IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN DURBAN

Case No. D682/02

Not Reportable

In the matter between:

SOLIDARITY obo G A BRANSBY	1ST Applicant
GERALD DOUGLAS FAIRMAN	2ND Applicant
MERVYN GRAHAM HULL	3RD Applicant

And

DEBIS FLEET MANAGEMENT	Respondent

JUDGMENT

Gush J.

1. The material facts in this matter are largely not in dispute. The applicants had been employed by the Department of Post and Telecommunications on the 2nd January 1967, 2nd January 1968 and the 3rd January 1968 respectively. In 1991 the Department became a limited company, Telkom Ltd.

2. The applicants were all members of the Telkom Pension Fund and fell within a group of employees which was later referred to as the Telkom Pension Fund members (TPF).

3. During March 2000 Telkom and the respondent concluded a contract in terms of which a division of Telkom, "Fastfleet", was sold together with its assets to the respondent as a going concern. The applicants were all employed in the "Fastfleet" division.

4. The contract recorded that the contracts of all the employees of Fastfleet would be transferred to the respondent on the effective date

> *" ... and that such employees will be employed by the* [respondent] *in accordance with section 197 of the Labour Relations Act [LRA] on terms and conditions of employment and employment benefits which will be the same as the terms and conditions and employment benefits which applied immediately prior to the Effective Date".* [1] (The effective date of the sale was the 31st March 2000.)

5. It is common cause that the applicants' contracts of employment at the time of the transfer were subject to and included benefits contained in the "(Statutes)".[2] Section 4.7 of the Statutes provided that if the services of an employee of Telkom were terminated in certain circumstances set out below the employee would be deemed to be a pensioner and would be entitled to those benefits enjoyed by pensioners. Section 4.7 read as follows:

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[1] The "Sale of Business Agreement". Bundle A page 21.

[2] The "Statutes" were promulgated in Government Gazette No. 13543 dated the 27th September 1991. Bundle A pages 137/8

"... as a result of the abolition of his post or a reorganisation of the employer's organisation, the following benefits shall be paid to the member:

(i) ...

(ii) If the pensionable service of such member is ten years or longer: an annuity and gratuity calculated as in clause 4.4(1). The member shall become a pensioner for the purposes of the Statutes at the date of termination of his services, and shall become entitled to benefits and subject to the conditions applicable to pensioners of the Fund."[3]

6. One of the benefits to which pensioners were entitled and therefore members when their services were terminated in the circumstances provided for in section 4.7 of the "Statutes" was the right to continued membership of the medical aid scheme in accordance with the Telkom's terms and rules as set out in the Telkom Human Resource Manual.

7. At the time of the time of the purchase of Fastfleet and thereafter the respondent further undertook to Telkom that the terms and conditions applicable to the employment of the employees would be no less favourable and issued various statements at in which statements it inter alia advised the Telkom employees that they would not lose any employment benefits; that the respondent would replicate their pension benefit; that they would not be in a less favourable position and later that they would be transferred into a "ring fenced retirement fund" which would mirror and preserve their section 4.7 benefits.

[3] Clause 4.7(ii) of the "Statutes" Bundle A page 138.

8. During June 2001 the respondent commenced a retrenchment exercise pursuant to a decision to outsource the workshop services and related functions. As the applicants were employed in the workshop services they were identified as employees to be retrenched. The applicants however fell within a group of employees referred to as the TPF members, whose employment was subject to the provisions of the "Statutes" and in particular section 4.7 thereof. When the respondent reached agreement regarding the retrenchment of the affected employees the agreement specifically excluded the TPF members save for inter alia the severance pay clause.[4] The agreement also specifically recorded that the TPF members' provisional notice of termination of employment was extended to the 30th November 2001. The end of November 2001 passed without the applicants' employment being terminated.

9. The respondent had previously issued "provisional notices of termination of employment which had been extended from time to time. The respondent did not dispute that the applicants' contracts of employment required that they be given a "months notice" and it was clear from the notices issued by the respondent that it intended to give the applicants one months notice.[5]

10. On the 4th December 2001 the respondent wrote a letter to the applicants advising them that:

[4] "Record of Agreement" Bundle A pages 93A and following and page 94 and following.
[5] See inter alia the letter in Bundle A at page 128.

> *"... as the retirement fund members have not been finalised and checked the provisional notice of termination is hereby extended to the 31st December 2001"*; (sic) and that
>
> *"Should an employee have secured a new employment position ... during December ... we are prepared to waive the months notice period"*. [6]

11. This letter was only handed to the applicants around the 14th December 2001.

12. On the 31st December 2001 the respondent terminated the applicants' employment and calculated the severance package and payment due to them as at the 31st December 2001. The amount so calculated was paid to them some time later in 2002. The applicants were not afforded the benefit of continued membership of the medical aid scheme.

13. The applicants firstly disputed that they had been given adequate notice and maintained that accordingly they remained employees of the respondent during January 2002 and that therefore their severance pay and benefits on termination had been incorrectly calculated. Their second dispute concerned the refusal of the respondent to allow them to remain members of the medical aid scheme as pensioners.

[6] Bundle A of documents at page 128.

14. The parties were at idem that there are two issues to be decided:

    1. The first issue involved the termination of the applicants' employment and more particularly the date of termination and the consequences that would flow from the determination of that date.
    2. The second issue concerned the section 4.7 benefit. What was the extent of the liability the respondent assumed for the applicants' employment benefits when they took transfer of the applicants contracts of employment and did the respondent specifically assume the obligation to afford the applicants the benefit of continued membership of the medical aid scheme post their retrenchment.

A. The Termination of the applicants' employment.

15. The pertinent facts are:
    1. The applicants' contracts of employment entitled them to one month's notice;
    2. The respondent intended to give the applicants one month's notice;
    3. The letter giving notice upon which the respondent relied in terminating their employment purported to give the applicants "provisional notice" of the termination of their employment

which apparently from the letter was dependent upon the "*finalisation of the retirement fund numbers*"

4. The letter was dated the 4th December 2001 and only delivered on or about 14th December 2001;
5. The respondent terminated the applicants' employment on the 31st December 2001.

16. It has been held that an employer is obliged to give "*clear and unequivocal*" notice of its intention to terminate the contract of employment.[7]

17. Whilst it is so that the notice upon which the respondent relied was expressly stated to be "*provisional*" the respondent steadfastly maintained that it was proper notice and that the applicants could have been in no doubt as to the intention of the respondent to terminate their employment.

18. Mr Sutherland argued that the respondent's provisional notice in September, extended in October to the end of November and then again purportedly extended in a letter dated 4th December which was only delivered on the 14th December justified a conclusion that "*the fact of termination* [was] *effectively communicated*".[8]

19. Whilst it is difficult to reconcile this argument with the fact that the reason for "provisional" nature of the notice was the outstanding

[7] 1992 (13) ILJ 1154 D
[8] Respondent's heads of argument para 5.1

issues referred to in the notice which had not been resolved the respondent insisted that it had communicated its intention and that it had accordingly terminated the applicants' employment on the 31st December 2001.

20. It was the respondent's case that the purpose of the letter of dated the 4th December 2001 but only delivered on the 14th December was to give the applicants notice of the termination of their employment on the 31st December 2001 and that the respondents acted accordingly in dismissing them.

21. It is equally clear that the respondents intended to give the applicants one months notice but they did not. The prior provisional notices that the applicants would be dismissed had been extended to the 30th November 2001, ostensibly by agreement. It is a fact however that the 30th November passed and the applicants were not dismissed. The respondents then purported to once again give the applicants "provisional" notice but this time there was no reprieve.

22. As far as the required period of the notice is concerned in Labour and Employment Law the learned author says:

> "*Where notice is given it must be given so as to expire at the end of one of the periods contractually stipulated for the payment of remuneration. So in the case of a monthly contract ... a month's notice is to be given expiring at the end of a month. ... Where notice is given late it will expire at the end of the end of the following contractual period" and to give sufficient and compliant notice where one months notice is required It is clear that not only must the employee be left in no doubt as to the fact that his employment is*

to terminate but when. A failure to do so will result in the notice expiring at the end of the following month".[9]

23. The facts are that the applicants were entitled to one month's notice, the respondent did not give them one months notice and the termination of the applicants employment was by the respondent was premature. The effect of giving notice late is that the termination of their employment should have taken place on the 31st January 2002 as opposed to the 31st December 2001. What that means is that the applicants' severance benefits as agreed and recorded in the "Record of Agreement" should have been calculated with effect from the 31st January 2002.

24. An issue arose as to what the correct amount was in respect of the applicants' monthly remuneration which should be applied in the calculation of the applicants' severance benefits as at the end of January 2002. Mr Schumann argued that the applicants would have received an increase of 5% on the first January 2002 and that according their remuneration for the purposes of the calculation should increased accordingly.

25. Two issues arise in respect of this submission:

    1. Firstly the applicants were required to establish that the respondent did in fact award all its employees a 5% increase on the 1st January 2002 and that they would have been entitled to

[9] Labour and Employment Law; MJD Wallis Chapter 5 para 33; Honono v Willowvale Bantu School Board & ano 1961 (4) AD; and SA Music Rights Organisation Ltd v Mphatsoe [2009] JOL 23476 (LC)

receive that increase. The 1st applicant was the only witness who in any way dealt with this issue. The 1st applicant's evidence was that the 1st January was the respondent's "*increase day*" and that the applicants believed that they were entitled to "*the 5% increase which kicked in on the 1st January".* Save for this evidence the applicant gave no direct evidence that the respondent had in fact increased the salaries of all its employees by 5% or at all on the 1st January 2002 nor that they, the applicants were contractually entitled to that increase. The only other references the applicants made to the 5% increase in their evidence were in explanation of how an increase of 5% on their salaries on the 1st January 2002 would have affected the quantum of their severance pay.

2. Secondly it is highly improbable, in the absence of any proof of a either a contractual right to an increase or that the respondent in fact awarded a 5% increase, that the respondent would have in the circumstances paid the applicants an increase in salary in the last month of their employment being their notice period. It is unlikely that the respondent would have been that generous particularly given that it at all times that it intended to terminate the applicants' services on the 31st December 2001.

26. I am not satisfied that the applicants have established that the respondent did in fact pay its employees an increase on the 1st January 2002 in an amount of 5% or at all nor that they were

contractually entitled to or would have received an increase. Their evidence was speculative rather than based on facts.

B **The section 4.7 benefit.**

27. In order to establish the terms and conditions of the applicants' contracts' of employment and their entitlement to benefits and the extent to which the respondent assumed the obligation to afford the applicant these benefits it is necessary to consider:
    1. The terms and conditions of the applicants' employment (and benefits) that existed immediately prior to their transfer to the respondent;
    2. The provisions of section 197 of the LRA (as at the time of the transfer); and
    3. The undertakings given by the respondent regarding the applicants terms and conditions of employment and benefits prior to, at the time of and subsequent to their transfer.

28. The "statutes" conferred on the applicants a benefit that as members of the Telkom Pension Fund they were entitled in the event that their employment was terminated as the result of the abolition of their post or a reorganisation of their employer's activities to the benefits applicable to pensioners.[10] What those benefits were are recorded in the Telkom Human Resource Manual which specifically deals with medical aid.

[10] Section 4.7(ii) of the "Statutes". Bundle A page 138. The applicants all had in excess of ten years pensionable service which was also a requirement.

29. Chapter 49 of the Telkom Human Resource Manual is headed "*Summary of Benefits for Pensioners and Deceased Employees*"., Under the heading "*Medical Aid*", it provides that:

> "*Employees who are members of one of the medical schemes recognised by Telkom ... have the option upon retirement ... to decide whether they want to continue membership as pensioners of one of the said schemes...*"[11]

30. The benefit that the applicants as members of the Telkom Pension Fund enjoyed at the time of their transfer, therefore, was simply that if they were retrenched they would become pensioners and would be treated as if they had retired and therefore receive the benefits accruing to pensioners in accordance with Telkom's conditions of employment. Accordingly they were entitled to "*continue membership* [of the medical aid scheme] *as pensioners".*

31. The respondent contended that this benefit was conferred on the applicants by the Telkom Pension Fund and specifically by the "Statutes" or rules of the pension fund and therefore could not "govern nor regulate anything other than what is in the Rules" .[12] This meant that the only benefits the applicants were entitled to as deemed pensioners were those conferred by the pension fund only. The deeming provision could not apply for the purposes of any benefit not included in the pension fund rules.

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[11] Section 49.5. page 2 of Bundle A.
[12] Respondent's heads of argument para 13

32. In addition it was argued that the benefit provided for in Chapter 49 of the Telkom Human Resource Manual is headed "*Summary of Benefits for* ***Pensioners*** *and Deceased Employees*" (emphasis added) only applied to retirees and therefore as the applicants were only deemed to be pensioners they were not retirees but retrenchees.

33. These arguments ignore the purpose and function of the "Statutes" regarding the benefits provided for in the Telkom Human Resource Manual. (Manual). The Statute specifically provides that the deemed pensioners will be entitled to the benefits applicable to Telkom pensioners which benefits are conferred and regulated by Telkom in the Manual.

34. There is no reason to suggest that it was the intention of Telkom to exclude persons in the position of the applicants from the medical aid benefits specifically provided for pensioners in the Manual. The "Statute" deemed the applicants to be pensioners specifically for the purpose of conferring on them the benefits due to pensioners which are provided for in the Manual.

35. The respondent recorded in the agreement for the purchase of Fastfleet that it was taking transfer of the Telkom employees in accordance with section 197 of the LRA. At the time that the respondent acquired Fastfleet, section 197 of the LRA simply provided that:

"... *unless otherwise agreed, all 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...*".[13]

36. In the matter of *NEHAWU v University of Cape Town*[14] the court interpreted section 197 of the LRA as it was before the 2002 amendment:

> *"... the section makes it possible to transfer the business on the basis that the workers will be part of the transfer. ... The section makes a distinction between contracts of employment, on the one hand, and the 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. ... The section is premised on the continuity of employment of the workers which is not interrupted by the transfer ... all the rights and obligations flowing from employment with the transferring employer are transferred to the new employer..."*[15]

37. The respondent at no stage advised the applicants that they were to claim their benefits from the Telkom Pension Fund in terms of section 4.7, or from Telkom itself. Instead apart from recording the statutory transfer of "*all the rights and obligations*" to which the applicants were entitled, the respondent gave a number of specific undertakings regarding the benefits that the applicants enjoyed by virtue of their employment and consequential membership of the Telkom Pension

[13] Section 197 (2)(a) prior to the amendment in 2002 by section 49 of Act 12 of 2002.
[14] (2003)24 ILJ 95 (CC)
[15] At pages 121 - 122

fund. These undertaking were made prior to, at the time of and subsequent to the transfer of Fastfleet and included:

1. Recording in the agreement for the purchase of "Fastfleet" that the contracts of employment of all the employees (including the applicants) would be transferred to it on the same terms and conditions and "***employment benefits***" (emphasis added) which applied immediately prior to the transfer and that the terms and conditions would be no less favourable[16];
2. Publically announcing that the erstwhile Telkom employees had the security of knowing that they would not lose "*any salary or other employment benefits...*"[17];
3. Advising all employees in a letter dated 4th October 2000 that in respect of their pension fund that the respondent was "replicating" "their existing benefits" and that they would not be in a less favourable position[18];
4. Advising the 3rd applicant "The *provisions of section 4.7 of [*the Statute*] are exceptional in the retirement benefit industry and, as such you have been advised that the Daimler Chrysler Pension Fund is not prepared to include this provision in its rules. However debis Fleet Management as your employer is prepared to assume the liability that may arise from this provision in respect of yourself"*[19];

[16] Bundle A page 21
[17] Bundle B page 1
[18] Annexure E
[19] Bundle B page 93

5. Issuing an email recording the respondent's position regarding section 4.7 of the Statute: "*The position of the Company on this matter is clear. The provisions of rule 4.7 have a material adverse financial impact on the overall cost of the reorganisation that is taking place within the Workshops. ... nor does the company seek to avoid the consequences of the defined benefit fund's statutes*"[20];
6. Advising the applicants that their benefits were being replicated and that they would not be in a less favourable position and that they would be transferred into a "ring fenced retirement fund" which would mirror their section 4.7 benefits and preserve their benefits and that the provisions of section 4.7 would be honoured.

38. There is no doubt that the respondent was well aware of the implications of section 4.7 band the benefits it bestowed on the applicants. The clear intention expressed by the respondent prior to dismissing the applicants was that, albeit reluctantly, the respondent would give effect to the benefits to which the applicants were entitled by virtue of the provisions of section 4.7 of the "Statutes".

39. It is clear that the respondent at very least held out to the applicants that it intended honouring the benefit to which the applicants were entitled by virtue of section 4.7.

[20] Bundle B page 117

40. The specific benefit that the applicants now seek is that their entitlement to continued membership of the medical aid scheme be given effect to.

41. It became clear during the evidence that the applicants were unable to quantify any claim for damages or past expenses arising arose from the fact that they were not retained as members of their medical aid scheme. Mr Schumann conceded in those circumstances the applicants' were only entitled to an order directing that the respondent place them on an appropriate Telkom approved medical aid scheme and to make such contributions as required in accordance with rules applicable to Telkom pensioners, subject naturally to the applicants complying with their concomitant obligations and that this could only be given effct to from the date of judgment.

42. I accordingly give judgement in favour of the applicants and make the following order:

    1. The termination of the applicants' employment on the 31st December 2001 pursuant to the notice given by the respondent by letter dated 4th December 2001 and handed to the applicants on or about the 14th December was premature. In the result the termination of the applicants' employment should have taken effect on the 31st January 2002 as opposed to the 31st December 2001.
    2. Accordingly the determination of the applicants' severance and termination benefits should have been calculated based on the

applicants' contracts of employment being terminated on the 31st January 2002.

3. The respondent is ordered to recalculate, in consultation with the applicants, the severance and termination benefits paid to the applicants based on the 31st January 2002 as the termination date; and to pay to the applicants the difference within one month of the date of this judgement.
4. The applicants are entitled, in accordance with the provisions of section 4.7 of the Statutes of the Telkom Pension Fund read with section 49.5 of Chapter 49 (Summary of Benefits for Pensioners and Deceased Employees: Medical Aid), of the Telkom Human Resource Manual is headed "., Under the heading to become members of a medical scheme recognised by Telkom.
5. The respondent is ordered to take such steps as are necessary to enrol the applicants as members of a Telkom approved medical aid scheme within one month of the date of this judgment and to make such contributions as are required in accordance with the rules applicable to Telkom pensioners; subject to the applicants complying with their concomitant obligations.
6. In the event that the parties are unable to agree on the calculation of the severance and termination benefits severance the application of the order pertaining to the applicants' membership of the medical aid the parties shall be entitled to approach the court on basis of a stated case in order that the dispute be resolved.

7. The respondent is ordered to pay the applicants costs confined only to the cost of the trial only.

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GUSH J

Date of hearing : 6, 7 and 8 September 2010

Date of judgment : 20 January 2011

Appearances

FOR THE 1ST APPLICANT	:	D GROENEWALD of SOLIDARITY
FOR THE 2nd & 3rd APPLICANTS	:	Advocate P Schumann
Instructed by	:	Dass Vedan and Partners.
FOR THE RESPONDENT	:	Advocate R Sutherland
Instructed by	:	PG Bam Attorneys.