IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO : JA 63/98

In the matter between :

FOODGRO, a division of LEISURENET LIMITED Appellant
(Respondent in the court a quo)

and

CAROL KEIL

Respondent
(Applicant in the court a quo)

JUDGMENT

FRONEMAN DJP :

[1] What is the effect on the employment of an employee when her old employer transfers the business where she works to someone else? That is the issue that needs to be decided in this appeal.

[2] On 1 February 1993 the respondent ("the employee") was appointed by MacRib Fast Food Systems (Pty) Ltd ("MacRib") as its national public relations officer and

marketing manager. Just on four years later, on 1 January 1997, MacRib was acquired as a going concern by the appellant ("Foodgro"). MacRib told the employee of the impending transfer of the business and promised her that Foodgro would employ her on the same terms and conditions as it, MacRib had done. She continued working in her previous position after the transfer. On 23 January 1997 she signed a letter of appointment setting out the terms and conditions of her employment with Foodgro.

[3] The new letter of appointment contained essentially the same terms and conditions as the old contract of employment. It did, however, record that the appointment was effective only from 1 January 1997; that the first three months of her employment would be of a probationary nature; and that the letter of appointment comprised the entire contract of employment.

[4] On 30 May Foodgro informed the employee that her services would be terminated on 30 June due to operational needs. This letter was preceded by two meetings held on 26 and 27 May between Foodgro officials and the employee. On termination of her services the employee was paid severance on the basis that she had only been employed by Foodgro since January 1997.

[5] Not content with this kind of treatment the employee approached the Labour Court for relief, based on her alleged unfair retrenchment. Mlambo J found in her

favour; declaring her dismissal procedurally unfair and ordering Foodgro to pay the statutory retrenchment package calculated as from 1 February 1993, compensation and costs. His judgment is reported as **Keil v Foodgro (a division of Leisurenet Ltd) [1999] 4 BLLR 345 (LC)**.

[6] On appeal Mr Cassim, who appeared for Foodgro, contended that Mlambo J erred in finding (at para [18] of the judgment) that the 1997 letter of appointment did not replace the employee's contract of employment with MacRib, and that it did not affect her previous length of service since 1993 (at para [17] of the judgment). He submitted that section 197(2)(a) of the Labour Relations Act, no 66 of 1995 ("the Act") allowed the replacement of the old terms and conditions of employment in a transfer of business and that the January 1997 letter of appointment had the effect that the employee should be treated as starting her employment in 1997, not 1993. The findings of unfair retrenchment procedures and the amount awarded as compensation were also attacked on appeal.

[7] Mr Robb, attorney for the employee, contended that the provisions of section 197 (4) of the Act precluded an agreement with the effect Foodgro relied upon, and that, even if it did not, the letter of appointment did not have the effect contended for by Foodgro. He also submitted that the retrenchment was unfair and that no proper basis existed for interfering with the compensation award.

[8] Section 197 of the Act reads as follows :

> **"197 Transfer of contract of employment**
>
> **(**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) the whole or a part of a business, trade or undertaking is transferred as a going concern -
>
> i)if the old employer is insolvent and being wound up or is being sequestrated; or
>
> ii)because a scheme of arrangement or compromise is being entered into to avoid winding-up or sequestration for reasons of insolvency.
>
> (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* at the time of transfer continue in force as if they were rights and obligations between the new 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) If a business is transferred in the circumstances envisaged by subsection (1) (b), unless otherwise agreed, the contracts of all *employees* that were in existence immediately before the old employer's winding-up or sequestration transfer automatically to the new employer, but all the rights and obligations between the old employer and each *employee* at the time of the transfer remain rights and obligations between the old employer and each *employee*, and anything done before the transfer by the old employer in respect of each *employee* will be considered to have been done by the old employer.
>
> (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. The employment continues with the new employer as if the old employer.
>
> (5) The provisions of this section do not transfer or otherwise affect the liability of any person to be prosecuted for, convicted of, and sentenced for, any offence."

[9] The provisions of section 197 are, as pointed out by Seady AJ in **Schutte and**

others v Powerplus Performance (Pty) Ltd and another (1999) 20 ILJ 655 (LC) at para. [27], the first of its kind in South African legislation. The common law prohibition of transferring a contract of employment from one employer to another without the consent of an employee is given effect to in the first part of section 197 (1), but the qualifications to this rule (section 197(1)(a) and (b)), their particular application (section 197(2) and 197(3), as well as the 'continuity of employment' provision (section 197(4)), are not of common law origin. The proper interpretation of these provisions is a matter of considerable dispute between the parties.

[10] The ease or otherwise, with which businesses, trades or undertakings may be transferred, and the consequences flowing from these transfers for employers and employees alike, may be very important for the economic well-being of a country. There may indeed be very good economic reasons why the free and unrestricted transfers of businesses, trades and undertakings will promote commercial efficiency and thus ultimately promote economic development. This consideration underpinned much of Mr Cassim's argument that new employees should be allowed to 'contract out' of onerous provisions in section 197 which protected employees in general when transfers take place. To hold otherwise, it was suggested, would stifle the entrepreneurial spirit so essential to a successful economy.

[11] The pursuit of economic development by means of a particular interpretation and application of the Act is, however, qualified by the injunction that it must be done in conjunction with other goals, namely those of social justice, labour peace and the democratisation of the workplace. This is to be done by fulfilling the primary objects of the Act : giving effect to fundamental rights and International Labour Organisation obligations; providing a proper framework for collective bargaining and the formulation of industrial policy; and promoting orderly collective bargaining, employee participation in workplace decision making and effective resolution of labour disputes (subsections 1 and 3 of the Act).

[12] Under the common law, the sale of a business usually meant the termination of existing employment contracts. The purchaser was under no obligation to offer re-employment to the employees. The choice of employees not to continue employment with a new employer was said to be "the main difference between a servant and a serf" (per Lord Atkins in **Nokes v Doncaster Amalgamated Collieries Ltd** [1940] 3 All ER 549(HL)). But the demands of the times we live in change, as was recognised by the industrial court in exercising its unfair labour jurisdiction under the old Labour Relations Act, no 58 of 1956. In **Kebeni v Cementile Products (Ciskei) (Pty) Ltd** (1987) 8 ILJ 442 (IC) the need to protect employees in situations of this kind was recognised by requiring safeguards in the transfer agreement, such as a clause deeming all existing contracts of employment to be transferred to the purchaser (at 450 B-C). It did not however go as far as insisting upon the inclusion of such a clause as an enforceable right.

[13] That the provisions of section 197 are primarily aimed at the further protection of employees is, in my view, quite apparent :

- if the purpose was to make it as easy as possible for purchasers to acquire a business from another without incurring obligations to existing employees, the introduction of section 197 would have been unnecessary. The common law would have created adequately for that situation;
- the provisions relating to automatic transfers of contracts of employment (section 197(1) and (2)) and the non-interruption of an employee's 'continuity of employment' (section 197(4)) secures advantages not previously enjoyed by employees;
- even after automatic transfers of contracts of employment under section 197 employees may still, unilaterally, resign from employment, without attracting additional sanction under the Act. An employer only has the ordinary contractual remedies against them;
- new employers however become subject to the additional sanctions or remedies under the Act upon transfer of the employment contract.

[14] That provisions of the kind set out in section 197 are aimed at the protection of

employees also appear from similar instruments in other jurisdictions.

[15] The relevant provisions for members of the European Community appear in Council Directive no.77/187/EEC :

> **"Article 3**
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> 1 The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee.
>
> Member states may provide that, after the date of transfer within the meaning of Article 1 (1) and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship.
>
> 2 Following the transfer within the meaning of Article 1(1), the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement. Member States may not limit the period for observing such terms and conditions, with the proviso that it shall not be less than one year.
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> .....
>
> **Article 4**
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> 1 The transfer of an undertaking, business or part of a business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the work force.
>
> .....
>
> 2 If the contract of employment or the employment relationship is terminated because the transfer ..... involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for the termination of the contract of employment or of the employment relationship."

(Quoted from **Harvey on Industrial Relations and Employment Law, London, Butterworths, Vol 3, P/132,133,134).**

[16] Effect was sought to be given to these directives in the United Kingdom in the **Transfer of Undertakings (Protection of Employment) Regulations 1981 (SI 1981/1974)**. Regulations 5 and 8(1) are of relevance :

> **"5 Effect of relevant transfer on contracts of employment, etc.**

1)[Except where objection is made under paragraph (4A) below,] a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor in the undertaking or part transferred but any such contract which would otherwise have been terminated by the transfer shall have effect after the transfer as if originally made between the person so employed and the transferee.

2)Without prejudice to paragraph (1) above but subject to paragraph (4A) below,], on the completion of a relevant transfer -

(a)all the transferor's rights, powers, duties and liabilities under or in connection with any such contract, shall be transferred by virtue of this Regulation to the transferee; and

(b)anything done before the transfer is completed by or in relation to the transferor in respect of that contract or a person employed in that undertaking or part shall be deemed to have been done by or in relation to the transferee.

3)Any reference in paragraph (1) or (2) above to a person employed in an undertaking or part of one transferred by a relevant transfer is a reference to a person so employed immediately before the transfer, including, where the transfer is effected by a series of two or more transactions, a person so employed immediately before any of those transactions.

4)Paragraph (2) above shall not transfer or otherwise affect the liability of any person to be prosecuted for, convicted of and sentenced for any offence

[(4A) Paragraphs (1) and (2) above shall not operate to transfer his contract of employment and the rights, powers, duties and liabilities under or in connection with it if the employee informs the transferor or the transferee that he objects to becoming employed by the transferee.

[(4B)] Where an employee so objects the transfer of the undertaking or part in which he is employed shall operate so as to terminate his contract of employment with the transferor but he shall not be treated, for any purpose, as having been dismissed by the transferor.]

5)[Paragraphs (1) and (4A) above are] without prejudice to any right of an employee arising apart from these Regulations to terminate his contract of employment without notice if a substantial change is made in his working conditions to his detriment; but no such right shall arise by reason only that, under that paragraph, the identity of his employer changes unless the employer shows that, in all the circumstances, the change is a significant change and is to his detriment.

.....

8)Dismissal of employee because of relevant transfer

(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part V of the 1978 Act and Articles 20 to 41 of the 1976 Order (unfair dismissal) as unfairly dismissed if the transferor or a reason connected with it is the reason or

principal reason for his dismissal."

(Quoted from **Harvey**, above, Vol3,R/144,149-150)

[17] **The Employment Rights Act, 1996 (UK)** also deals with the issue:

"218 Change of employer

.....

2)If a trade or business, or an undertaking ..... is transferred from one person to another -
(a)the period of employment of an employee ..... counts as a period of employment with the transferee, and
(b)the transfer does not break the continuity of the period of employment."

[18] The usefulness of these comparative provisions should not be overstated. The differences in wording from section 197 are quite obvious, as is the fact that they find their applications in societies different in history and development from our own. It would be unnecessarily parochial, though, not to enquire whether the treatment of these provisions in these jurisdictions do not provide some insight for the proper interpretation and application of section 197 of the Act.

[19] The European Court of Justice held, in **Foreningen af Arbejdsledere I Danmark v Daddy's Dance Hall** A/S:324/86 [1988] IRLR 315 (ECJ) that, in the context of the Directive (para [15] above), an employee is not in a position to validly waive rights under the Directive even in circumstances where, as a consequence, the employee receives benefits which place him in a better position. The provisions of section 197(2)(a) and (b) of the Act make it clear that

the benefits of their particular provisions may be changed by agreement between the relevant parties. The **Daddy's Dance Hall** case can thus not be of help to the employee in the present case insofar as the alleged amendments in Foodgro's letter of appointment of "the rights and obligations between the old employer and each employee at the time of transfer" are concerned. They may be validly amended.

[20] It is interesting to note, however, that until the decision in **Wilson v St Helens Borough Council** [1996] IRLR 320 (EAT), [1997] IRLR 505 (CA) it was the conventional view that once regulation 5 of the Transfer of Undertakings regulations "has operated, that does not mean that the employee's contractual rights are set in stone; the transferee employer may then (with the employee's consent) alter terms and conditions just as much as the transferor might have done ..... The restriction on contracting out ..... would not prevent such changes in terms and conditions after the proper effect of the transfer ....." (**Harvey**, above, Vol 3,R/147).The **Wilson v St Helens Borough Council** case challenged that conventional view by finding that if the operative reason for the variation was the transfer of the undertaking, then the variation will be ineffective. That was not the basis of the employee's case in the present instance, however.

[21] The legal contention advanced on her behalf was that although section 197(2)(a) allowed the amendment, by agreement, of the terms and conditions of her

employment with the old employer, it did not allow for contracting out of the transfer of the contract of employment or for the interruption of her continuity of employment by the transfer. The latter, it was said, is expressly forbidden by section 197(4).

[22] In my view this submission is sound. The subject matter of section 197(2)(a) is "all the rights and obligations between the old employer and each employee at the time of the transfer" (as well as the contract of employment itself in the case of section 197(2)(b)), but not an employee's 'continuity of employment'. The latter is a calculation, a fact - not a right or obligation between old employer and employee (compare **Macer v Abafast Ltd** [1990] IRLR 137 (EAT)).

[23] It is true that an employee's continuity of employment - the calculation, or fact - may be used as a measure for determining the extent of rights or obligations, or as a standard or criterion for other purposes. An example of the former is the formula used in section 196(1) of the Act to determine the statutory minimum payable as severance when an employee is dismissed for operational reasons. An example of the latter is when length of service is used for the selection of employees for retrenchment (LIFO). But these instances are very different from saying that 'continuity of employment' is itself a right or obligation contemplated in section 197(2). It is not.

[24] In its essence Mr Cassim's argument was not merely that the new agreement signed by the parties on 24 January 1997 amended the terms and conditions between MacRib and the employee, but that it replaced that agreement in its entirety and that there was never any transfer of the employment contract itself. This submission cannot be upheld.

[25] Section 197(1)(a) and (b) provides for the automatic transfer of an employee's contract of employment upon transfer of the business, trade or undertaking in the circumstances set out in the section. Section 197(2)(b) allows for the contracting out of the transfer of the contract of employment itself, but section 197(2)(a) does not. Under section 197(2)(a) the relevant parties may alter the terms of the transferred contract, but they cannot escape the fact of its existence. Because an employee's continuity of employment is not a right or obligation, or a term or condition of the employment contract, express provision was made in section 197(4) that the transfer of the employment contract would not interrupt that continuity. There is no provision in it, similar to section 197(2), which allows the parties to alter an employee's continuity of employment by agreement.

[26] It follows that I am of the view that Mlambo J, was correct in finding that the agreement signed by the employee on 24 January did not replace the employee's previous contract of employment and that its terms could not affect her previous length of service.

[27] He also found her retrenchment procedurally unfair because of non-compliance with the requirements of section 189 of the Act. In **Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union** [1998] 12 BLLR 1209 (LAC) at para. [27] this court held that 'the ultimate purpose of section 189 is .... to achieve a joint consensus-seeking process'. Foodgro paid scant regard to the letter or spirit of section 189. On the evidence on record the probabilities are that when the first meeting was held with her on 26 May a final decision had already been taken to retrench the employee. She requested written information, relevant to a proper consultation process, which she was initially promised, but never received. She was never given a proper opportunity to discuss the possible alternatives to retrenchment. In short, the finding of procedural unfairness was fully justified. In view of the incorrect reliance on her shorter period of service her dismissal was probably also substantively unfair, but it is not necessary for the purpose of this appeal to enquire into that aspect any further.

[28] Lastly, the compensation award is in accordance with the decision in **Johnson and Johnson**, above. It seems clear that section 194(1) of the Act was drafted on the assumption that the period between dismissal and bringing the matter to finality would be much shorter than it has turned out to be in practice. It is the task of the legislature to rectify this problem. There are limits to what a court can do to alleviate this kind of situation.

[29] The appeal is accordingly dismissed with costs.

FRONEMAN DJP

I agree.

NICHOLSON JA