



HEAD OFFICE
Johannesburg
3rd Floor, Digital House
Cnr 5th Street & Park Lane
Sandton, 2196
PO Box 651826, Benmore, 2010
Tel (011) 884-8454 □ Fax (011) 884-1144
E-Mail: enquiries-jhb@pfa.org.za

Cape Town
2nd Floor, Oakdale House, The Oval
Oakdale Road, Newlands, 7700
P O Box 23005, Claremont, 7735
Tel (021) 674-0209 □ Fax (021) 674-0185
E-mail: enquiries@pfa.org.za
Website: www.pfa.org.za

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO. 24 OF 1956 (“the Act”) – NT MAYISELA AND 4 OTHERS v IMPERIAL LOGISTICS (a division of Imperial Group (Pty) Ltd) AND IMPERIAL TRUCK SYSTEMS PROVIDENT FUND

Introduction

- [1] Having considered your clients’ complaint received by this office on 10 March 2005 I consider it unnecessary to hold a hearing in this matter. My determination and reasons therefor appear below. As the facts are well-known to the parties I shall not burden this determination by repeating them here. I repeat only the essential facts with a view to enabling the parties to understand the reasons for my finding.

The facts

- [2] Your clients were formerly employed by Rent-A-Truck (Pty) Ltd (“Rent-A-Truck”) and by virtue of their employment they became members of the Rent-A-Truck Provident Fund (“the Rent-A-Truck fund”). During 2000 Imperial Distribution (Pty) Ltd (“Imperial Distribution”), a subsidiary of Imperial Truck Systems (Pty) Ltd (“ITS”), which is in turn a subsidiary of the Imperial Group (Pty) Ltd (“the Imperial Group”), acquired the business of Rent-A-Truck as a going concern and the Rent-A-Truck employees’ contracts were accordingly transferred to ITS in terms of section 197 of the Labour Relations Act 66 of 1995 (“the LRA”).
- [3] Your clients’ membership of the Rent-A-Truck Fund was transferred to the Imperial Truck Systems Provident Fund (“the fund”) in terms of section 14 of the Act, with effect from 1 January 2001.

V Ngalwana (Adjudicator), N Jeram (Deputy Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), L Shrosbree (Snr Assistant Adjudicator), Z Camroodien (Snr Assistant Adjudicator), F Mtayi (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), R Maharaj (Assistant Adjudicator), J Mabuza (Assistant Adjudicator), V Abrahams (Assistant Adjudicator), Solomzi Gcelu (Assistant Adjudicator)

Office Manager: L Manuel

- [4] During August 2001 your clients were transferred with part of the business of Imperial Distribution to another subsidiary of the Imperial Group, Fast 'n Fresh (Pty) Ltd ("Fast 'n Fresh"), in terms of section 197 of the LRA.
- [5] Fast 'n Fresh as a separate legal entity within the Imperial Group participates in a separate fund known as the Fast 'n Fresh Retirement Fund ("the Fast 'n Fresh Fund").
- [6] Since 31 August 2001 Fast 'n Fresh paid over member and employer contributions to the Fast 'n Fresh Fund.

Complainants' case

- [7] Your clients in essence contend that the effect of the transfer to Fast 'n Fresh was to bring about a termination of their services (with Imperial Distribution), more especially, because they were employed by Fast 'n Fresh under new contracts. This, in turn, your clients submit, brought about the termination of their membership of the respondent fund, which accordingly entitles them to the benefits from the fund in terms of rule A.5 of the fund rules. Thus, they seek an order directing the fund to pay them their respective retrenchment benefits in terms of rule A.5.
- [8] Rule A.5 of the fund rules provides as follows:

“

REDUNDANCY OR RETRENCHMENT

A.5.1. AMOUNT PAYABLE

If, in the opinion of the BOARD OF TRUSTEES, the MEMBER is obliged to leave the EMPLOYER'S service as a result of redundancy, retrenchment or a reduction in, or reorganisation of staff, all contributions in respect of him in terms of Rule 3.1. will cease. The MEMBER'S ACCUMULATED CREDIT will become payable.

A.5.2. MANNER OF PAYMENT

The MEMBER may direct that the amount to which he is entitled in terms of this Rule

A.5.2.1 be transferred to an APPROVED PENSION FUND, an APPROVED PROVIDENT FUND or an APPROVED RETIREMENT ANNUITY FUND,

OR

A.5.2.2. be paid to him in cash.”

- [9] It is common cause that your clients have selected the cash option.

The first and second respondents' response

- [10] The respondents essentially argue that in consequence of the transfer from Imperial Distribution to Fast 'n Fresh in terms of section 197 of the LRA, the complainants' employment contracts were transferred to Fast 'n Fresh. By implication therefore they contend that by virtue of the transfer of the employment contracts from Imperial Distribution to Fast 'n Fresh the complainants' employment contracts with Fast 'n Fresh were not terminated. In the result, the respondents argue, that the complainants are not entitled to retrenchment benefits in terms of rule A.5.
- [11] The fund contends that it is entitled to transfer the complainants' accrued benefits to the Fast 'n Fresh Fund in terms of rule 4.4 of the fund rules, as the rule provides for transfers between funds under these circumstances.
- [12] Rule 4.4. provides as follows:

“TRANSFER OR AMALGAMATION

If the business of the EMPLOYER transfers to or amalgamates with some other business, company or organisation, the BOARD OF TRUSTEES (on written instruction from the EMPLOYER) may elect as from a date specified to the UNDERWRITER in writing:

- 4.4.1. subject to the approval of the REGISTRAR, to transfer the assets and liabilities of the FUND, as determined by the UNDERWRITER, to a new or existing APPROVED PENSION FUND, APPROVED PROVIDENT FUND or APPROVED RETIREMENT ANNUITY FUND for the benefit of the MEMBERS and other BENEFICIARIES; or
- 4.4.2. to cede its rights and obligations under these Rules to the other business, company or organisation; or
- 4.4.3. to discontinue the FUND, in which event the provisions of Rule 4.2.2. will apply.”

- [13] The respondents aver that their original intention was that your clients' benefits would be transferred to the Fast 'n Fresh Fund. However, the respondents argue that since your clients' transfer to Fast 'n Fresh a decision was made by them to retain the transferring members' interest in the respondent fund pending the completion of the transfer from the Fast 'n Fresh Fund to the National Bargaining Council for the Road Freight Industry Provident Fund (“the NBCRFI Provident Fund”). Their intention, they argue, was that the retained benefits in the respondent fund would be transferred to the NBCRFI Provident Fund upon the completion of the section 14 transfer.
- [14] The respondents further submit that they oppose the relief sought because your clients remain within the employ of the Imperial Group and because they consider it not to be in the interests of your clients, *inter alia*, to receive

their benefits at this stage.

[15] Accordingly, the respondents request that the complaint be dismissed.

Determination and reasons therefor

[16] This matter raises an issue of law as regards what the nature of the benefit is upon members being forcibly transferred consequentially with the transfer to another company of the business (or part thereof) in which they work in terms of section 197 of the LRA. It is an issue that has been decided by the Supreme Court of Appeal in *Telkom SA Ltd and Others v Blom and Others* [2004] 6 BPLR 5781 (SCA) and the Constitutional Court in *NEHAWU v UCT* (2003) 24 ILJ 95 (CC).

[17] Jones AJA in *Telkom supra* at 5784 D-G referring to section 197 of the LRA stated that:

“I am in agreement with the argument that the section brings about a statutory assignment of employment contracts ...
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.”

Jones AJA, referring to Ngcobo J’s judgment in *NEHAWU supra* with approval at 5785 H/I – 5786B, stated further that:

“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 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, ie 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 obligated to perform services for Telkom and Telkom was no longer entitled to their services. They were then employed by Molapo.”

(Emphasis added)

[18] Similarly, the contractual relationship between the old employer, Imperial Distribution, and the complainants were brought to an end on transfer to the new employer, Fast ‘n Fresh. The complainants alleged that they entered into new contracts of employment when joining Fast ‘n Fresh which allegation was not disputed by the respondents. *A fortiori*, the complainants’ contracts of employment were terminated with the old employer, Imperial Distribution. The rule of the fund which regulates what happens when the contractual relationship between the employer and employee is terminated is Rule A.5. It, in essence, provides that upon

VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR

Cc: Principal Officer
Imperial Truck Systems Provident Fund
20 Bosworth Street
Alrode
1450

Cc: Mr E Truebody
Bowman Gilfillan Attorneys
PO Box 78512
Sandton
2146

Fax: (011) 669 – 9001

Section 30M filing: High Court