EIMS was placed in voluntary liquidation, there was an identifiable transaction that placed a business in different hands. This transaction was EIMS's voluntary liquidation, coupled with the decision that AOOML would continue with, or honour existing obligations in respect of, the EIMS shared services offering, with the result that a large part of the shared services moved from EIMS to AOOML.

The Labour Court held that the fact that six of the ex-EIMS employees were contracted to AOOML was indicative of the fact that there had been a transfer of a business as a going concern. The court found that this was done to ensure that, despite EIMS's liquidation, it would be business as usual for the operating companies, albeit with a reduced team.

The Labour Court granted that declarator on the basis that the shared services previously rendered by EIMS had simply changed hands through the instrumentality of the voluntary liquidation of EIMS.

The Labour Appeal Court

The LAC was aligned with the Labour Court. The LAC referred to the *dictum* of the Constitutional Court in *Tasima* that the substance rather than the form of the transaction is relevant to the determination of whether a transfer has taken place.

The mode of transfer is irrelevant, and it is of no consequence whether there is a contractual link between the transferor and the transferee.

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The LAC explained that to find in favour of AOOML would require the court to place the form of the transaction over its substance, which would subvert the operation of sections 197 and 197A of the LRA.

The LAC dismissed AOOML's appeal of the Labour Court's judgment, with costs.

Conclusion

Among other things, this case shows that our courts will carefully scrutinise any transaction and look to its substance in deciding whether there has been a transfer of a business as a going concern.

Businesses should be careful when concluding commercial transactions not to attempt to subvert the operation of sections 197 and 197A of the LRA.

This area of employment law remains complex. Whether sections 197 or 197A of the LRA applies remains a question of fact and will depend on the circumstances of each case.

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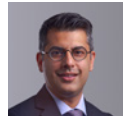
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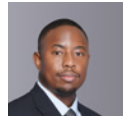
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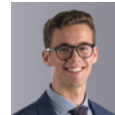
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