

**PENSION FUNDS and
LABOUR RELATIONS ACT
- RECENT CASES**

by Samantha Davidson

Telkom SA Ltd & others v Blom & others - SCA

- Blom & 7 others previously employed by Telkom in the Iuvatek Electronics Services division, which repaired electrical equipment
- All members of the Telkom Pension Fund, by virtue of their employment
- Iuvatek division sold as a going concern
- All employees transferred to purchaser in terms of Section 197 of the Labour Relations Act

Section 197 of Labour Relations Act

- “(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 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) ...*

Section 197 cont.

- (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) *...”*
- Amended in August 2002, but effect of automatic transfer of employment contracts unchanged

Telkom SA Ltd & others v Blom & others - SCA

- Blom & others argued effect of Section 197 was to terminate their employment with Telkom “*as a result of the abolition of their posts and a reorganisation*”. This terminated their membership of the Fund and entitles them to benefits
- Telkom argued Section 197 kept their contracts of employment alive

Telkom case cont.

SCA held: “... *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...*”

Telkom case cont.

- Therefore entitled to benefits from Fund
- Telkom and the new employer agreed that the new employer would create a new pension fund. The Fund was not a party to the agreement.
- SCA held the Fund *“could not be compelled to accept contributions by an outsider for the benefit of persons who were no longer members. It could also not, without the consent of the members affected, be compelled to transfer accrued pension rights..”*

New Section 197(4)

“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 24 of 1956) are satisfied.”

- Problem - rules of Fund required members approval for transfer of benefits on termination employment

CAN EMPLOYERS CHANGE PENSION ARRANGEMENTS?

- First establish whether the pension (or medical aid or other benefit the employer wishes to change) is a term and condition of employment
- Rustenburg Base Metal Refiners v NUM & others - Labour Court
- Employment contract stated: employee would become & remain a member of the medical scheme nominated by the employer from time to time

TERMS & CONDITIONS OF EMPLOYMENT

- However, employment contracts often specify the pension or medical aid scheme, and even the contribution levels without provision for change
- Then these are terms and conditions of employment, which the employer may not alter unilaterally - without risking strike action or a contractual claim

HOW CAN TERMS & CONDITIONS OF EMPLOYMENT BE CHANGED?

Beware Section 187(1)(c) of Labour Relations Act

“(1) A dismissal is automatically unfair ... if the reason for the dismissal is -

(a) ...

(b) ...

(c) to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and the employee ...”

NUMSA & others v Fry's Metals (Pty) Ltd - LAC

- Employer wanted to change from a 3-shift to a 2-shift system to reduce lost production time during shift changes - operational requirement
- Employees rejected the proposal
- Employer commenced retrenchment consultations
- Union brought urgent application to interdict retrenchments because would breach Section 187(1)(c) - succeeded in Labour Court

NUMSA & others v Fry's Metals (Pty) Ltd - LAC

- Labour Appeal Court overruled
- Held: purpose of retrenchments not to compel employees to accept change to terms and conditions of employment, because:
 - dismissal would be final and not reversed if employees agreed to the new shift system;
 - bargaining options exhausted before retrenchment consultations began

Shepstone & Wylie

THE END