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LEGAL UPDATE 8/2010: EFFECT OF SECTION 197 TRANSFERS ON RETIREMENT FUND MEMBERS

The law

A member is obliged to belong to a fund because of the fact that they are employed by a participating employer of that fund. When they are no longer employed by that participating employer due to them being transferred to another employer, consideration needs to be given to the following in order to determine the entitlements of the member:

- the rules of the fund to which the member belongs,
- the terms and conditions of transfer as a going concern (the sale agreement), and
- the provisions of Section 197 of the Labour Relations Act ("LRA").

In the case of a transfer in terms of the provisions of section 197 of the LRA (going concern transfer), the transfer / assignment of the employees' contracts of employment from one employer to another does not automatically bring about the transfer of the employees' membership from the retirement fund of the transferring employer to the retirement fund of the receiving employer. In the case of such a transfer, both the transfer agreement between the two employers and the rules of the transferor and transferee funds are of relevance. The rules of both funds have to provide for the transfer (in terms of Section 14 of the Pension Funds Act) of the members from one fund to another.

The above is in line with the judgment delivered in the Appeal Court in the case of *Telkom SA Ltd and Others v Blom and Others*. In paragraph 11 of this judgment the judge pointed out that *[t]he statutes of the Fund regulate what happens when the contractual relationship of employer and employee is terminated*. The following dicta from paragraph 16 (pages 15 and 16) are also of relevance:

... the failure of the Labour Relations Act to make specific provision for the transfer of pension rights when employment contracts are transferred. Literally, the effect of s 197 in this case is to transfer Telkom's obligation to contribute to the Telkom Pension Fund for the benefit of each employee from Telkom to Molapo. But once transferred, Molapo would be unable to perform it. This is because the employees would no longer be members of the Fund after transfer, and Molapo was not a contributing employer. The Fund, which is an independent entity distinct from the employer, was not a party to the agreement between Telkom and Molapo. It could not be compelled to accept contributions by an outsider for the benefit of persons who were no longer members. It also could not, without the consent of the members affected, be compelled to transfer accrued pension rights under paragraph 4.7 to a pension fund to be established by Molapo.... the Fund may not transfer pension benefits without the approval of the member.

As stated at the end of paragraph 18 on page 17: section 197(4) *does not adequately address the transfer of pension rights simultaneously with the transfer of employment contracts where employees are not by agreement party to the transfer.*

The effect of a section 197 transfer was also considered in the case of *Independent Municipal & Allied Trade Union & Others v Cape Joint Retirement Fund & Others* where an agency agreement existed between the municipality and the provincial government in terms of which the business of road maintenance was performed by the local municipality. In July 2001, the provincial government terminated the agency agreement and the employees of the municipality were made redundant. However, the employees of the municipality were then taken into the employment of the provincial government. It was agreed and held that:

- Employment by the municipality was distinct from employment by the provincial government.
- The contractual relationship between the employees and local municipality was brought to an end by redundancy or retrenchment triggered by the termination of the agency agreement. The employees were as a result entitled to the additional benefit in terms of the pension fund rules. The employees fell outside of the definition of employee contemplated in the pension fund rules (which encompassed service with a local authority, not provincial government, such entities being in any event separately demarcated in the Constitution of the RSA. Thus the argument that there has been no termination of service, as defined in the Fund rules, is unsustainable) because they did not remain in service as defined in the rules.
- The Judge mentioned in passing that on these particular facts a formal declaration of redundancy was irrelevant because the municipality had effectively declared the posts to be redundant after the employees' services had been terminated on 1 July 2001.

FundsAtWork Umbrella Pension and Provident Funds

The FundsAtWork Umbrella Pension and Provident Funds' General Rules provide as follows with regards to a section 197 transfer of business:

4.4 Transfer of PARTICIPATING EMPLOYER'S business

Where a PARTICIPATING EMPLOYER'S business or part of its business is transferred to another employer in terms of the provisions of Section 197 of the Labour Relations Act, 1995 (Act No. 66 of 1995), the following shall apply:

- 4.4.1 *If the new employer elects to participate in the FUND, and the provisions of the agreement between the PARTICIPATING EMPLOYER and the new employer so provide, the MEMBERS concerned will not be entitled to a WITHDRAWAL benefit, but will be transferred from the old PARTICIPATING EMPLOYER to the new PARTICIPATING EMPLOYER. Such MEMBERS' benefits will remain invested in the investment portfolio selected by the MEMBERS or on their behalves in terms of the provisions of RULES 8.1, 8.5 or 8.6, unless the ADMINISTRATOR is advised in writing to the contrary in accordance with the provisions of RULE 8.12.*
- 4.4.2 *If the new employer elects not to participate in the FUND, and the FUND receives notification to the effect that the MEMBERS are to be transferred to another pension fund in which the new employer participates, the MEMBERS concerned will not be entitled to a WITHDRAWAL benefit, but will be transferred to the said pension fund in terms of the provisions of section 14 of the ACT.*

4.4.3 *If the FUND receives WITHDRAWAL NOTIFICATIONS in respect of the MEMBERS concerned, the MEMBERS will be entitled to a WITHDRAWAL BENEFIT and the provisions of RULE 10.2 will apply.*

What this effectively means is that if Employer A, who is participating in the FundsAtWork Umbrella Pension Fund (FAW), transfers its business to Employer B in terms of section 197 of the Labour Relations Act, the following applies:

1. If Employer B is also participating in FAW, the members will not become entitled to benefits - their records will merely be moved administratively from Employer A to Employer B in FAW.
2. If Employer B does not participate in FAW, there are two possibilities:
 - (a) If FAW is notified that all members have to be transferred to another **pension** fund, the members will be transferred to Employer B's new fund in terms of section 14.

A provision to this effect is normally contained in the sale agreement between the parties.

If the agreement stipulates that the members have to be transferred to another **provident** fund, (b) below will apply.
 - (b) If FAW receives withdrawal forms for all the members, the members will become entitled to withdrawal benefits.

It is important to note that in scenario 2 either ALL members are transferred to another pension fund via section 14 of the Pension Funds Act, or ALL members become entitled to withdrawal benefits. Furthermore, neither the rules of the fund nor SARS allows for preservation of part of a member's benefit (their contributions) and the transfer of the balance of their benefit to another pension or provident fund.

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