

RADAR SCREEN BY WILLIAM MAEMA

LABOUR RELATIONS Company merger and acquisition process is characterised by unbearable uncertainty and panic among staff

Kenya needs a law on transfer of employees

The enactment of Labour Laws 2007 has no doubt left Kenya standing among nations with the most robust workplace legal regimes in the world.

And that is further buttressed by the fact that the Employment and Labour Relations Court, which enjoys exclusive jurisdiction in the determination of labour disputes in Kenya, is known the world over for its pro-employee stance.

In many instances, the court has showed a willingness to bend double backwards to ensure employees who knock on its doors do not go home empty-handed unless their case is completely hopeless.

It is therefore surprising to note that unlike many other countries, Kenya has not enacted any legislation to regulate the seamless transfer of employees from one company to another in the event of a merger or acquisition of their employer by another entity.

As it were today, employees are in such cases left at the mercy of the acquirer, who by law has no obligation to absorb or retain them. Not surprisingly, therefore, news of a potential merger/acquisition of a business invariably sends cold shivers down the spines of Kenyan employees.

The whole process is characterised by unbearable uncertainty and panic among employees.

There is currently no law obligating the acquirer of a business to retain any of the existing employees or to honour

any employment terms agreed between the acquired company and its employees.

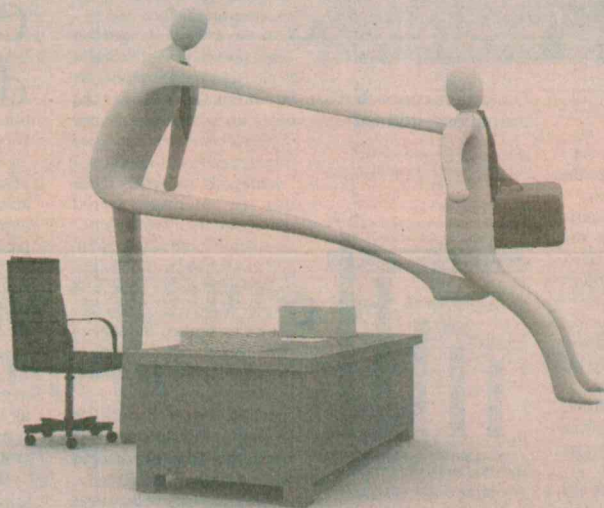
The fate of employees is consequently determined by the contractual terms agreed between the

two companies.

Never mind that the employees are generally not privy to negotiations concerning the transaction and their views are rarely sought.

Employees have to contend with one of two options when their employer is bought out. They must either agree to be employed afresh by the acquirer on such terms as the buyer may determine or accept a redundancy package and join the league of the jobless.

In the absence of a law regulating the matter and imposing obligations upon



BEST PRACTICE
Lessons from South Africa and Uganda

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should not have to lose employment because of a merger/acquisition of their employer by another entity.

Countries such as the UK, Singapore, South Africa and even Uganda have enacted legislation to protect employees in these circumstances.

The import of such laws is that the merger/acquisition has practically no impact on the employees. By law, the existing employment contracts are automatically transferred to the new employer, which thereafter assumes all the obligations of the employer going forward.

The acquirer therefore inherits all the rights and obligations of the previous employer, thereby ensuring that the employees are not adversely affected by the commercial transaction.

The laws also provide that before any merger/acquisition transaction is undertaken, statutory notification must be given to the regulator of the labour sector at least two months before the date of the intended merger/acquisition of the business.

This gives the regulator visibility into the transaction to ensure that employee rights are safeguarded throughout.

The current legal position in Kenya is most unsatisfactory.

The law does not impose any obligation on the transacting parties to consult with the employees or take any measures to protect their welfare.

Once in a while the competition au-

thority will, in the process of approving the merger/acquisition transaction, impose a condition that the acquirer shall absorb a certain percentage of employees. This is, however, a pyrrhic consolation in the sense that the condition does not usually set any minimum duration within which the acquirer should retain the stated proportion of employees after the transaction.

A law regulating the transfer of employees would also assist employers in fostering certainty during merger and acquisition negotiations.

At present companies are forced to make huge provisions in their books for redundancy payments in case the employees decline the new contracts.


Even where they accept new contracts but the acquirer is unwilling to book the redundancy liability in its books by recognising the past years of service, the employees are entitled to a redundancy package before transiting to the new employer.

A good law would provide that since in practical terms there is no loss of employment as such, any employee who declines to transit will not be entitled to a redundancy package.

This legal mechanism, if introduced, would significantly reduce the cost of merger and acquisition transactions and provide employees with the much-needed certainty and peace of mind. It can only be a win-win situation.

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