THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case No 227/02

In the matter between

TELKOM SA LIMITED	First Appellant
THE TELKOM PENSION FUND	Second Appellant
MOLAPO TECHNOLOGY (PTY) LTD	Third Appellant

and

P N BLOM	First Respondent
D R GOUNDEN	Second Respondent
D D DELL	Third Respondent
B E O'REILLY	Fourth Respondent
S MALLIAH	Fifth Respondent
M L SMITH	Sixth Respondent
P D TURNER	Seventh Respondent
J E ENSLIN	Eighth Respondent

Coram **Harms, Cameron, Mthiyane JJA, Jones and Mlambo AJJA**
Heard 15 May 2003
Delivered 30 May 2003

Summary: Pension benefits – transfer of employment contracts in terms of s 197 of Labour Relations Act, 66 of 1995 – whether employees entitled to payment of pension benefits on transfer –whether transfer to a new employer brings about termination of their former employment as a result of abolition of their posts or a reorganization of the old employer's business.

JUDGMENT

JONES AJA:

[1] The eight respondents were formerly employed by the first appellant ('Telkom') and because of their employment they were members of the second appellant (the Telkom Pension Fund or the 'Fund'). On 5 March 2002 Bertelsmann J made an order[1] in the Transvaal Provincial Division directing Telkom and the Fund 'to pay forthwith the benefits due to [the respondents] in consequence of their former employment with [Telkom] being terminated as a result of the abolition of their posts on 31 March 2000, such benefits being payable to [the respondents] in terms of clauses 4.7 and 5.7 respectively of the statutes of the [Fund]'. He also ordered them to pay the respondents' costs of suit. Telkom and the Fund appeal against these orders with leave from the court *a quo*.

[2] Until 31 March 2000 the respondents were employed by Telkom in its Iuvatek Electronics Services division, which carried on the business of performing repairs to electronic equipment. During March 2000 Telkom sold the Iuvatek division to Molapo Technology (Pty) Ltd ('Molapo'). Molapo was the third respondent in the court below, and it is cited as the

[1] The judgment follows the wording of the notice of motion.

third appellant. No relief was sought against it and it has not participated in these proceedings.

[3] The Iuvatek division was sold to Molapo as a going concern, and Telkom no longer carries on any of the operations previously conducted by that branch of its business. In terms of the agreement of sale Telkom transferred its contracts of employment with its employees to Molapo without their consent, which brings the provisions of s 197 of the Labour Relations Act 66 of 1995 into play.

[4] Section 197 was amended in 2002. The section as it was before amendment must be applied in these proceedings. Its provisions are:[2]

'(1) A contract of employment may not be transferred from one employer (referred to as "the old employer") to another employer (referred to as "the new employer") without the employee's consent, unless-

(a) the whole or any part of a business, trade or undertaking is transferred by the old employer as a going concern; or

(b) . . .

(2) (a) If a business, trade or undertaking is transferred in the circumstances referred to in subsection (1) (a), unless otherwise agreed, all the rights and obligations between the old employer and each employee at the time of the transfer continue in

[2] Parts of the section which are not material to this appeal are elided. They are subsections (1) (b) and (2)(b) which deal with transfer of employment contracts where the old employer is insolvent and being wound up or is being sequestrated or where a scheme of arrangement or compromise is entered into to avoid winding up or sequestration, and subsection (5) which refers to criminal prosecutions.

force as if they were[3] rights and obligations between the new employer and each employee and, anything done before the transfer by or in relation to the old employer will be considered to have been done by or in relation to the new employer.
(b) . . .
(3) An agreement contemplated in subsection (2) must be concluded with the appropriate person or body referred to in section 189 (1).
(4) A transfer referred to in subsection (1) does not interrupt the employee's continuity of employment. That employment continues with the new employer as if with the old employer.
(5) . . . .'

[5] The parties agree that s 197 applies to the transaction and that the respondents' contracts of employment were transferred to Molapo in terms of the section. Paragraph 12 of the agreement, which deals with employees, is patently designed to comply with s 197. It acknowledges that the sale of the Iuvatek division is the transfer of a whole or a part of Telkom's business as a going concern in terms of s 197(1), and that in the absence of an agreement involving the employees in terms of s 197(3), the provisions of s 197(2) apply. It records that all the rights and obligations between the seller, as the old employer and employees will continue in force as if they were rights and obligations between the purchaser, as the new employer, and employees and that anything done before the transfer of the business by or in relation to the old employer will be considered to have been done by or in relation to the new employer.

[6] The respondents contend that the effect of this was to bring about a termination of their services with Telkom as the result of the abolition of their posts and a reorganization of Telkom's activities. This in turn brought about termination of their membership of the Fund which, they say, entitles them to benefits from the Fund in terms of its statutes, or rules.

[3] The text at my disposal contains the word 'were' whereas Bertelsmann J in the court *a quo*, and Ngcobo J in *NEHAWU* v *University of Cape Town* (2003) 24 ILJ 95 (CC) at 114G, quote from a text which contains the words 'had been'. The difference is not important in this case.

[7] Telkom and the Fund on the other hand contend that the application of s 197 produced quite the reverse result. This was to keep the respondents' contracts of employment alive. Far from being abolished, their posts were preserved when their employment contracts were transferred to Molapo. After the transfer the respondents continued to occupy the same posts by doing precisely the same work on precisely the same terms and conditions as before. Telkom and the Fund also argue that the sale to Molapo does not amount to a reorganization of Telkom's activities. Central to the appellants' main argument is the proposition that s 197 brings about an assignment in terms of which the old and new employers cede rights and delegate obligations under the employment contracts. This is done with statutory authority and hence with the deemed consent of the employees. The result, so they argue, is that the contracts of employment were not terminated but assigned by substituting one employer for another. In all respects other than the identity of the employer the employment contracts remained as before, their continuity was maintained from the date upon which the original parties entered into them, and their existence continued undisturbed. This results in a statutory assignment which, they argue, expresses the policy and the wording of section 197. The argument is, further, that a transfer of this nature precludes the conclusion that the employees' contracts were terminated by the employer and, consequently, it precludes their entitlement to payment of pension benefits by reason of such termination.

[8] I am in agreement with the argument that the section brings about a statutory assignment of the employment contracts. The result is similar to the situation where a new owner becomes *ex lege* the substituted lessor of leased premises. Corbett CJ in *Genna-Wae Properties (Pty) Ltd* v *Medio-Tronics (Natal) (Pty) Ltd* 1995 (2) SA 926 (A) 939 A-C put it thus:

'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.'

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 rules of the Fund.

[9] The courts have over the years expressed different views on the interpretation and effect of s 197, and, in particular, on whether or not, on transfer of a business as a going concern, the employees are automatically transferred in the absence of prior agreement to that effect between the parties to the transfer. The Constitutional Court has now put the conflict to rest in *NEHAWU* v *University of Cape Town*[4] by holding that the section, properly interpreted, indeed produces an automatic transfer of employment contracts. In the course of doing so Ngcobo J explained that the section has the twofold purpose of facilitating the transfer of a business and of protecting workers against loss of employment when a

[4] (2003) 24 ILJ 95 (CC).

business is transferred.[5] He then proceeded to interpret the section as it was before the 2002 amendment:[6]

'[62] The proper approach to the construction of s 197 is to construe the section as a whole and in the light of its purpose and the context in which it appears in the LRA [Labour Relations Act]. In addition, regard must be had to the declared purpose of the LRA to promote economic development, social justice and labour peace. The purpose of protecting workers against loss of employment must be met in substance as well as in form. And, as pointed out earlier, it also serves to facilitate the transfer of businesses. The section is found in a chapter that deals with unfair dismissal. Construed against this background, the section makes provision for an exception to the principle that a contract of employment may not be transferred without the consent of the workers. Subsection (1) says so and it makes it possible to transfer the business on the basis that the workers will be part of that transfer. This will occur if the business is transferred "as a going concern".

[63] Subsection (2) tells us the consequences that flow from a transfer of a business as a going concern as contemplated in subsection (1). It refers back to subsection (1) which envisages two categories of transfer: one from a solvent employer and the other, broadly speaking, from an insolvent employer. In both instances, the transfer of the business as a going concern results in the transfer of the workers to the new business. The section makes a distinction between contracts of employment, on the one hand, and rights and obligations that flow from such contracts on the other. "All the rights and obligations" must include all the terms and conditions of the contracts of employment. It therefore does not matter, from a practical point of view, that

5 At 115C-F paras 45 and 46, 118G para 53, and 124F para 70.

6 AT 121D – 122D paras 62, 63, 64 and 65.

subsection (2)*(a)* does not explicitly provide for the transfer of contracts of employment. The section is premised on the continuity of employment of the workers which is not interrupted by the transfer contemplated in subsection (1). "That employment", subsection (4) says, "continues with the new employer as if with the old employer".

[64] Reading the section as a whole, and, in particular, having regard to the fact that all the rights and obligations flowing from employment with the transferring employer are transferred to the new employer in the case of a solvent business; that in the case of an insolvent business the contracts of employment are transferred; that the transfer of business does not interrupt the workers' continuity of employment; the inference that the transferee employer takes over the workers and that the transferee employer is, by operation of law, substituted in the place of the transferor employer is irresistible. It follows by necessary implication.

[65] If there is any doubt on this score, the recent amendment to s 197 puts matters beyond doubt by providing that "the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment". Indeed its declared purpose is "the clarification of the transfer of contracts of employment in the case of transfers of a business, trade or undertaking as a going concern".'

[10] Ngcobo J did not use the word assignment, but his description of the nature and effect of the transfer of an employment contract contemplated by the Act leaves me in no doubt that an assignment takes place. In legislating that all the rights and obligations between the old employer and each employee at the time of the transfer continue in force as if they were rights and obligations between the new employer and each employee, and that the transfer of business does not interrupt the workers' continuity of employment, the lawgiver makes its intention plain. In the words of Ngcobo J, the inference is irresistible that the new employer

takes over the workers and is by operation of law substituted in the place of the old employer. This is what happens on assignment. In my view the further inference is also irresistible that in the course of this process the contractual relationship between the old employer and each employee, i.e. the employment contract between them, is brought to an end. This is a natural result of the assignment: the original employer falls out of the picture, and, as between him and the employees, the contract is extinguished. From the effective date of this transfer – 1 April 2000 – the employees were no longer obliged to perform services for Telkom and Telkom was no longer entitled to their services. They were then employed by Molapo.

[11] The statutes of the Fund regulate what happens when the contractual relationship of employer and employee is terminated. Paragraph 3.2 says that no member may terminate his membership of the Fund while he is in the service of Telkom and his membership shall terminate upon termination of his services with Telkom, unless otherwise provided in the statutes. This can only mean that the respondents' membership of the Fund terminated when their contracts were transferred to Molapo. Paragraph 4 deals with payment of benefits to members when they cease being members and employees. It applies to seven of the respondents, who are class A members of the Fund, and paragraph 5

applies to the remaining respondent, who is a class B member. The two paragraphs confer different benefits upon class A and B members, but their wording and structure is otherwise identical and for present purposes what is said about paragraph 4 applies equally to paragraph 5. It is therefore not necessary to deal separately with paragraph 5 and class B members. Paragraph 4 is structured to cater for the various ways in which termination of employment is possible. Paragraphs 4.1, 4.2 and 4.3 provide for benefits on the retirement of a member. Paragraph 4.4 applies in the case of disability. Paragraphs 4.5 and 4.6 apply to the death of a member or a pensioner. Paragraph 4.7 applies to the case of retrenchment by the employer. And paragraph 4.8 deals with a member's resignation and dismissal.

[12] Paragraph 4.7 is the operative clause here. It provides that 'if the services of an A-member are terminated by the employer as a result of the abolition of his post or a reorganisation of the employer's activities', certain specified pension and gratuity benefits 'shall be paid to the member'. In my judgment its provisions cover what happened when Telkom transferred its Iuvatek division and the Iuvatek employment contracts to Molapo in terms of s 197. The transfer of the Iuvatek division and its employees was designed to rearrange Telkom's affairs. It would no longer carry on any of the activities undertaken by Iuvatek. This work

would in future be contracted out to Molapo. The posts of employees who worked for Telkom in the Iuvatek division ceased to exist within the framework of Telkom's organization. In the wording of rule 4.7, the transfer brought about a termination of the respondents' employment with Telkom as the result of a reorganization of its activities and the abolition of the posts of its Iuvatek employees.

[13] Mr *Brassey* argued on behalf of Telkom and the Fund that although the transfer may have brought about a termination of the employees' services *with* Telkom, it was not a termination *by* Telkom, which is indispensable to the operation of paragraph 4.7. This argument is artificial. Although the assignment of contracts of employment is, by operation of law, an automatic consequence of the transfer of a business to which s 197 applies, Telkom's conduct in transferring the employment contracts together with the Iuvatek division was plainly the *causa sine qua non* of the termination of the contractual relationship between it and its employees within the meaning of paragraph 4.7. It follows that the employees are entitled to the benefits for which paragraph 4.7 provides.

[14] During the course of argument, Mr *Brassey* suggested that even if the appeal is dismissed, the order for payment made by the court *a quo* is inappropriate. It should be replaced with a declaratory order which

simply asserts the respondents' entitlement to benefits in terms of paragraphs 4.7 and 5.7. This would enable the Fund to manage the respondents' pension rights in the most satisfactory manner in the light of the prevailing circumstances. In developing the argument Mr *Brassey* raised the possibility of the Fund preserving the pension rights of transferred employees in trust in the event, for example, of the respondents resuming employment with Telkom, or transferring them to another pension fund in terms of paragraph 7.8 of the statutes. These suggestions were made in the context of Mr *Brasssey*'s response to problems which Molapo would inevitably encounter in stepping into Telkom's shoes as the employer obliged to contribute to the Fund. These problems point to an apparent lacuna in the Act in respect of pension rights which, according to Mr *Brassey*, gives rise to absurdity.

[15] Mr *Brassey*'s suggestion cannot be countenanced. It came late in the proceedings. It was neither part of the case on the papers nor even raised in the heads of argument. Indeed, it first emerged in the course of counsel's argument in reply.

[16] In any event the difficulty, which illustrates that not all rights are capable of unqualified transfer from old to new employer and that some form of modification will sometimes be necessary, is not really one of

absurdity. It arises from the failure of the Labour Relations Act to make specific provision for the transfer of pension rights when employment contracts are transferred. Literally, the effect of s 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. But once transferred, Molapo would be unable to perform it. This is because the employees would no longer be members of the Fund after transfer, and Molapo was not a contributing employer. The Fund, which is an independent entity distinct from the employer, was not a party to the agreement between Telkom and Molapo. It could not be compelled to accept contributions by an outsider for the benefit of persons who were no longer members. It also could not, without the consent of the members affected, be compelled to transfer accrued pension rights under paragraph 4.7 to a pension fund to be established by Molapo. Paragraph 4.7.3 of the rules reads:

'If the services of an A-member are terminated by the employer in terms of this clause, the Board may, with the approval of the member, arrange for the transfer of the said service termination benefits to an alternative retirement scheme, whereafter the Fund shall have no further obligation towards the member.'

It follows that the Fund may not transfer pension benefits without the approval of the member.

[17] From the aforegoing it also follows that the respondents must be paid their pension benefits on transfer of their contracts. In the absence of statutory measures for the protection of the rights of employees, the notion of the previous pension fund holding pension benefits in trust is untenable. There is no provision for this in the old or amended sections of the Labour Relations Act dealing with the transfer of employment contracts, and without such provision there is no basis for permitting it.

[18] Much the same reasoning refutes the argument that the new employer's obligation regarding pension rights, once transferred to him, translates into an obligation to make the same contribution for the benefit of the employees to a similar fund and not necessarily the same fund. I have already explained that in terms of the rules the Fund cannot transfer employees to another Fund without their co-operation. There is also no provision in s 197 before it was amended for the transfer of employees from one pension fund to another. Even though Telkom and Molapo had agreed that Molapo would create a new pension fund, such a fund, which (we were told from the Bar) has apparently to date not been formed, could well be but a poor substitute for the well-established, well-funded and well-supported Telkom Pension Fund. Where the intention of s 197 is to leave the rights of the employee intact, this result cannot be attained in

relation to pension rights. The 2002 amendment contains section 197(4) which is permissive and not mandatory and which seems to me to be an indication that the legislature is alive to the difficulties relating to pension rights when contracts are transferred in terms of the section. It reads:

'Subsection (2) [which provides for automatic transfer of employment contracts in the absence of agreement involving the employees] 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 24 of 1956) are satisfied.'

This subsection strengthens the conclusion that in this case, under the old section, transfer to another fund is not possible. But it does not adequately address the transfer of pension rights simultaneously with the transfer of employment contracts where employees are not by agreement party to the transfer.

[19] Yet another alternative advanced by counsel during the course of argument was that, being a statutory provision, s 197 overrides the rules of the Fund, and that in order to enable compliance with the section the respondents should be regarded as members of the Fund despite the terms of its rules, and the new employer should be regarded as their employer for purposes of contributions although it is not an employer as defined in the rules. I can find no justification for so drastic an interpretation of s

197. I can see no merit in an interpretation which, first, compels the Fund to disregard the rules which it is by statute obliged to obey, and, second, which compels the respondents to accept a situation for which the rules do not provide and which they do not want.

[20] In the result the appeal is dismissed with costs.

RJW JONES
Acting Judge of Appeal

Concur:
HARMS JA
CAMERON JA
MTHIYANE JA
MLAMBO AJA