IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO: P565/00 and P581/00

In the matter between:

BURMAN KATZ ATTORNEYS	Applicant
and	
MR FLOORS BRAND NO	1st Respondent
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	2nd Respondent
JOHANNA ELIZABETH WATSON	3rd Respondent
JOSEPHINE GREENBLATT	4th Respondent

JUDGMENT

LANDMAN J:

1. Mrs Greenblatt commenced employment on 1 June 1972, as a litigation secretary, with a firm or partnership of practicing attorneys. The firm was known as Aronson Burman Blumberg and Saks. The firm subsequently became known as Burman Blumberg Saks, Burman Blumberg Saks and Brophy, Burman Saks and Butler, Burman Katz Saks, Burman Katz Saks and Schody, and Burman and Katz. These are the names of the firm or more correctly the succession of partnerships. The names reflect the succession of partners. But there were other partners over the years whose names were not reflected in the name under which the partners practiced. These include Susan Zeiss, Deon Van Vollenhoven, Claude Tee, Louis Schoeman and Riette. There may have been other partners.

2.In 1983 Mrs Watson, a conveyancing secretary, entered into employment while the firm was known as Berman Katz Saks, and she too remained with the firm over the years.

3.In 1996 two partners left and Mr Burman, Mr Van Vollenhoven and Mrs Zeiss started practicing as partners under the name Burman Katz. The partnership agreement which was in place at the time provided that although the partnership would terminate on *inter alia* the resignation of a partner, the remaining partners were automatically deemed to have acquired the share of the leaving partner and would continue with the right to all files. The returning partner was also to be released of all suretyships.

4.In April 1998, Mr Burman decided to resign from the partnership. Mr Van Vollenhoven and Mrs Zeiss would acquire the firm and they had to release Mr Burman from his suretyships. Mr Burman said he wanted to go his own way.

5.It is common cause that Mr Van Vollenhoven and Mrs Zeiss then decided that they could not carry the whole of the practice and a subsequent agreement was concluded that the partnership would dissolve. The partnership, Burman Katz, terminated with effect from 31 July 1998 and each partner went off taking their own files and clients.

6.Mr Burman practiced on his own account with Mr Katz as a consultant. Mrs Watson was asked to come with Mr Burman as she basically worked with Mr Katz. The case of Mrs Greenblatt is more involved but it was not denied that Mrs Greenblatt was also taken into employment by Mr Burman. Mr Burman practiced under the name of Burman and Katz.

7.On 31 August 1999 Mr Burman decided for economic reasons to cease his practice. Mr Burman offered Mrs Watson and Mrs Greenblatt one week's wages as severance pay. Mrs Watson and Mrs Greenblatt found his offer unacceptable. They instituted proceedings in terms of s 41 (2) of the Basic Conditions of Employment Act 75 of 1997. Mrs Greenblatt claimed severance pay for the period 1 June 1972 to 31 August 1999. Mrs Watson claimed severance pay for the period 1 August 1983 to 31 August 1999.

8.The matter proceeded to arbitration before Adv Floors Brand, a commissioner of the CCMA. In a closely reasoned award he found for Mrs Greenblatt. As Mrs Watson had retired and commenced employment anew the Commissioner awarded her severance pay as though she had been employed since 1 July 1997.

9.Burman Katz, represented by its sole proprietor, Mr Daryl Burman, seeks to review and set aside part of the award on the grounds that the Commissioner committed the following irregularities:

(a) That the grievants' contracts of employment had been transferred from one employer to another, when in fact the evidence before the CCMA clearly showed that the previous employer ceased to exist, and thus any contracts of employment would have been automatically terminated and incapable of transfer;

(b) That each individual partner who, after dissolution of the former partnership, commenced practicing for his or her own account, falls under the definition of s 197 (1) (a) in that the whole or any part of a business or trade or undertaking is transferred by the old employer as a going concern;

(c) That business was transferred as a going concern;

(d) That the Commissioner failed to consider properly the question of retrospectivity, and erred in finding that s 196 of the Act (now s 41 (2) of the Basic Conditions of Employment Act) operated retrospectively, in the absence of an express provision to that effect;

(e) That the award is inappropriate as it ignored direct evidence before the Commissioner, and is based on errors of law. Thus, the order is not justified by the evidence that was led at the hearing nor by the law and principles that the Commissioner was required to apply.

10.Mr Burman does not dispute that Mrs Watson was entitled to severance pay for the period 1 August 1998 to 31 August 1999.

11.Starting with *Ntuli v Hazelmore Group t/a Musgrave nursing Home* (1988) 9 ILJ 709 (IC) the Industrial Court, in interpreting the definition of an unfair labour practice in the Labour Relations Act 28 of 1956, opined that on retrenchment an employer should pay the retrenchees severance pay. The issue was subsequently hotly debated. The debate culminated in the enactment of s 196 of the Labour Relations Act 66 of 1995 (the LRA) which compelled the payment of severance pay in the circumstances outlined in the section. This section was subsequently repealed and replaced by s 41 of the Basic Conditions of Employment Act 75 of 1997(the BCEA). The BCEA came into operation on 1 December 1998. Section 41(2) reads:

"An employer must pay an employee who is dismissed for reasons based on the employer's operational requirements severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer, calculated in accordance with s 35 ".

12.The terms of s 41(2) link the quantum of severance pay to the "each year of completed service with that employer". In determining service it may be permissible to ignore breaks in service with the employer. See s 84 of the BCEA. However I need not express an opinion on this. Because of the commonality in the definitions of "employee", s 197 of the LRA provides that a contract of employment may not be transferred from the old to the new employer without the employee's consent unless whole or part of the business, trade or undertaking is transferred as a going concern. The implication is that if the whole or the part of the business, trade or undertaking is transferred as a going concern then the contracts of employment are automatically transferred without a break in the continuity of service. Section 197, of course, has no application to disputes which occurred prior to 11 November 1996.

13.It is necessary to explore briefly the nature of a partnership, its termination and the effect on contracts of employment. A partnership is not a legal person. An employee who is employed by a partnership enters into a contractual relationship with each of the partners jointly and severally. When the partnership terminates and is dissolved by the resignation of a partner or otherwise, the contract is not terminated but remains in force. Cf *Whitaker v Whitaker* 1931 EDL 122 and *Baldinger v Broomberg and Rowe* 1949 (3) SA 258 (C) at 268 regarding a lease of property.

14.Our legislature seems to have proceeded from the assumption, which I believe to be a partially incorrect one, that a contract of apprenticeship entered into with a partnership terminates on the death or retirement of a partner. This is probably true in the case of death. In any event the legislature provided in s 22(5)(a) of the Manpower Training Act 56 of 1981 that a contract of apprenticeship is not terminated by the death or retirement of a partner if the business of the partnership is continued by another person or partnership and deems the rights and obligations of the employer to be transferred to the person or partnership continuing the business.

15.If, on the resignation of a partner, a partnership between the remaining partners is constituted specifically or in terms of an existing partnership agreement, the employee may expressly or tacitly enter into a new contract of employment with the new (remaining) partners. The retiring partner's liability to the employee remains but

may in practice be overlooked and may prescribe.

16.When another partner joins the partnership a new partnership is constituted and the employee would expressly or tacitly enter into a new contract of employment although here too the previous contract is not terminated.

17.On dissolution of the partnership the partners are liable *singuli in solidum* for the partnership debts. This would include the obligations of the partnership regarding contracts of employment. Henning and Delport in **The Law of South Africa** (First Reissue, Volume 19, paragraph 323) observe that:

"The partnership may extinguish its obligations by due performance or by delegation to, for instance, a new partnership formed to take over its business. Novation by delegation is effected by express or implied agreement between the old partnership, the creditor and the new partnership. Hence, the consent of each creditor is necessary for the old partnership to be released of its obligations, and the new partnership will not be liable to a creditor of the old partnership unless such an agreement (*novatio inter easdem personas*) is established."

18.English law has wrestled with the problem of continuous service and whether it has been with the same employer. Michael Rich et al **Meads Unfair Dismissal** 5th edition 60 expresses the view that: "At common law a change in the partnership is a change of employer". In order to address the problem, inter alia, of partnerships which dissolve and the service of employees contracted to partnerships, English law has enacted deeming provisions. For instance see para 9 (5) of the Schedule to the Contracts of Employment Act of 1972 and its successors.

19.In *Harold Fielding Ltd v Mansi* [1974] IRLR 79 (NIRC) Sir John Donaldson held that:

"Leaving aside para. 9(5), the question is whether Mr Mansi was employed by the same employer during the run of 'Gone With The Wind' as he had been during the run of 'The Great Waltz'. In our judgment, the answer must be that he was not. During 'The Great Waltz' he had two employers - Harold Fielding Ltd and Bernard Delfont Organisation Ltd. During 'Gone With The Wind' he had only one employer - Harold Fielding Ltd. A and B is not the same as A.

It is precisely for this reason that para. 9(5) is included in the Schedule. This provides that: 'if there is a change in the partners, personal representatives or trustees who employ any person, the employee's period of office at the time of the change shall count as a period of employment with the partners, personal representatives or

trustees after the change and the change shall not break the continuity of employment'. The first part of this paragraph is necessary in any event in order to decide whether the liability to make the redundancy payment is that of the old or the new partners. But the second part is only necessary because employment by A, B and C followed by employment by A and B or by A, B, C and D is not employment by the same or 'the one' employer."

20.The approach in the *Mansi* case was commented on in *Allen and Son v Coventry* [1979] IRLR 399 (EAT) at 401. In *Jeetle v Elster* [1985] IRLR 227 (EAT) the court indicated that it would have declined to follow the *Mansi* case but appears to have accepted Sir Donaldson's exposition of the law of partnerships.

Jurisdiction of the CCMA

21.Mr Beyleveld, who appeared for Mr Burman, raised a point of law at the outset of the hearing. It was submitted that the Commissioner misdirected himself in firstly accepting that he had jurisdiction to entertain the matter. It was submitted that s 41 (6) of the BCEA provides that if there is a dispute only about the entitlement to severance pay in terms of this section, the employee may refer the dispute in writing to a council, if the parties to the dispute fall within the registered scope of that council or the CCMA, if no council has jurisdiction. Building on this, it was contended that it is apparent that the issues which came before the Commissioner were much wider than simply the question as to the amount of severance pay. They related particularly to the effect of s 41 (whether it is retrospective or not) and the applicability of s 197 of the LRA and the question whether, on the dissolution of a partnership, it can be said that there was a transfer of the whole or part of the business as a going concern. It is correct that, in order to decide the dispute about severance pay, the commissioner was obliged to consider other provisions of the BCEA, s 197 of the LRA and the law of partnership but this was entirely incidental to deciding the core dispute. The fact that incidental matters need to be decided does not detract from the fact that the central dispute was about severance pay. I am satisfied that the Commissioner had jurisdiction to arbitrate the dispute which was presented to him.

Retrospectivity of s 41 of the BCEA

22.On behalf of Mr Burman, it was submitted that s 41 (2) of the BCEA does not operate retrospectively, nevertheless the Commissioner applied it to events which took place 27 years ago. It was contended that s 41 (2) is retrospective in its effect in that, in the words of Corbett CJ: "A statute is retrospective in its effect if it takes

away or impairs a vested right acquired under existing laws or creates a new obligation or imposes a new duty or attaches a new disability in regard to events already past." See *National Iranian Tanker Co v MV Pericles GC* 1995 (1) SA 475 at 483H. The fact that an Act does not operate retrospectively may have unfortunate results. This, however, cannot affect the principle. See *Workmen's Compensation Commissioner v Jooste* 1997 (4) SA 418 (SCA). Mr Beyleveld went on the submit that the present instance is not a case where there is an exception to the general rule that the operation of a statute is prospective. See *Protea International (Pty) Ltd v Peat Marwick Mitchell & Co* 1992 (SA) 566 (A). He submitted that an employer faced with retrospective effect of s 41 of the BCEA is left saddled with a burden for which such employer had never been given the opportunity to provide for. I was also referred to *Allied Structural Steal v Spannaus* 438 US 234 (1978), Hogg **Constitutional Law of Canada** , *Loose Leaf Edition,* Vol 2 at 31-6, Cote **The Interpretation of Legislation in Canada** 2nd Ed 1991 at 115-137 and Ulrich Karpen **The Constitution of the Federal Republic of Germany:** ***Essays on the Basic Rights and Principles of the Basic Law with a Translation of the Basic Law*****. Entscheidungen des Dundesverwaltungsrerichtes** 18, 439, 30, 386, 32, 123.

23. In the first place it should be observed that the infringement of existing rights is limited as regards the period 11 November 1996 to 1 December 1998. Section 41 is similar but not identical to s 196 of the LRA which has been repealed. Employers were therefore aware, at least from the date that the LRA came into operation, that they would be liable for severance pay. Prior to this date s 196 (and thus s 41 of the BCEA) interferes with existing rights. But s 196 should be read against the backdrop to its introduction, namely the dispute about whether severance pay should be paid. It was uncontentious that if it should be paid it should be calculated from the date of commencement of service. See *Imperial Cold Storage and Supply Company Ltd v Field* (1993) 14 ILJ 1221 (LAC) .

24. Parliament is deemed to know the law and it can be safely assumed that Parliament clearly intended to address the issue of severance pay and to link it to completed years of service served before s 196 of the LRA came into operation. The same holds good for s 41 of the BCEA. The point raised on behalf of Mr Burman cannot be sustained.

<u>Contracts of Employment Terminated</u>

25. The next complaint is that the contracts of employment terminated when "the previous employer ceased to exist". I

have demonstrated during the course of discussing the law relating to partnerships that this proposition is untenable save in the instance of the death of a partner. The contracts of employment were capable of transfer. The Commissioner surveyed the evidence and held:

"In the circumstances, I am of the view that the evidence shows that although there were changes in the identity of the employers over the years prior to 1996 (when section 197 came into operation) the 'new employers' took over the contracts of employment of the two Applicants with their consent and that the periods of employment with the dissolved partnerships were and should be recognised as continuous service".

26. I have examined the transcript carefully to determine whether the Commissioner's finding which is a mixed question of fact and law was justifiable in relation to the material before him. In so far as there is a question of law involved I am of the view that the Commissioner is obliged to determine the law objectively as he has no discretion in this regard. See *Hira and another v Booysen and another* 1992 (4) SA 69 (A).

27. Although there may have been continuity in practice in law there were a series of contracts of employment, entered into tacitly, with different employers. The different partnership constituted different employers. The mere fact that there is a common denominator in the person of Mr Burman having been a partner throughout the period 1 June 1972 until 1996 does not mean that the grievants were employed by the same employer. The Commissioner's finding that the new employers took over the contracts of employment of the grievants is not justified on the evidence. It is not permissible to rely on ordinary perceptions. Cf *Jeetle v Elster* at 230 para 17.

Application of s 197

28. The remaining complaints raised by Mr Burman relate to the period commencing 11 November 1996 when the LRA and therefore s 197 came into operation. To recap on the facts. In February 1996 the grievants worked for a partnership consisting of Mr Burman, Mr Van Vollenhoven and Mrs Zeiss who practiced under the name Burman and Katz. On 1 August 1998 Mr Burman had resigned but the partnership did not reconstitute itself and each partner took his or her own files and paid their own share of the debt. Mr Burman employed both grievants. The question which faced the Commissioner was whether s 197 of the LRA applied. He held:

"There are several factors which, in my view, indicate that it was a transfer as contemplated in section 197 (1) (a) of the LRA.

Firstly, the Respondent conceded that an agreement was concluded in terms of which each partner of the firm would go his / her separate way and each of them would take their own computers, desks, etc and whatever secretaries they wanted to go with them. Mr Burman took the two secretaries of Mr Katz who went with him (Mrs Watson was one of them) and his own two secretaries.

Secondly, the credit balance of the trust account was split in three according to the files and clients which each partner kept. This is an indication that some files were still open and had to be attended to. They also split the overdraft of the business account.

Thirdly, Mr Burman commenced practicing for his own account on 1 August 1998, immediately after the dissolution of the partnership. He retained the name of the partnership, Burman Katz. He also conceded that he and Mr Katz commenced to practice law as before. He did so by utilising the share that he had taken over. Mrs Watson and Mrs Greenblatt assisted him. The allegation that the operations of the partnership ceased is therefore not supported by the evidence. But, even if I have to accept that the operations ceased to be controlled by the partnership. The operations continued, but was controlled by the 'new employers' the very next day. In my view, only the status of the old employer as a partnership was terminated, i.e. only the old employer ceased to exist. Clearly the status of the previous employer and of the new owner is of no consequence and the question of whether the transfer was as a result of a sale, exchange, donation, agreement or merger, also does not take the matter any further.

Therefore, making an overall assessment of the relevant factors, and without treating any single factor as decisive, my conclusion is that a part of the business of the partnership was transferred to the Respondent as a going concern as contemplated in section 197(1)(a) and that the provisions of subsection (4) apply."

29. The Commissioner's finding on the facts is justifiable in relation to the evidence. I can find no reason to interfere with it.

30. This is not a case where I should make an order for costs.

31. In the premises:

1. Paragraph 2 of the award of the 1st Respondent made under case numbers EC 14798 & 14964 is hereby reviewed and set aside and replaced by the following:

"2. Applicant, Mrs Greenblatt is entitled to severance pay calculated as though she had been employed since 11 November 1996."

2. The award as amended is made an order of court.

Signed and dated at JOHANNESBURG on this 16th day of November 2000.

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LANDMAN J

Judge of the Labour Court of South Africa