



**Employment & Pension Law Department**

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**INTRODUCTION**

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## **1. SECTION 197 TRANSFERS & CONTINUITY OF SERVICE LIABILITY FOR SEVERANCE PAY**

An important question to be considered by new employers following the purchase of a business as a going concern, in terms of section 197 of the Labour Relations Act, is the length of the service histories of the employees transferred with the business. The calculation of severance pay when an employee is dismissed for operational requirements, governed by the Basic Conditions of Employment Act 1997, is inexorably linked to the period of time that a person has been employed and obviously, the longer the length of service the higher the amount the employer will have to pay.

Section 197(2)(d) of the Labour Relations Act clearly states that the transfer will not interrupt an employee's continuity of employment. This provision was examined in the Labour Appeal Court decision of *AST Holdings (Pty) Ltd v Roos JA2/2005* recently. Roos had been working at Iscor in the IT Department for 27 years when it was sold off as a going concern to AST Holdings. He was given a number of employment options to choose from when the department was sold. He chose to become a *new employee* on AST terms and conditions of service rather than remain on his old terms and conditions that he had enjoyed as an Iscor employee. When he was retrenched 4 years later his severance pay was



calculated from the date he commenced as a new employee on AST terms and conditions of service. He challenged the quantum of his severance pay and alleged that his severance package should have been calculated from the date that he commenced employment at Iscor and not when he commenced at the new employer.

AST counsel argued that Roos had forfeited his service history by agreement (Section 197 provides that employee rights and obligations are transferred in their entirety "unless otherwise agreed") as he was to receive improved conditions of employment, benefits and free shares as a new employee of the company. Counsel for Roos argued that he had accepted the new conditions of employment in the context of a section 197 transfer and therefore, his continuity of service could not be interrupted.

The Court agreed with Roos. Relying heavily on an earlier Labour Appeal Court decision in the matter of *Foodgro, a division of Leisure Net Ltd v Keil*, the Court found that although parties to a section 197 transfer may agree to vary or alter an employee's rights and obligations under his/her contract of employment, they may not agree that "upon transfer of the contract of employment, the employee will forfeit his/her period of service with the old employer..." The Court concluded by saying that the provision relating to continuity of employment in the context of a section 197 transfer prohibits the parties from agreeing to alter an employee's service history.

Whether the situation would alter if the employee was expressly paid out for his length of service before transfer is a matter for debate.

#### **Verlie Oosthuizen**

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## **2. RESTRAINTS OF TRADE AGREEMENTS: ARE THEY USEFUL OR DOES AN EMPLOYER JUST HAVE TO CROSS IT'S FINGERS AND HOPE FOR THE BEST**

Once again, the enforceability of a restraint of trade agreement has come under the spot light. This time the case reached the Supreme Court of Appeal ("the court") in the case of **Reddy v Siemens Telecommunications (Pty) Ltd (2006) JOL 18829 (SCA)**.



Reddy was employed by Siemens as a solutions integrator, and had received extensive training on unique, Siemens software. He resigned to take up a position with Ericsson, at which stage Siemens brought an application to enforce the restraint of trade agreement between the parties and to interdict Reddy from working for a competitor of Siemens for a period of 12 months, in the province of Gauteng.

The court referred to the case of *Magna Alloys (SA) (Pty) Ltd v Ellis* 1984 (4) SA874 (A) in which that court had held that restraint of trade agreements were valid and enforceable unless they are unreasonable, (if it unreasonably restricts the employee's freedom to trade or to work) and thus contrary to public policy. The court added to this by saying that it was required to make a value judgment between the public interest requiring that parties should comply with their contractual obligations, and interests of society that all persons should be productive and permitted to engage in their trade or profession.

The court asked the following questions (based on the case *Basson v Chilwan & others* 1993 (3) SA 742 (A)):

- Is there an interest that deserves protection?
- Is that interest threatened?
- Does the restraint go further than necessary to protect the interest?
- Does such an interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?
- Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected?

A turning point in the *Reddy v Siemens* case was that the court observed that Reddy could transmit this confidential information to his new employer if he wanted to, and that the restraint of trade agreement was intended to relieve Siemens of this risk of disclosure. The court closed by saying that Siemens "should not have to contend itself with crossing its fingers and hoping that (Reddy) would act honourably or abide by the undertakings which he has given..."

The court found upheld the restraint of trade agreement and ordered Reddy to pay Siemens' costs.

### **Samantha Norton**

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### 3. DISMISSAL DISPUTES CAN BE HEARD IN THE HIGH COURT

When the Labour Relations Act (LRA) became law on 11 November 1996, it created specialist Labour Courts equivalent to the High Courts. The Labour Court was defined as a court of law and equity and section 157 recorded that "*the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court*". Initially, after the introduction of the Labour Relations Act, all employment related disputes were referred to the Labour Courts and it appeared that the High Courts would be only too happy to find that they did not have jurisdiction over employment issues in the private sector, which should more properly be dealt with by the specialist Labour Courts. This is not longer the position, and two recent decisions from the Supreme Court of Appeal (SCA) demonstrate that court's willingness to 'erode' the perceived exclusivity of the jurisdiction of the Labour Courts. Employers need to be aware that employees may refer employment-related disputes to the High Courts, where considerations of equity play no part.

In **Old Mutual Life Assurance Company S.A. Ltd vs Gumbi** the SCA accepted that the High Court had jurisdiction to deal with a dispute regarding the alleged unlawful dismissal of Gumbi by Old Mutual. The SCA went on to confirm an employee's common law rights to a pre-dismissal hearing.

In **Boxer Superstores Mthatha and another vs Mbenya**, the SCA was called upon to rule on whether or not the High Court would have jurisdiction to decide a claim relating to a dismissal. Mbenya had been dismissed by Boxer Superstores and waited 7 months before challenging her dismissal. Under the LRA, such a dispute would have to have been referred to the CCMA within 30 days of the date of dismissal. Mbenya decided to take her chances in the High Court, which has no such time restriction. She sought an order:

- that her dismissal was 'unlawful' and of 'no force';
- re-instating her to her former position 'with the same salary and benefits', alternatively an equivalent position with all the same benefits; and
- awarding her back-pay.

The SCA held that certain conduct by an employer (such as dismissal) can give rise to claims under the LRA as well as contractual claims and claims under other rights of action (such as the common law).



Provided the employee formulates his or her claim outside the LRA, the High Court has jurisdiction to determine that claim. Mbenya had formulated her claim on the basis that her dismissal was 'unlawful' as opposed to 'unfair' (which would be a claim arising under the LRA and in respect of which the CCMA or Labour Court had exclusive jurisdiction). The SCA ruled that the High Court had jurisdiction grant Mbenya's order that her dismissal was unlawful, but she was not entitled to retrospective re-instatement and backpay because these were remedies available only under the LRA and In respect of which only the CCMA and Labour Court would have had jurisdiction.

What is the significance of this judgment for employers?

Firstly, employees may refer disputes to the High Courts outside of the time limits prescribed by the LRA. Secondly, employees may recover damages (beyond the limited compensation provided for in the LRA) for a breach of the employment contract and/or common law right to a pre-dismissal hearing.

#### **Samantha Davidson**

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## **4. A RIGHT TO SHARE IN A SPOUSE'S PENSION ON DIVORCE: THE "CLEAN BREAK" PRINCIPLE**

Parliament is currently considering a number of significant amendments to the Pension Funds Act, 1956, not the least of which is the introduction of the 'clean break' principle on divorce.

So exactly what is this 'clean break' principle? To understand it, one needs to look at the position as it stands.

Currently the Divorce Act, 1979 allows a Court granting a divorce to order that any part of one spouse's ("the member spouse") pension interest must be paid to the other spouse ("the non-member spouse") on the member spouse's exit from the fund. (or when any pension benefits accrue in respect of that member).

This sounds reasonable, until one takes a closer look at the part reading '*when any pension benefits accrue in respect of that member*'.



When do pension benefits accrue to a member? Unfortunately for the non-member spouse, it is only in one of three situations: when the member retires, withdraws from the fund (due to resignation from employment, dismissal or retrenchment), or dies. This effectively means that most non-member spouses must wait years (possibly until the member spouse retires) to be paid the portion allocated to him or her.

The next problem is that no interest accrues on the non-member spouse's share and it does not increase in value after the date of the divorce order. This is because the amount which may awarded to the non-member spouse is defined as a portion of the 'pension interest'. The Divorce Act defines 'pension interest' in relation to a pension fund as *"the benefit to which that party as such a member would have been entitled in terms of the rules of that fund if his membership of the Fund would have been terminated on the date of divorce"*, and in relation to a retirement annuity fund as *"the total amount of that party's contributions to the Fund up to the date of divorce, together with a total amount of annual simple interest on the contributions up to that date"*.

So, the amount to which the non-member spouse is entitled will be determined according to the total amount of the member spouses' contributions up to the date of divorce only, and will not increase despite the amount of time that may lapse before the benefit is paid out. The portion allocated to the non-member spouse will not incur any interest from the date of divorce to the date of payment.

The member spouse loses out too, because he or she is liable to pay tax on the entire pension benefit as at the date that the pension benefit accrues to him or her, including that portion which has been allocated to the non-member spouse.

The Pension Funds Amendment Bill, 2007 reflects a change in the approach to the division of pension benefits on divorce for two reasons.

The first, as discussed above, is a move away from having to wait until the member spouse leaves the fund before the share of benefit can be paid out to the non-member spouse. The proposed amendments to section 37D of the Pension Funds Act will allow for deductions from the member spouse's benefit immediately at the time of the divorce order being issued. It is proposed that the non-member spouse will have the option of having their share paid out in cash within 60 days of the divorce order, or being transferred into another retirement fund of their choice.



The second motivation for the proposed amendments is to update the definition of "spouse" in Section 1 of the Pension Funds Act, to include a person who is a spouse or civil union partner in terms a customary marriage or civil union.

Something important to keep in mind is that a spouse's pension interest is not automatically included in the estate of that member spouse, so any claim for a share of the member spouses' pension interest must be stipulated in the divorce order. Another important point is that before the divorce is finalized the fund must be informed of the terms of the order sought and once the order is granted, the fund must be requested to pay the share ordered over to the non-member spouse as elected, either by transfer into another fund or payment of a lump sum.

Although the Pension Funds Amendment Bill was approved by Cabinet on 7 February 2007, that is only one step in the law-making process and these amendments are not yet effective.

**Samantha Norton**

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## 5. SCOREBOARD

Martin Oosthuizen acted in a matter involving an application to the High Court to enforce a decision of the Appeal Committee of the Medicines Control Council to allow the testing of drugs to inhibit the transmission of Hiv to infants through breast milk. The matter had a long and legally complex history with every delaying tactic in the book having to be overcome. Recently Judge Hartzenberg confirmed that the tests could proceed. The Registrar of the MCC signed the necessary authority on Friday 27 July after almost four years of opposition.

Martin is also seized with a number of High Court applications attempting to stop internal disciplinary enquiries from proceeding - more about this important principle next time.

Michael Maeso and Verlie Oosthuizen were involved in a restraint of trade dispute in an attempt to restrain a sales representative from joining the competition. The Eastern Cape High Court confirmed that restraints are alive and well and they had no hesitation in accepting that the information to which the employee had been exposed was worthy of protection.



Michael Maeso and Samantha Norton obtained an urgent interdict during a protected strike interdicting unlawful behaviour. The order directed the union to control their members and also enforced a perimeter order preventing the strikers away from getting too close to client's premises.

## 6. CONTACTS

Should you require additional information on any of the above issues or with regard to any other issues of an employment and pension law nature, please contact any one of our following team members:

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