CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 97/14

In the matter between:

JOHANNES PETRUS LOUW HORN	First Appellant
LYDIA ADAMS	Second Appellant
LENA DOUW	Third Appellant
KATHARINA SUSANNA HOLTZHAUZEN	Fourth Appellant
BELINDA KARSTEN	Fifth Appellant
BASIL PAUL RUGHUBAR	Sixth Appellant
DIANA THERON	Seventh Appellant
LOVINA ELIZABETH YOUNG	Eighth Appellant
and	
LA HEALTH MEDICAL SCHEME	First Respondent
CAPE JOINT RETIREMENT FUND	Second Respondent

Neutral citation:	*Horn and Others v LA Health Medical Scheme and Another* [2015] ZACC 13
Coram:	Mogoeng CJ, Cameron J, Froneman J, Khampepe J, Leeuw AJ, Madlanga J, Nkabinde J, Tshiqi AJ, Van der Westhuizen J and Zondo J.
Judgments:	Nkabinde J (majority): [1] to [37] Zondo J (concurring): [38] to [140]

Heard on: 11 November 2014

Decided on: 14 May 2015

Summary: Leave to appeal granted on misrepresentation — right to a fair hearing — no constitutional issue raised — appeal dismissed with costs

The effect of section 197(2) of the Labour Relations Act 66 of 1995 on contracts of employment and rights and obligations concerning pension benefits and redundancy benefits upon transfer of business as a going concern — employees' right to redundancy benefit, if any, before transfer is taken over by business transferee

---

ORDER

On appeal from the Supreme Court of Appeal:

1. Condonation is granted.
2. The appeal is dismissed with costs.

JUDGMENT

NKABINDE J (Cameron J, Froneman J, Khampepe J, Madlanga J, Tshiqi AJ and Van der Westhuizen J concurring):

Introduction

[1] This is an appeal against a decision of the Supreme Court of Appeal[1] in terms of which the order granted by the Full Court of the Western Cape Division of the

[1] *LA Health Medical Scheme v Horn and Others* [2014] ZASCA 72; [2014] 3 All SA 421 (SCA) (Supreme Court of Appeal judgment).

High Court, Cape Town[2] (Full Court), upholding that of the High Court, per Erasmus J,[3] in favour of the appellants, was set aside. The key question we have been asked to determine is whether the appellants are entitled to an additional redundancy or retrenchment benefit specified under the Pension Fund Rules (Rules). Answering the key question involves the interpretation of rule 7.1A(1) of the Rules.[4] Also in question is whether the appellants' rights to be heard under section 34 of the

---

[2] *LA Health Medical Scheme v Horn and Others*, unreported judgment of the High Court of South Africa Western Cape Division, Cape Town, Case No A221/2012 (25 January 2013) (Full Court judgment) at para 37.

[3] *Horn and Others v Cape Joint Retirement Fund and Another* [2011] ZAWCHC 34 (1 March 2011) (High Court judgment).

[4] Rule 7.1A(1) "Redundancy or Retrenchment" provides:

> "The MEMBER'S conditions of SERVICE provide for an additional redundancy / retrenchment benefit to be paid by the LOCAL AUTHORITY.
>
> . . .
>
> REDUNDANCY / RETRENCHMENT BENEFIT FROM 1 MARCH 1999
>
> If a MEMBER'S SERVICE is terminated owing to a reduction in, or reorganisation of staff, or to the abolition of his [/ her] post, or in order to effect improvements in efficiency or organisation (which includes termination of SERVICE in order to establish equity in the workplace or to implement affirmative action programmes) or as the result of having been declared redundant or having been retrenched, on receipt of advice from the LOCAL AUTHORITY, he [/ she] shall be entitled to:
>
> (a) the MEMBER'S SHARE;
>
> PLUS
>
> (b) an amount payable by the LOCAL AUTHORITY concerned (and for which it alone shall be liable to the member), being the lesser of—
>
> (aa) the difference between the age of 65 years and his [/ her] age on his [/ her] nearest birthday, multiplied by 8%, multiplied by the MEMBER'S SHARE.
>
> OR
>
> (bb) 100% of the MEMBER'S SHARE.
>
> Provided that the amount payable by the LOCAL AUTHORITY in terms of paragraph (b) hereof, may be reduced if the MEMBER agrees thereto in writing; Provided further that the FUND shall only become liable to pay the amount in terms of paragraph (b) hereof, if and when the said amount has been paid by the LOCAL AUTHORITY to the FUND, and there is and shall be no obligation upon the FUND or the TRUSTEES to take any steps to enforce payment by the LOCAL AUTHORITY concerned of the said amount; Provided still further that if the LOCAL AUTHORITY concerned fails to pay the said amount to the FUND within seven days of termination of the MEMBER'S SERVICE in terms of this subsection, the FUND may nevertheless at its sole and exclusive option and election, and notwithstanding anything to the contrary herein contained, pay the amount to the MEMBER and it and/or the TRUSTEES may thereupon charge interest at the PREVAILING RATE on the said amount, calculated from the day on which payment thereof was made by the FUND to the MEMBER, up to and including the date on which the payment is received by the FUND from the LOCAL AUTHORITY.
>
> This benefit will change if the LOCAL AUTHORITY'S redundancy / retrenchment policy changes in terms of a collective bargaining agreement."

Constitution were violated and whether section 197 of the Labour Relations Act[5] (LRA) finds application in resolving the key question.

Parties

[2] The first appellant, a former Senior Manager in the employ of the first respondent, LA Health Medical Scheme (LA Health), represented the other appellants who are also former employees of LA Health. LA Health is a medical scheme registered in terms of the Medical Aid Schemes Act[6] which provides medical aid to local authorities in the Western Cape, Northern Cape and Eastern Cape.[7] As a result of their employment with LA Health and its predecessor, the Local Authorities Medical Aid Fund (LAMAF), the appellants were members of the second respondent, the Cape Joint Retirement Fund[8] (Fund), until 31 December 2004. The Fund is a defined contribution fund registered in terms of section 4 of the Pension Funds Act.[9] It was established for the purpose of benefiting employees of local authorities.

Background

[3] The appellants were former employees of LAMAF, which changed its name to LA Health with effect from 1 January 2005 when LA Health transferred the department in which the appellants were employed to Discovery Health (Pty) Ltd (Discovery). Before 1994, the Rules permitted employees who were not employed by a "local authority" within the meaning of the Income Tax Act[10] to become members of the Fund. Thus, although LAMAF was not a "local authority" under the

[5] 66 of 1995.

[6] 131 of 1998.

[7] Its predecessor, the Local Authorities Medical Aid Fund (Cape) was established in terms of section 2(1) of the Local Authorities (Medical Aid Fund) Ordinance 25 of 1967.

[8] The Cape Joint Retirement Fund was registered in terms of section 4(7) of the Pension Funds Act 24 of 1956.

[9] Id. At its inception Cape Retirement Amalgamated Joint Pension Fund (the current Fund's predecessor) was established by the Local Authorities (Pension Fund) Ordinance 23 of 1969 section 3(1)(a). Following a further iteration which like the Amalgamated Joint Pension Fund was a defined *benefit* fund, the current Retirement Fund, a defined *contribution* fund, was registered in 1996.

[10] 58 of 1962.

Income Tax Act,[11] its employees, including the appellants, were members of the Fund. The Rules were amended in 1994 to prohibit persons not employed by a "local authority" from becoming members. However the Commissioner of Inland Revenue accepted that all existing members of the Fund, despite not being employees of a local authority, could remain as members, and thus the appellants were permitted to continue with their membership of the Fund.[12]

[4] With effect from 1 July 2000, the Rules were then amended further, and rule 9.7(4) was added. That rule relates to members who are transferred to a new employer or a local authority which is not associated with the Fund.[13] This further amendment provides the transferred member with an option to elect to transfer his or her member's share in the Fund to the new employer or to leave that share in the Fund as a deferred benefit and then be regarded as a deferred member of the Fund. This rule also lays down the benefits which the deferred members are entitled to receive. In addition a new sub-rule was added to the existing rule 7.2, to enable members to elect to become a "DEFERRED MEMBER" of the Fund.

---

[11] Id at section 1(xiv).

[12] In addition to this, in terms of the Pension Fund Rules, "Local Authority" refers to:

> "(a) any other Local Government body including a District Council as defined for such purposes: and in relation to an EMPLOYEE or a MEMBER, the LOCAL AUTHORITY in whose SERVICE such EMPLOYEE or MEMBER is, provided that joining the FUND will occur on conditions set by the TRUSTEES.
>
> (b) Any other Local Government body or similar body constituted before 1995 and who is a participant of the FUND".

[13] Rule 9.7(4) provides:

> "MEMBERS who are transferred to a new employer or LOCAL AUTHORITY, not associated with the FUND, may be required, as a result of their new conditions of service, to terminate their membership of this FUND and join a Fund that is associated with their new Employer.
>
> (a) In such instance, the MEMBER will have the option to transfer his MEMBER SHARE to the Fund of the new Employer. The transfer of the MEMBER SHARE will be subject to taxation as is applicable at the date of the transfer to the new Fund.
>
> (b) The MEMBER may elect to leave his MEMBER SHARE as at the date of transfer, in the FUND, as a deferred benefit and he [/ she] will then be regarded as a DEFERRED MEMBER of the FUND."

The rule then proceeds to set out the circumstances in which a deferred member will be entitled to receive the benefit.

[5] On 31 May 2004, having caught wind of an impending transfer of their department to Discovery, the affected employees addressed a letter to LAMAF (LA Health). They maintained that a case could be made out for retrenchment. Consequently, they said there was a "possibility of the payment of a [redundancy or retrenchment] benefit in addition to the relevant employees' 'Member's share' as provided for in the Rules".

[6] On 1 January 2005 LA Health transferred its administration division to Discovery in terms of section 197(2)(a) of the LRA.[14] Discovery has not been a party to these proceedings at any point. It is common cause that on being transferred to Discovery, the appellants fell within the language of rule 7.1A(1) of the Rules because their employment positions had been abolished. Further, the Rules provided that payment of the benefit over and above the member's interest (to which all members were entitled) was to be funded by the local authority, which in this case would be LA Health, and not the Fund.[15]

[7] It is common cause that when the administration division was transferred to Discovery under section 197(2) the appellants, who had contributed to the Fund in accordance with the terms of their employment, reserved their rights to claim the redundancy or retrenchment benefit provided for in the Rules.[16] The Rules provided

[14] Section 197(2)(a) provides:

> "The new employer complies with subsection (2) if that employer employs transferred employees on terms and conditions that are on the whole not less favourable to the employees than those on which they were employed by the old employer."

[15] See above n 4. In particular this provision stipulates: "Provided further that the FUND shall only become liable to pay the amount in terms of paragraph (b) hereof, if and when the said amount has been paid by the LOCAL AUTHORITY to the FUND".

[16] The letter addressed to LAMAF (LA Health), in which the appellants reserved their rights with regard to the redundancy benefit provided for in the Rules notwithstanding the section 197 transfer, is instructive. It reads:

> "Voortspruitend uit die reëling wat LAMAF Mediese Skema met Discovery aangegaan het en wat betrekking het op Artikel 197(2) van die Wet op Arbeidsverhoudige, Wet 66 van 1995, *oefen die betrokkenes tans hul opsies uit met betrekking tot die onttrekking van hulle fondse uit bogenoemde Aftreefonds*.
>
> Die betrokkenes wat hierdie dokument onderteken, oefen die onderhawige opsies uit onderworpe aan die finalisering van die eis wat teen LAMAF ingestel is en wat betrekking het of Reël 7.1A ("Redundancy/Retirement") van bogenoemde Aftreefonds." (Emphasis added.)

Loosely translated, it reads:

that if a member's service is terminated owing to a reduction or reorganisation of staff or by the abolition of his or her post in order to effect improvements in efficiency or organisation or as a result of his or her post having been declared redundant or him or her having been retrenched, the member is entitled to a redundancy benefit.[17] As the employer at the relevant time, LA Health was bound by the Rules.[18]

[8] LA Health and Discovery concluded a memorandum of understanding[19] (MOU) in terms of which the latter undertook to offer all employees of LA Health

---

> "Arising from the arrangement made between LAMAF Medical Scheme and Discovery and which has bearing on section 197(2) of the [LRA], *those involved are currently exercising their option with reference to the withdrawal of funds from the abovementioned Retirement fund.*
>
> Those involved who have signed this document are exercising the option concerned subject to the finalisation of the claim instituted against LAMAF and which has bearing on Rule 7.1A ("Redundancy/Retirement") of abovementioned Retirement Fund." (Emphasis added.)

[17] Above n 4.

[18] Section 13 "Binding force of rules" of the Pension Funds Act above n 8 provides:

> "Subject to the provisions of this Act, the rules of a registered fund shall be binding on the fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming."

[19] The relevant parts of the MOU read:

> "1. Introduction
>
> . . .
>
> 1.2 It is envisaged that the employees of LAMAF will be transferred to Discovery in terms of section 197(2) of the Labour Relations Act.
>
> 2. Discussions with Employees
>
> 2.1 LAMAF shall as soon as possible . . . provide Discovery with a list of employees detailing their current positions, employment history, years of service, remuneration, outstanding leave pay and all other matters that may be applicable to the employees concerned;
>
> 2.2 Discovery will notify LAMAF . . . as to the employees of LAMAF with whom it wishes to hold discussions;
>
> 2.3 The purpose of such discussions will be to clarify the key performance areas, the terms and conditions of such employees and to establish how such employees can be transferred on terms and conditions that are on the whole no less favourable than those which they presently enjoy.
>
> 2.4 Subject to 2.3 above and whether or not Discovery interviews the employees of LAMAF as envisaged in 2.2 above it is anticipated that Discovery shall offer all employees of LAMAF affected by the Administration agreement, employment with Discovery on terms and conditions on the whole not less favourable than those which pertain to such employees of LAMAF.
>
> . . .
>
> 4. Due Diligence

affected by the administration agreement employment on terms and conditions not less favourable than those pertaining to their employment with LA Health.[20] In June 2004 the members of the Fund were informed of the following options available to them upon their transfer to Discovery, namely that—

(1) their member's share in the Fund could be transferred to Discovery;

(2) they could become deferred members of the Fund, thereby permitting them to preserve their benefit in the Fund until normal retirement age, without further contributions being made by the respective member or local authority; or

(3) they could transfer their member's share to a preservation fund, which was considered the best option in the light of the applicable tax legislation.

[9] Under this last option members had a once-off choice to withdraw a portion or 100% of their member's share. The majority of the appellants opted for the latter,

---

4.1 Discovery shall, as soon as practically possible . . . be entitled to conduct a due diligence exercise in respect of all employees of LAMAF whom it is anticipated will be transferred to Discovery.

4.2 In order to give effect to that due diligence exercise LAMAF undertakes:

. . .

4.2.3 to make available to Discovery the current rules of any Provident and/or Pension Fund of which the employees are members;

4.2.4 to make available any recognition and/or collective agreements between LAMAF and any Trade Union;

4.2.5 to make available any copies of any documents in respect of any litigation which is threatened or has been instituted by any current or ex employee of LAMAF in the CCMA, Labour Court or any other Court of Law;

. . .

5. General

. . .

5.2 This memorandum of understanding shall be binding upon the parties hereto, provided that the parties shall use their utmost endeavours to enter into a formal agreement encapsulating the terms and conditions hereof, should the parties conclude the Administration agreement."

[20] Id. See specifically clause 2.4 of the MOU.

withdrawing their member's share after transfer to a preservation fund.[21] Those that did so withdrew their member's share after it was transferred to a preservation fund. They then continued employment with Discovery, from 1 January 2005.

High Court

[10] The appellants instituted proceedings in the High Court against LA Health and the Fund, claiming payment of the additional redundancy or retrenchment benefit under rule 7.1A(1)(b).[22] This claim was based on the alleged obligation of LA Health to make payment to the Fund to finance the additional benefit payable to the individual appellants under rule 7.1A(1). The appellants said that the obligation arose "from the terms and conditions of their contracts of employment and because [LA Health] was an employer participating in or associated with the Pension Fund". They contended that in terms of the Rules and the conditions of employment of the individual appellants, the additional benefit, in so far as it exceeded each of the individual appellants' member's share in the Fund, had to be financed by LA Health.

[11] The appellants' case thus rested on the interpretation of the Rules, in particular the introductory words of rule 7.1A(1). These read: "The member's conditions of

[21] This is borne out by the appellants' respective banking details pursuant to the option elected by them. The amounts ranged from just under two hundred thousand rand (R196 965.82 in the case of the third appellant) to well over one million rand (R1 668 454.51 in the case of the first appellant).

[22] The relief sought in para 1 of the notice of motion was:

> "1. Ordering the [Fund], upon receiving payment [from LA Health in terms of para 2 of the notice of Motion] to pay each of the individual [appellants] identified in Annexure (A) hereto:
>
> 1.1 The additional benefit specified in paragraph (b) under the heading, "REDUNDANCY/RETRENCHMENT BENEFIT FROM 1 MARCH 1999" in Rule 7.1A(1) of the Rules of the [Fund], calculated as at 1 January 2005 in respect of each of the respective individual [appellants].
>
> 1.2 Interest at the [Fund's] 'prevailing rate' (as defined in Rule 1.7 of the Rules of the [Fund]) as was applicable from time to time since 1 January 2005, alternatively at 15.5% per year on the additional benefit payable to each of the respective individual [appellants] from 1 January 2005.
>
> 2. Ordering [LA Health] forthwith to make payment to the [Fund] of [the amounts listed in 1.1 and 1.2]."

service provide for an additional redundancy / retrenchment benefit to be paid by the Local Authority."[23] The parties proffered different interpretations.

[12] Basing their claim under rule 7.1A(1) and the terms and conditions of their contracts of employment with LA Health,[24] the appellants claimed that—

> "[a] concomitant of employees' compulsory membership of the Pension Fund and the participation of [LA Health] with the Pension Fund was that [the employer] had bound [itself] towards [its] employees who were members of the Pension Fund to perform the obligations stipulated for participating local authorities in the rules of the Pension Fund as they existed and were amended from time to time".

[13] The appellants claimed further that the obligations LA Health was bound to perform were those that "arose as necessary incidents of LAMAF [/ LA Health] participating in and associating [itself] with the [Fund]".

[14] In its response to the appellants' contention that they were entitled to the additional redundancy or retrenchment benefit, LA Health asserted that it was not a local authority. It contended that the plain meaning of rule 7.1A(1) is that whether an additional redundancy or retrenchment benefit may be paid depends upon the conditions of service applicable to the employment. It said that nowhere in the conditions of service is provision made for the additional redundancy or retrenchment

[23] In support, they referred to a copy of LA Health's "Conditions of Service" and to a "Retrenchment / Redundancy Policy" which was attached to the LAMAF Staff Conditions.

[24] While the appellants referred only generally to the LAMAF Staff Conditions, they placed special reliance on the "Retrenchment / Redundancy Policy", by which they aimed to establish that the Rules were incorporated by reference in section 7. That section reads:

> "7.2 LAMAF may provide that the employees concerned be retired in terms of the Pension Rules.
>
> 7.3 The employee will also receive all payments he / she is entitled to in terms of his / her contract of employment i.e. leave pay, pro rata share of bonus, notice pay, etc."

They did not attach their contracts of employment to the founding papers.

benefit,[25] save for what is provided for in the retrenchment policy regarding dismissals.[26] The Fund abided the decision of the Court.

[15] In reply, the appellants contended that the benefits need not be provided for in the conditions of service. It is only those additional benefits over and above those set out in rule 7.1A(1) that must be provided for in the conditions of service should the employer wish to do so.

[16] The High Court, per Erasmus J, remarked that the appellants had accepted the application of section 197, in particular that in having been transferred to Discovery under section 197, LA Health's employees had also been retrenched as defined by rule 7.1A. The Court, however, noted LA Health's contention that it was a "'non issue' that the transfer brought about a termination of the [appellants'] employment with [LA Health]".[27] The High Court referred to the issue to be decided as follows:

> "*[W]hether the individual applicants are, in terms of the Pension Fund Rules, entitled to receive the benefits stipulated in Rule 7.1A(1) of the Pension Fund Rules.* The conditions of service only became relevant insofar as it makes it compulsory for the employee to belong to the [Fund]. The rules then bind the employer and the employee."[28] (Emphasis added.)

[17] The High Court, having had regard to *Telkom*[29] and *IMATU*,[30] held that "the transfer of the individual [appellant's] service with [LA Health] with effect from 1 January 2005, has the effect that the individual [appellants] became entitled to the

---

[25] The appellants did not take issue with this claim.

[26] Para 7.5 of the policy stated:

> "LAMAF will pay an employee who is dismissed for reasons based on the employer's operational requirements severance pay equal to at least <u>two</u> weeks remuneration for each completed year of continuous service with LAMAF. All subsidies normally received by an employee must be included in the remuneration calculations." (Emphasis in original.)

[27] High Court judgment above n 3 at para 25.5.

[28] Id at para 26.

[29] *Telkom SA Ltd and Others v Blom and Others* [2003] ZASCA 67; 2005 (5) SA 532 (SCA) (*Telkom*).

[30] *Independent Municipal & Allied Trade Union & Others v Cape Joint Retirement Fund & Others* (2008) 29 ILJ 1687 (C) (*IMATU*).

benefits specified in the Rules" and that, consequently, they are entitled to the relief sought in the notice of motion.[31] The Court ordered the Fund to pay the appellants the additional benefit upon receiving payment from LA Health plus interest.[32] It also ordered LA Health to pay costs.[33]

[18] However, on the basis of the holding in *IMATU 2*,[34] where another judge of the High Court, Thring J, came to the opposite conclusion on the same legal question, the High Court granted LA Health leave to appeal to the Full Court.[35]

Full Court

[19] The Full Court[36] also grappled with the interpretation of rule 7.1A(1).[37] It ultimately confirmed the decision of the High Court. It held that the correct interpretation of "additional benefit" in the opening sentence of rule 7.1A(1) is that it serves as "no more than a recordal of a factual situation".[38] The "additional benefit", the Full Court remarked, was that which appeared in the policy documents.[39] Furthermore, the Court held that the phrasing of additional benefit in the notice of motion and in the affidavit did not lend support for the interpretation contended for by LA Health.[40] The Court dismissed the appeal with costs. It subsequently dismissed the application for leave to appeal to the Supreme Court of Appeal with costs. LA

[31] High Court judgment above n 3 at para 40.

[32] Id at para 41.

[33] Id at para 42.

[34] *Independent Municipal and Allied Trade Union and Others v Cape Joint Retirement Fund and Another*, unreported judgment of the High Court Western Cape Division, Cape Town, Case No 18743/2007 (24 November 2009) (*IMATU 2*).

[35] *LA Health Medical Scheme v Horn and Others*, unreported judgment of the High Court of South Africa Western Cape Division, Cape Town, Case No 18886/2007 (25 May 2011). The costs of the application for leave to appeal were costs in the appeal.

[36] Saldanha J, Baartman J and Louw J.

[37] Full Court judgment above n 2 at paras 6, 12, 18 and 24.

[38] Id at paras 18 and 37.

[39] Id at para 18.

[40] Id.

Health successfully petitioned the Supreme Court of Appeal for special leave to appeal.[41]

Supreme Court of Appeal

[20] LA Health's successful appeal rested also on the interpretation of rule 7.1A(1).[42] Having dealt with the background context to this rule, the Supreme Court of Appeal noted that "[o]ther than a cryptic provision that the employer 'may provide' that the affected employee be retired in terms of the pension fund rules, which the employer in this case did not provide, there is no reference to the benefit in rule 7.1A(1)".[43] In relation to the introductory words of the rule, the Supreme Court of Appeal held that the words "did not record anything in relation to the conditions of service of employees of LA Health".[44] The Court remarked that "[t]he introductory words only make sense if they refer to the local authorities that had agreed to provide [the additional] benefits to their employees in terms of a collective agreement".[45] It found that, in that event, the terms of the collective agreement would have been incorporated in the employees' contracts of employment by virtue of section 23(3) of the LRA.[46]

[21] The Supreme Court of Appeal concluded that "when rule 7.1A(1) is viewed in context, the references to the 'local authority' in that rule can only be construed as references to local authorities properly so called and not to other employer members of the fund falling within the extended definition of that term in para (b) of the definition of 'local authority'".[47] That being so, the Court said, the rule did not apply

[41] On 24 April 2013 the Supreme Court of Appeal, per Lewis JA and Pillay JA, granted special leave to appeal to that Court.

[42] The Supreme Court of Appeal upheld the appeal with costs and replaced the order of the Full Court with the order: "The appeal is upheld with costs and the order of the court below is altered to one dismissing the application with costs."

[43] Supreme Court of Appeal judgment above n 1 at para 17.

[44] Id at para 18.

[45] Id.

[46] Id.

[47] Id at para 19.

to LA Health and its employees and the appellants were not entitled, when they were transferred to Discovery, to claim the additional redundancy or retrenchment benefit under the rule.[48]

[22] In answer to the appellants' argument that the finding that the rule did not apply would leave employees of LA Health (and any other member of the Fund similarly situated) empty-handed if they were retrenched, the Supreme Court of Appeal found that those employees and members would still be entitled to their member's share in terms of the rule. It said:

> "The structure of rule 7.1A(1), in all the forms it took over the years, was that the retrenched member would receive their member's share plus the benefit provided by the local authority. This is the 'additional' benefit referred to in the introductory words and it was so understood by the [appellants] who had all received their member's shares on withdrawal from the Fund. The relief they sought in the notice of motion was payment of the additional benefit provided under the rule, which payment was to be funded by LA Health. Rule 7.1A(1) did not add anything to their existing entitlement to the member's share as a withdrawal benefit under rule 7.1(1), nor did the lack of entitlement to the additional benefit detract from the entitlement to the withdrawal benefit."[49]

[23] The appellants took issue with the manner in which the Supreme Court of Appeal contextualised the background to the genesis of the rule. They sought leave to appeal to this Court.

In this Court

[24] Concurrently with setting this matter down, this Court granted the appellants leave to appeal.[50] They challenged the decision of the Supreme Court of Appeal on

---

[48] Id.

[49] Id at para 20.

[50] The order dated 7 August 2014 reads:

> "The Constitutional Court has considered this application for leave to appeal. It has concluded that leave to appeal should be granted.

various grounds. They took issue with that Court's interpretation that the incorporation of the original rule into the Rules was for the benefit of employees of local authorities in the strict sense (including only those local authorities as defined in the Rules) and not in the extended sense (which would include local authorities that were no longer defined as such under the Rules but had remained incorporated in the definition as per the Commissioner's pronouncement).[51] The appellants contended that the Supreme Court of Appeal had regard to facts that did not form part of the evidence and that they were not afforded the opportunity to dispute the version of the genesis and development of the rule that that Court relied upon.[52]

Issues

[25] Leave to appeal having been granted, the contentions by the parties raise the following questions:

(a) Were the appellants' section 34 rights[53] violated by the Supreme Court of Appeal (procedural ground)?

(b) Are the appellants entitled to the payment of the benefit in terms of rule 7.1A(1)?

(c) Is section 197 applicable to the determination of whether the appellants are entitled to the payment of the additional benefit in terms of rule 7.1A(1)?

[26] Before I deal with the merits, I deal first with a preliminary issue regarding condonation of the late filing of the statement of facts by the appellants.

Order:

1. Leave to appeal is granted

2. Costs will be in the appeal."

[51] Supreme Court of Appeal judgment above n 1 at para 19.

[52] Id at paras 8-14. For example, at para 9, the Supreme Court of Appeal regarded as obvious that the original wording of the Rule at the time of its introduction in 1996 was inspired by the "massive restructuring of local authorities then taking place as a result of the advent of democracy".

[53] Section 34 of the Constitution reads in full:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum."

Condonation

[27] LA Health was directed to file an agreed statement of facts by 27 August 2014.[54] If the parties could not agree on a statement of facts, following the filing of LA Health's statement of factual findings on or before 27 August 2014, the appellants were directed to file a statement setting out the factual findings that were disputed on 3 September 2014. No agreement was in fact reached, and thus the appellants' statement of disputed factual findings was to be filed by that date. However, the appellants only properly filed their statement on 12 September 2014. An electronic version was tendered to the Court on 3 September 2014 but this, on its own, does not constitute proper filing according to this Court's Rules.[55] Their statement was thus late by seven days; the explanation proffered for the delay, which is reasonable, is that they only became aware of the fact that their statement had not been filed in accordance with the rules on 9 September 2014 when their correspondent attorneys conveyed the Registrar's message that their filing had not complied with proper procedures. LA Heath does not oppose the condonation. It is in the interests of justice to condone the delayed filing of the statement.

Merits

[28] The appellants contended that the Supreme Court of Appeal decided the appeal on a ground of appeal not advanced in the High Court nor raised on appeal to it. Using strong language, they maintained that they were "ambushed" by the judgment because they were not afforded the opportunity to dispute the version adopted by the Supreme Court of Appeal regarding the genesis and development of the rule.

[54] The directions issued by the Chief Justice, in relevant part, read:

> "2. The respondents must, on or before 27 August 2014, file an agreed statement of facts based on the factual findings of the High Court and the Supreme Court of Appeal that are pertinent to the issues. If no agreement can be reached:
>
> (a) The applicants must, on or before 3 September 2014, file a statement setting out the factual findings of the High Court and the Supreme Court of Appeal that the applicants dispute together with only those portions of the record that are relevant to the impugned findings."

[55] Rule 1(3) of this Court's Rules.

LA Health contended that the Supreme Court of Appeal judgment provided legal certainty, that that Court did not improperly take notice of facts that did not form part of the evidence and that the appellants were afforded an opportunity to be heard on the issue of the genesis and development of the rule upon which it relied. Although LA Health conceded that the application raises a constitutional issue, it contended that leave to appeal should have been refused.

[29] The Constitution guarantees everyone "the right to have any dispute that can be resolved by application of the law decided in a fair public hearing before a court".[56] In *Stopforth*[57] this Court held that this right has substantive and procedural components both of which need to be upheld.

[30] The pleaded procedural ground, implicating the appellants' rights to a fair hearing, indeed imbued this Court with jurisdiction. This Court has held in *Gcaba*[58] that in applications for leave to appeal "[j]urisdiction is determined on the basis of the pleadings . . . and not the substantive merits of the case".[59] It follows that, on what this Court was told in the pleadings when the application was lodged, leave to appeal was properly granted.

[31] When the record of the proceedings *a quo* was subsequently lodged, it became apparent that the application for leave to appeal was gravely misleading. The claim that the Supreme Court of Appeal "ambushed" the appellants was false. The appellants had, as a matter of fact, been afforded an opportunity by the Supreme Court of Appeal, not once but twice, to make submissions on the genesis and development of rule 7.1A(1): indeed, the appellants were expressly required by the Supreme Court

[56] See above n 53 where the provision is set out in full.

[57] *Stopforth Swanepoel & Brewis Incorporated v Royal Anthem Investments 129 (Pty) Ltd and Others* [2014] ZACC 26; 2015 (2) SA 539 (CC) (*Stopforth*) at para 25.

[58] *Gcaba v Minister for Safety and Security and Others* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC).

[59] Id at para 75.

of Appeal to make submissions on the history of rule 7.1A(1).[60] The assertion that the appellants were "ambushed" by the judgment of the Supreme Court of Appeal is thus not only ill-founded and disingenuous but also borders on perjury.

[32] Where does that leave the appeal – leave to appeal having been granted, on the basis of misleading averments? The issue regarding the entitlement to the redundancy or retrenchment benefit requires a proper interpretation of the rule. However, it is well established that matters involving the straight application of law that do not raise a constitutional question about the validity or the proper interpretation of that law are not constitutional issues.[61] The interpretation of rule 7.1A(1) does not, in and of itself, raise a constitutional issue. Moreover, the appellants have not shown how any matter of constitutional import is implicated by either of the interpretations contended for by the parties. It is therefore not necessary to determine whether the appellants are entitled to the additional benefit under rule 7.1A(1). In any event, there is no merit in the attack on the interpretation of the rule by the Supreme Court of Appeal, which was in all respects correct.

[33] The appeal must be dismissed on the ground that the facts and issues before the Court do not invoke its jurisdiction.[62] The fact that leave to appeal is granted on the basis of what is alleged in the pleadings does not mean that the appeal itself cannot be dismissed if it subsequently appears that those allegations are not proven.

---

[60] The record shows that on 9 April 2014 the parties were urgently requested by the Registrar of the Supreme Court of Appeal to "provide the Court with the history of rule 7.1A(1) as reflected in the records of the Financial Services Board, in particular when it was introduced and / or amended."The second opportunity to be heard is evidenced in the cover letter to the submissions made by LA Health to the Supreme Court of Appeal wherein it was said that in relation to the appeal "*the Court requested Counsel to provide*, preferably in electronic form, *a copy of the full rules of the Cape Joint Retirement Fund*" (emphasis added).

[61] *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 15.

[62] In the United States, the Supreme Court sometimes dismisses a case after granting *certiorari* for an oral hearing by announcing that the writ of *certiorari* is "dismissed as improvidently granted" (DIG); for a helpful analysis see Solimine and Gely "The Supreme Court and the DIG: An Empirical and Institutional Analysis" 2005 *Wisconsin Law Review* 1421. It seems to be a practical, flexible and appropriate mechanism to respond to situations where, following the filing of the record, for instance, a different set of facts and issues emerge that alter the Court's initial assessment of the facts and issues.

[34] I have had the benefit of reading the judgment of my brother, Zondo J, in which he opines that the determination of the matter requires the interpretation and application of section 197 of the LRA. It bears emphasis that throughout this litigation, the question of the transfer under section 197 of the LRA was a non-issue.[63] It is common cause that the appellants reserved their rights to claim the additional benefit in terms of the Rules of the Fund. The determination of the interpretation and applicability of section 197 is, in my view, not dispositive of the key question referred to above.[64] Accordingly, in the view I take of the matter, the interpretation and applicability of section 197 is not an issue "which ought to be considered by [the] Court".[65]

[35] In addition, Discovery was never joined as a party. To hold that the obligation the appellants sought to enforce against LA Health was one that was taken over by Discovery by virtue of section 197 without joinder of Discovery should not be done.[66] And to join Discovery at this late stage of the appeal process, in a lost cause, would simply cause the parties unnecessary trouble, expense and delay.[67]

---

[63] High Court judgment above n 3 at para 6. In this regard see also the Supreme Court of Appeal judgment above n 1 at para 5, where it characterised the issue as involving the interpretation of rule 7.1A(1).

[64] Section 197 would, in my view, aid only in determining *who* would be responsible for the payment of the alleged additional benefit, not the crisp question on appeal which is *whether* the appellants are entitled to the benefit.

[65] Section 167(3) of the Constitution provides:

> "The Constitutional Court—
>
> (a) is the highest court of the Republic; and
>
> (b) may decide—
>
> (i) constitutional matters; and
>
> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance *which ought to be considered by that Court*; and
>
> (c) makes the final decision whether a matter is within its jurisdiction."
>
> (Emphasis added.)

This aspect underscores the overall interest of justice criterion.

[66] *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (AD) at 663.

[67] Id.

[36] Accordingly, the appeal should fail.

Order

[37] The following order is made:

1. Condonation is granted.
2. The appeal is dismissed with costs.

ZONDO J (Mogoeng CJ and Leeuw AJ concurring):

Introduction

[38] The question before us in this appeal is whether the Supreme Court of Appeal was right in its judgment in holding that the appellants were not entitled to the payment of an additional redundancy benefit that they sought to compel LA Health Medical Scheme (LA Health), the first respondent and their former employer, to pay to the Cape Joint Retirement Fund (Fund), the second respondent, which in turn was to pay the benefit to the appellants. The judgment is that of Wallis JA in which Navsa JA, Maya JA, Saldulker JA and Mathopo AJA concurred.[68] The Supreme Court of Appeal's decision was based on an interpretation of the Rules of the Fund. In the view I take of the matter, before we can consider whether in terms of the Rules of the Fund the appellants were entitled to the payment, we need to consider a prior question. That is whether the obligation that the appellants seek to enforce against LA Health is not an obligation that was taken over by Discovery Health (Pty) Ltd (Discovery) when LA Health transferred its administrative division to Discovery as a going concern. In this judgment I refer to this question as the section 197 point.

[68] Supreme Court of Appeal judgment above n 1.

[39] If the answer to the question is that the obligation was taken over by Discovery, LA Health cannot be liable and the appeal should be dismissed. If, however, the obligation was not taken over by Discovery, then the Rules of the Fund should be examined to determine whether LA Health was indeed obliged to pay the additional redundancy benefit in terms of the Rules of the Fund. This question arises because it is common cause that section 197 of the Labour Relations Act[69] (LRA) applied to that transfer of business and because of the provisions of section 197(2) of the LRA. Section 197(2)(b) provides that, unless otherwise agreed in terms of subsection (6), all the rights and obligations in existence between the business transferor and an employee at the time of the transfer continue in force, after the transfer, as if they had been rights and obligations between the business transferee and the employee.[70]

Background

[40] This appeal originates from a claim that the appellants instituted against the first and second respondents by way of motion proceedings in the Western Cape Division of the High Court. Prior to, and, until 31 December 2004 the appellants were employed by the Local Authorities Medical Aid Fund (LAMAF) in its administrative division. LAMAF changed its name to LA Health (Pty) Ltd with effect from 1 January 2005. During their employment by LAMAF, the appellants were members of the Fund. LAMAF participated in the Fund as their employer.

[41] It is common cause that the appellants and LAMAF were bound by the Rules of the Fund. The relevant part of Rule 7.1A(1)(b) of the Rules of the Fund reads:

> "REDUNDANCY / RETRENCHMENT BENEFIT FROM 1 MARCH 1999.
>
> If a MEMBER'S SERVICE is terminated owing to a reduction in, or reorganisation of staff, or to the abolition of his [/ her] post, or in order to effect improvements in

[69] Above n 5.

[70] Note that in this judgment the terms "business transferor" and "business transferee" are used even though the Act uses "old employer" and "new employer".

efficiency or organisation (which includes termination of SERVICE in order to establish equity in the workplace or to implement affirmative action programmes) or as the result of having been declared redundant or having been retrenched, on receipt of advice from the LOCAL AUTHORITY, he [/ she] shall be entitled to:

(a) the MEMBER'S SHARE;

PLUS

(b) an amount payable by the LOCAL AUTHORITY concerned (and for which it alone shall be liable to the member), being the lesser of—

(aa) the difference between the age of 65 years and his [/ her] age on his [/ her] nearest birthday, multiplied by 8%, multiplied by the MEMBER'S SHARE.

OR

(bb) 100% of the MEMBER'S SHARE.

Provided that the amount payable by the LOCAL AUTHORITY in terms of paragraph (b) hereof, may be reduced if the MEMBER agrees thereto in writing; Provided further that the FUND shall only become liable to pay the amount in terms of paragraph (b) hereof, if and when the said amount has been paid by the LOCAL AUTHORITY to the FUND, and there is and shall be no obligation upon the FUND or the TRUSTEES to take any steps to enforce payment by the LOCAL AUTHORITY concerned of the said amount; Provided still further that if the LOCAL AUTHORITY concerned fails to pay the said amount to the FUND within seven days after termination of the MEMBER'S SERVICE in terms of this subsection, the FUND may nevertheless at its sole and exclusive option and election, and notwithstanding anything to the contrary herein contained, pay the said amount to the MEMBER."

[42] The Fund was mainly for employees of local authorities. As a result, its Rules referred to local authorities when they referred to employers participating in the Fund. By some arrangement LAMAF had been allowed to participate in the Fund even though it was not a local authority. One of the questions which arises in the interpretation of Rule 7.1A(1) is whether the reference to local authority in that Rule

is a reference to a local authority proper or whether the reference also includes LAMAF.

[43] It is common cause that—

(a) with effect from 1 January 2005 the administrative division of LAMAF was transferred from LAMAF, the business transferor, to Discovery, the business transferee, as a going concern as contemplated in section 197(1) of the LRA;

(b) the administrative division formed a part of LAMAF's business until 31 December 2004;

(c) upon the transfer of the administrative division as a going concern from LAMAF to Discovery, Discovery was substituted in LAMAF's place as the employer of the appellants with effect from 1 January 2005 and it took over all the contracts of employment of the appellants.

[44] The appellants' case is that the transfer of the administrative division terminated their contracts of employment with LAMAF for redundancy or as part of retrenchment. In this regard they contend that the posts that they occupied at LAMAF ceased to exist. They say that this brought them within the ambit of Rule 7.1A(1)(b) of the Rules of the Fund. They contend that, as a result of the termination of their services, or, as a result of that declaration of redundancy or as a result of retrenchment, with effect from 1 January 2005 an obligation arose for LA Health to pay the additional redundancy benefit to the Fund so that the Fund could pay it over to them. The appellants submit that that obligation was part of their terms and conditions of employment. The dispute between LA Health and the appellants is whether that obligation existed or exists. LA Health contends that neither the conditions of service of the appellants nor the Rules of the Fund made provision for that obligation. The appellants contend that Rule 7.1A(1)(b) provides for that obligation.

[45] The Courts below decided the matter on the basis of different interpretations of the Rules of the Fund without any regard to section 197 of the LRA. The judgment by my Colleague, Nkabinde J, (main judgment), which I have had the opportunity of reading, is to the effect that there is no constitutional issue in this matter and, therefore, this Court has no jurisdiction. It reaches this conclusion after a discussion of the Rules of the Fund and despite the fact that this matter raises the interpretation of section 197(2) of the LRA. The main judgment does not consider section 197. It says that this is because section 197 is "not material", that the appellants reserved their rights and that section 197 is not dispositive of the matter. I deal with these points one by one.

[46] The statement in the main judgment that section 197 is not material is not substantiated. The statement is difficult to understand because it is common cause between the parties that section 197 applied to the transfer of the administrative division from LAMAF / LA Health to Discovery as a going concern. The affidavits, the correspondence between the parties and the memorandum of understanding signed between LAMAF and Discovery reveal an acceptance by all concerned that section 197(2) was applicable in this case. Section 197(2) sets out mandatory consequences of a transfer of business as a going concern on contracts of employment and the employment relationships between, on the one hand, the business transferor and the employees and, on the other, the business transferee and the employees. I cannot see how it can be said that a statutory provision that spells out mandatory consequences if a certain event occurs can be said to be immaterial in a case where it is common cause that the event has occurred and the question is whether or not a certain consequence falls within the ambit of the prescribed consequences. The statement seems to suggest that, just because the point was not raised by any of the parties, it cannot be raised *mero motu* by the Court nor may it form the basis of the Court's decision.

[47] In suggesting so, the main judgment is incorrect. The suggestion is contrary to a well-known principle of our law that a court may raise a point of law *mero motu* at

any time and decide a matter on the basis of that point if to do so would not involve any unfairness to any of the parties. On this I can do no better than refer to an articulation of this principle by this Court in *CUSA v Tao Ying Metal Industries and Others.*[71] In that case this Court said:

> "Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality. Accordingly, the Supreme Court of Appeal was entitled *mero motu* to raise the issue of the Commissioner's jurisdiction and to require arguments thereon."[72] (Footnotes omitted.)

[48] That is what happened in this case. The statements in the affidavits of both parties in the High Court that the transfer of the administrative division was a transfer of business as a going concern and their acceptance that section 197 applied to that transfer, made the section 197 point quite apparent. The parties were invited to deal with the point and they did so. All parties accepted that the Court was entitled to raise the section 197 point of its own accord in this case even at this stage of the litigation because that point is purely a point of law. Furthermore, the section 197 point is not a point that would have made it necessary for any party to place any evidence before the Court that had not been placed before the Court already. None of the parties indicated that there would be any unfairness to it if the case was decided on the basis of the section 197 point. Therefore, in terms of the decision of this Court in *CUSA* we were obliged to raise and deal with the section 197 point.

[49] The main judgment points out that the appellants reserved their rights before the transfer of business. It seems to suggest that that would have prevented Discovery from taking over the rights and obligations of LAMAF / LA Health upon the transfer

[71] *CUSA v Tao Ying Metal Industries and Others* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) (*CUSA*).

[72] Id at para 68.

of business as a going concern in terms of section 197(2). As a matter of law, the consequences that section 197(2) says flow from a transfer of business as a going concern cannot be prevented by a reservation of rights that falls outside of a subsection (6) agreement. The appellants cannot contract out of section 197 or avoid the consequences of section 197 in any way other than by resigning before the transfer of business or by concluding a subsection (6) agreement.

[50] The European Court of Justice has taken the view that an employee cannot waive his or her rights arising out of a transfer of business under Article 3 of the Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (1977 EEC Directive)[73] which I discuss later in this judgment. This is because of the public policy on which Article 3 is based.[74] I think that, subject to subsection (6), the same would apply to an employee's rights under section 197. If an employee cannot waive his or her section 197 rights outside of a subsection (6) agreement, he or she can also not reserve such rights outside of a subsection (6) agreement. The main judgment also concludes that section 197 is not dispositive of the matter. That is not correct because, if the obligation to pay the additional redundancy benefit was taken over by Discovery upon the transfer of business with effect from 1 January 2005, LA Health cannot be liable for the payment of that benefit. That conclusion, based on the interpretation of section 197(2), would be dispositive of the entire dispute.

[51] The view I take of this matter is that, since the administrative division in which the appellants were employed by LAMAF was transferred as a going concern with effect from 1 January 2005, there is a question that arises in regard to the appellants' claim even before one can get to the question whether the Rules of the Fund or the appellants' conditions of service contained the obligation that the appellants seek to

[73] The Acquired Rights Directive 77/187/EEC of the European Council of 14 February 1977 No L 61/26 Official Journal of the European Communities 5.3.77.

[74] *Martin and Others v South Bank University* [2004] IRLR 74 (*Martin*) at para 40.

enforce against LA Health. That question is whether, if ever LAMAF had such an obligation at the time of the transfer, Discovery took it over as a consequence of the transfer of business as a going concern with the result that the appellants should have sued Discovery and not LA Health. If the answer is that Discovery did not take that obligation over, then we can inquire into the correct interpretation of the Rules of the Fund to determine the dispute. However, if the answer is that one of the consequences of the transfer of the administrative division was that Discovery took over that obligation, that would be the end of the matter because it will mean that the appellants sued a wrong party.

Jurisdiction of this Court

[52] We granted the appellants leave to appeal against the judgment of the Supreme Court of Appeal when this matter was set down. During the hearing a question arose whether this Court had jurisdiction in this matter and whether the decision to grant leave was correct. For this reason it is necessary to briefly state why this Court has jurisdiction and why granting leave was correct. We could only grant leave to appeal if we were satisfied that this Court had jurisdiction. The main judgment holds that this Court does not have jurisdiction. It says this within the context of the interpretation of the Rules of the Fund but overlooks the fact that this matter raises the interpretation of section 197 of the LRA which is legislation enacted to give effect to section 23 of the Constitution. The determination of this matter requires the interpretation and application of section 197(2) of the LRA. If the obligation sought to be enforced by the appellants against LA Health falls within the ambit of section 197(2) of the LRA, then it was taken over by Discovery upon the transfer of the division. If it doesn't fall within the ambit of section 197(2)(b), then it may have remained with LA Health. Whether the obligation falls within section 197(2)(b) or not is a matter for the construction of section 197 of the LRA. As this Court has said before, the interpretation and application of the LRA is a constitutional issue.[75] Accordingly, this Court has jurisdiction.

[75] *National Education Health & Allied Workers Union v University of Cape Town and Others* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*NEHAWU*) at paras 14-5.

Leave to appeal

[53] With regard to leave, there are also proper grounds to justify our decision to grant leave to appeal. Leave is granted if it is in the interests of justice to grant leave. All the matters that have come before this Court concerning section 197 of the LRA have revolved around the question whether the transaction concerned constituted a transfer of business as a going concern.[76] That in this case the transaction was a transfer of business as a going concern is common cause. The question that arises is: what is the effect of a transfer of business as a going concern on obligations that the business transferor had before the transfer concerning employment benefits for employees employed in the business that has been transferred? In other words, do they remain with the business transferor or are they taken over by the business transferee? That is a question that requires an interpretation of section 197(2) of the LRA. This Court has never made a pronouncement on that question. This case gives this Court an opportunity to make a pronouncement on the scope of section 197(2)(b). In particular, it gives this Court an opportunity to pronounce on whether there are exceptions to section 197(2)(b) of the LRA when there is a transfer of business as a going concern.

[54] The question whether it is the business transferor or the business transferee who is liable, after the transfer of business, for the performance of obligations that would have been the business transferor's before the transfer is an important question that deserves the attention of this Court. There are reasonable prospects of success for the appellants. This matter has already been heard by a total of nine judges, four of whom found in the appellants' favour and five of whom found in LA Health's favour.[77] In my view it was in the interests of justice to grant leave to appeal in this case.

[76] Id and see also *Aviation Union of South Africa and Another v South African Airways (Pty) Ltd and Others* [2011] ZACC 39; 2012 (1) SA 321 (CC); 2012 (2) BCLR 117 (CC) at para 33 and *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and Others* [2015] ZACC 9 at para 1.

[77] In the Court of first instance the matter was heard by a single judge who found in favour of the appellants. In an appeal to the Full Bench, the matter was heard by three judges who unanimously found for the appellants as

The appeal

[55] It is important to point out that, although the obligation that the appellants wish to enforce is said to be contained in the Rules of the Fund, the Fund is nothing more than a conduit through which a benefit that an employer may be bound to pay its employees gets paid to the employees albeit via the Fund. In terms of the Rules of the Fund, the Fund is not liable to pay the alleged additional redundancy benefit to the appellants until the employer has paid the benefit to the Fund. It would only be once the Fund has received the payment of the additional benefit that it would be obliged to pay it over to the appellants if they qualified for payment in terms of the Rules of the Fund.

[56] For the reasons that follow I am of the view that any liability that LAMAF / LA Health may have had arising out of Rule 7.1A(1), if the appellants' services were terminated for redundancy or if they were retrenched and if there had been no transfer of business as a going concern, was taken over by Discovery with effect from 1 January 2005. Accordingly, LA Health cannot be liable for the payment of the additional redundancy benefit claimed by the appellants.

[57] As the determination of this matter requires an interpretation of the provisions of section 197 of the LRA, it is appropriate to bear in mind certain constitutional and statutory injunctions and factors required to be borne in mind in interpreting legislation in general and the LRA in particular. Section 23(1) of the Constitution provides that "everyone has the right to fair labour practices". Section 39(2) provides that, "when interpreting any legislation . . . every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights". Section 233 of the Constitution provides that "when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law".

---

well. In the Supreme Court of Appeal the appeal was heard by five Judges who unanimously found for LA Health.

[58] It is trite that purposive interpretation must be invoked in construing the LRA. Section 1 of the LRA states that the purpose of the LRA is "to advance economic development, social justice, labour peace and the democratisation of the workplace". The LRA seeks to achieve this purpose by fulfilling its primary objects.[78] Those primary objects include giving effect to and regulating the fundamental rights conferred by section 23 of the Constitution and giving effect to international obligations incurred by the Republic as a member state of the International Labour Organisation.[79]

[59] Before I go into an analysis and discussion of section 197 of the LRA it is important to understand the background to the section. Before the enactment of section 197, the position in our law was that, if an employer (the business transferor) transferred its business or part of its business as a going concern to another person (the business transferee), that was an acceptable reason for the business transferor to terminate the contracts of employment of the employees employed in the business. That enabled the business transferee to employ its own workforce in that business after the transfer. In employing its own workforce in the business, the business transferee was free to pick and choose among the workforce of the business and offer employment to those it liked and not offer employment to those it did not like. Therefore, the transfer of a business as a going concern meant that employees employed in the business lost employment, or, if they did not lose employment, they lost their previous service under the business transferor and other benefits. Section 197 changed all that. Its primary purpose is to safeguard the rights of employees when there is a transfer of business as a going concern and the business changes hands.

[60] Section 197(1) and (2) reads:

[78] See section 3 of the LRA.

[79] Id.

"Transfer of contract of employment

(1) In this section and in section 197A—

(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.

(2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6)—

(a) 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;*

(b) *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;*

(c) *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*

(d) *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*." (Emphasis added.)

[61] Certain features of section 197(2) need to be highlighted. These are that—

(a) subsection (2) sets out specific consequences that flow from the transfer of a business as a going concern but those consequences only follow if

there is no agreement contemplated in subsection (6) to the contrary.[80] This means that it is important to enquire at an early stage whether in a transfer of business as a going concern there is a subsection (6) agreement. A subsection (6) agreement may ensure that any consequence of a transfer of business as set out in section 197(2) is avoided. However, where there is no subsection (6) agreement, the consequences set out in subsection (2) follow upon the transfer of a business as a going concern. In the case of pension rights and obligations, in addition to there being no subsection (6) agreement, there should also be no transfer of members of the pension fund to another pension fund as contemplated in section 197(4) before the consequences of a transfer of business as a going concern may follow. In the present case there is no subsection (6) agreement. Nor was there a transfer of members to another pension fund;

(b) the consequence in paragraph (a) of subsection (2) is that the business transferee takes over all the contracts of employment in existence "immediately before the transfer". Paragraph (a) is about the effect of a transfer of business on contracts of employment;

(c) the consequence in paragraph (b) of subsection (2) relates to:

(i) all the rights and obligations contained in sources such as statutes, common law or agreed rules as opposed to those

---

[80] Section 197(6) of the LRA reads:

"(a) An agreement contemplated in subsection (2) must be in writing and concluded between—

(i) either the old employer, the new employer, or the old and new employers acting jointly, on the one hand; and

(ii) the appropriate person or body referred to in section 189(1), on the other.

(b) In any negotiations to conclude an agreement contemplated by paragraph (a), the employer or employers contemplated in subparagraph (i), must disclose to the person or body contemplated in subparagraph (ii), all relevant information that will allow it to engage effectively in the negotiations.

(c) Section 16(4) to (14) applies, read with the changes required by the context, to the disclosure of information in terms of paragraph (b)."

contained in contracts of employment. Obviously, any rights and obligations that are contained in contracts of employment that attached to the business transferor before the transfer attach to the business transferee after the transfer because the latter is substituted in the place of the business transferor in respect of all the contracts of employment of the employees. It stands to reason that the rights and obligations referred to in paragraph (b) are rights and obligations that might not necessarily be contained in the contracts of employment. These would be rights and obligations that existed between the business transferor and each employee at the time of the transfer of business as a going concern which may be found in statutes, agreed rules, common law and subordinate legislation;

(ii) the idea behind paragraph (b) of subsection (2) was to cover those rights and obligations that may have existed between the business transferor and each employee at the time of the transfer that related to the employment relationship but were not contained in contracts of employment. To the extent that the alleged obligation that the appellants seek to enforce may be found in the Rules of the Fund, and to the extent that the provisions of those Rules did not form part of the contracts of employment, the business transferor's obligation in question would fall under paragraph (b) of subsection (2);

d) paragraph (c) of subsection (2) covers liability, after the transfer, that would have arisen from anything done by the business transferor before the transfer. In the absence of paragraph (c), the business transferor would have remained liable, after the transfer of business, for anything it had done before the transfer. Without paragraph (c) of subsection (2), the business transferee would not be liable for anything done by the transferor before the transfer;

(e) paragraph (d) of subsection (2) deals with the continuity of employment of the employees whose contracts of employment are taken over by the business transferee; paragraph (d) makes it clear that the transfer of business as a going concern does not itself interrupt an employee's continuity of employment.

[62] In the light of paragraphs (a) and (b) of subsection (2) the answer to the question whether the alleged obligation was not taken over by Discovery upon the transfer of the administrative division must be that it was. If that obligation was part of the appellants' contracts of employment, then it was taken over by reason of paragraph (a) of subsection (2). If the alleged obligation was not part of the contracts of employment but was, nevertheless, an obligation affecting the employment relationship, then it was taken over by reason of paragraph (b) of subsection (2). The language used in paragraph (b) is very wide. The paragraph says that, if a business is transferred as a going concern, unless otherwise agreed in terms of subsection (6)—

> "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*."

[63] If the obligation was in existence at the time of the transfer, it continued in force beyond the transfer but, after the transfer, it was borne by Discovery, the business transferee. If the obligation was not in existence at the time of the transfer but arose after the transfer, then that obligation can only be enforced against the business transferee and not the business transferor.

[64] In my view paragraph (b) of subsection (2) achieves two objectives. The first objective is covered by the first part of the paragraph and the second objective by the second part of the paragraph. The first part of the paragraph ends with the word "force" just before the words "as if". The second part of the paragraph starts with the words "as if" and continues up to the end of the paragraph. The first objective is the continuation in force of all the rights and obligations that were in existence between

the business transferor and every employee at the time of the transfer. Without the second part of the paragraph, that objective could have been achieved by the first part of the paragraph.

[65] The second part of paragraph (b) has the same effect as a deeming provision. This proposition is based on the role of the words "as if" in that paragraph and the tense used in the second part of the paragraph. The second part is to the effect that all the rights and obligations that existed between the business transferor and an employee at the time of the transfer are to be treated "as if" they had been rights and obligations between the transferee and the employees. That is the same as to say that, after the transfer, those rights and obligations are deemed to have been rights and obligations between the business transferee and each employee prior to the transfer even though, as a matter of fact, before the transfer of the business, they existed between the business transferor and the employees. The tense that is used in paragraph (b), namely, the past participle tense, underscores this effect of the second part of the paragraph.

[66] It will be noted that there is no provision in section 197 to the effect that there are rights and obligations that are excluded from the rights and obligations to which reference is made in paragraph (b) of subsection (2). The 1977 EEC Directive made an exception in Article 3(3) to the provision that all rights and obligations of the transferor transfer to the transferee upon the transfer of business. The Transfer of Undertakings (Protection of Employment) Regulations (1981 TUPE Regulations)[81] also made an exception in Regulation 7(1) to the general rule that, when there is a transfer of business as a going concern, all the rights and obligations that attached to the business transferor at the time of the transfer are transferred to the business transferee. Apart from that, the language used in section 197(2)(b) is very wide and is not qualified other than by the requirement that the rights and obligations be "between the old employer and an employee at the time of the transfer". Other than that, section 197(2)(b) says that all the rights and obligations between the business

[81] 1981 No 1794.

transferor and each employee at the time of the transfer continue in force as if they were rights and obligations between the business transferee and each employee. A suggestion that the obligation that the appellants seek to enforce falls outside the ambit of section 197(2)(b) would require a justification as to how that is possible in the light of the wide language used in paragraph (b). The appellants have failed to proffer such a justification. In my view there is no exception provided for in section 197(2)(b) and, therefore, the obligation sought to be enforced by the appellants falls within the ambit of section 197(2)(b).

[67] It is by now trite that section 197 was inspired by the provisions of Article 3 of the 1977 EEC Directive[82] and by the 1981 TUPE Regulations.[83] It is also accepted that, although there are certain differences in the language of Article 3 of the 1977 EEC Directive and the 1981 TUPE Regulations, on the one hand and that of section 197, on the other, there is much overlap in the points that section 197 and these instruments make.

[68] What is covered by paragraphs (a) and (b) of section 197(2) is covered in substance by Article 3(1) of the 1977 EEC Directive. Article 3(1) reads:

> "The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of article 1(1) shall, by reason of such transfer, be transferred to the transferee."[84]

[69] Regulation 5(1) and (2) of the 1981 TUPE Regulations covers paragraphs (a), (b) and (c) of section 197(2) of the LRA. Regulation 5(1) and (2) reads as follows:

---

[82] Since the 1977 EEC Directive, there have been further directives issued. These are the Council Directive 98/50/EC (an amendment to the 1977 EEC Directive) and Business Transfers Directive 2001/23/EC.

[83] In 2006 new TUPE Regulations were issued and in January 2014 another set was issued. These are the Transfer of Undertakings (Protection of Employment) Regulations 2006/246/EC and The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014/16/EC.

[84] I have left out the second part of Article 3(1) that permits member states to provide for joint liability of the business transferor together with the business transferee in respect of obligations that arose from a contract of employment or employment obligations.

> "(1) A relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor in the undertaking or part transferred but any such contract which would otherwise have been terminated by the transfer shall have effect after the transfer as if originally made between the person so employed and the transferee.
>
> (2) Without prejudice to paragraph (1) above . . . on completion of a relevant transfer—
>
> (a) all the transferor's rights, powers, duties and liabilities under or in connection with such a contract, shall be transferred by virtue of this Regulation to the transferee; and
>
> (b) anything done before the transfer is completed by or in relation to the transferor in respect of that contract or a person employed in that undertaking or part shall be deemed to have been done by or in relation to the transferee."

However, both Article 3(3) of the 1977 EEC Directive and Regulation 7(1) and (2) of the 1981 TUPE Regulations contained exceptions to the general rule that all the rights and obligations existing between the business transferor and an employee at the time of a transfer are, by reason of such transfer, transferred to the transferee.

[70] Article 3(3) read:

> "Paragraphs 1 and 2 shall not cover employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security scheme in Member states."

Regulation 7(1) and (2) of the 1981 TUPE Regulations read:

> "7 *Exclusion of occupational pension schemes*
>
> (1) Regulations 5 and 6 above shall not apply—
>
> (a) to so much of a contract of employment or collective agreement as relates to an occupational pension scheme

> within the meaning of the Social Security Pensions Act 1975(a) or the Social Security Pensions (Northern Ireland) Order 1975(b); or
>
> (b) to any rights, powers, duties or liabilities under or in connection with any such contract or subsisting by virtue of any such agreement and relating to such a scheme or otherwise arising in connection with that person's employment and relating to such a scheme.
>
> (2) For the purposes of paragraph (1) above any provisions of an occupational pension scheme which do not relate to benefits for old age, invalidity or survivor shall be treated as not being part of the scheme."

[71] Regulation 7 of the 1981 TUPE Regulations dealt with the exclusion of rights and obligations arising from or connected with occupational pension schemes from the transfer of rights and obligations from the business transferor to the business transferee when there was a transfer of business as a going concern. Very remarkably, section 197 does not make any provision for the exclusion of any rights and obligations connected with pension schemes from being taken over by the business transferee under either paragraph (a) or (b) of section 197(2). This is quite remarkable because the drafters of the LRA must be taken to have been aware of the fact that the 1977 EEC Directive and the 1981 TUPE Regulations excluded rights and obligations relating to certain pension schemes from the rule that, upon the transfer of a business as a going concern, the business transferor's rights and obligations are taken over by, or, are transferred to, the business transferee. They must have deliberately decided not to follow the example of those instruments on this point. Instead, we have what appears to have been intended as an escape route from the consequences of paragraphs (a) and (b) of section 197(2). That is section 197(4).[85]

[85] Section 197(4) of the LRA reads:

> "Subsection (2) does not prevent an employee from being transferred to a pension, provident, retirement or similar fund other than the fund to which the employee belonged prior to the transfer, if the criteria in section 14(1)(c) of the Pension Funds Act 1956 (Act No. 24 of 1956), are satisfied."

[72] It seems to me that section 197(4) is, to section 197(2), what section 43(7)[86] of the Labour Relations Act, 28 of 1956, as amended, (1956 LRA) was to section 43(4)[87] of that Act. Section 197(4) means that, if employees are transferred from the pension fund of which they were members before the transfer to another fund as contemplated in that provision, the business transferee does not have rights and obligations that attach to the pre-transfer pension fund.

[73] The conclusion that the obligation the appellants seek to enforce in this case, if ever there was one at the time of the transfer of business as a going concern, was taken over by the business transferee and did not remain with the business transferor is

[86] Section 43(4) of the 1956 LRA gave the Industrial Court the power to make an interim order of reinstatement that entailed the physical reinstatement of a dismissed employee but section 43(7) provided that, if an employer paid an employee his or her remuneration during the operation of such an interim reinstatement order, that constituted compliance with the reinstatement order issued in terms of section 43(4). Section 43(7) of the 1956 LRA read:

> "If an order is made not to suspend or terminate the employment of any employee, or if such suspension or termination has already occurred, to rescind the suspension or to reinstate an employee, an employer who pays to an employee the remuneration which would have been due to the employee in respect of his normal hours of work had his employment not been suspended or terminated or such lesser remuneration as the industrial court may determine taking cognisance of any remuneration to which the employee has in the meantime become entitled by virtue of work performed by such employee, shall be deemed to have complied with the order."

[87] Section 43(4) of the 1956 LRA read:

> "(a) Unless the industrial court on good cause shown decides otherwise, no order may be made under this subsection if the relevant application under subsection (2) was not made within 30 days of the date on which notice was given of the alleged unfair labour practice, or if no such notice was given, of the date on which the alleged unfair labour practice was introduced.
>
> (b) After considering—
>
> (i) whether the applicant has complied with the relevant provisions of this section;
>
> (ii) the facts set out in the application and the affidavits as contemplated in subsection (3)(b);
>
> (iii) any oral representations or evidence allowed by the industrial court;
>
> (iv) whether the applicant has in good faith endeavoured to settle the dispute by agreement or otherwise; and
>
> (v) whether it is expedient to grant an order in terms of this section,
>
> the industrial court may make such order as it deems reasonable in the circumstances: Provided that no party may be ordered to pay damages of whatever nature and the court may at any time, on the application of any party to the dispute, in respect of which application the provisions of subsection (3) shall apply, withdraw or vary any such order."

consistent with the statutory regime created by the LRA in sections 197 and 197A for the protection of the rights of employees. It cannot be said that the drafters of the LRA did not apply their minds to the question whether there could be cases where certain obligations should remain with the business transferor and not be taken over by the business transferee notwithstanding the fact that a transfer of business as a going concern has taken place. This is because in section 197A provision is made for the rights and obligations in existence between the business transferor and every employee at the time of the transfer to remain with the business transferor and each employee where the transfer of business occurs in circumstances of insolvency. Therefore, a comparison of section 197 and section 197A[88] reveals that the scheme that was created is one where it is in cases of the transfer of a business under insolvent circumstances that the LRA provides for the rights and obligations existing between the business transferor and the employees at the time of a transfer to remain with the business transferor and every employee.

[88] Section 197A(1), (2) and (3) reads:

> "(1) This section applies to a transfer of a business—
>
> (a) if the old employer is insolvent; or
>
> (b) if a scheme of arrangement or compromise is being entered into to avoid winding up or sequestration for reasons of insolvency.
>
> (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.
>
> (3) Section 197(3), (4), (5) and (10) applies to a transfer in terms of this section any reference to an agreement in that section must be read as a reference to an agreement contemplated in section 197(6)."

[74] To hold, therefore, that in a transfer of business in non-insolvent circumstances i.e. under section 197 as opposed to under section 197A and where no agreement contemplated in subsection (6) exists, an obligation that existed between the business transferor and an employee at the time of the transfer of business remains with the transferor and is not taken over by the business transferee would be to read into section 197(2) an exception that is not in the statute. There is no justification in law to do that. The wording of section 197(2) is very wide and all-embracing. In our law it is only in two situations that the business transferor's rights and obligations existing between the transferor and an employee at the time of the transfer of a business as a going concern are not taken over by the business transferee. The situations are—

(a) where an agreement as contemplated in subsection (6) of section 197 has been concluded; and

(b) where the transfer of a business as a going concern occurs in circumstances of insolvency contemplated in section 197A(1) of the LRA.

Other than in (a) and (b) above, there is no other situation where that happens.

[75] The interpretation of section 197 that I have adopted in this case is in line with the jurisprudence of the European Court of Justice in regard to the interpretation of Article 3 of the 1977 EEC Directive. Article 3(1) provided that the transferor's "rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee". Article 3(3) provided in effect that that Article 3(1) and (2) would not apply to employees' rights to "old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member states".

[76] In *Beckmann v Dynamco Wicheloe Macfarlane Ltd*,[89] Mrs Beckmann had been employed by the North West Regional Health Authority (NWRHA) within the National Health Service (NHS) under the General Whitley Council (GWC) conditions of service. The body for which Mrs Beckmann worked was transferred as a going concern to Dynamco Wicheloe Macfarlane Ltd (DWM). Upon that transfer of business, Mrs Beckmann's employment was also transferred to DWM. This was in terms of Regulation 5 of the 1981 TUPE Regulations. Years later, Mrs Beckmann was dismissed for redundancy by DWM. She was paid a certain lump sum under section 45 of the GWC conditions of service but no payments were made to her under section 46 of the GWC conditions of service even though she met the conditions of that section. The benefits were part of the NHS Superannuation Scheme which was an occupational pension scheme as defined in Regulation 7(1) of the 1981 TUPE Regulations. The contemplated benefits would initially be paid by the relevant Secretary of State but the employer would ultimately refund the Secretary of State. Mrs Beckmann instituted legal proceedings to compel the payment of those benefits.

[77] One of the questions that the High Court of Justice of England and Wales, Queen's Bench Division, asked the European Court of Justice to decide in Mrs Beckmann's case was whether the contested benefits fell within the exception in Article 3(3) of the 1977 EEC Directive. The European Court of Justice answered this question in the negative. Another question that the European Court of Justice was asked to decide, if the contested benefits did not fall within the exception in Article 3(3), was:

> "[I]s there an obligation of the transferor arising from the contract of employment, the employment relationship or the collective agreement within the meaning of Article 3(1) and / or 3(2) which transfers by reason of the transfer of the undertaking and renders the transferee liable to pay the benefits to the employee upon dismissal?"

[89] *Beckmann v Dynamco Wicheloe Macfarlane Ltd* [2002] EUECJ C-164/00; [2000] IRLR 578 (ECJ) (*Beckmann*).

[78] The European Court of Justice had to answer this question within the context of Article 3(1) and (2) of the 1977 EEC Directive. I have quoted Article 3(1) above. Article 3(2) reads:

> "Following the transfer within the meaning of Article 1(1), the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement."

The provisions of section 197(5)(a) and (b) of the LRA are to the same effect as the provisions of Article 3(1) and (2). So, Article 3(1) finds its counterpart in section 197(2)(a) and (b) while Article 3(2) finds its counterpart in section 197(5)(a) and (b).[90]

[79] The European Court of Justice held that, apart from the exception in Article 3(3) of the 1977 EEC Directive relating to the rights to old-age, invalidity or survivors' benefits, no other exceptions to the rules in Article 3(1) and 3(2) were provided for. It said that—

> ". . . the existence of such a specific clause leads to the conclusion that Article 3(1) and (2) *relates to all the rights of employees mentioned therein which are not covered by those exceptions*."[91] (Emphasis added and citation omitted.)

---

[90] Section 197(5) reads:

> "(a) For the purposes of this subsection, the *collective agreements* and arbitration awards referred to in paragraph (b) are agreements and awards that bound the old employer in respect of the *employees* to be transferred, immediately before the date of transfer.
>
> (b) Unless otherwise agreed in terms of subsection (6), the new employer is bound by—
>
> (i) any arbitration award made in terms of this Act, the common law or any other law;
>
> (ii) any *collective agreement* binding in terms of section 23; and
>
> (iii) any *collective agreement* binding in terms of section 32, unless a commissioner acting in terms of section 62 decides otherwise."

[91] *Beckmann* above n 89 at para 37.

In the South African context I would emphasise that, except for cases where it has otherwise been agreed as contemplated in section 197(6) or, in the case of a transfer of a business in insolvent circumstances, under section 197A or where section 197(4) applies, section 197(2)(b) covers all rights and obligations.

[80] Having considered the provisions of Article 3(1) and (2) of the 1977 EEC Directive, the European Court of Justice held that the business transferor's obligation to make the contested payments had transferred to the business transferee upon the transfer of business. It held that—

> ". . . in order to decide whether Mrs Beckmann [could] require DWM, as transferee, to pay the benefits in question, it is for the referring court, if necessary, to determine whether these benefits arose from her contract of employment or her employment relationship with the transferor employer or from a collective agreement which bound the transferor and would also bind the transferee under Article 3(2) of the Directive."[92]

The European Court of Justice further said:

> ". . . Article 3(1) and (2) of the Directive provides that the transferee is bound by the rights and obligations arising from a contract of employment or an employment relationship existing between the employee and the transferor on the date of the transfer of the undertaking, and by the terms and conditions agreed in a collective agreement on the same terms as are applicable to the transferor under that agreement."[93]

In the South African context I would emphasise the terms of paragraph (b) of section 197(2).

[81] The European Court of Justice went on to say that—

[92] Id at para 39.

[93] Id at para 36.

> ". . . neither the fact that the rights and obligations arising from a contract of employment, an employment relationship or a collective agreement binding the transferor on the terms described in paragraph 37 of this judgment derive from statutory instruments or were implemented by such instruments, nor the practical arrangements adopted for such implementation can have the effect that such rights or obligations are not transferred to the transferee."[94]

In my view, the "practical arrangements adopted" for the "implementation" of the rights and obligations include the use of an entity such as a pension fund as a conduit for the implementation of the pension rights and obligations. The European Court of Justice concluded its judgment with the following answer to the question:

> "The answer to the second question must therefore be that, on a proper construction of Article 3 of the Directive, the obligations applicable in the event of the dismissal of an employee, arising from a contract of employment, an employment relationship or a collective agreement binding the transferor as regards that employee, are transferred to the transferee subject to the conditions and limitations laid down by that article, regardless of the fact that those obligations derive from statutory instruments or are implemented by such instruments and regardless of the practical arrangements adopted for such implementation."[95]

[82] After examining a number of judgments of the European Court of Justice interpreting Article 3 of the 1977 EEC Directive in *British Fuel,*[96] the House of Lords also gave its understanding of the jurisprudence of the European Court of Justice on what happens to the rights and obligations existing between a business transferor and an employee at the time of the transfer of business. Through Lord Slynn of Hadley, the House of Lords in that case said:

> "In my opinion, the overriding emphasis in the European Court's judgments is that the existing rights of employees are to be safeguarded if there is a transfer. *That*

[94] Id at para 38.

[95] Id at para 40.

[96] *British Fuel Limited v Baxendale and Another; Wilson and Others v St Helens Borough Council* [1998] 4 All ER 609 (HL).

> *means no more and no less than that the employee can look to the transferee to perform those obligations which the employee could have enforced against the transferor*."[97] (Emphasis added.)

[83] In *Martin and Others v South Bank University*[98] the European Court of Justice followed the approach it had taken in *Beckmann*. One of the questions that the Court was asked to decide in *Martin* was whether rights contingent upon dismissal or the grant of early retirement by agreement with the employer fell within the concept of rights and obligations within the meaning of Article 3(1) of the 1977 EEC Directive. The European Court of Justice gave an affirmative answer to this question. It said:

> "It is clear from the wording of Article 3 of the directive that, except in the cases mentioned in paragraph 3 thereof, *all the transferor's rights and obligations* arising from the contract of employment or employment relationship with an employee fall within the scope of Article 3(1) and are therefore transferred to the transferee, regardless of whether or not their implementation is contingent upon the happening of a particular event, which may depend on the will of the employer. Thus, if, following the transfer, the transferee, like the transferor before him, has the power whether or not to adopt certain decisions in respect of the employee, for example concerning dismissal or the grant of early retirement, once he adopts such a decision, he remains bound, like the transferor before him, by the rights and obligations laid down as the consequence of such a decision by the contract of employment or employment relationship with the transferor as long as the relevant terms thereof have not been lawfully varied."[99] (Emphasis added.)

[84] The Court also said in *Martin*:

> "Article 3 of [the 1977 EEC Directive] is to be interpreted as meaning that obligations arising upon the grant of such early retirement, arising from a contract of employment, an employment relationship or a collective agreement binding the transferor as regards the employees concerned, are transferred to the transferee

[97] Id at 627D-E.

[98] *Martin* above n 74.

[99] Id order 2 of the Court's order.

> subject to the conditions and limitations laid down by that Article, regardless of the fact that those obligations derive from statutory instruments or are implemented by such instruments and regardless of the practical arrangements adopted for such implementation."[100]

In my view the provision of section 197(2)(b) means what it says. That is that the reference in section 197(2)(b) to "all the rights and obligations in existence at the time of the transfer between the [business transferor] and each employee at the time of the transfer" is a reference, without exception, to all the rights and obligations in existence at the time of the transfer between the business transferor and every employee and all those rights and obligations continue after the transfer as if they had been rights and obligations between the business transferee and the employee. This interpretation is consistent with the European Court of Justice's decisions in *Beckmann* and *Martin*.

[85] The appellants also relied upon the judgment of the Supreme Court of Appeal by Jones AJA (with Harms JA, Cameron JA, Mthiyane JA and Mlambo AJA concurring) in *Telkom*[101] for their contention that Discovery did not take over the obligation they seek to enforce against LA Health. In *Telkom*, Telkom SA Limited (Telkom) transferred part of its business to Molapo Technology (Pty) Limited (Molapo) as a going concern. The question was whether the employees of the business that was transferred and whose contracts of employment had been taken over by Molapo were entitled to certain pension benefits in terms of the Rules of the Telkom Pension Fund. In that case the employees argued that the Rules of the Telkom Pension Fund provided for the payment to them of such benefits if their services were terminated by their employer for redundancy. They argued that their services had been terminated by Telkom for redundancy arising out of the transfer of the business as a going concern. In that case the Supreme Court of Appeal held that a transfer of business terminated the contracts of employment of the employees employed in the business at the time of the transfer of business. This raises the

[100] Id at para 35.

[101] *Telkom* above n 29.

question whether in our law it can be said that the transfer of a business as a going concern terminates the contracts of employment of the employees of the business. In my view, in our law it does not do so.

[86] It is true that, before the transfer of business, the employees' employer would have been the business transferor and that, after the transfer, their employer would be the business transferee. It is equally true that, before the transfer, the employees would have had contracts of employment with the business transferor and that, after the transfer, they would no longer have contracts of employment with the business transferor but would have them with the business transferee.

[87] Section 197(2)(a) provides:

> "(2) If a transfer of business takes place, unless otherwise agreed in terms of subsection (6)—
>
> (a) 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 transfer."

[88] Section 197(2)(a) provides for the business transferee to take over the contracts of employment from the business transferor. The business transferee steps into the shoes of the business transferor in relation to the contracts of employment of the employees in existence immediately before the transfer of the business. The business transferee is substituted for the business transferor in respect of all the contracts of employment. This occurs in a special statutory manner without the contracts of employment of the employees being terminated. If this provision was all that there was in section 197, it would have meant that the business transferee would not, for example, be liable, after the transfer, for the performance of any obligation not contained in the contracts of employment.

[89] A question that arises is: why would it have been necessary to provide in paragraph (a) that the business transferee is substituted in the place of the business transferor if the transfer of business terminated the contracts of employment? Why would it have been necessary for paragraph (a) to say anything other than that the business transferee must offer the employees of the business employment on the same terms and conditions of employment as they had during their employment by the business transferor? Why invoke the concept of substitution? Paragraph (a) must be read together with the other paragraphs and subsections of section 197 to get the true nature of a transfer of business as a going concern and its effect on employment contracts or the employment relationship between the employees employed in the business and either the business transferee or the business transferor.

[90] As already indicated earlier, section 197(2)(b) provides that, if a transfer of business as a going concern takes place, "unless otherwise agreed in terms of subsection (6)", "all the rights and obligations between the [business transferor] and an *employee* at the time of the transfer continue in force as if they had been rights and obligations between the business transferee and the *employee*". There are three features in this paragraph that need to be highlighted. The first is that this provision is inconsistent with the notion that the contracts of employment of employees are terminated by the transfer of business as a going concern. If a transfer of business terminates the employees' contracts of employment, why would we have a provision such as paragraph (b) of section 197(2) that provides for the continuation of all the rights and obligations in force as if they had been the rights and obligations between the transferee and the employee? In my view the presence of this paragraph in section 197(2) underlines the notion that the transfer of a business as a going concern does not terminate any rights and obligations that existed at the time of the transfer of business. If all those rights and obligations continue in force, as section 197(2)(b) says they do, it means that they could not have been terminated at the time of the transfer of business. Anything that has been brought to an end cannot be said to continue in force.

[91] The second feature complements the first one. If I am right in saying, as I have said earlier, that the words "as if" coupled with the tense used in the second part of paragraph (b) have the same effect as a "deeming provision", then what paragraph (b) means is that not only will all the rights and obligations that were in existence between the business transferor and each employee at the time of the transfer continue in force after the transfer but also, from then onwards, those rights and obligations will be deemed to have been between the business transferee and each employee even before the transfer of business. If this is so, those rights and obligations could not possibly have been terminated by the transfer of business. Section 197(2)(c) provides that "anything done before the transfer by or in relation to the [business transferor], including the dismissal of an employee or the commission of an unfair labour practice or of an act of unfair discrimination is considered to have been done by or in relation to the [business transferee]". If a transfer of business as a going concern terminates the contracts of employment of the employees in the business, why would the business transferee be made liable for the actions of the business transferor? There appears to be no reason why there would be a provision such as paragraph (c) in such a case. However, if one says that the contracts of employment are not terminated but the business transferee takes over the contracts and the business transferor's rights and obligations, then it makes sense to have a provision such as paragraph (c).

[92] Section 197(2)(d) provides that "the transfer [of a business as a going concern] does not interrupt an employee's continuity of employment and an employee's contract of employment continues with the [business transferee] as if with the [business transferor]". Together with paragraph (a) of section 197(2), this provision attempts to capture Regulation 5(1) of the 1981 TUPE Regulations. Regulation 5(1) provided, in so far as it is relevant, that "a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor in the undertaking or part transferred but any such contract that would otherwise have been terminated by the transfer shall have effect after the transfer as if originally made between the person so employed and the transferee". Regulation 5(1) made it clear that in English law the transfer of a business as a going concern does not have the

effect of terminating any contract of employment. In my view, even though the LRA does not use identical words as Regulation 5(1), the words it uses in section 197, the purpose of the section and the provisions of section 187(1)(g) of the LRA, which I discuss below, drive one to the conclusion that, in our law, too, the transfer of a business as a going concern does not terminate the contracts of employment of the employees.

[93] It is to be noted that in Regulation 5(1) we find the phrase "as if" that we also find in both paragraphs (b) and (d) of section 197(2). In my view paragraph (d) makes it crystal clear that in our law a transfer of business as a going concern does not terminate the contracts of employment of the employees. That is because it explicitly says that a transfer of business does not interrupt the continuity of employment. If a transfer of business terminated contracts of employment, that would interrupt the continuity of employment because there would be contracts of employment that were terminated and new contracts of employment that would be concluded after those.

[94] An acceptance of the proposition that the transfer of a business as a going concern terminates the contracts of employment of the employees of the business would mean that, after the transfer of business, employees commence employment with the business transferee on new contracts of employment and they would be new employees. The contracts could be on the same terms and conditions as the contracts of employment they had with the business transferor before the transfer.

[95] The implication of this suggestion is that, if the business transferee were later to terminate the employees' contracts of employment for operational requirements, it would be entitled to calculate the employees' length of service from the day they became its employees as opposed to from the day they were employed by the business transferor. That would be in conflict with paragraph (d) of subsection (2) where there is no agreement to the contrary under subsection (6). It would mean that the business transferee could disregard the employees' service with the business transferor. Having regard to the purpose and terms of section 197, that would be untenable.

[96] In addition to the principle in our law that a transfer of a business as a going concern does not terminate a contract of employment, there is also the principle captured in section 187(1)(g) of the LRA. That principle is that an employer is neither permitted to use the transfer of a business as a going concern as a reason to dismiss an employee nor may it use a reason related to the transfer to dismiss an employee. Section 187 provides:

> "187. Automatically unfair dismissals
>
> (1) A dismissal is automatically unfair if the employer, in dismissing the *employee*, acts contrary to section 5 or, if the reason for the *dismissal* is—
>
> . . .
>
> (g) a transfer, or a reason related to a transfer, contemplated in section 197 or 197A."

These two principles form the cornerstone of the entire section 197. It is upon them that the entire edifice of the provision rests. If one removes these principles from section 197, the whole purpose of the section will be defeated. These principles replaced two principles that were part of our law before the enactment of section 197. The one was that the sale and transfer of a business as a going concern was an acceptable reason for the termination of contracts of employment of employees employed in the business. The other was that the business transferee was free to offer or not to offer employment to the employees of the transferred business or to pick and choose as he wished. A conclusion that the transfer of a business as a going concern terminates the contracts of employment of the employees employed in the business is a conclusion that will destroy a very important feature of the LRA which was enacted to protect the rights of workers. That conclusion will resurrect a principle of the common law that section 197 had buried.

[97] If the law does not permit the transfer of a business to be a reason for the dismissal of employees, it follows that the transfer cannot itself terminate a contract of employment. It would be illogical to say that an employer may not rely upon the transfer of a business as a going concern to terminate the contracts of employment of employees but the transfer will terminate them. In my view, section 197 of the LRA creates a statutory dispensation in terms of which the business transferor falls out of the picture as the employer without the termination of the employees' contracts of employment.

[98] In *Telkom* the Supreme Court of Appeal held that the result of what happens under section 197 when there is a transfer of business as a going concern "is similar to the situation where a new owner becomes *ex lege* the substituted lessor of leased premises".[102] It then quoted what Corbett CJ, writing for a unanimous Court, said in *Genna-Wae Properties (Pty) Ltd v Medio Tronics (Natal) (Pty) Ltd.*[103] There, Corbett CJ said:

> "Accordingly, I hold that in terms of our law the alienation of leased property consisting of land or buildings in pursuance of a contract of sale does not bring the lease to an end. The purchaser (new owner) is substituted *ex lege* for the original lessor and the latter falls out of the picture. On being so substituted, the new owner acquires by operation of law all the rights of the original lessor under the lease. At the same time the new owner is obliged to recognise the lessee and to permit him to continue to occupy the leased premises in terms of the lease, provided that he (the lessee) continues to pay the rent and otherwise to observe his obligations under the lease. The lessee, in turn, is also bound by the lease and, provided that the new owner recognises his rights, does not have any option, or right of election, to resile from the contract."[104]

[102] *Telkom* above n 29 at para 8.

[103] *Genna-Wae Properties (Pty) Ltd v Medio Tronics (Natal) (Pty) Ltd* [1995] ZASCA 42; 1995 (2) SA 926 (A); [1995] 2 All SA 410 (A) (*Genna-Wae*).

[104] Id at 939A-C.

What Corbett CJ said in this passage about the effect of a transfer of leased property on an existing lease describes, with the changes required by the context, part of the effect of the transfer of a business as a going concern on the contracts of employment or the employment relationship of employees employed in the business at the time of the transfer.

[99] The situation with which Corbett CJ was dealing concerned the consequences of a transfer of ownership of a leased property on a lease, lessor and lessee. The situation with which we are dealing concerns the consequences of a transfer of business as a going concern on contracts of employment, employment relationships, the business transferor, employees and the business transferee. It is important to highlight the similarities between the situation in connection with which Corbett CJ made the remarks in the above passage and the situation in which there is a transfer of business as a going concern in terms of section 197. These are that—

(a) in the case of a transfer of ownership of a leased property, before the transfer of property the owner of the property who was also the lessor, had a lease with the lessee in respect of the property; in the case of a transfer of business, before the transfer the owner of the business, who was also the employer, had contracts of employment with the employees employed in the business;

(b) in the case of the transfer of property, there would have been a sale and transfer of the leased property from the owner / lessor to another person, the purchaser / transferee; in the case of the transfer of a business or part of a business as a going concern, there would have been a sale and transfer of business from the owner / transferor to another person, the transferee;

(c) in the case of a transfer of a leased property, the transferor of the property / lessor of the leased property falls out of the picture upon the transfer of the property and is substituted by the transferee of the property who then steps into the shoes of the lessor and becomes the

lessor. Corbett CJ explained the situation thus: "The purchaser (new owner) is substituted *ex lege* for the original lessor and the latter falls out of the picture."[105] Corbett CJ was not the first one to use the notion of the original lessor falling out of the picture in this kind of situation. Friedman AJA had also used that phrase in *Mignoel Properties (Pty) Ltd v Kneebone.*[106] In fact the notion of the purchaser stepping into the shoes of the lessor had been used in other cases as well.[107] In the case of a transfer of business, the business transferor also falls out of the picture upon the transfer of a business as a going concern and is substituted by the business transferee who then steps into the business transferor's shoes and becomes the employer of the employees who were employed by the business transferor; in paragraph (a) of section 197(2) it is stated that "the new employer is automatically substituted in the place of the old employer" and;

(d) in the case of a transfer of a leased property, Corbett CJ said that "on being so substituted the new owner acquires by operation of law all the rights of the original lessor under the lease. At the same time the new owner is obliged to recognise the lessee and to permit him to continue to occupy the leased premises in terms of the lease. . . ."[108] In the case of a transfer of business as a going concern, section 197(2)(b) says "all the rights and obligations in existence between the [business transferor] and each employee at the time of the transfer continue in force as if they were rights and obligations between the [business transferee] and each employee".

These similarities show that the two situations have a lot in common. Therefore, it should come as no surprise that in both situations the contracts existing at the time of

[105] Id at 939A-B.

[106] *Mignoel Properties (Pty) Ltd v Kneebone* 1989 (4) SA 1042 (A).

[107] Id at 1050I-J.

[108] *Genna-Wae* above n 103 at 939B.

the transfer, whether it is the contract of lease, in the case of the transfer of property or the contract of employment, in the case of the transfer of a business as a going concern, are not terminated by the transfer.

[100] In *Telkom* the Supreme Court of Appeal accepted the above passage from Corbett CJ's judgment as correct. It seems logical that the acceptance of that passage ought to have driven the Supreme Court of Appeal to also accept that a transfer of business as a going concern does not terminate the contracts of employment. However, the Supreme Court of Appeal did not extend the principle contained in Corbett CJ's passage to the transfer of a business as a going concern and hold that a transfer of business as a going concern also does not terminate contracts of employment. Instead, the Supreme Court of Appeal said:

> "But I do not agree that the assignment takes away the employees' rights to receive pension benefits on the date of their entitlement thereto in terms of the [R]ules of the Fund."[109]

The Supreme Court of Appeal said this because it believed that a transfer of business as a going concern terminated the contracts of employment. In *Telkom*, the Rules of the Telkom Pension Fund were to the effect that, if the employees' services were terminated by the employer, the employees would be entitled to certain benefits.[110]

[101] If a transfer of a business does not bring about an end to the contracts of employment of the employees, the services of the employees cannot be said to have been terminated and, therefore, the employees would not be entitled to those benefits upon the transfer of business. They would carry the rights to those benefits with them over to the other side of the transfer and, if their services were to be terminated for redundancy subsequent to the transfer, they would be entitled to those benefits. In effect section 197(2)(b) implies that we should identify all rights and obligations in

[109] *Telkom* above n 29 at para 8.

[110] Id at para 12.

existence between the business transferor and each employee at the time of the transfer. All those rights and obligations survive the transfer and exist after the transfer but at that stage they are between the business transferee and each employee. However, we have to note that section 197(2)(b) says that, after the transfer, they exist as if they originally existed between the business transferee and each employee. Accordingly, provided a particular right or obligation existed between the business transferor and each employee at the time of the transfer, it survives the transfer of business and is effectively thereafter deemed to have been between the business transferee and the employee even before the transfer.

[102] The reason why in *Telkom* the Court did not take Corbett CJ's passage to its logical conclusion in applying it to section 197 is that it thought that applying that passage to section 197 would take away the employees' rights to receive pension benefits on the date of their entitlement thereto in terms of the Rules of the Telkom Pension Fund.[111] In my view the Supreme Court of Appeal was in error in taking this view. That view is completely at odds with the primary purpose of section 197 and the principles on which section 197 is based. That purpose is the safeguarding of the rights of employees when a business changes hands. That is what the provisions of paragraphs (a), (b), (c) and (d) of subsection (2) and subsections (5) and (6) are all about. In my view, if the Court had appreciated this, it would have reached a different conclusion.

[103] In determining whether the transfer of business as a going concern terminates contracts of employment, the Supreme Court of Appeal was required to construe the provisions of section 197 but, it did not do so. In effect it seems to have interpreted the Rules of the Telkom Pension Fund to reach the conclusion that it reached. In my respectful view, it is not permissible in law to determine the meaning of a statutory provision by construing the Rules of a certain body instead of construing the relevant statutory provisions.

[111] Id.

[104] The Supreme Court of Appeal's conclusion in *Telkom* that a transfer of business as a going concern terminates the contracts of employment should, if correct, mean that employees who are aggrieved by that termination would have unfair dismissal claims they can pursue. However, there are no unfair dismissal claims that can arise out of the termination of a contract of employment that is allegedly brought about by a transfer of business *per se*. That is because in that situation we are not dealing with a case where the business transferor makes a decision to terminate the contracts of employment and conveys it to the employees or where the business transferor gives employees notice of termination of their contracts of employment. Once one accepts that this is the position, then there can be no dismissal of employees under the LRA. This is because in terms of section 186(1)(a) of the LRA a "[d]ismissal means that an employer has terminated the contract of employment with or without notice."[112]

[112] The full definition of "dismissal" in section 186(1) of the LRA reads:

> "(1) "*Dismissal*" means that—
>
> (a) an employer has terminated employment with or without notice;
>
> (b) an employee employed in terms of a fixed term contract of employment reasonably expected the employer—
>
> (i) to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; or
>
> (ii) to retain the employee in employment on an indefinite basis but otherwise on the same or similar terms as the fixed term contract, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee.
>
> (c) an employer refused to allow an *employee* to resume work after she—
>
> (i) took maternity leave in terms of any law, *collective agreement* or her contract of employment; or
>
> (d) an employer who dismissed a number of *employee*s for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or
>
> (e) an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee; or
>
> (f) an employee terminated employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer."

[105] In order to try and overcome an argument that was based on the definition of "dismissal" in section 186(1)(a) of the LRA in *Telkom*, the Supreme Court of Appeal said that the transfer of business was a *sine qua non* of the termination of the contracts of employment. In saying this, the Court overlooked the distinction that exists in our law between a termination of a contract of employment that occurs because the employer makes a decision to terminate a contract of employment and conveys it to the employee and a termination that occurs by operation of law.[113] The former is well-known and occurs all the time. The latter only occurs in those cases where there is a statutory provision to the effect, for example, that the employment of an employee or officer shall be deemed to have come to an end if the employee fails without permission or authorisation to report for duty for a certain specified period. In such a case, if the employee fails to report for duty for the specified period, his or her employment is brought to an end by operation of law and there is no dismissal.

[106] In *Phenithi v Minister of Education & Others*[114] it was held that, where a discharge from service occurs by operation of law, there is no "decision" and no "administrative act" capable of review and setting aside. I agree. In such a case there is no decision to dismiss. The Supreme Court of Appeal's approach in *Phenithi* was in line with the approach the Supreme Court of Appeal had taken in *Louw*.[115] In *Grootboom v National Prosecuting Authority and Another*[116] we said that we could not fault reliance on the principle in *Phenithi* and *Louw*.[117] The result is that in *Telkom* the Supreme Court of Appeal created a dismissal for which there could be no enforceable unfair dismissal claim under the LRA. Indeed, an employee who feels aggrieved by such "dismissal" cannot sue the business transferor for reinstatement or damages or compensation for that "dismissal".

---

[113] See *Minister van Onderwyse en Kultuur en 'n Andere v Louw* [1994] ZASCA 160; 1995 (4) SA 383 (A) (*Louw*) at 388; *Grootboom v National Prosecuting Authority* [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC) (*Grootboom*) at para 16.

[114] *Phenithi v Minister of Education & Others* [2005] ZASCA 130; 2008 (1) SA 420 (SCA) (*Phenithi*) at para 10.

[115] *Louw* above n 113.

[116] *Grootboom* above n 113.

[117] *Phenithi* and *Louw* above n 114 and 113.

[107] In *Telkom* the Supreme Court of Appeal resurrected a principle of common law that section 197 had sought to bury. That principle is that the sale and transfer of a business from one person to another is an acceptable reason for the termination of employees' contracts of employment. As I have said, the main reason for the enactment of section 197 was to change precisely that legal position. The Supreme Court of Appeal dealt with the matter on the footing that the employees' membership of the Telkom Pension Fund was dependent upon or linked to the employees' continued employment by Telkom with the result that, if their contracts of employment with Telkom were terminated, their membership of the Telkom Pension Fund would also be terminated. I have said above that the employees' contracts of employment are not terminated by a transfer of business as a going concern. It seems that, if the position was that the appellants' membership of the Fund would terminate if their contracts of employment with LA Health terminated, it would follow that the appellants' membership of the Fund would also not be terminated if the employees' contracts of employment were not terminated by the transfer of business as a going concern.

[108] Even if the employees' membership of the Pension Fund was not linked to the continuation of the employees' contracts of employment with the specific employer, their membership of the Pension Fund would still not come to an end just because the business is transferred as a going concern from the business transferor to someone else. That is the effect of the provisions of section 197(2). It is, therefore, necessary to deal with questions that arise from the conclusion that a transfer of business as a going concern does not terminate contracts of employment. These questions include the following: if the contracts of employment of the employees are not terminated by a transfer of business as a going concern, what happens to the employees' membership of a pension fund or retirement fund after the transfer? Who is obliged to pay the employer contributions after the transfer? What is the relationship, after the transfer, between the business transferee and the pension fund or retirement fund of which the employees were members before the transfer?

[109] If, after the transfer of business and, therefore, also after the transfer of the contracts of employment as well, the employees remained members of the Pension Fund of which they were members before the transfer and their membership was not terminated, then one of the points relied upon by the Supreme Court of Appeal in *Telkom* for the conclusion that it reached would get out of the way. That Court held that, if the employees were no longer members of the Telkom Pension Fund, Molapo would no longer be able to perform the obligation of contributing to the Telkom Pension Fund for the benefit of the employees. In this regard the Court pointed out that the Telkom Pension Fund had not been party to the agreement between Telkom and Molapo. It also said that the Fund would be under no obligation to accept contributions from Molapo.

[110] The Supreme Court of Appeal said that "[l]iterally, the effect of section 197 in this case is to transfer Telkom's obligation to contribute to the Telkom Pension Fund for the benefit of each employee from Telkom to Molapo". As I have said, Molapo was the business transferee in the *Telkom* case. The Supreme Court of Appeal was right in this regard. That obligation is no different from any other obligation that is governed by section 197(2)(b) except that there is a third party involved, namely a pension fund. That, however, is no obstacle to the obligation continuing in force but attached to the business transferee.

[111] Before a transfer of business, the business transferor carries the obligation to make regular contributions to the pension fund for the benefit of the employees employed in the business. When the business is transferred as a going concern from the business transferor to the business transferee, that is one of the obligations that, in the words of paragraph (b) of subsection (2), "continue in force as if they had been rights and obligations between the new employer and the employee".

[112] If paragraph (b) had ended with the word "force" in that paragraph, that would have been enough to attach that obligation to the business transferee. However,

paragraph (b) does not end with the word "force". It goes on. It must be assumed that there was a purpose that the addition after the word "force" was meant to achieve. The addition is to the effect that the rights and obligations to which paragraph (b) refers do not just continue in force but they continue in force "as if they had been rights and obligations between the new employer and the employee". There is an implied "before the transfer" in that phrase and one sees this from the tense used in that part of the paragraph. Read properly, paragraph (b) of subsection (2) means that all the rights and obligations that were in existence between the business transferor and each employee prior to the transfer of business continue in force after the transfer of business as if, even before the transfer of business, they had been the rights and obligations between the business transferee and the employee.

[113] I draw attention to the fact that in paragraphs (a), (b) and (c) of subsection (2) there are different times specified. In paragraph (a) the time specified to describe the contracts of employment to which the paragraph applies is "*immediately before the date of transfer*". (Emphasis added.) Paragraph (a) relates to "all contracts of employment in existence *immediately before the date of transfer*". (Emphasis added.) It follows from this that paragraph (a) does not apply to a contract of employment that had been in existence between the business transferor and an employee long before the date of transfer but was not in existence immediately before the date of transfer. However, anybody falling into this last mentioned category who is still challenging the fairness or lawfulness of the termination of his contract of employment through the courts or the Commission for Conciliation, Mediation and Arbitration (CCMA) or a bargaining council or arbitration and obtains an order of reinstatement or compensation would have to be reinstated or paid by the business transferee unless there is a subsection (6) agreement to the contrary.[118] This would be because the business transferor's obligations to that employee were taken over by the business transferee in terms of paragraph (b) or because in terms of paragraph (c) the dismissal

[118] See *Transport Fleet Maintainence (Pty) Limited and Another v NUMSA and Others* [2003] 10 BLLR 975 (LAC) and Todd et al *Business Transfers and Employment Rights in South Africa* (LexisNexis Butterworths, Durban 2004) at 182.

of that employee that was effected by the business transferor is considered in terms of paragraph (c) to have been effected by the business transferee.

[114] Paragraph (b) of subsection (2) does not specify that the rights and obligations must have been in existence between the business transferor and the employees "immediately before the date of the transfer". It specifies "*at the time of the transfer*". (Emphasis added.) In describing the rights and obligations to which the paragraph applies, paragraph (b) says it is "all the rights and obligations between the [business transferor] and an employee *at the time of the transfer*". (Emphasis added.) This distinction in time is important and can make all the difference to a claim or dispute.

[115] Then there is the time specified in paragraph (c) of subsection (2). It, too, is different from both the time specified in paragraph (a) and the time specified in paragraph (b). In paragraph (c) the time specified is given simply as "before the transfer". That time is specified to describe the things done by or in relation to the business transferor to which the paragraph applies. It says that "anything done before the transfer by the [business transferor] or in relation to the [business transferor] . . . is considered to have been done by or in relation to the [business transferee]".

[116] The fact that in paragraph (c) the time is not specified as "immediately before the date of transfer" as was done in paragraph (a) and was not specified as "at the time of the transfer" as was done in paragraph (b) suggests that the decision to describe the time in paragraph (c) as simply "before the transfer" was deliberate and well-thought out. The phrase "anything done before the transfer" can mean anything done immediately before the transfer, anything done days, weeks, or months before the transfer and, indeed, even anything done many years before the transfer. Paragraph (c) says that, after the transfer, anything done by or in relation to the business transferor before the transfer is considered to have been done by the business transferee. Paragraph (c) gives examples, namely, dismissal, an unfair labour practice or an act of unfair discrimination. The list is not exhaustive.

[117] The contracts of employment to which paragraph (a) of subsection (2) applies are obviously contracts of employment between the business transferor and every employee employed in the business or part of the business that is being transferred as a going concern. So, although the phrase "between the [business transferor] and an employee" does not appear in paragraph (a), it is necessarily implied. In paragraph (b) one finds the phrase "between the [business transferor] and an employee" describing the rights and obligations that continue beyond the transfer. In paragraph (c) no comparable phrase appears. In my view, once again this must have been deliberate. If that phrase had been included in paragraph (c), the paragraph may have referred only to those things done by and between the business transferor and any employee. However, the absence of that phrase means that there is no limitation.

[118] The decision not to use the phrase "between the [business transferor] and an employee" in paragraph (c) when it had just been used in paragraph (b) must also have been deliberate. The idea was to include things that had been done by anyone including an employee and any third party if that thing was done in relation to the business transferor. A third party could be a pension fund, a medical aid company, an insurance company and so on. However, it is necessarily implied in paragraph (c) that such a thing must concern the employment relationship between the business transferor and an employee. It cannot be anything that has nothing to do with the employment relationship. What does all this mean in regard to pension rights and obligations that may have been in existence between the business transferor and the employees before the transfer of business?

[119] In my view the implications of this interpretation of paragraph (c) are that—

(a) the decision that the business transferor may have taken some time before the transfer of business as a going concern - and this could be some years before the transfer - to participate in a particular pension fund for the benefit of its employees is, after the transfer, considered in terms of paragraph (c) to have been made by the business transferee for the benefit of the employees;

(b) the contributions that the business transferor paid to the pension fund over whatever period before the transfer are, after the transfer, considered to have been paid by the business transferee for the benefit of the employees;

(c) in so far as the business transferor may have signed any documents before the transfer in connection with the pension fund to accept the Rules of the pension fund or to ensure pension benefits for the employees, after the transfer the documents and Rules are considered to have been signed by the business transferee;

(d) whatever decisions the pension fund may have made before the transfer in relation to the business transferor concerning pension benefits for the employees are considered, after the transfer, to have been made in relation to the business transferee;

(e) the pension fund's acceptance of the contributions from the business transferor before the transfer is considered, after the transfer, to have been an acceptance of contributions in relation to the business transferee and;

(f) whatever decision any employee may have made in relation to the business transferor is considered to have been made in relation to the business transferee.

[120] I now turn to paragraph (d) of subsection (2). The first part of paragraph (d) ends with the word "employment" just before the conjunctive word "and". The second part starts with the word "and" and goes up to the end of the paragraph. If paragraph (d) consisted of the first part only, it would have been enough to make the point that a transfer of business as a going concern does not interrupt the continuity of the employee's employment and does not terminate the employee's contract of employment. The second part of the paragraph was included for a purpose or for a reason. The second part of paragraph (d) provides that "an employee's contract of

employment continues with the [business transferee] as if with the [business transferor]". The phrase "as if with the [business transferor]" is particularly important. This means that, after the transfer of business as a going concern, unless otherwise agreed in terms of subsection (6), an employee's contract of employment must be treated as if it is still continuing with the business transferor where this is necessary to achieve the purpose of the section.

[121] If, after the transfer of business as a going concern, an employee's contract of employment continues as if it is still between the employee and the business transferor, nobody can use the fact that the employee is no longer employed by the business transferor to justify any adverse decision or conduct. This would be particularly apposite in relation to the continuation of the rights and obligations relating to pension benefits. The second part of paragraph (d) means that, where necessary in order to achieve the purpose of the section, the employee's contract of employment is deemed to be still between the employee and the business transferor.

[122] What section 197 does with regard to pension rights and obligations when there is a transfer of business as a going concern is that, by operation of law, the business transferee is imposed on the pension fund or retirement Fund as a participating employer without the consent of the pension or retirement fund. That is if no agreement to the contrary has been concluded in terms of subsection (6). The imposition of the business transferee upon the Pension or Retirement Fund without the Fund's consent is no cause for surprise because section 197 also imposes the business transferee upon the employees as their new employer without their consent. It also imposes the employees on the business transferee without the latter's consent unless there is a subsection (6) agreement to the contrary. It deprives the business transferor of the services of its employees in the business even if the business transferor wanted to retain them unless there is a subsection (6) agreement or unless the employees resign before the transfer of business.

[123] In *Telkom* the Supreme Court of Appeal said that, if, after the transfer, the business transferee in that case tried to pay contributions to the Telkom Pension Fund for the benefit of the employees, the pension fund would not have been under any obligation to accept the contributions from the business transferee. I do not agree. As I have said elsewhere in this judgment, section 197(2) provides that anything done before the transfer by or in relation to the business transferor is considered, after the transfer, to have been done by or in relation to the business transferee. Before the transfer the business transferor would have done whatever needed to be done and would have signed whatever documents needed to be signed in order to participate in the pension fund and paid contributions to the Fund for the benefit of the employees.

[124] After the transfer, the business transferee is considered to have done all those things. So, in paying pension contributions to the fund, the business transferee would be continuing with something that in law it was deemed to have been doing for some time already. The business transferee would be considered to be participating in the fund by virtue of the fact that whatever the business transferor had done in order to participate in the fund prior to the transfer is considered, after the transfer, to have been done by the business transferee. Whatever the pension fund may have done in relation to the business transferor to enable the latter to participate in the fund, the fund is, after the transfer, deemed to have done it in relation to the business transferee. The pension fund would have no grounds in law not to accept the business transferee's pension contributions for the employees.

[125] The Supreme Court of Appeal's view that the Telkom Pension Fund would have been under no obligation to accept contributions from Molapo is also inconsistent with section 13A(1) and (3) of the Pension Funds Act. Section 13A(1) reads:

> "Payment of contributions and certain benefits to pension funds—

> (1) *Notwithstanding any provision in the rules of a registered fund to the contrary, the employer of any member* of such a fund shall pay the following to the fund in full, namely—
>
> (a) any contribution which, in terms of the rules of the fund, is to be deducted from the member's remuneration; and
>
> (b) any contribution for which the employer is liable in terms of those rules." (Emphasis added.)

Section 13A(1) places an obligation on "the employer" of a member of a pension fund to pay to the fund any contribution which in terms of the rules of the fund is to be deducted from the member's remuneration and any contribution for which the employer is liable in terms of those rules.

[126] Prior to the transfer of business as a going concern, the employer of the members who are employed in the business that is being transferred is the business transferor. After the transfer, the employer of those very same members is the business transferee. Therefore, prior to the transfer, the section 13A(1) obligation would be on the business transferor but upon the transfer that obligation would attach to the business transferee. In the first place this change simply occurs because there is a change in the identity of the employer. The obligation would shift from one employer to the next employer even if the change of the identity of the employer was not brought about by a transfer of business as a going concern. However, when there is a transfer of business as a going concern the section 13A(1) obligation shifts from the business transferor to the business transferee as well. This is because a statutory obligation also falls within the ambit of the phrase "all the rights and obligations" in section 197(2)(b) of the LRA which that provision says continue, after the transfer of business, between the business transferee and each employee as if they had been rights and obligations between the business transferor and each employee.

[127] Since, in the *Telkom* case, after the transfer of business, Molapo was the employer of the members of the Telkom Pension Fund employed in the part of the

business that was transferred from Telkom to Molapo, it had the obligation referred to in section 13A(1) and the Telkom Pension Fund was obliged to accept any contributions from Molapo as the employer of those members. In the present case, after the transfer, Discovery was the employer of the appellants and, as such, it bore the section 13A(1) obligation and the Fund was obliged to accept any contributions paid by Discovery to it.

[128] In so far as it is relevant, section 13A(3)(a) reads:

> "(3) (a) Any contribution to a fund in terms of its rules, whether it be a contribution contemplated in subsection (1), a contribution for the payment of which a member of the fund is responsible personally, *or a contribution to be paid on a member's behalf*—
>
> (i) shall be transmitted directly into the fund's account with a bank finally registered as such under the Banks Act, 1990 (Act No. 94 of 1990), not later than seven days after the end of the month for which such a contribution is payable; or . . ." (Emphasis added.)

[129] This provision makes it clear that the Pension Funds Act contemplates that payment of a contribution can be made on behalf of a member. It has no restriction as to who can pay contributions on behalf of a member. Therefore, anybody is permitted to pay such contributions on behalf of a member. This, therefore means that in the *Telkom* case, after the transfer, Molapo could have paid pension contributions on behalf of the employees to the Telkom Pension Fund and the Telkom Pension Fund could not have had any grounds not to accept those contributions. In this case, too, if Discovery had paid contributions to the Fund on behalf of the appellants after the transfer, the Fund could not have had any grounds not to accept those contributions.

[130] Section 13 of the Pension Funds Act provides that the Rules of a registered pension fund are "binding on the fund and the members, shareholders and officers thereof and, on any person who claims under the Rules or whose claim is derived from

a person so claiming".[119] While this is important, it is also important to bear in mind that the LRA is legislation the provisions of which prevail over the provisions of even another Act of Parliament where the latter contains provisions that are in conflict with provisions of the LRA. That is what section 210 of the LRA says.[120]

[131] Other provisions of the Pension Funds Act are also important in regard to what a pension fund may or may not do when, after a transfer of business as a going concern, the business transferee pays pension contributions to it for the benefit of the employees. In terms of section 7A(1) of the Pension Funds Act every fund shall have a board.[121] The powers of a board are set out in the Rules of a pension fund.[122] The object of a board is to "direct, control and oversee the operations of a fund in accordance with the applicable laws and the Rules of the fund". The applicable laws include, where relevant, the LRA.

[132] Section 7C(2)(a), (b), (c) and (d) reads—

> "(2) In pursuing its object the board shall—
>
> (a) take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of this Act are protected *at all times*, especially in the event of an amalgamation or

[119] Section 13 reads:

> "Binding force of rules
>
> Subject to the provisions of this Act, the rules of a registered fund shall be binding on the fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming."

[120] Section 210 reads:

> "Application of Act when in conflict with other laws
>
> If any conflict, relating to the matters dealt with in *this Act*, arises between *this Act* and the provisions of any other law save the Constitution or any Act expressly amending *this Act*, the provisions of *this Act* will prevail."

[121] Section 7A(1) reads:

> "Board of fund
>
> (1) Notwithstanding the rules of a fund, every fund shall have a board consisting of at least four board members, at least 50% of whom the members of the fund shall have the right to elect."

[122] Section 7A(2).

transfer of any business contemplated in section 14, splitting of a fund, termination or reduction of contributions to a fund by an employer, increase of contributions of members and withdrawal of an employer who participates in a fund;

(b) act with due care, diligence and good faith;

(c) avoid conflicts of interest;

(d) act with impartiality in respect of al members and beneficiaries." (Emphasis added.)

Section 7D(d) and (f) reads:

"The duties of a board shall be to—

. . .

(d) take all reasonable steps to ensure that contributions are paid timeously to the fund in accordance with this Act;

. . .

(f) *ensure that the rules and the operation and administration of the fund comply with this* Act, the Financial Institutions (Protection of Funds) Act, 2001 (Act No. 28 of 2001) *and all other applicable laws*." (Emphasis added.)

Earlier on, I made the point that the Fund could not in law have refused to accept pension contributions that Discovery could have paid to it in respect of the appellants as members of the fund. Not only is this view supported by the provisions of section 197(2) as discussed earlier but also it is supported by the provisions of the Pension Funds Act. In particular it is supported by section 13A of the Pension Funds Act. In this regard section 7C(2)(a) requires the board of a fund to "take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of this Act are protected at all times . . .". Section 7C(2)(b), (c) and (d) requires the Board of a Fund to act with due care,

diligence and good faith, to avoid conflicts of interests and to act with impartiality in respect of all members and beneficiaries.

[133] In *Telkom* the Supreme Court of Appeal said:

> "I can see no merit in an interpretation which, first, compels the Fund to disregard the [R]ules which it is by statute obliged to obey, and, second, which compels the [employees] to accept a situation for which the [R]ules do not provide and they do not want."[123]

I think that, in adopting this view, the Supreme Court of Appeal did not appreciate the significance and effect of—

(a) that part of paragraph (b) of section 197(2) that says that all the rights and obligations referred to in paragraph (b) "continue in force" after the transfer "as if", even before the transfer, "they had been rights and obligations between the [business transferee] and the employee"; as I have said earlier, this means that, after the transfer, they are regarded, if necessary to achieve the purpose of section 197, as if they had been rights and obligations between the business transferee and the employee;

(b) that part of paragraph (c) of section 197(2) that says that "anything done before the transfer by or in relation to the [business transferor] . . . is considered to have been done by or in relation to the [business transferee]";

(c) that part of paragraph (d) of section 197(2) that says that an employee's contract of employment that was in existence before the transfer "continues with the [business transferee]" after the transfer "as if with the [business transferor]"; and

[123] See *Telkom* above n 29 at para 19.

(d) the fact that section 13A of the Pension Funds Act obliges the employer to pay contributions to the Fund and allows anyone to pay pension contributions on behalf of a member of a pension fund.

[134] Finally, in the present case the appellants also contended that the obligation that they seek to enforce is not of the type that is taken over by the business transferee as contemplated in section 197(2) of the LRA. In support of this contention the appellants submitted that—

(a) this is a once-off obligation;

(b) the additional redundancy benefit they seek was "activated" by the transfer of their employment from LAMAF / LA Health to Discovery and their becoming redundant;

(c) they claimed their member's share in terms of the Rules of the Fund, Discovery could not have participated in the fund because it had not been constituted in 1995 which is the year when LAMAF joined the Fund and it could never qualify as a local authority for the purposes of the Rules of the fund;

(e) Discovery could not have made payment of the benefit to the Fund; and

(f) the effect of section 197 cannot be to amend the provisions of the Rules of the Fund which, they submitted, would be the case if the obligation imposed on LAMAF / LA Health was to be regarded as having been transferred to Discovery. In support of this the appellants refer to the following passage in *Telkom*:

> "I can see no merit in an interpretation which, first, compels the Fund to disregard the [R]ules which it is by statute obliged to obey, and, second, which compels the [employees] to accept a situation for which the [R]ules do not provide and which they do not want."[124]

[124] *Telkom* above n 29 at para 19.

[135] All these points on which the appellants rely for their contention are based upon a failure to appreciate that, in the light of section 197(2), a transfer of business as a going concern does not terminate contracts of employment and upon a failure to appreciate the true import of paragraphs (a), (b), (c) and (d) of section 197(2) as explained earlier in this judgment. In the light of the language used in section 197(2)(b), the clear provisions of paragraphs (a), (b), (c) and (d) of section 197(2) as well as the primary purpose of section 197, the appellants' submissions have no merit.

[136] As an alternative to their above contention, the appellants submitted that LA Health is jointly and severally liable together with Discovery for the performance of the obligation they seek to enforce. They based this alternative submission on section 197(9) of the LRA.[125] This alternative submission falls to be rejected. This is because section 197(9) makes it clear that it relates to claims that arose prior to the transfer of business. In the present case the appellants made it clear in Mr Horn's founding affidavit in the High Court that the obligation that they seek to enforce arose on 1 January 2005. That was not before the transfer of the business.

[137] I see that in their work: *Business Transfers and Employment Rights in South Africa*,[126] Todd *et al* share the view that a transfer of business as a going concern does not terminate contracts of employment.[127] They argue that "the transfer of a contract of employment as contemplated in section 197 has the effect that the existing contract of employment is preserved while the employer party to the contract is substituted".[128] In a balanced discussion of the topic the authors also set out arguments that they consider may be used in support of the proposition that new contracts of employment

[125] Section 197(9) of the LRA reads:

> "The old and new employers are jointly and severally liable in respect of any claim concerning any term or condition of employment that arose prior to the transfer."

[126] Todd et al above n 118.

[127] Id at 16-8 and 66-8.

[128] Id.

are "established" between employees and the business transferee after the transfer of a business as a going concern but they reject those arguments.[129] The one argument relates to the effect of section 197(3)[130] of the LRA and the other refers to the reasoning of the Supreme Court of Appeal in *Telkom*.[131] If section 197(3) is not considered in isolation but is considered together with section 197(2) in the context of the primary purpose of section 197, the view that a transfer of business as a going concern terminates employees' contracts of employment and that new contracts are entered into with the business transferee cannot be justified. It follows from what I have said in this judgment that, in my view, *Telkom* was wrongly decided.

[138] From all the above it follows that, having regard to paragraphs (a), (b), (c) and (d) of subsection (2) of section 197, whatever rights and obligations the business transferor had concerning pension benefits for its employees are taken over by the business transferee upon the transfer of business. Whatever rights and obligations any employee had before the transfer concerning his or her pension benefits continue after the transfer as if the business transferee is the business transferor. This, therefore, means that pension rights and obligations fall within the ambit of the phrase "all the rights and obligations" in paragraph (b) of section 197(2) of the LRA and they do not constitute an exception to section 197(2)(b).

[139] I am of the view that section 197 makes all the necessary provisions that could conceivably have been made to ensure that, unless otherwise agreed in terms of subsection (6) or unless there is a section 197(4) arrangement concerning pension, the business transferor's rights and obligations concerning its employees' pension benefits continue beyond the transfer of a business and are taken over by the business transferee. Contrary to the view expressed by the Supreme Court of Appeal in *Telkom*

---

[129] Id.

[130] Section 197(3) reads:

> "Subsection (2) does not prevent an employee from being transferred to a pension, provident, retirement or similar fund other than the fund to which the employee belonged prior to the transfer, if the criteria in section 14(1)(c) of the *Pension Funds Act, 1956* (Act No. 24 of 1956), are satisfied."

[131] Todd et al above n 118 at 66-8. See also *Telkom* above n 29.

that there is a *lacuna* in section 197 concerning the transfer of pension rights and obligations, there is, in my view, no *lacuna* in section 197.

[140] In conclusion I hold that, to the extent that at the time of the transfer of business as a going concern, LAMAF may have had an obligation to pay an additional retrenchment benefit to the Fund which the Fund had to pass on to the appellants arising out of an alleged retrenchment, that obligation fell within the ambit of section 197(2)(b) of the LRA and was taken over by Discovery with effect from 1 January 2005. Accordingly, the appellants sued a wrong party. To the extent that the obligation that the appellants seek to enforce arose on or after 1 January 2005, then again, it was borne by Discovery and not by LA Health. This would also mean that the appellants sued a wrong party. In the result, for the above reasons I agree that the appeal should be dismissed. However, I would make no order as to costs as this is a labour matter and, in my view, considerations of fairness and equity dictate that no costs order should be made.

For the Appellants:	A L Heyns instructed by Kellerman Hendrikse Inc.
For the First Respondent:	R G Goodman SC instructed by Fairbridge Arderne & Lawton Inc.