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Date
23 March 2010

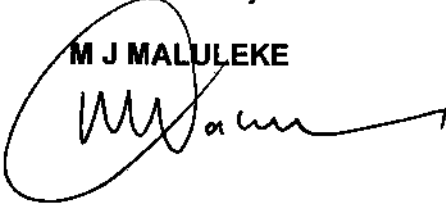
Dear Sir,

**RE: LEGAL OPINION RE THE APPLICATION OF S197 (LRA) ON TRANSFER OF
VACANT POSTS**

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1. We refer to the above and our consultation of 19 March 2010.
 2. Attached hereto please find our opinion as requested.
 3. We trust that you find the above to be in order and shall be pleased to hear from you in this regard.

Yours faithfully

M J MALULEKE



LEGAL OPINION

Instruction:

We have been requested by the Further Education and Training Colleges Employer organization (FETCEO) to advise on whether the transfer of contracts of employment in terms of S197 of the Labour Relations Act, included transfer of vacant positions from, the State represented by the Department of Education (old employer) to the council of the FET Colleges (new employer). The transfer was effected from 1 January 2008 and these vacant positions were subsequently filled on or after date of transfer. The collective agreements were concluded on 17th July 2007 and 31st August 2007 (Agreement No 4 and 5 of 2007 respectively). The instruction requires a strict interpretation of S197 and whether it includes transfers of vacant positions.

Documents for perusal

1. Collective agreement no 4 of 2007 which is the implementation of the FETC Act 16 of 2006
2. Collective agreement no.5 of 2007 which is the further agreement on the transfer of employees from the Department of Education to Individual FET Colleges
3. Founding agreement dated 9th June 2009
4. Collective agreement no 1 of 2009
5. Implementation of FETCBU collective agreement 1 Of 2009

This opinion is based on the information contained in these documents provided to us only.

Consideration of Case Law- and relevant Acts

1. Labour Relations Act 66/1995
2. FETC Act
3. Employment of Educator's Act 1998

4. Various case law on S197 Transfers

We have no information on the records of the Bargaining process and whether the issues surrounding vacant positions were at all discussed. If not, we cannot claim non-disclosure or *ultra vires* on behalf of the old employer. Consequently there would be no consensus on this issue and therefore no breach can be claimed on either of the parties. We doubt that this issue was discussed at all as it would have been specifically reduced to writing in the collective agreement.

Background

Collective agreements were entered into between the old employer and new employer in terms of S197 of the LRA, wherein transfer of employees was effected (refer to collective agreements No. 4 and 5 of 2007).

The agreements further set out the purpose, scope, principles of agreement and transfer and procedure in respect of other employees who elected to remain with the old employer. (This latter information we are not privy to).

The agreements are clear and if we understand correctly, there is no factual or legal dispute concerning this agreement save for the question whether the S 197 transfer of employees included the transfer of vacant positions.

The Applicable Legal Principles

1. S197 of the LRA is mainly concerned with transfers of contracts of employments. The application of this section is confined to the existence of a contract of employment. Accordingly only a contract of employment may be transferred from one employer to the other. It therefore would appear that if there is no contract of employment the enquiry regarding the application of S197 stops. It is not necessary to quote sections from the Act. (Please refer to S197 where necessary).

2. The collective agreement No 5 of 2007 refers to employees as defined in terms of the Employment of Educators Act (EEA) 1998 as amended.
3. On perusing and interpreting the definition of employees in the EEA, an educator is described as a person who teaches, educates or trains.
4. Chapter 3- Section 6(2) of the LRA refers to any collective agreement concluded by the ELRC, appointments, promotions or transfers to posts on any educator establishment under this Act shall be made in accordance with such procedure and such requirements as the Minister may determine.
5. The Collective agreement in Paragraph 3 states “ the parties have set out..., to effect the transfer of the employees as defined in terms of the Employment of Educators Act and who performs the managerial and lecturing functions.....” (See above definition of employees in terms of EEA)
6. Paragraph 3.1 continues to read “ a) Such transfer and absorption of employees shall be carried out in a fair , equitable and transparent manner b) the transfer and absorption of employees shall be subject to this agreement.”
7. The agreement deals only with the transfer of employees not vacancies.
8. (check if all employees were absorbed or if they had to apply for closed vacancy lists- see 3.13)
9. All rights and obligation passed from the old employer to new employer on 1 January 2008.

CASE LAW

The Courts have dealt with the interpretation of S 197 and the following principles have emerged:

National Education Health and allied Workers Union v University of Cape-
TRown 2000 JOL 6434 (LC)-

The matter involved the interpretation of S197 of the LRA- An application for a declaratory order that the outsourcing of certain maintenance functions

amounted to transfer of the business as a going concern and that the relevant employees' contracts were automatically transferred.

The Court held that a purposive approach must be adopted in interpreting S197. The substance of the transaction rather than the forms needs to be examined. While the purpose of the section was to protect employee's rights in transfers, this protection was not of a blanket nature. This section prohibits transfer of employment contracts without the consent of the affected employees. However an employer may transfer employment contracts without consent of the relevant employees where the business is transferred as a going concern. The outsourcing was not found to be seen as a transfer in terms of this Section.

NEHAWU v University of Cape-Town & Others 2003 JOL 10448 CC-

This matter also dealt with the court's interpretation of S 197.

The union argued that employment of members by contractors was a S197 transfer. The court found that upon the transfer of a business as a going concern, workers are transferred to the new employer. The fact that there was no agreement to transfer the workforce did not prevent a finding that the outsourcing was a transfer of business.

Kgethe & others v LMK Manufacturing 1997 JOLK 669 (W)

Dealt with the transfer of a contract of employment, prescribing that such relationship cannot be transferred unless part or whole of the business is transferred as a going concern. Where this is not so, the new employer may re-employ persons under different terms and conditions.

No case law exist on the application of S197 transfers to Vacant posts as opposed to contracts of employment as explained above.

Application of the legal principles to the issue

In following the principles laid down in the Case law and the relevant Acts, we express an opinion that we cannot find any legal basis upon which the new employer can hold the old employer responsible for the transfer of vacant positions which have subsequently been filled by the new employer. (were new contracts of employment entered into with the new employer, what were the new terms and conditions, what was the dispensation etc).

The collective agreement makes no reference to vacant positions unless the parties specifically discussed same and reduced it to writing in the collective agreement. We are not privy to information on whether this was discussed in the bargaining process.

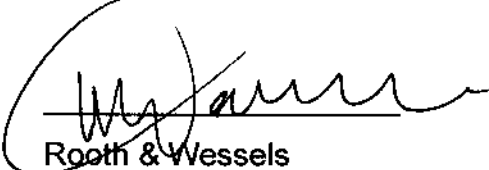
Paragraph 3.13 (iv) and (v) of the agreement refers to the procedure in respect of other employees:

“v. The filling of posts would be conducted in terms of the applied rules and procedures as set out in ELRC Resolution 5 of 1998 (PAM)...”

We were not privy to this Resolution and not sure whether the filling of these posts only referred to employees who elected to remain with the old employer and then had to apply for posts as advertised in a closed vacancy list. We are not sure as to what extent the vacant positions were discussed.

Based on your instruction and the information at our disposal, we conclude that to hold the old employer responsible for “transfer of vacant posts’ is risky and has very limited prospects of success. Accordingly it is our opinion that a transfer contemplated by S197 of the Labour Relations Act strictly interpreted does not apply to vacant positions.

DATED AT PRETORIA THIS THE 23RD DAY OF MARCH 2010


Rooth & Wessels