How SA employment law impacts corporate deals

By Tracy van der Colff

20 Nov 2023

Local and cross-border mergers and acquisitions, asset sales and share transfers trigger employment law consequences that could range from fairly straightforward to complex, requiring a well devised strategy.

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It is important to understand the underlying nature of the transaction, as each deal type will have a different consequence for a company's South African workforce.

Share sales

There are no statutory employment law implications that flow from direct and indirect share sales in a company. As there is no change in the employing entity, the employment relationship remains intact and governed by the same terms and conditions.

However, sometimes a share transfer will result in the target company entering or exiting a group company structure and the employing entity may want to harmonise employee benefits to avoid a proliferation of different terms and conditions within a workforce. The source of the benefit (contractual or policy) will determine how the employer should go about implementing any changes.

Changes to terms and conditions of employment will require employee consent, whilst changes to a workplace policy typically require prior employee consultation. Failure to follow the correct process when implementing changes will likely create an employee relations nightmare, not to mention the risk of employees instituting claims against the company (eg. for breach of contract or unfair labour practices).

Employees who no longer form part of the group of companies will generally not be permitted to participate in group plans (such as pension, provident and medical aid schemes) and employers will need to timeously consider contingency plans to ensure continuity, replacement, or changes to these benefits.

Business transfers and asset sales

South Africa's TUPE equivalent automatic employee transfer legislation, section 197 of the Labour Relations Act, provides that where the whole or part of a business transfers as a going concern, employees who are sufficiently connected to the transferring business will transfer automatically from the old to the new employer. Prior consultation with employees is not required and employees cannot object to the transfer.

When determining whether a business transfers as a going concern, a court will essentially consider whether the business remains the same but in different hands.

The Labour Appeal Court has succinctly summarised the meaning of "going concern" and held that it is a matter for objective determination after examining relevant factors including the impact on the goodwill of the business, the stock-in-trade, the premises of the business, contracts with clients or customers, the workforce, the assets of the business, the debts of the business, whether there has been interruption of the operation of the business and, if so, the duration thereof, whether the same or similar activities are continued after the transfer or not, etc.

Our courts have stressed on many occasions that the list of factors to determine whether a business transfers as a going concern is not exhaustive and no single factor is individually decisive. All the facts must be considered holistically in the overall assessment.

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When a business transfers as a going concern, there are certain automatic employee consequences that flow from the transaction:

- the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;
- all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;
- anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and
- the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer.

The new employer is obliged to employ the transferred employees on terms and conditions that are, on the whole, not less favourable. Our law does not require a line-by-line replication of benefits upon transfer. A 197 transfer, therefore, presents new employers with a unique opportunity to harmonise the benefits of the transferring employees with their existing workforce without needing to consult or obtain employee consent (provided employees are no worse off after the transfer).

Parties can vary the automatic consequences of section 197. This will require a written agreement between the employee, on the one hand, and the old or new employer on the other hand. The parties can agree that the employees will transfer on less favourable terms, employees who are in-scope to transfer will remain behind with the old employer or employees who would otherwise not be in-scope to transfer will move across to the new employer.

Despite the automatic nature of many of the employment consequences flowing from a business transfer, there are a few formalities that the old and new employer must attend to.

The old employer must:

- agree with the new employer to a valuation as at the transfer date of the notional leave pay and severance pay;
- conclude a written agreement that specifies, inter alia, which employer is liable for paying the above amounts, should they fall due.

The old employer is obliged to disclose the terms of this agreement to each transferring employee.

As a matter of best practice, the old and new employers should notify the employees about a pending automatic transfer. They can do so separately or jointly by issuing a 197 transfer or “welcome” letter to the transferring employees, including details about the transfer date, work location and employment terms and conditions.

Multi-jurisdictional considerations

The above article sets out some employment law considerations from a South African perspective. Whilst some of the underlying principles may be the same, each jurisdiction will have its own unique set of laws and regulations governing the employment law aspects of corporate transactions, ranging from highly regulated to not regulated at all. Often, prior information and consultation with employees or works council are required, failure of which can result in a delayed or stymied deal. Other times, there is no employment law framework, and the parties are required to negotiate and agree on the employment impact.

Crucial to managing the employment aspects of a multi-jurisdictional corporate deal will be a project team that deeply understands the deal structure in each jurisdiction and who can pressure test local counsel’s advice against the backdrop of a solid understanding of the deal structure, the company’s operations, vision and risk appetite.

ABOUT THE AUTHOR

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